
**Response to the CMA's Consultation on Digital Markets Competition Regime Draft
Guidance**

12 July 2024

I. Introduction and executive summary

- (1) Weil, Gotshal & Manges (London) LLP (“**Weil**”) welcomes the opportunity to respond to the CMA’s consultation opened on May 24, 2024 (the “**Consultation**”) on the draft digital markets competition regime Draft Guidance (the “**Draft Guidance**”).
- (2) Whilst the Draft Guidance is undoubtedly helpful in clarifying some aspects of how the CMA intends to apply the new UK digital competition regime (the “**Regime**”), we provide some comments and suggestions below for important improvements which we hope the CMA will consider ahead of finalising the Draft Guidance.¹
- (3) We have set out our comments and suggestions grouped in line with the following broad areas of the Draft Guidance:
 - **Section II:** SMS designation.
 - **Section III:** Competition requirements for SMS firms.
 - **Section IV:** The CMA’s overall administration of the Regime.
- (4) At the outset, we would like to make the following overarching remarks:
 - a) The Digital Markets, Competition and Consumers Act 2024 (“**DMCC**”) affords the CMA considerable discretion to apply and enforce the Regime, with relatively limited judicial oversight, especially as compared with its peer regulators.
 - b) Meanwhile, in its 2023 DMCC impact assessment, the UK Government relied on the “*open, transparent, and participative approach the DMU will take to regulation, including consultation with affected parties*” to mitigate the risk of companies decreasing investment in the UK.²
 - c) Indeed, throughout the DMCC legislative process, the CMA has promised to use the Draft Guidance to set out in detail how it intends to carry out its functions to deliver the full benefits of the Regime to UK consumers, including via its January 2024 roadmap (“**Roadmap**”).³ For example, in January 2024, Chief Executive Sarah Cardell stated that: “*we will release more detailed draft guidance for consultation. This will mean that everyone is clear about how we intend to operate the regime.*”⁴
 - d) In this context, the CMA must set out clearly and in sufficient detail in the Draft Guidance what specific legal concepts, case law/legal practice, and evidence it intends to rely on (and not rely on). Setting out its planned methodology and

1 Unless otherwise stated, all references in this document to paragraphs are to paragraphs in the Draft Guidance.

2 Impact Assessment - A new pro-competition regime for digital markets (April 2023) at paragraph 244.

3 Overview of the CMA’s provisional approach to implement the new Digital Markets competition regime (11 January 2024)

4 See press release (11 January 2024): <https://www.gov.uk/government/news/cma-sets-out-approach-to-new-digital-markets-regime>

framework for assessment clearly and transparently is vital for at least four reasons:

- i. to ensure robust, consistent, and proportionate decision-making;
 - ii. to continue to build trust with all relevant stakeholders (from SMS firms and potential SMS firms under the Regime, to competitors and users in digital markets) and to empower them to engage proactively with the CMA and the Regime in order to deliver the most impactful outcomes;
 - iii. to allow SMS firms and potential SMS firms to understand their legal obligations under the Regime and to exercise their rights of defence; and
 - iv. to avoid a reduction in UK investment (via R&D/innovation or entry/expansion) to the detriment of UK consumers, as a result of real or perceived regulatory uncertainties.
- e) To achieve these robust, consistent and proportionate outcomes, it is also important that, as part of the CMA’s planned procedures relating to the Regime, there are sufficient internal checks and balances to “stress test” key decisions made by the investigation team.
- f) There must also be sufficient consideration of how the Regime will interact with other overlapping regimes, administered by the CMA (*i.e.*, markets, mergers and CA98 investigations), including the approach to monitoring and enforcing any ongoing remedies and/or commitments.
- (5) We consider that our below suggestions are firmly within the spirit of the DMCC and will further improve the effective and appropriate application and enforcement of the Regime.
- (6) We look forward to continuing to engage constructively with the CMA as the Regime evolves.

II. SMS designation

A. Substantive SMS assessment

(a) Definition of digital activity and “significant” UK users

- (7) In line with Section 3(3) of the DMCC, paragraphs 2.13-2.15 of the Draft Guidance set out that the CMA can “*group two or more of the firm’s*” activities together to form a single digital activity where they have (a) “*substantially the same or similar purposes*”, or (b) “*can be carried out in combination to fulfil a specific purpose*”. The Draft Guidance states that, where this is the case, “*SMS assessment will relate to the grouped activity as a whole*”.
- (8) Digital products and services are fast moving and subject to constant innovation and improvement. At the same time, the CMA acknowledges in the Roadmap that the DMCC sets out “*strict criteria*” which “*ensure designations will be targeted at a small number of firms.*”⁵ This reflects the recommendation for conduct requirements to focus on larger, “*particularly powerful*” firms by the Furman Report in 2019⁶, which warned

5 At paragraph 1.2.

6 Unlocking Digital Competition: Report of the Digital Competition Expert Panel (March 2019)

that any regulatory regime needed to be carefully designed to “*avoid creating new burdens or barriers for smaller firms*”⁷.

- (9) The CMA intends to interpret section 3(3) of the DMCC broadly. Clearly, there are some benefits in grouping together multiple digital activities as part of one SMS designation as envisaged by section 3(3) of the DMCC. For example, this will enable the CMA to streamline SMS investigations, and firms to streamline their compliance efforts internally. However, grouping digital activities together and assessing them as one digital activity could conceivably impact the CMA’s assessment (both of SMS and CRs), and may, for example, make it easier to identify substantial and entrenched market power (see below). Given the CMA’s wide discretion and the need to focus on the largest, most powerful firms, we would suggest that the CMA’s interpretation needs to be proportionate here, and we would welcome the introduction in the Draft Guidance of explicit criteria that must be fulfilled in order to “roll up” individual digital activities. Without sufficient limiting principles, there is a risk of creating unintended and disproportionate outcomes.
- (10) The CMA should also make it clearer in the Guidance that it does not intend to “roll up” activities, which would not otherwise meet the threshold for a digital activity on their own, in order to bring them within the Regime. This would clearly go beyond the scope of the DMCC, and would mean disproportionate burdens for smaller firms.
- (11) Meanwhile, paragraph 2.21 of the Draft Guidance states that the assessment of whether the number of UK users is “significant” is context specific. There is expressly no quantitative threshold for how many users can be considered significant; the CMA’s assessment may consider the firm’s absolute position and/or the number of UK users it has relative to other undertakings. The Draft Guidance gives the CMA extremely wide discretion and it would be helpful to have more guidance (including specific examples) on what would (or would not) constitute “significant” in this context.

(b) Concept of “substantial and entrenched market power”

- (12) The DMCC does not define the legal concept of “substantial and entrenched market power.” Instead, it only specifies that the CMA must carry out a forward-looking assessment for a period of at least five years (i.e. closely pinned to the period of designation), taking into account developments that (a) would be expected or foreseeable if the CMA did not designate the undertaking as having SMS in respect of the digital activity, and (b) may affect the undertaking’s conduct in carrying out the digital activity.⁸
- (13) The Draft Guidance expressly clarifies at paragraph 2.45 that the legal concept of “substantial and entrenched market power” is distinct from that of “dominance” used in competition law enforcement cases, reflecting the fact that the digital markets competition regime is a new framework with a different purpose. As a result, the CMA clarifies that it will not typically seek to draw on case law relating to the assessment of dominance when undertaking an SMS assessment, although it “*may have regard to the*

⁷ At p. 5.
⁸ Section 5 of the DMCC.

underlying evidence and analysis from the CMA's investigations under the CA98 (or the CMA's other tools) to the extent it is relevant".⁹

- (14) However, the CMA does not clarify *how* the two concepts are distinct (for example, is “substantial and entrenched market power” something more or less than dominance?) or provide a clear alternative framework for assessment which sets out when companies are likely to be considered as holding substantial and entrenched market power, and when they are not. This is made more challenging by the fact that the CMA does not intend to undertake a formal market definition exercise, and will focus instead on relevant competitive constraints.¹⁰ This is in line with the CMA's more recent markets work¹¹ which, as the CMA itself acknowledges¹², will be instructive here. However, while defining digital markets can be very challenging, having no reference to relevant markets in the context of an entirely new regime removes another well-established layer of certainty for market participants.
- (15) We acknowledge that the CMA is applying a new framework and understand the CMA's need for flexibility in the context of dynamic and fast-moving digital markets. However, in the absence of case law and given the considerable flexibility set out in the Draft Guidance including regarding market definition, the CMA needs to set out more clearly what the new framework is. Otherwise, it will be extremely difficult for companies (and third parties) to assess if and when they could fall within scope of the Regime, and therefore the extent of their legal obligations thereunder.
- (16) One close – if not the closest – parallel to the Regime is the telecoms market review process, whereby Ofcom (also a sector-specific regulator as the CMA now is) is tasked with carrying out market reviews to regulate telecoms operators with “significant market power” (or “SMP”, also distinct from dominance but importing a lot of EU case law on dominance). The relevant guidelines¹³ are very clear about who is likely to fall within scope based on a clear and determinable framework for assessment with express filters. By comparison, there is a distinct lack of clarity and/or limiting principles in the Draft Guidance.
- (17) In this regard, some candidates for SMS designation are perhaps more obvious than others. But as we have seen, digital products and services can evolve extremely quickly over time, capturing increasing swathes of the UK economy. While there are more obvious candidates for designation in relation to currently identifiable digital activities, clearly there are less obvious and even unforeseen candidates which could be captured in the future.
- (18) At the same time, innovation in digital markets requires huge investment. A lack of regulatory certainty around the scope of this new concept or any applicable limiting principles could therefore easily have an unintended and significant chilling effect on future investment decisions regarding innovation and/or entry and expansion in UK markets, to the potential detriment of UK consumers, as well as on economic growth.

9 At paragraph 2.45.

10 At paragraph 2.43.

11 For example the CMA's market studies into mobile ecosystems and digital advertising.

12 At paragraph 2.45.

13 Market review guidelines: Criteria for the assessment of significant market power (5 August 2002) available at: <https://www.ofcom.org.uk/siteassets/resources/documents/phones-telecoms-and-internet/information-for-industry/smp-guidelines/smpg0802.pdf>

For example, potential SMS firms might take investment decisions which result in reduced functionality for UK users. This type of consequence was seen, for example, in Australia in 2021, when Facebook blocked publishers and users in Australia temporarily from viewing or sharing news content in response to Australia’s proposed Media Bargaining Law.¹⁴ Another more recent example relates to the EU Digital Markets Act (“DMA”), whereby Apple chose to delay implementation of AI-powered features on smartphones in the EU due to “regulatory uncertainties” associated with the DMA.¹⁵ In this context, it is clear that, since the Regime is designed to allow for bespoke interventions, the risk of creating regulatory uncertainties is much higher, and therefore transparency is key.

(c) “Substantial” vs. “entrenched” market power

- (19) The Draft Guidance states clearly the CMA’s interpretation of the DMCC that “substantial” and “entrenched” are “*distinct elements and each needs to be demonstrated.*”¹⁶ However, the Draft Guidance goes on to state that “*where the CMA has found evidence that the firm has substantial market power at the time of the SMS investigation, this will generally support a finding that market power is entrenched.*”¹⁷ These two statements appear rather contradictory, especially in the context of fast-moving and dynamic digital markets, where there is a clear need to show the non-transient nature of market power (however substantial), as envisaged by the DMCC.

(d) Interlinkages between products

- (20) Paragraph 2.44 of the Draft Guidance adds in relation to the assessment of “*substantial and entrenched market power*” that, “*in practice, the CMA may consider evidence relevant to market power of individual products and whether and how any interlinkages between these may contribute to market power across the digital activity, for example whether the firm’s position in one activity in the group reinforces its position in another.*”
- (21) This suggests that the CMA considers that situations may arise where the grouped digital activities do not have substantial and entrenched market power on an individual basis but that, when “interlinked”, do. Equally, the CMA appears to suggest that an SMS firm may have a degree of “market power” across the activities in the group but it is only as a direct result of any interlinkages that that market power becomes substantial and entrenched. Either way, but for the interlinkage(s), the SMS condition (which requires that market power is both substantial and entrenched) would not be met. We would ask for clarification as to whether this is the CMA’s intention and that the CMA sets out clearly what evidence it considers would be required.

14 Press release: Changes to Sharing and Viewing News on Facebook in Australia (February 2021) available at: <https://about.fb.com/news/2021/02/changes-to-sharing-and-viewing-news-on-facebook-in-australia/#:~:text=In%20response%20to%20Australia's%20proposed,it%20to%20share%20news%20content.>

15 See e.g. <https://www.ft.com/content/360751cb-7a22-48e0-9b00-6a30ff41dcfe>

16 Paragraph 2.42.

17 Paragraph 2.52.

(e) Several firms with substantial and entrenched market power

- (22) The Draft Guidance does not clarify whether more than one firm could have substantial and entrenched market power in respect of the same digital activity or groupings of digital activities. We would welcome express clarification in the Draft Guidance on this point.

(f) Relevant period for assessing SMS conditions

- (23) Under paragraphs 2.36 and 2.46 of the Draft Guidance, the CMA must carry out a “forward-looking assessment of a period of at least five years” – i.e., the period of SMS designation. The CMA should clarify whether there are circumstances in which the prospective period of “at least five years” could extend significantly beyond five years, and whether the period could be different depending on the digital activity.
- (24) In addition, the Draft Guidance states at paragraph 2.51 that may be an *ex post* element to the CMA’s assessment and specifically the sources of previous market power. Again, the CMA should set out more clearly the parameters of its assessment.

(g) Types and weighting of evidence

- (25) We would welcome the CMA giving further Draft Guidance on how it will assess and weight relevant evidence in conducting its prospective, forward-looking analysis. Clearly, the CMA’s approach needs to be sufficiently flexible to deal with the fact that market developments can differ significantly, depending on the nature of the digital activity, and that business models can be at varying stages of development with limited historical data. But, for example, will evidence of entry and/or expansion be assessed in the same way as in other contexts such as merger investigations?
- (26) We would also welcome clarification that the CMA will continue to engage openly with potential SMS firms throughout the designation process and what/when the opportunities would be to provide relevant evidence to assist the CMA in its assessment.
- (27) As discussed above, paragraph 2.52 of the Draft Guidance states that: “*where the CMA has found evidence that the firm has substantial market power at the time of the SMS investigation, this will generally support a finding that market power is entrenched, where there is no clear and convincing evidence that relevant developments will be likely to dissipate the firm's market power.*” The CMA should provide examples of the types of evidence which would be considered sufficiently clear and convincing to support a likely dissipation of a firm’s market power.
- (28) Paragraph 2.48 of the Draft Guidance states that: “*If post-designation developments or new evidence indicate that a firm’s market power has – contrary to the CMA’s expectations in its initial assessment – been significantly diminished, the CMA is able to revisit its previous assessment and can consider whether to revoke the SMS designation.*” We welcome the CMA’s acknowledgement that these markets may be subject to dynamic and rapid changes that can significantly affect the position of the SMS firm. However, the CMA should clarify in the Draft Guidance what it means by “*significantly diminished*” and what evidence it intends to use to show this.

B. SMS investigation procedure

(a) Subsequent investigations of the same digital activity

- (29) Under paragraph 2.93 of the Draft Guidance, the CMA clarifies that, following a decision to close an SMS investigation without a decision to designate, the CMA can open another SMS investigation into the same digital activity “*at a later point*”. The CMA should clarify whether it will wait for a period of time (and what that period of time would usually be) between closing an investigation and a decision to open a further investigation into the same digital activity.

(b) Early reassessments of SMS designations

- (30) Under section 10(1) of the DMCC, the CMA has discretion to consider whether to carry out early reassessments during the designation period. However, we note that under paragraph 2.112 of the Draft Guidance, the CMA will not consider evidence submitted by a firm within 12 months of declining a previous request. We would strongly suggest that, given the fast paced and dynamic nature of digital markets and the importance of fostering innovation, 12 months is a disproportionately long time, especially when there is new compelling evidence that should be considered. Limited resources are not a sufficient justification for delaying reassessment by such a significant amount of time, especially on the basis of new evidence.
- (31) The CMA should also clarify how this 12-month period dovetails with its own monitoring activities – presumably, the CMA will not itself wait 12 months before reassessing relevant evidence. Equally, would the CMA wait 12 months between submissions by a complainant? There should at least be parity between the treatment of different stakeholders, but particularly those directly affected by a designation, the most obvious of which is the SMS firm.

III. Competition requirements for SMS firms

A. Proportionality of CRs must be assessed before effectiveness

- (32) As set out in paragraph 3.17, the CMA’s approach to imposing CRs is to:
- “*identify what the CR is intended to achieve*” (step 1);
 - “*consider CRs within the permitted types set out in legislation to identify CRs or combinations of CRs that would be effective in achieving the CMA’s aim*” (step 2); and
 - “*consider the proportionality of any CRs that it proposes to impose*” (step 3).
- (33) However, the CMA’s own announced approach as set out in the Roadmap states as Operating Principle 1 that the CMA will consider “*proportionality and likely effectiveness*”. In particular, in relation to CRs, the CMA states at paragraph 5.10 of the Roadmap that: “*We will only be able to impose CRs if we consider doing so would be proportionate for one or more of three legislative objectives*”, which is specified within section 19(5) of the DMCC. Moreover, section 21 of the DMCC requires that

the CMA publish a statement including “*the objective for the purposes of which the CMA considers it is proportionate to impose the conduct requirement*”.

- (34) It is therefore both inappropriate and inconsistent for the CMA to assess effectiveness (currently step 2) before it assesses proportionality (currently step 3). As the CRs must be proportionate to the objectives, proportionality has to be assessed in advance of considering the types of CRs that would be most effective.

B. More clarity needed on the allocation of overlapping cases and remedies/commitments

- (35) There will be instances where the CMA could choose to act under one or more of its competition powers (*i.e.*, mergers, markets or CA98 investigations) and/or the DMCC, in relation to either the initiation of new investigations or the monitoring and enforcement of existing remedies/commitments. The Draft Guidance appears to be silent on this possibility. For example, while the Draft Guidance contains guidance on the process for varying and terminating “competition requirements” (which are defined at paragraph 6.3, and include CRs and PCOs), it does not consider the possibility of varying/introducing new CRs on the basis of existing commitments which overlap with CRs/PCOs being carried over from other regimes to the DMU.
- (36) In this regard, we note the following:
- The CMA’s recent commitments decision in Amazon Buy Box¹⁸ which states at paragraph 1.9 and 5.8 that: “*If the CMA decides to designate Amazon as having Strategic Market Status in relation to any digital activity (or activities) and imposes requirements under the new regime, those requirements may apply alongside the Commitments, or – where they overlap and render the Commitments unnecessary in whole or part – may result in the Commitments being varied or terminated in whole or in part*”;
 - The CMA’s merger remedies guidance which states that the “*likelihood of effective monitoring will be significantly increased if it is possible to involve a sectoral regulator in the monitoring regime*”¹⁹; and
 - The CMA’s Prioritisation Principles, which set out the process by which the CMA determines whether it is best placed to act, including that it will take into account the full range of its toolkit.²⁰
- (37) In our view, given the specific nature of the DMU as a new market regulator (albeit sitting organisationally within the CMA), the Draft Guidance should explicitly set out (i) that the CMA should also have regard to its Prioritisation Principles to determine when it would be more appropriate for the DMU or another CMA team to act; and (ii) the process for transfer of cases (and any overlapping commitments) between the DMU and other CMA teams, depending on who is best placed.

18 Decision to accept binding commitments under the Competition Act 1998 from Amazon in relation to conduct on its UK online marketplace (Case number 51184, 3 November 2023).

19 CMA, Merger Remedies (CMA 87) (December 2018), at paragraph 7.6.

20 Prioritisation Principles (CMA188) (October 2023) at paragraph 3.15.

- (38) This is already the case for transferring cases between concurrent regulators and the CMA, whereby the Concurrency Regulations²¹ set out the procedure that must be followed. That procedure provides that: “*when the CMA and a Regulator intend to transfer a case, the undertaking which is the subject of the investigation and any other person likely to be materially affected by the transfer (which may include any complainant) will be given an opportunity to make representations on the proposed transfer, and will be notified of the outcome.*”²²
- (39) As with the concurrency procedure, the parties concerned should be given the opportunity to make representations and should be informed of the outcome.

IV. The CMA’s overall administration of the Regime

A. More clarity needed on the CMA’s approach to SMS/CR case teams

- (40) We understand that, as set out in paragraph 3.35, the CMA “*will typically impose an initial set of CRs as soon as practicable following an SMS designation decision.*” This will mean that both processes will effectively run in parallel.
- (41) The Draft Guidance is silent about whether there will be separate case teams responsible for SMS designation and imposition of CRs. It will be important that both processes, and both case teams, are indeed kept separate, with sufficient sharing of background information to avoid duplication of factual information requests. It will be important that any assessment of whether a firm indeed has SMS should not be compromised by an assessment of whether and if so what CRs might be imposed upon that firm. As part of this, it will be important to have appropriate internal safeguards in place to avoid any confirmation bias within the process.
- (42) It will also be important for stakeholders to understand how and when the case team will interface with the remedies team for any parallel market or merger investigations.

B. More visibility needed over underlying evidence

- (43) The CMA envisages that it will give firms access to certain evidence in the context of a potential breach of a competition requirement, for example a breach of a CR:
- “*where the information gathered is not voluminous [...] it may be practicable to provide copies of third party documents to the party under investigation subject to a confidentiality assessment*” (paragraph 7.28(a)); or
 - “*where the volume of information is considerable [...], the CMA may provide the firm under investigation with one or more of the following: (i) the gist of the relevant information and/or copies of the documents directly referred to in the provisional breach finding; (ii) a list of other documents the CMA considers relevant, with the firm being able to make reasoned requests for access to specific listed documents*” (paragraph 7.28(b)).

21 Regulation 7 of The Competition Act 1998 (Concurrency) Regulations 2014 (2014 No. 536).

22 Paragraph 3.32 of the CMA’s Guidance on concurrent application of competition law to regulated industries (CMA10, March 2014).

- (44) The CMA should take the opportunity to implement a more transparent and open system in relation to the disclosure of third-party evidence, in line with:
- the CMA’s own announced approach as set out in the Roadmap (see paragraph 7.14 which describes the CMA’s Principle 10 regarding operating with transparency), and
 - the CMA’s approach in investigations under the Competition Act 1998. Parties are given an opportunity to inspect the file “*to ensure that they can properly defend themselves [...] and have an opportunity to make representations in respect of any proposed penalty.*”²³ In CA98 cases, the CMA is flexible regarding the process used and the time given for inspection will depend on a number of factors including the size of the file, the nature of the documents and the access to file process being used.²⁴
- (45) In our view, it would be appropriate for the CMA to adopt a similar approach when applying the Regime. Access to the full underlying evidence and analysis (and not just a curated list) is vital to:
- properly ensure a firm’s right to reply to the case for SMS designation, or so-called “competition requirements” or breaches thereof;
 - maintain the robustness of the CMA’s process, and to maximize trust and constructive engagement with key stakeholders; and
 - ensure that SMS firms can work effectively with the CMA to correct any inaccuracies or misperceptions that are driving its conclusions.
- (46) Allowing full access to all underlying evidence, including third party submissions and economic analysis used to make key decisions should not negatively impact the CMA’s timetable given that these processes can be set up relatively swiftly and can be adjusted depending on the circumstances of the case in the same way as under CA98 processes. Introducing similar qualifications in the digital context would reduce any administrative burden that could arise.
- (47) This approach should not just apply to situations of possible breaches of competition requirements, but to all key decisions made by the CMA, including the initial SMS designation and decisions to impose CRs/PCOs.

C. More opportunities needed for bi-lateral engagement with the CMA

- (48) Rightly so, the DMCC envisages numerous points for mandatory public consultation by the CMA. Whilst time and resource intensive for the CMA, these consultations will act as important procedural guardrails to ensure effectiveness and accountability of the CMA’s decision-making.

²³ Guidance on the CMA’s investigation procedures in Competition Act 1998 cases, at paragraph 11.21.

²⁴ Ibid, at paragraph 11.23.

- (49) Conversely, we note that the Draft Guidance only makes a small handful of references to opportunities for informal, bi-lateral engagement with third parties – and even then only the possibility at the CMA’s sole discretion. For example:
- *“The CMA may engage informally with the relevant SMS firm and other stakeholders before amending the compliance reporting requirements in respect of a CR.”²⁵*
 - *“Before commencing the formal process to vary or revoke a CR, the CMA may engage informally with the relevant SMS firm and other stakeholders to understand their views as to whether it is necessary or desirable for a CR to be varied or revoked.”²⁶*
 - *“Where the CMA has concerns about an SMS firm’s compliance with a CR, it may engage with the SMS firm in order to understand whether participative resolution of the concerns is possible.”²⁷*
- (50) Whilst appreciating the constraints of the statutory timetable and the CMA’s finite resources, we would welcome more opportunities for bi-lateral engagement (for all stakeholders) to be entrenched in the process, rather than remaining as optional. This will be important for the CMA to truly understand the markets and the issues in each case, and in turn to deliver appropriate, proportionate and effective outcomes, which – crucially – are actually capable of implementation by the relevant SMS firms.

D. More clarity needed on the constitution of the Digital Markets Board Committee

- (51) We note that the CMA has established a “Digital Markets Board Committee” (“DMBC”) which is authorised to take a number of decisions including (a) whether to make an SMS designation, (b) whether to impose/revoke a CR and (c) whether to accept commitments in respect of a PCI investigation.
- (52) We look forward to reviewing the Board Committee Terms of Reference, which we understand will be published on the CMA’s website to give further detail concerning the composition, operation and remit of the DMBC.²⁸ In particular, we would be grateful to understand whether committee members are intended to be permanent and, assuming not, how regularly the constitution of the DMBC will change. While arguably an internal matter for the CMA, this will have certain practical implications. For example, will the individuals appointed to the DMBC when a CR is imposed differ from the individuals serving on the DMBC when it is revoked? Given the contextual need for transparency and openness, the CMA should provide clarity on how it will ensure consistency of decision making if the DMBC is regularly assembled and disbanded with new members on each occasion.
- (53) For those key decisions that are reserved for the DMBC, we hope that the CMA will implement a process of peer review by senior CMA staff to provide a second pair of

25 At paragraph 3.67.

26 At paragraph 3.86.

27 At paragraph 7.76

28 See paragraph 9.33.

eyes and help enhance the robustness of the CMA's decision-making, as already happens in other CMA (and sectoral regulator) procedures.

- (54) This “devilling” process should involve the cross-checking of economic evidence and include “non-decisions” by CMA staff where, for example, they have considered a CR as potentially capable of resolving a concern, but ultimately dismissed it before taking their decision to the Panel/Committee.
- (55) The limited nature of judicial review of decisions means that such internal processes do not only ensure the robustness of hugely impactful decisions, but are also one of the very few ways to challenge decision-making groups.

V. Conclusion

- (56) As both the UK Government and the CMA acknowledge, the Draft Guidance is an important means for the CMA to set out clearly how it intends to apply the Regime – a completely new era for UK digital regulation, where bespoke interventions require sufficient procedural guardrails, as well as transparency and constructive collaboration with relevant stakeholders.
- (57) While the current draft goes some way to alleviate concerns, we believe that there is still more that the CMA could and should do to provide a clearer framework within which it will apply its immense regulatory discretion.
- (58) We hope our above comments and suggestions are useful to the CMA as it finalises the Draft Guidance, and we look forward to continuing to engage constructively with the CMA as the Regime evolves.

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