

Consultation Response

Which? response to the CMA's consultation on its Digital Markets Competition Regime Guidance

Submission date: 12/07/2024

Summary

Which? welcomes the opportunity to comment on the CMA's draft guidance on how it will fulfil its functions under Part 1 of the Digital Markets, Competition and Consumers Act (the "Act").

We are largely supportive of the approach set out in the draft guidance. Where the regime has parallels with other CMA functions we have found that the guidance adopts a consistent approach to that used elsewhere. In parts of the regime that are novel the CMA has adopted a balanced and reasonable approach to exercise its functions, which affords a fair approach to all stakeholders but contains a requisite degree of flexibility.

We believe the discretion that the CMA sets out in the draft guidance accords with that bestowed by the Act. By design, this new regime seeks to create bespoke regulations which take into account the business models of SMS-designated firms so that regulations can be designed in a way that minimise unintended consequences and maximise consumer benefits in a dynamically competitive environment. A necessary consequence of this is that the regulator requires discretion to carry out its functions.

However, while it is appropriate for the CMA to have the discretion it needs to exercise its functions on a case-by-case basis, for the regime to be successful it must be complemented with a high degree of engagement between the CMA and other parties and the regime must have a high degree of transparency.

Engagement with third parties is a critical feature of the new digital markets regime. While the Act makes repeated provision for formal public consultations, it will be important to ensure these consultations are conducted in a manner that supports third parties to provide useful responses. Further, it will be necessary for CMA engagement with third

parties to extend beyond formal consultations. We therefore welcome the CMA's intention to publish an invitation to comment at the outset of SMS and PCI investigations and to have additional engagement with stakeholders when it imposes, varies and revokes conduct requirements and when designing and implementing PCIs. The CMA needs to ensure that opportunities for less formal engagement are afforded to a wide range of third party stakeholders, including consumer organisations, trade associations and professional bodies.

Transparency will also be key to the success of the new regime. It will be essential to facilitate the high quality of engagement that is needed to deliver good regulation, and more broadly, it is needed to build trust and legitimacy as the accountability mechanisms on which the regime relies. For example, public consultations and parliamentary scrutiny will have limited effectiveness without adequate transparency. The draft guidance signals a welcome commitment by the CMA to being transparent, but we encourage the CMA to consider if there are aspects of the regime that could benefit from further transparency. For example, it seems likely that decisions about the prioritisation of SMS and PCI investigations may lack transparency as the CMA may only publicise decisions to open investigations and not those which do not lead to an investigation.

While we are supportive overall of the draft guidance, our detailed response below contains some recommendations for inclusion in the final guidance. These include:

- The list of factors that may be used as the basis to begin an SMS investigation or a PCI investigation should include complaints or information from a third party, including a 'super-complaint' from consumer bodies designated to make such complaints under Section 11 of the Enterprise Act 2002.
- Clarification of whether consumer benefits from a conduct requirement (or combination of conduct requirements) may include benefits to consumers of digital activities other than the relevant digital activity.
- Clarification on the distinction between a conduct requirement and a behavioural pro-competitive intervention, and guidance on when the CMA would favour using either a conduct requirement or a pro-competitive intervention where a similar or even identical remedy might be applied using either tool.

Finally, we note that relative to other CMA guidance this draft contains few illustrative examples. We recognise that since regulatory interventions will be bespoke, it may not be possible to provide specific examples without a risk that they are interpreted as relating to a specific potential designated firm

and relevant activity. However, we expect the guidance will be updated over time with examples from actual cases as regulatory interventions are made.

Response to specific chapters

Strategic market status

(a) The substantive SMS assessment

Which? is supportive of the CMA's proposed approach to making a substantive SMS assessment and we consider each of the two SMS conditions in turn.

First, with regard to the forward-looking assessment of whether a firm has substantial and entrenched market power with respect to a digital activity, we agree therefore that it is not necessary for the CMA to formally define markets to be able to make this assessment. We see this as being consistent with the provisions of the Act, while the CMA's recent market studies on Online Platforms and Digital Advertising and Mobile Ecosystems provide excellent evidence that a robust assessment of market power can be made without defining a market.

With specific regard to the forward-looking assessment, the CMA is right to use current market conditions and market power as the starting point for assessing the next five years. We also agree that the CMA should not seek to make precise predictions about the likely development of the industry. The assessment that the CMA needs to make is whether the potential dynamics of competition are such that the firm will likely no longer hold substantial market power within the next five years. The high level of uncertainty about the impact of potentially disruptive innovations and inventions, let alone other market and regulatory developments, means that precise predictions have little value. Instead the CMA will need to identify the foreseeable factors that could reduce market power over time and make a qualitative assessment about the likelihood of this. We agree that this assessment should be made on the balance of probabilities. In cases where there is a high degree of uncertainty about whether a factor may prove significant and there is not enough evidence that market power will not endure, then the CMA should consider the condition for substantial and entrenched market power in respect of a digital activity to be met.

The guidance indicates that the CMA may draw on a wide range of sources of evidence to make an assessment about substantial and entrenched market power. We agree that it will be necessary to do this to make assessments

across a diverse range of digital activities. Further, the need to use a wide range of evidence to make a forward-looking assessment is consistent with the observations of the Competition Appeal Tribunal that when considering dynamic competition “*the traditional tools of analysis (concentration, market share, market definition, etc) are less likely to be determinative than in the case of static or potential competition*”.¹ We particularly welcome the CMA’s indication that it will consider demand-side factors in making this assessment. For many of the activities that could be designated, consumers are unable to exercise choice and control to the extent that would be expected in competitive markets, and this disempowerment is often a direct result of the actions of overly powerful firms.

However, while a wide range of sources of evidence will be needed, some will be more commonly used than others and the CMA could have provided commentary on the circumstances when certain sources might be more or less important. For example, where there is a stable share of supply, strong evidence of dynamic disruption will likely be needed for an activity not to be designated.

Second, with regard to the SMS condition of establishing whether the firm holds a position of strategic significance in respect of the digital activity, we believe that the CMA has set out a reasonable approach to considering each of the four conditions set out in the Act. We believe the first two of these conditions (that the firm has a position of significant size or scale in respect of the digital activity and that a significant number of other firms use the digital activity as carried out by the firm in carrying on their business) are likely to be of most importance, since there are likely to be few circumstances in which conditions three and four are met when one and two are not. With respect to one and two, we agree that there should be no quantitative threshold for what can be considered as significant and that this assessment may need to be made relative to other relevant firms. Again, we agree that assessment of the SMS condition should be made on the balance of probabilities.

(b) The SMS investigation procedure

The draft guidance on the SMS investigation procedure largely follows in an appropriate fashion from the provisions of the Act and we have just three points to make. First, we believe that the CMA is overly restrictive when identifying the factors it may use as the basis to begin an SMS investigation (paragraph 2.68). We believe these factors should also include a complaint(s)

¹ [1429/4/12/21 Meta Platforms, Inc. v Competition and Markets Authority - Judgment](#), June 2022

or information from a third party or third parties who are not providers of the goods or services (including but not limited to consumer groups, upstream suppliers, trade and professional bodies), and that this may include a ‘super-complaint’ from consumer bodies designated to make such complaints under Section 11 of the Enterprise Act 2002.

Second, we understand that the CMA will provide a description of the digital activity, but will not give an exhaustive list of products which fall within the digital activity to which the SMS investigation relates, as a firm may adapt its products over time or introduce new ones (paragraph 2.74). The CMA should make clear in its guidance that it will monitor or periodically review a firm’s ongoing assessment of which products fall within the digital activity, given the description provided. As it stands, the firm is left to make the assessment but there is no reference in the draft guidance that this assessment will be monitored or periodically reviewed. Some level of monitoring or review will particularly be helpful in foreseeing if there are any divestitures of part of a digital activity during the SMS investigation period.

Third, we welcome the CMA’s stated intention to publish an invitation to comment at the outset of an SMS investigation (paragraph 2.82). We recognise that this goes beyond the requirements set out in the Act, but that it is consistent with the mergers regime, where there is an invitation to comment in Phase 1, and in market investigations, where parties have an opportunity to comment on the market investigation reference. An invitation to comment presents an important opportunity for third parties such as Which? to input our evidence and perspectives, and reflects a fully participatory regime.

Conduct requirements

(a) The analytical approach to imposing conduct requirements (CRs)

Consumer benefits (paragraphs 3.10, 3.23 and 3.28)

We agree with the CMA’s interpretation that indirect benefits to consumers from a CR or combination of CRs may occur either through the pass-through of benefits received by business users or as a result of increased competition.

The draft guidance notes that the benefits to consumers may be in the form of lower prices, higher quality goods and services and/or a greater range of products and services. We believe security, accessibility or interoperability should be considered to be aspects of quality. It is also important that issues of privacy are included in the assessment of consumer benefit. Our research

has shown that consumers care strongly about how much of their personal data is collected by online platforms and that they put considerable value on the ability to exercise choice and control over how this data is used.² Given this, privacy issues should be considered either to be an aspect of price, where the amount of personal data collected in the provision of free services represents a shadow price, or more standardly as an aspect of quality.

With regard to the notion of a greater range of products and services (i.e. greater choice), there are numerous ways in which the imposition of a CR (or a combination of CRs) could bring this about. It may be that it reduces competitive barriers and makes it easier for a rival of an SMS firm to market their existing products and services to customers. Alternatively, it may lead to an increase in innovation so that more products and services are created. The first of these could be interpreted as a benefit from reducing barriers to static or potential competition, while the second more likely reflects dynamic competition. It will be important that the CMA recognises all of these when considering the benefits to consumers of imposing a conduct requirement. Dynamic competition inevitably introduces greater levels of uncertainty which makes consideration of consumer benefits more difficult, and the methodologies for assessing dynamic competition are less well established. However, the judgement of the Competition Appeal Tribunal to Meta's appeal against the CMA's decision in the Meta-Giphy merger gives good guidance on how to consider an impairment of dynamic competition in merger cases and it should be possible to use this when considering the benefits to dynamic competition of pro-competitive regulation.³

We think there are two issues relating to consumer benefit about which the CMA may be able to offer greater clarity in the draft guidance. First, there is little discussion of the time frame over which benefits should be considered (paragraph 3.28). We would expect that this will vary on a case-by-case basis. Where benefits depend on removing impairments to dynamic competition these may not be realised for some time. However, consideration should be given to the fact that SMS designations are time limited.

Second, it is unclear whether benefits must be restricted to consumers of the relevant digital activity. We would expect that benefits to consumers of other digital activities should be considered as this would be consistent both with the recognition in this regime that conduct in an activity other than the relevant digital activity can affect an SMS firm's market power in the relevant

² Which? (2020) [Are you following me?](#); Which? (2021) [Are you still following me?](#); Which? (2021) [Value of the Choice Requirement Remedy](#).

³ [1429/4/12/21 Meta Platforms, Inc. v Competition and Markets Authority - Judgment](#), June 2022

activity, and also the approach in the merger regime⁴. However, it would be helpful for the CMA to clarify this.

CRs applying to non-designated activities

The Act gives the CMA the power to impose CRs for the purpose of preventing an SMS firm from carrying on activities other than the relevant digital activity in a way that is likely to materially increase the SMS firm's market power or materially strengthen its position of strategic significance in relation to the relevant digital activity. In interpreting this with the purposes of considering future competition, we believe it will be necessary to consider how entrenched market power is. Therefore, we agree with the CMA that its ability to impose CRs on activities other than the relevant digital activity will include imposing requirements to prevent the SMS firm from reinforcing or embedding its market power and/or its position of strategic significance (paragraph 3.13).

Designing effective and proportionate CRs

We agree in principle with the CMA's approach to considering potential CRs (paragraphs 3.24-3.29). It is desirable that the SMS firm should be given discretion over how it achieves the aim of a CR as this reduces the risk of unintended consequences, and so where outcomes are measurable and compliance is verifiable then an outcome-focused CR is likely to be preferred. Likewise, in situations where an action-focused CR is preferred because compliance cannot be easily assessed, it will be better that higher-level requirements are used so as to afford the firm some discretion. However, there are situations in which it will be better for the CMA to set detailed requirements. These may be scenarios in which the SMS firm has demonstrated a failure to comply with similar regulations either in the UK or in other jurisdictions or where the aim of the CR has already been achieved through rules-based regulation in another jurisdiction and the actions needed to achieve this are known. In such circumstances the CMA should not delay in setting detailed requirements.

We consider the CMA's approach to assessing the proportionality of CRs to be reasonable (paragraphs 3.30-3.33).

(b) procedure for imposing CRs

We note that the CMA may publish interpretative notes to accompany a CR or combination of CRs (paragraph 3.53). We see these being particularly useful in the case of higher-level CRs. That said, the CMA should make it clear that the interpretative notes will be kept to matters of fact only. We note that the

⁴ CMA (2018) [Mergers: Exceptions to the duty to refer](#), paragraph 69.

CMA will typically also publish a draft version of the interpretative notes at the same time as consulting on the proposed CR to aid parties' interpretation of the proposed CR (paragraph 3.57). We agree an early draft is a sensible approach as it will ensure that parties share the same understanding from the outset. As this appears to be a new process, the CMA should keep under review whether the interpretative notes are meeting their intended purpose.

We note that the CMA may ask an SMS firm to provide it with a written plan on how it intends to comply with a CR in advance of the CR coming into force (paragraph 3.63). We believe this should be the norm and only in exceptional circumstances is a plan not provided. Further, and notwithstanding that the CMA intends to have discussions with the SMS firm during the implementation period, in cases where the implementation period is relatively long then compliance reporting should outline the progress of implementation. This will give confidence to third parties about the likely efficacy of the CR.

Pro-competition interventions

(a) analytical approach to assessing whether there is an adverse effect on competition (AEC)

The guidance states that when assessing whether there is an adverse effect on competition, the CMA will consider factors that affect current competitive conditions and potential competition. However, this is a narrower definition of competition than is used elsewhere in the guidance. Paragraph 7.73 states that the CMA considers that effective dynamic competition is key to delivering better outcomes for users in the long term. If the CMA does not intend to consider factors related to dynamic competition then it should explain why.

(b) analytical approach to designing PCIs

It would be helpful if the CMA could offer greater clarity on the relationship between behavioural PCIs and CRs since there seems to be a strong overlap between these remedies. This lack of clarity is also reflected in the government's impact assessment for the Act. Which? has previously valued the impact of a single behavioural remedy (the introduction of a choice requirement remedy that would give consumers greater control over the use of their personal data) and in its impact assessment the government attributes part of the value of this remedy to being the benefit of a CR and

the remainder to being the benefit of a PCI.⁵ It would be helpful if the CMA could clarify what its preferred approach would be in situations where a similar or even identical remedy could be applied as either a CR or a PCI. We expect one relevant factor might be the relative timeliness of each intervention, as in many cases the CMA will be able to implement a CR more quickly than a PCI.

We consider the CMA's approach to assessing the proportionality of PCIs to be reasonable (paragraphs 4.34-4.36).

(c) procedure for PCI investigations

Similar to our response to the procedure for SMS investigations:

- We believe that a complaint(s) or information from a third party or third parties who are not providers of the goods or services (including but not limited to consumer groups, upstream suppliers, trade and professional bodies) could be added to the list of evidence that the CMA might take into account when deciding whether to open a PCI investigation (paragraph 4.43), and that this may include a 'super-complaint' from consumer bodies designated to make such complaints under Section 11 of the Enterprise Act 2002.
- We welcome the CMA's stated intention to publish an invitation to comment at the outset of a PCI investigation (paragraph 4.54.)

Investigatory powers

We welcome the clarity provided by the draft guidance relating to information notices that might require a party to perform a demonstration or test. We believe this power could substantially help to improve the efficacy of the digital competition regime and the draft guidance indicates that the CMA intends to adopt a reasonable approach to making such notices (paragraph 5.14).

Monitoring

(a) monitoring compliance

We agree that the CMA should require the SMS firm to publish a summary compliance report (paragraph 6.51). We believe this will be important to

⁵ Department for Science, Innovation and Technology (2023) [Impact Assessment - A new pro-competition regime for digital markets](#)

providing transparency and promoting trust in the regime. We further agree that the CMA should have regard for the likely value of information to third parties when it determines the specific information to be included in the summary report. The CMA will likely need to engage with relevant third parties to understand what information would be valuable to them. This may be achieved as part of the formal consultations associated with each competition requirement, but the CMA may need to go beyond this with further stakeholder engagement.

It is right that the CMA will seek to achieve a participative resolution to compliance concerns where it is possible and appropriate to do so. However, where the CMA takes the actions described in paragraph 6.60 (e.g. engage in bilateral dialogue with the SMS firm), the CMA should put information about these actions in the public domain to maintain transparency.

(b) monitoring effectiveness

We largely agree with the approach set out by the CMA to monitor the effectiveness of competition requirements. We agree that the evaluation of the effectiveness of competition requirements will require using a mix of qualitative and quantitative evidence and that the approach will vary by competition requirement.

We believe it will be unlikely that the CMA is able to directly relate competition requirements to specific changes in underlying competitive conditions (paragraph 6.74), but we think the CMA will be able to consider the counterfactual of what would have happened if the competition requirement had not been implemented.

We also note that the CMA has an ongoing programme of evaluation of merger remedies and that the methodology used includes conducting interviews with affected parties. We believe such an approach may also sometimes be beneficial to the evaluation of the effectiveness of competition requirements.

(c) monitoring whether to impose, vary or revoke competition requirements

No comment.

Enforcement of competition requirements

Our response to the enforcement of competition requirements pertains entirely to the guidance relating to the countervailing benefits exemption (CBE).

We are pleased that the CMA gives clarity that any firm relying on the CBE in a conduct investigation must provide new evidence going beyond submissions or representations made at the time the conduct requirement was imposed (paragraph 7.62).

We would welcome the draft guidance clarifying whether the CMA will put a firm's representations when seeking to rely on the CBE to third parties (subject to any confidentiality considerations). Currently, it is not clear whether a firm's representations will directly be shared with relevant third parties and/or whether such representations will be set out in the CMA's provisional findings (and therefore made public) when concerning a CR breach investigation. Doing so would enable third parties to specifically consider the claims being made by SMS firms as part of any evidence they provide to the CMA (paragraph 7.62), giving them an opportunity to test and challenge any claims made by SMS firms seeking to rely on the CBE.

With regard to each of the five conditions required for a CBE to be applied:

(a) the conduct to which the investigation relates gives rise to benefits to users or potential users of the digital activity in respect of which the CR in question applies.

The guidance sets out examples of the benefits to users or potential users that could be considered. However, it could be clearer that these are benefits to consumers and not business users. These benefits will be weighed against competition harms that are harms to consumers and so where benefits are received by business users then it will be necessary to evidence that these will be passed through to consumers.

The types of consumer benefits considered should accord with those that would be considered by the CMA before imposing a CR or combination of CRs on an SMS firm. So for example, they could include direct or indirect benefits being realised in the future. The substantiation of these benefits by the SMS firm needs to be objective, detailed and verifiable.

(b) those benefits outweigh any actual or likely detrimental impact on competition resulting from a breach of the CR.

In general we would expect a similar approach to that used when assessing countervailing benefits in a merger investigation.⁶ This means that in assessing the weight of the claimed relevant customer benefits, the CMA should have regard for both the magnitude of the benefits and the probability of them occurring and that these will be set against the magnitude and probability of the identified anti-competitive effects. The more powerful and more likely the anticompetitive effects of the breach of the conduct requirement, the greater and more likely the relevant customer benefits must be to meet and overcome such concerns.

It would be reasonable to use both quantitative and qualitative evidence in making this judgement, but we would expect that, wherever possible, the SMS firm will attempt to quantify the consumer benefits.

(c) those benefits could not be realised without the conduct.

Ministers made it clear in the passing of the Act that the wording is intended to maintain the same high threshold as the indispensability test in section 9(1)(b) of the Competition Act 1998 and that “*SMS firms must still prove that there is no other reasonable, practical way to achieve the same benefits for consumers with less anti-competitive effect*”.⁷ We therefore agree that the test is therefore akin to the indispensability test and the CMA should have regard to the interpretation of it when applying this condition.

(d) the conduct is proportionate to the realisation of those benefits

We note that when considering the proportionality of CRs (paragraph 3.30), the CMA has set out the criteria it will consider when making its proportionality assessment. The guidance does not set out the CMA’s assessment on proportionality in the context of (d) above. We would welcome further clarification from the CMA.

(e) the conduct does not eliminate or prevent effective competition

We agree that the CMA should consider whether the conduct impairs dynamic competition.

Penalties for failure to comply with competition requirements

We note that deterrence is one of the factors the CMA will consider when deciding whether to impose a penalty (paragraph 8.11) and in determining the level of a penalty (paragraph 8.19). In the CMA’s guidance as to the

⁶ CMA (2018) [Mergers: Exceptions to the duty to refer](#), paragraphs 82-86.

⁷ HC Deb 20 November 2023, Vol 741, Col 74.

appropriate amount of a penalty CMA73⁸, the CMA has regard to general deterrence, as well as specific deterrence, when calculating a financial penalty under section 36 of the Competition Act 1998. We would welcome clarification that the CMA's adjustment for deterrence (at Step 2, paragraphs 8.31 - 8.34) when calculating a financial penalty in relation to the Act mirrors a similar approach. The CMA should be able to take into account general deterrence and specific deterrence when deciding the level of a penalty, so that it can impose significant fines on entities that already hold significant and entrenched market power. Deterrence by way of imposing substantial fines is going to be key in preventing harm to competition and consumers.

Administration

Consultation and publication of statements

We welcome the approach to consultation set out in paragraph 9.13. The CMA will need to balance the fairly short statutory deadlines for conducting investigations with the need to give parties sufficient time to be able to provide useful responses to consultations. For an organisation such as Which? that represents a large number of stakeholders, it is often necessary to conduct primary research to inform our position and this is not possible if we receive insufficient notice of a consultation. Advanced notice of the timetable for consultation is helpful, but often some advanced understanding of the scope and content is also needed. This emphasises the importance of Principle D of the government's Consultation Principles, which states that consultations are only part of a process of engagement.⁹

Transparency

Transparency will be key to the success of the new regime. It will be essential to facilitate the high quality of engagement that is needed to deliver good regulation, and more broadly it is needed to build trust and legitimacy. We welcome the CMA's statement that the draft guidance sets out the minimum steps it will take to ensure transparency. As we noted in the introduction to this response, there are aspects of the regime, such as the CMA's prioritisation process, that currently have few formal transparency mechanisms. The CMA suggests that other transparency mechanisms might come about as the regime develops and we encourage it to give thought to what these might be.

⁸ CMA (2021) [Guidance as to the appropriate amount of a penalty](#)

⁹ [HMG Consultation Principles \(March 2018\)](#)

Duty of expedition

We note at paragraph 9.25 of the guidance that where parties or their advisors act in a manner which runs counter to the CMA's duty of expedition, for example seeking to delay the process by making late, duplicative or unnecessarily lengthy submissions, the CMA may be less able to engage as fully with such submissions, particularly where they risk undermining the effective exercise of the CMA's functions. Whilst we understand the CMA's position, it is important that the CMA's engagement with third parties who have engaged appropriately is not adversely impacted.

About Which?

Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

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