The City of London Law Society

12.07.2024

City of London Law Society Competition Law Committee: Response to the CMA's Consultation on the Draft Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024 (CMA194con DRAFT)

1. Introduction

1.1 The Competition Law Committee of the City of London Law Society ("**CLLS**") welcomes the opportunity to comment on the consultation by the Competition & Markets Authority ("**CMA**") on the draft version Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024 ("**DMCC**") (CMA194con DRAFT) ("**DMCC Guidance**").

1.2 The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee (the "**Committee**") comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions, and regulatory and government bodies in relation to competition law matters. Members of the Committee represent grantors and recipients of subsidies as well as third parties who may have an interest in the grant of particular subsidies. The members that participated in preparing this response were: Jonathan Ford (Linklaters), Becket McGrath (Euclid Law), Ian Giles (Norton Rose Fulbright), Nigel Parr (Ashurst), Nelson Jung (Clifford Chance), Jenine Hulsmann (Weil), Robert Bell (Memery Crystal), Nicole Kar (Paul Weiss), Aurora Luoma (Skadden), Isabel Taylor (Slaughter and May), and Deirdre Taylor (Gibson Dunn).

1.3 The new Digital Markets, Competition and Consumers Act 2024 is set to shape digital markets, merger control and consumer protection alike. The DMCC Guidance has been a highly anticipated policy document for the legal community, representing the clearest reflection of the CMA's forthcoming strategy for implementing the digital aspects of this new and comprehensive piece of legislation.

1.4 We set out in **Annex 1** our comments by reference to particular sections of the paper. However, we first provide some directional thoughts on the approach of the DMCC Guidance as a whole below.

2. Flexibility in the DMCC presents an opportunity

2.1 Enforcement in digital markets is characterised by significant challenges and complexities, given the unique features of these markets. Against the backdrop of a fast-moving industry, traditional *ex post* enforcement tools may well not be sufficient or agile enough to address the dynamic nature of digital markets.

2.2 That said, it is also important to bear in mind that digital markets are global in scale and other regulators are in the process of implementing similar regimes, most notably the European Commission with the Digital Markets Act (DMA). International businesses active in the sector will, therefore, be keen to ensure they carry out their activities globally in compliance with all such applicable rules. This may be a challenge, but it also presents an opportunity for the CMA

to help shape a business-friendly regime that will attract investment in the UK and provide regulatory stability and legal certainty to businesses.

2.3 Indeed, the CLLS believes that the DMCC has the potential to be an improved version of regulation to the digital sphere, inviting more engagement with digital players, allowing greater flexibility and a more tailored approach, and ultimately leading to fairer outcomes for businesses and consumers alike. This is very much in line with the CMA's stated objectives for the DMCC.[1] Unlike its European counterpart, the CMA can, and should, take the opportunity to provide businesses with a more fluid, but also transparent and easy to identify, set of obligations. This will maximise the chances that the DMCC can be used as a helpful tool for the authority to target specific shortcomings and gaps in other regulation, whilst minimising the burden on businesses and avoiding unintended consequences.

3. High level observations on process and substance

3.1 The DMCC hands the CMA expansive and flexible powers, reflecting Parliament's intention for an agile regime that is able to move quickly to address the challenges posed in digital markets. The flexibility of the regime is its strength: it provides an opportunity for the CMA to administer a regime that is targeted, proportionate and, ultimately, effective. However, flexibility in application should be balanced against clarity of approach.

3.2 Certain aspects of the DMCC Guidance provide welcome insight into how the CMA will exercise its discretion under the new regime. We appreciate that different digital markets have different characteristics, and the DMCC Guidance therefore understandably and rightly recognises that the CMA's approach (e.g. with regard to sources of evidence) may differ from case to case.

3.3 Nonetheless, we believe the CMA could provide further clarity, both on issues of process and substantive assessment, which would support both potential Strategic Market Status ("**SMS**") firms as well as third parties in engaging with the regime, in line with the CMA's stated desire to create a participative model with key stakeholders. In brief, we consider that the DMCC Guidance could be improved on the following issues:

(i) On **process**, we would welcome further procedural clarity on the timeline and designation process, development of codes of conduct, and imposition of pro-competition interventions. While the DMCC Guidance provides information regarding consultation on key decisions, it is not clear how SMS investigations / drafting of conduct requirements and PCI investigations will be run in practice – i.e. the timescales for evidence gathering, provisional findings and any hearings (including the involvement of CMA decision makers). Further input would support both SMS firms and third parties engaging with the CMA in the most timely and effective way. The DMCC Guidance helpfully explains the plan to establish a Digital Markets Board Committee which will have responsibility for many of the key decisions under the regime. While we understand details are yet to be finalised, further clarification in the DMCC Guidance of

[1] See: https://www.gov.uk/government/news/cma-sets-out-approach-to-new-digital-markets-regime, which notes "*This will include tailoring the CMA's actions to the specific problems that are identified; focusing on where it can have the most impact for people, businesses, and the UK economy; engaging with a wide range of stakeholders; and operating with transparency*."

how that Committee will operate would be very useful to all interacting with the regime. In particular, it would be useful to understand what decision-making mechanism will be in place for each kind of decision, and what access stakeholders can expect to have to decision makers – direct and indirect.

(ii) On **substance**, some key areas where the DMCC Guidance could provide a clearer steer to businesses and advisors include:

- the *scope of digital activities*: whilst we recognise that the DMCC Guidance is by necessity open-ended, incumbent and challenger businesses ultimately need sufficient clarity of what might come within scope of the regime. Equally, the CMA's ability to group together more than one digital activity should not become a back-door for the CMA to designate and/or impose conduct requirements on activities in which there is not substantial and entrenched market power;

- the assessment of *substantial and entrenched market power*: the DMCC Guidance should make it clearer that "substantial" and "entrenched" are two necessary requirements for SMS designation that need to be assessed separately, and presumptions should not be a substitute for demonstrating that these criteria are both met. Ultimately, the SMS designation will be linked to the parallel development of tailored codes of conduct, which makes it even more important for businesses to be able to refer to a clear set of criteria and guidance; and

- the CMA's approach to *pro-competition intervention* and assessing *efficiencies*: more clarity is needed on the factors that the CMA will take into account in determining whether an intervention is required. In particular, countervailing benefits appear in the current draft to be described as "akin to" an "indispensability" assessment, which goes beyond the letter of the legislation (and the parliamentary debate on this issue).

3.4 As a general point, some worked examples may help illustrate how the DMCC Guidance will be applied in practice. We appreciate that the CMA is keen not to pre-judge markets or commercial practices that may come before it, but nonetheless the CLLS believes that some practical worked examples, kept at a high-level and even using neutral or invented products (i.e. widgets and blodgets) might help illustrate a point the DMCC Guidance is making. This has been very helpfully done in the CMA's horizontal guidelines, for example, and we consider it would work equally well here.

3.5 Finally, the CLLS believes that, against the backdrop of very broad discretionary powers the CMA enjoys under the DMCC and the limited degree of judicial oversight, businesses in the UK and internationally need predictability as to what business models and behaviours will be prioritised, and how the CMA will ensure its interventions are proportional. Hints of the approach in the CMA's roadmap are welcomed; however, the prioritisation principles to which the CMA refers in the Guidance were not created with markets such as these in mind. We would therefore welcome additional clarity in the DMCC Guidance beyond the general prioritisation principles, while accepting the need for some flexibility in the new regulatory toolbox.

12 July 2024

Annex 1

As outlined in the main body of the response, the CLLS believes that, whilst the DMCC regime has the potential to transform the digital landscape in the UK, there are certain areas where the DMCC Guidance could provide more clarity to market participants and delineate the boundaries of how the CMA will apply its discretion.

1. SMS Designation

The DMCC Guidance provides welcome insight into how the CMA will interpret the criteria for SMS designation. The flexibility of the DMCC regime is a positive feature because, as the CMA has noted, it will enable the CMA to respond quickly to the often rapid developments in digital markets. At the same time, whilst retaining this flexibility, it is crucial that both potential SMS firms as well as interested third parties have sufficient clarity on what aspects are, and are not, within the scope of the regime. Further clarity on the CMA's proposed approach to SMS designation would be welcomed.

- The CMA envisages full and deep engagement with a wide range of stakeholders and market participants. It seems to us that procedural efficiency and speed would be best served by allowing firms to understand the CMA's initial position on the correct approach to applying the SMS designation criteria and therefore to properly address the issues that are more relevant to the CMA in their submissions.

- We also consider that the DMCC Guidance should include sufficient detail to allow firms to understand precisely which evidence the CMA intends to base its decisions on, and its reasons for doing so, in advance of the decision being taken. This is all the more important in light of the short, evidence-based investigative timetables in the DMCC and the important role played by third parties.

We also submit that the inherent flexibility built into the SMS regime should, in particular, not result in the CMA taking an inconsistent approach between potential SMS firms which could distort the playing field. A coherent and consistent application of the SMS criteria across firms would provide clarity for businesses, investors and consumers and ensure effective ex-ante control.

1.1 The scope of digital activities

The CMA's flexibility in defining the scope of digital activities is beneficial in achieving a tailored, targeted and proportionate regime. However, it is vital that there is sufficient clarity and specificity around the digital activity in question; greater legal certainty to SMS firms and other stakeholders alike could be achieved by:

- A more structured approach to identifying digital activities: consistent with the tailored approach of the new regime, the CMA has discretion and flexibility in terms of identifying digital activities. That said, we believe that businesses would greatly benefit from a more consistent and detailed approach when it comes to how the CMA aims to define digital activities (rather than a "relatively brief description"). The DMCC Guidance also notes that identifying digital activities is a case-specific assessment and that the CMA may vary its approach between investigations depending on the particular circumstances of a case. We respectfully suggest that an indication of which

factors may lead the CMA to adopt a different approach between potential SMS firms when identifying digital activities, or at a minimum to have a concrete list of examples (in the same way as examples are given later in the DMCC Guidance on the meaning of "carrying on business" in the UK), could be included.

- Clarity on the approach to "grouping" activities for purposes of identifying relevant activities: the CMA's power should not afford it an unlimited ability to designate firms in unrelated activities, where they do not enjoy market power. We would also welcome clarity on when / what relevant factors will determine whether the CMA actually exercises its discretion to group activities into a single designation.

1.2 Designation assessment criteria and process

Considering the potential consequences of a firm being designated as having SMS status, the CLLS would welcome more clarity on how the CMA will apply its designation assessment and process.

- There should be more consistency on the approach to "market power":
  - The "entrenched market power" test is a different test from the "substantial market power" one, and the two should not be conflated, i.e., it is unreasonable to introduce a presumption of entrenched market power following from a finding of substantial market power.
  - While we recognise the legal test is intentionally different, we would caution against the CMA fully disregarding existing caselaw on the issue of "dominance" which could provide a useful starting reference point to businesses (e.g., in respect of countervailing buyer power); this approach would not only create a more predictable regulatory regime, but would also be more in line with the approach taken in other UK regulated sectors.[2]
  - The CMA's assessment of substantial market power should not be limited to a firm's ability (ignoring its incentives) to extend market power to a range of other activities.
  - The CMA's assessment of whether an undertaking has "substantial and entrenched market power" is forward-looking over a period of at least five years.

Link to the United Kingdom: The DMCC Guidance explains that there will be a link to the UK when at least one of three elements is present, including that the "digital activity has a significant number of UK users". The DMCC Guidance states that the assessment of whether the number of UK users is significant is context specific, and the CMA provides no quantitative threshold for how many users can be considered significant. It would provide greater certainty and predictability to potential SMS firms as

[2] For example, the Office of Communication's communications regulation applies to operators that have significant market power ("**SMP**"). The relevant UK legislation, the Communications Act 2003, defines SMP as being equivalent to the competition law concept of dominance; namely a communications provider shall be deemed to have SMP if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

well as interested third parties if at least indicative thresholds could be specified in the DMCC Guidance. This is particularly the case because there is no prior CMA practice in this area which provides firms with at least some indication of when this element may or may not be met. Indicative thresholds or a concrete list of examples would enable businesses to engage with the regime with more certainty and predictability. This approach would retain the CMA's discretion to adapt its approach on a case-by-case basis as necessary.

- Evidentiary standard: The evidentiary standard should be solid, particularly as no infringement of laws is alleged at the designation stage. In addition, the CMA's approach to forward-looking analysis needs to be clearly articulated, considering the lack of quantitative requirements. It would assist both potential SMS firms as well as interested third parties if the DMCC Guidance could provide further detail on the quantitative and qualitative evidence, as well as features that the CMA may consider in its assessment of both substantial and entrenched market power[3] and position of strategic significance. The lack of prior CMA decisional practice in this area means that firms have little guidance on when this element may or may not be met. It would provide greater certainty and predictability to potential SMS firms as well as interested third parties if at least indicative thresholds or examples could be specified in the DMCC Guidance. This approach would retain the CMA's discretion to adapt its approach on a case-by-case basis as necessary.

- Procedural points: The CMA's ability to begin an investigation "at any time", and to open a new SMS investigation having closed an earlier one, offers unlimited flexibility, but the circumstances in which this might be appropriate should be delineated more clearly. More broadly, the designation process (and ability/steps to challenge the designation) should be set out more robustly in the DMCC Guidance.

2. Conduct Requirements ("CRs")

It is welcomed that the CMA encourages parties to engage with the CMA early to identify what would be most appropriate – and the least onerous – to meet the intended aim of the CR (or pro-competition intervention ("**PCI**"), as the case may be), as well as any disadvantages that are disproportionate to the intended aim. This engagement will be critical in ensuring that CRs (as well as PCIs) are as targeted and effective as the regime envisages.

The CLLS believes that there are some areas where the DMCC Guidance could provide a greater insight to businesses and ensure due process regarding CRs:

- There should be a clear explanation as to the circumstances where CRs will be applied to non-designated activities: The DMCC Guidance suggests CRs may be applied to non-designated activities based on an assessment that conduct is "*likely to increase [the SMS firm's] substantial and entrenched market power and/or strengthen its position of strategic significance*". This does not reflect the legislative requirement that this "materially" increases the firms' market position.

[3] "Entrenched" is a term that typically refers to market power that has persisted through time (for example, the EU's DMA looks back over the past three years to assess whether a designated firm holds an "entrenched and durable position"); as the DMCC presents a different approach, it would provide greater clarity if this was accompanied by more prescriptive guidance to facilitate the administration of the new regulatory regime.

SMS firms will need to be assured of a proportionate approach to this assessment, given significant procedural/rights of defence limitations, including that the CMA will not have gained evidence about the non-designated activity in any SMS investigation and parties will not have had the opportunity to test the basis for the CMA's approach.

- How the CMA will select CRs: It would be beneficial if the DMCC Guidance could provide firms with more information on the types of digital activities that it considers it is more likely to subject to CRs (rather than PCIs), particularly where the language of the Act could leave it open for either tool to be used (e.g., requirements relating to "interoperability"). Additional guidance would give greater certainty as to the likely form and practical impact of interventions, which would be useful for all market participants, as well as explaining how the CMA will approach revising or refining CRs. The CMA's Digital Taskforce Report in December 2020 indicated that the CMA expected to take a stepped approach, using PCIs only when the issue lay outside the scope of CRs, or where CRs are clearly, or prove to be, insufficient. It would be welcomed to have additional clarity in the DMCC Guidance on whether the CMA intends to use CRs and PCIs in parallel or a stepped approach.

- Compliance: The DMCC Guidance notes that it "it will be open to the SMS firm to take a different approach where the SMS firm is able to demonstrate to the CMA that its approach complies with the terms of the CR". For reasons of administrative efficiency, it would be helpful if DMCC Guidance could include further clarity on the process for a potential SMS firm to demonstrate to the CMA that its approach is in compliance with the terms of the CR.

- Process: Concerns remain regarding the CMA's unfettered discretion on the processes around designing and implementing CRs, in particular on:

  - Whether the CMA will consult only on its proposed CR or on multiple options.

  - How the CMA will choose between CRs, PCIs (or other tools) to address concerns conceivably addressable by either tool.

  - Some likely examples of bilateral and multilateral engagement with stakeholders and when they will take place.

  - How the CMA will make sure that it provides the "gist" of a case in practice where its evidence base may rely on information from complaints, some of which may be anonymous.

  - What the key milestones (e.g. "Issues Statements", "Working Papers", "Oral Hearings" etc.) will be in the CRs process and the expected timelines.

3. Pro-Competitive Interventions (PCIs)

We would welcome further clarity as to how PCIs will be introduced in practice for businesses in the UK, In particular:

AEC threshold: The DMCC Guidance explains that factors giving rise to an adverse effect on competition ("**AEC**"), or the AEC itself, may relate to or occur within any digital activity that is "connected to" the designated digital activity. To increase the predictability of the PCI tool, a more definitive list of examples of the cases where a digital activity would be connected to the designated digital activity would be welcomed.

- Process/remedies: In light of the very short nine-month timetable for conducting PCIs, we would encourage the CMA to ensure that it meaningfully engages with the SMS firm as well as interested third parties throughout the process, including on potential other, less onerous options if an AEC is identified. It would be helpful if the procedural steps for applying PCIs could be clearer, for instance clarifying the type of engagement on the design and terms of the PCO in advance of the public consultation; or whether the CMA will provide the SMS firm with the evidence that it has relied on to open an PCI investigation. It would also be helpful to have some more guidance on the stage at which it will consider remedies, and ensures it engages in remedies discussions where these are necessary to reduce the administrative burden for businesses.

4. Investigatory Powers

- Appropriate limits to the exercise of the CMA's investigatory powers: The DMCC Guidance should provide further clarity on when and how the CMA's investigatory powers will be exercised, considering there may be scenarios where there is no allegation of wrongdoing. The CLLS would welcome, in particular, an opportunity for businesses to (i) meaningfully engage with the CMA in relation to the scope of requests for information; and (ii) be provided with access to the underlying methodologies of reports by "skilled persons" and be able to challenge these using objective benchmarks, reports, and best practice.

- Testing of PCI remedies: Testing should be proportionate to the need for legal certainty and ensure that a firm will be protected from having to adopt varying approaches.

5. Monitoring

The CLLS would welcome more guidance on the monitoring aspects of the new regime, for instance on:

- Compliance reporting: The DMCC Guidance should provide more clarity on its expected frequency and content and align the reporting requirements for SMS firms designated for multiple activities.

- Participative resolution: The participative resolution approach is very welcome, but the CLSS would encourage more transparency on how the CMA intends to provide this opportunity to SMS firms in practical terms.

- Complaints: How complaints will be reported on and the scope of information that will be provided to SMS firms.

- Nominated Officer: The role and expectations regarding the Nominated Officer (e.g. how frequently the CMA expects engagement to take place; whether there will be a designated counterpart for each nominated officer/SMS firm).

6. Enforcement / Penalties

Regarding the enforcement of conduct requirements, in assessing the benefits of countervailing benefits, the DMCC Guidance suggests that the CMA will apply case law from an antitrust enforcement context on "indispensability". This goes beyond the intention of Parliament which intentionally removed the word "indispensable" from the legislation during the legislative process.

The DMCC Guidance provides the CMA with significant discretion in how it enforces CRs. While some flexibility in the process is necessary in order to respond efficiently and effectively to potential CR breaches, the CMA should nevertheless aim to be as consistent as possible across its assessments to ensure that firms are treated equally. More generally, it is critical both to the rights of defence of SMS firms and to ensuring CMA decisions are robust, that SMS firms fully understand the case "against" them. This principle applies to all decisions taken under the SMS regime but is particularly acute in the context of enforcement proceedings. Appropriate provision must therefore be made for SMS firms and/or their advisers to access the key underlying evidence the CMA seeks to rely upon in any enforcement proceedings.

In addition, certain due process requirements will need to be more robustly put forward, including:

- Representations: Given the potential for significant fines, and the relevance of other areas of business to the calculation, businesses must have a "reasonable opportunity" to submit representations on a provisional penalty notice. It should also be made clear in what circumstances the CMA can deem an oral hearing not appropriate, as well as giving firms the opportunity to comment during an initial assessment of a CR breach.

- Reasons for decisions: Given the lack of case law, it is even more critical that the CMA provide detailed reasoning for its decisions. The CMA makes various statements which appear in tension with the duty to give reasons for a decision, such as that it will not consider the precise effects of conduct requirements but will only consider such effects 'in the round'.

- Penalty calculation: The calculation of gains (including those outside the breach activity) will need to be sufficiently detailed, particularly if the deterrence uplift is applied to "materially exceed" these.

- Balancing due process and speed: The "duty of expedition" cannot outweigh the need for due process and appropriate care in timetabling. The statutory deadlines are already incredibly tight compared to market investigations, for example. In those circumstances, it would be unreasonable and overly burdensome on SMS firms for the CMA to seek, as a matter of course, to progress investigations more quickly than the time allowed, or to adopt inconsistent approaches to setting deadlines etc. As a final matter, the suggestion at 9.25 that parties or their advisors may "act in a manner which runs counter [to] the [duty of expedition] requirement, for example seeking to delay the process by making late, duplicative or unnecessarily lengthy

submissions" is unhelpful and surprising. We would suggest this pre-conception is unwarranted in a regulatory context and should be removed from the DMCC Guidance.

It would also be helpful to know to what extent the CMA expects the upcoming Penalties Guidance to significantly supersede what is contained in this chapter.