12 July 2024

VIA EMAIL

Competition and Markets Authority
25 Cabot Square
London, E14 4QZ
United Kingdom
dmguidance@cma.gov.uk

Re: Consultation on Digital Markets Competition Regime Guidance

Dear Competition and Markets Authority:

The Software & Information Industry Association ("SIIA") appreciates the invitation to provide these comments on the draft digital markets competition regime guidance ("Draft Guidance") issued by the Competition and Markets Authority ("CMA") on 24 May 2024.

SIIA is the principal trade association for the software and digital information industries worldwide. Among our nearly 400 members are cloud service providers, developers of software (including AI applications), and platforms, as well as digital content providers and users in academic publishing, education technology, and financial services. SIIA is dedicated to fostering a healthy environment for the creation, dissemination, and productive use of information, and we believe in a competition policy that is focused on promoting innovation, protecting the competitive process, and providing consumers with superior products and services at competitive prices.

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Introduction

Over the last several years, multiple jurisdictions have ramped up efforts to rein in what some see as the excesses and anticompetitive conduct of large tech platforms. In 2019, the EU's Directorate-General for Competition published a report on "Competition policy for the digital era."[1] Following release of the report, the Commission introduced the Digital Markets Act ("DMA"), which was subsequently passed into law.[2] Among other things, the DMA, which runs in parallel with the EU's traditional competition law regime, imposes a set of conduct obligations on companies that are designated as "gatekeepers" under the act.

[1] European Commission, Directorate-General for Competition, Montjoye, Y., Schweitzer, H., Cremer, J., *Competition policy for the digital era*, Publications Office, 2019. Available at **https://data.europa.eu/doi/10.2763/407537**

[2] Regulation No. 1925/2022, 2022 O.J. (L265) 1.

While the DMA only became fully operational in March of 2024, it is already having a substantial negative effect on businesses and consumers in the European Union. Among other things, it poses significant challenges for the service industry[3] and small- and medium-sized enterprises[4]. And due to concerns about how the DMA is being implemented, Apple recently announced that it will pause the rollout of new product features in the EU in the fall.[5]

In the United States, the then-majority staff on the Judiciary Committee in the House of Representatives in 2020 produced a voluminous report on competition in digital markets.[6] The Judiciary Committee report resulted in the introduction in the U.S. Congress of a number of platform-targeting bills, none of which ultimately went anywhere. Chief among them was the *American Innovation and Choice Online Act* ("AICOA")[7], which was widely panned as being a poorly drafted solution in search of a problem. In the words of one of America's preeminent antitrust exports, "… AICOA misidentified the sources of harmful market power by being both under- and overinclusive. It [was] underinclusive to the extent that it applie[d] only to online commerce; it was overinclusive in that it applie[d] to products and services over which the seller [had] no market power. As a result, its substantive requirements [were] egregiously mistargeted."[8]

The United Kingdom government has undertaken its own efforts to evaluate the need for changes to its competition law. In 2018, the government commissioned a Digital Competition Expert Panel (the "Panel"), chaired by American economics professor, Jason Furman, to investigate and report on competition in digital markets. The Panel's final report[9] made a range of non-binding recommendations designed to address alleged challenges to the enforcement of UK competition law in digital markets. These recommendations led to the Digital Markets, Competition and Consumer Act 2024 ("DMCC" or the "Act"), which received Royal Assent on 24 May 2024, and which is the basis of the present consultation.[10]

[3] https://www.linkedin.com/feed/update/urn:li:activity:7166372671595634689/
[4] https://vladimirvano1.medium.com/under-the-digital-shadow-how-the-dma-could-darken-the-future-for-hotels-and-smes-40708bf48b52
[5] https://www.reuters.com/technology/artificial-intelligence/apple-delay-launch-ai-powered-features-europe-blames-eu-tech-rules-2024-06-21/
[6] Majority Staff Report and Recommendations of the United States House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, *Investigation of Competition in Digital Markets*, 2020. Available at https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf
[7] https://www.congress.gov/bill/117th-congress/senate-bill/2992/text
[8] Hovenkamp, Herbert, *Gatekeeper Competition Policy*, March 18, 2023. U of Penn, Inst. For Law & Econ Research Paper No. 23-08, Michigan Technology Law Review (2023), at 5.
[9] Report of the Digital Competition Expert Panel, *Unlocking digital competition*, March 2019. Available at https://www.congress.gov/bill/117th-congress/senate-bill/2992/text
[10] *Digital Markets, Competition and Consumers Act 2024*, c. 13. Available at https://www.legislation.gov.uk/ukpga/2024/13/contents/enacted

1. DMCC and the Draft Guidance

Antitrust laws often describe prohibited conduct in vague and general terms. See, for example, Section 2 of the U.S. Sherman Act, which holds that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire … to monopolize any part of the trade or commerce … shall be punished …"[11]

The UK has adopted a similar approach. For example, the Chapter II prohibition in the UK Competition Act 1998 provides, in relevant part, that "…any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom."[12]

In either case, the proper understanding of what those rather opaque commands actually mean, and how they might or should influence the conduct of businesses, has been almost entirely dictated by years of court decisions and administrative practice, including that of the CMA.

Like the EU DMA, the DMCC purports to establish a novel and unique competition regulatory regime. Its legislative text, while long, is short on actual detail.[13] Yet companies designated under it as having Strategic Market Status ("SMS"), are expected to quickly comply with whatever substantial and onerous obligations the CMA might choose to impose. And if, for whatever reason, the CMA is not happy with their compliance efforts, they run the real risk of incurring steep penalties as a result.

In light of this, it is imperative for the CMA to provide clear operational guidance about expectations for and responsibilities of companies that either have been, or are likely to be, designated as an SMS firm under the Act. As discussed more fully below, the Draft Guidance[14], unfortunately, largely fails to do so. Not only is the Draft Guidance in crucial respects devoid of any attempt at defining important but vague terms, it also stresses at the outset that "[w]hile the CMA will have regard to this guidance in undertaking its digital markets function, it will apply this guidance flexibly and may depart from the approach described where there is an appropriate and reasonable justification for doing so."[15]

Moreover, appellate review of the CMA's actions is circumscribed by the judicial review standard[16], which inquires not whether a decision is "right" or "correct," but whether it is procedurally defective, illegal, or irrational.[17] In practice, this means that the determination of what is "appropriate and reasonable" in individual cases, absent decisions that are either unlawful or patently absurd, is left

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[11] 15 U.S.C. § 2 (1997). Available at https://www.law.cornell.edu/uscode/text/15/2

[12] *The Competition Act 1998*, c. 41. Available at https://www.legislation.gov.uk/ukpga/1998/41/contents

[13] *Supra* note 10.

[14] *Digital markets competition regime guidance*, CMA 194con DRAFT, Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024. Available at https://assets.publishing.service.gov.uk/media/6650a56d8f90ef31c23ebaa6/Digital_markets_competition_regime_guidance.pdf

[15] *Id*. at 1.7.

[16] See *supra* note 10 sections 103(4)(a) and (5).

[17] Courts and Tribunals Judiciary – Judicial review. Available at https://www.judiciary.uk/how-the-law-works/judicial-review/

entirely to the CMA's discretion. Without in any way impugning the motives of the CMA or its staff, the lack of clear guidance about how it intends to enforce the DMCC, coupled with the nearly unfettered discretion it claims to possess, regrettably, raises significant rule of law and due process concerns.

To be clear, we recognize that decisions made in accordance with the DMCC, as in most competition law enforcement situations, are case specific. Without perfect information and a crystal ball, it is also plain that that the CMA will need some leeway, or margin of discretion, when making decisions in individual matters. But that is vastly different from the claim of almost boundless flexibility to do as it wants, which the CMA appears to assert in the Draft Guidance.

A fitting description of what adherence to the rule of law demands is that "[t]he law must be known and predictable so that persons will know the consequences of their actions. The law must be sufficiently defined and government discretion sufficiently limited to ensure the law is applied in a nonarbitrary manner."[18] Leaving aside the dearth of clear guidance, based on resource constraints alone, there is no plausible scenario in which the DMCC can be consistently and predictably enforced.

See, for example, the CMA's own publication on its provisional approach to implementation of the DMCC, which states that it "expect[s] to initiate … 3-4 SMS investigations" in the first year after the new regime enters into effect.[19] But significantly more than 3-4 companies will almost certainly meet the requirements under the DMCC. How the CMA expects to identify the 3-4 companies it plans to single out for its initial round of investigations, and why, is unclear.

In light of the above, we encourage the CMA to amend the Draft Guidance to provide businesses and the public substantially more and better guidance about its understanding of critical terms in the DMCC, the type of evidence it will require companies to provide as part of investigations, and, at least, some indication of how it expects to weigh competing interests in its decisional practice. Finally, it would be helpful if the CMA recognized the need for a limiting principle to guide how it exercises its discretion in individual cases.

In the following, we will address a number of specific concerns. Per your request, the balance of the submission will follow the outline of the Draft Guidance.

2. Strategic Market Status

To come within the scope of the DMCC and be designated as having SMS, a company must satisfy a number of statutory requirements. It must carry out a digital activity[20] that is linked to the United

[18] Stein, Robert, *What Exactly is the Rule of Law?*, 57 Hous. L. Rev. 185, 194 (2019).
[19] *Overview of the CMA's provisional approach to implement the new Digital Markets competition regime*, CMA, Competitions & Markets Authority, 2024, at 10.4. Available at https://assets.publishing.service.gov.uk/media/659ee36de8f5ec000d1f8b60/20240110_overview_of_digital_markets_regime_-_FINAL_for_publication.pdf
[20] *Supra* note 10 section 2(1).

Kingdom[21]. In addition, the company must have substantial and entrenched market power[22] and a position of strategic significance[23].

Activity Linked to the United Kingdom

While the Draft Guidance explains that the key driver behind the new digital competition markets regime is to tackle effects on competition in the United Kingdom, the threshold for at least one of the criteria that the CMA can use to establish the necessary link to the UK appears quite low. Specifically, the CMA can consider conduct relating to digital activities that are occurring wholly outside the UK but are "likely to have an immediate, substantial and foreseeable effect on trade in the United Kingdom."[24]

This would allow the CMA to start an investigation into conduct that at the time the decision is made has had no effect in the UK at all. And the word "likely" is sufficiently malleable that it would be helpful if the CMA could provide potentially affected businesses with a better understanding of what it will take for that requirement to be met.

Substantial and Entrenched Market Power

In the Draft Guidance, the CMA asserts that the assessment of whether a company possesses "substantial and entrenched market power" does not require it "to undertake a formal market definition exercise."[25] While defining the relevant market may not be an end unto itself, it is traditionally seen as an important step in identifying the competitive restraints that a company faces. And because of this, defining a formal market is a critical foundational step for a proper competition law analysis.[26] As a result, we urge the CMA to reconsider its rejection of the need for a formal market definition as part of its SMS analysis under the DMCC.

The Draft Guidance correctly states that the "mere holding of market power is not in itself" enough to satisfy the separate but equally important requirements that the market power be "substantial" and "entrenched."[27] Against that backdrop, the later conclusion 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," seems odd. In some sections of the Draft Guidance, to the contrary, the CMA appears to put an emphasis on how other companies might leverage their power in one market to enter adjacent markets and therefore could pose a competitive threat to incumbent companies. The assertion also does not appear to align with what the British

[21] *Id.* sections 2(1)(a) and 4.
[22] *Id*. sections 2(2)(a) and 5.
[23] *Id.* sections 2(2)(b) and 6.
[24] *Supra* note 14 at 2.24.
[25] *Id*. at 2.43.
[26] See, for example, *Market Definition – Understanding Competition Law*, Office of Fair Trading, 2004, at 2.1. Available at https://assets.publishing.service.gov.uk/media/5a7cbf4ced915d68223624dc/oft403.pdf
[27] *Supra* note 14 at 2.42.

Parliament intended when it debated and passed the bill, as the Act makes a clear distinction between the two.[28]

Strategic Significance

As part of its SMS investigation, the CMA must also decide whether a company has a position of "strategic significance." In order to do so, it must rely on four factors, only one of which is needed to find that a firm has met that requirement.[29] Those four factors are: (1) whether the firm has a position of significant size or scale as it relates to the digital activity under review; (2) whether the company's digital activity is used by a significant number of other firms; (3) whether the company's position in respect of the digital activity would allow it to extend its market power to a range of other activities; and (4) whether the company's position as it relates to the digital activity allows it to determine or substantially influence how other firms conduct themselves.[30]

We strongly recommend that the Draft Guidance provide clear guidance about how the CMA will evaluate those four factors. Currently, the Draft Guidance does not do so. While it states that the CMA will be "looking at a wide range of metrics" to determine whether a company has achieved "a position of significant size or scale," the lack of guidance makes it nearly impossible for companies to determine if or how they will be considered to have SMS – either now or in the future. [31]

The Draft Guidance takes the same approach for the second factor—whether a significant number of other firms are using the potential SMS company's digital activity. It states that "there [also] is no quantitative threshold for when the number of other firms using the digital activity to carry on their business [is] significant. [Rather,] the most appropriate metric (or combination of metrics) is likely to depend on the specific context."[32] The Draft Guidance also explains that "the CMA does not have a prescriptive list of the evidence that it will take into account in its SMS assessment and may rely on a range of quantitative and/or qualitative evidence, with the balance between the two varying across investigations."[33]

The need to preserve some flexibility to make decisions as the specific circumstances of a particular case may warrant is, as mentioned previously, understandable. But the near total lack of clarity about what type of evidence the CMA might be looking for, as well as some indication of when relevant thresholds might be met, makes it virtually impossible for companies to be responsive to what the CMA might need as it conducts its SMS investigations. We, therefore, urge the CMA to revise the Draft Guidance to provide greater clarity on those issues, as well as on milestones and touchpoints for engagement for potential SMS firms throughout the designation process.

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[28] *Supra* note 10 section 5.
[29] *Supra* note 14 at 2.53.
[30] *Id*. at 2.54ff.
[31] *Id*. at 2.55. Indeed, the Draft Guidance even notes that "[t]here is no quantitative threshold for when size or scale of the potential SMS firm can be considered significant." *Id.* at 2.57.
[32] *Id*. at 2.59.
[33] *Id*. at 2.63.

3. Conduct Requirements

If, after an investigation, the CMA designates a firm as having SMS in respect of a digital activity, it may impose one or more conduct requirements ("CRs") on that company.[34] CRs are obligations by which the CMA can require the company to engage in specific conduct, or refrain from engaging in certain conduct, in relation to the designated digital activity.[35] And while the Act purports to provide an exhaustive list of "permitted" CRs[36], it also authorizes the relevant department head to amend the list of permitted CRs by regulation.[37] Finally, it is worth acknowledging that the CMA, before imposing a CR, must consider what, if any, consumer benefits will accrue as a result of the proposed CRs.[38]

As was the case in the section on SMS, *supra*, however, certain aspects related to the imposition of specific CRs call for a greater level of clarity than provided in the Draft Guidance.

For example, the Act provides the CMA with the authority to impose a CR that applies to an SMS firm's conduct that is unrelated to the digital activity that was designated.[39] The goal would be to prevent the SMS company from engaging in activities that could strengthen its position with respect to the relevant digital activity.[40]

But while the Draft Guidance purports to describe how the CMA plans to conduct its assessment of whether to impose a CR that is unconnected to the relevant digital activity, it really is unclear how that determination will be made. To wit: "the CMA will focus on whether an SMS firm designs or operates *any* other products in a way that is *likely* to increase its substantial and entrenched market power and/or strengthen its position of strategic significance in relation to the relevant digital activity."[41]

As mentioned previously, the word "likely" provides the CMA with close to unlimited flexibility, as does the ability to look at "any" of the SMS firms other product or service offerings, as it decides whether to impose the CR on an unrelated activity. At a minimum, the CMA's margin of discretion when making that decision should be curtailed. Moreover, the CMA should commit to making sure that its assessment focuses not just on how the prohibition might affect the designated digital activity but the overall operations of the SMS firm. Put differently, a CR that has only minor (positive) competitive effects on the relevant digital activity but significant (negative) implications for the unrelated activity would be unjustified.

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[34] *Supra* note 10 section 19(1).
[35] *Id*. section 19(3).
[36] *Id*. section 20.
[37] *Id*. section 20(4).
[38] *Id*. section 19(10).
[39] *Id*. section 20(3)(c).
[40] *Supra* note 14 at 3.13.
[41] *Id*. at 3.14. (Emphasis added.)

When deciding the appropriate form of any CR, the Draft Guidance outlines four principles, including whether the CR is outcome-focused or action-focused.[42] In addition to relying on those principles, the CMA must also ascertain that the proposed CR is proportionate to the end it seeks to achieve. The CR, in other words, must be effective and no more onerous than it needs to be.[43]

The Draft Guidance says that this assessment will be done as part of an effects-based test, and it then posits that "[t]he CMA will not typically seek to quantify these effects precisely, but will consider their magnitude in the round, having regard, as relevant and appropriate in each case, to the quantitative and/or qualitative evidence available."[44] While the CMA may want to preserve the maximum amount of flexibility for itself, it would be helpful for companies if it could provide greater clarity about how it proposes to weigh various relevant factors in making this assessment, including shorter- and longer-term effects, as well as the evidence it will look at in making that determination.

The CMA has powers to require SMS firms to vary their conduct and/or carry out live testing on consumers. The outcome of such testing is often unknown and risks unintended consequences, particularly on businesses that depend on the services provided by SMS firms, and end-consumers. Therefore, guardrails should be placed on these powers to ensure they are only used in relation to designated SMS firms—rather than firms that could be designated—and where other information gathering powers have proved insufficient. This will reduce the risk that such interventions could have broader negative effects on competition, including competitors, and innovation in the UK.

4. Pro-Competition Interventions

Section 46 of the Act authorizes the CMA to impose what is called pro-competition interventions ("PCIs") in respect of a designated entity if it finds that "a factor or combination of factors relating to the relevant digital activity is having an adverse effect on competition," and imposing a PCI would be proportionate.[45]

But it is virtually impossible, based on what the Draft Guidance says, for potentially affected companies and their advisors to develop a thorough understanding of how the CMA might actually decide whether to impose a PCI. When making this decision, according to the Draft Guidance, the "CMA has the flexibility to investigate a wide range of possible factors relating to a relevant digital activity, each of which *may* have effects on different aspects of competition."[46]

Not only that, the statutory definition of when the CMA might conclude that there is an "adverse effect on competition"[47] is extremely broad and basically allows it to sweep in anything it wants. Per the Draft Guidance, the "Act does not specify a theoretical benchmark against which to measure [an adverse effect on competition]. [In making that assessment,] the CMA will … focus on whether the factor or

[42] *Id*. at 3.26.
[43] *Id*. at 3.30.
[44] *Id*. at 3.32.
[45] *Supra* note 10 section 46(1).
[46] *Supra* note 14 at 4.5. (Emphasis added.)
[47] *Supra* note 10 section 46(5).

combination of factors prevents, restricts, or distorts *in some way* the effective interaction of demand and supply or if there are ways in which *it* considers current competition could work more effectively absent the factor(s). In doing so the CMA will not however seek to describe, in detail, the competitive conditions that could prevail in those circumstances."[48] Another recurring theme in the Draft Guidance is that there is no particular list of evidence that the CMA will look to when making its assessment about whether an adverse effect on competition exists. Instead, its "methods and approaches" appear to be entirely situational.[49]

While the Act may not prescribe a specific theoretical benchmark against which to measure an adverse effect on competition, we strongly urge the CMA to develop one. The kind of free flowing and completely unbounded analysis that the Draft Guidance proposes is supremely unhelpful to potentially affected companies, and will, in effect, leave them completely at the whims of the CMA and is unlikely to work in practice.

5. Procedure

The Draft Guidance says little about how the CMA will approach bilateral engagement with all parties, including third parties likely to have an interest in proposed interventions. Without clear milestones and timetables as in merger reviews, where potentially affected parties can raise concerns effectively, the CMA will not get the information it needs to ensure that the DMCC regime delivers good outcomes. Input from consumers, businesses, investors, and other third parties will round out the CMA's understanding of how its decisions will affect those parties, to mitigate the risks of unintended consequences and ensure the regime works best for all. In addition, clear timelines and milestones will enable all parties to prepare for that engagement and allocate resources accordingly.

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SIIA thanks the CMA for considering our views. We look forward to continuing our engagement with the Authority on this important issue, and we would welcome the opportunity to answer any additional questions that you may have.

Respectfully submitted,

Morten C. Skroejer
Senior Director, Technology Competition Policy

[48] *Supra* note 14 at 4.10. (Emphasis added.)
[49] *Id*. at 4.19.