



12 July 2024

Competition and Markets Authority  
The Cabot  
25 Cabot Square  
London, E14 4QZ  
United Kingdom

**Re: Consultation on digital markets competition regime guidance**

On behalf of Chamber of Progress – a tech industry association supporting public policies to build a more inclusive society in which all people benefit from technological leaps – we appreciate the opportunity to provide this response to the UK Competition and Markets Authority (CMA) consultation on the Draft Digital Markets Competition Regime Guidance (Draft Guidance)<sup>1</sup> setting out how the CMA will exercise its powers under the Digital Markets, Competition and Consumers Act 2024 (DMCC)<sup>2</sup>.

**Operating the DMCC in a New Market Context: Substantive and Procedural Concerns**

The DMCC grants the CMA substantial powers to intervene in digital markets at a time when these markets themselves are currently in a state of flux. When these powers were first being pondered in 2018, there was a perception that digital markets had become stagnant with a small number of firms that were no longer serving consumer interests. Events since then have proven that these markets are far more dynamic, innovative, and competitive than they were perceived to be.

In recent years we have seen dramatic technological advancements in robotics, artificial intelligence, and digital assets, amongst others. New innovations are being delivered to consumers faster than ever before. The case for heavy-handed intervention is concomitantly weaker, and there are greater risks of unintended consequences from disproportionate intervention. Our suggestions for the Draft Guidance are designed to help the CMA reduce further error costs as DMCC enforcement ramps up.

The CMA has committed itself to using its powers so that “people can be confident they are getting great choices and fair deals; that competitive, fair-dealing businesses can innovate and thrive; and that dynamic competition stimulates investment and competitive

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<sup>1</sup> Encompassing both the Draft digital markets competition regime guidance, the Draft guidance on the mergers reporting requirements for SMS firms, and the Draft SMS merger reporting notice, all available [here](#).

<sup>2</sup> Digital Markets, Competition and Consumers Act 2024, available [here](#).

innovation, driving economic growth and productivity.”<sup>3</sup> Therefore, the CMA’s interventions should be carefully tailored so as to avoid unintentionally undermining these objectives. In Part 1 of this submission we will focus on ways **Chapters 1, 2, and 3** of the Draft Guidance could better reflect the necessary tailoring to ensure the DMCC’s objectives are met.

Given the dynamic nature of the market, the unpredictability of market evolutions, and the information asymmetries inherent between government and the private sector, the CMA’s commitment to engaging with stakeholders and operating with transparency is paramount. In Part 2 of this submission we will focus on procedural elements of the Draft Guidance that could be improved in **Chapters 7, 8 and 9** to reduce the risk of errors.

### **Part 1. Substantive Suggestions (Chapters 1, 2, and 3)**

The Draft Guidance gives the CMA broad discretion to intervene in digital markets. However, absent clear evidence of consumer harm, restraining digital intermediaries or forcing them to share their investments without compensation would be counterproductive, raising entry barriers for their business users, shielding large incumbents from competition from the long-tail of supply, harming small and medium sized enterprise suppliers, and ultimately, reducing consumer welfare.

In this context, and particularly when dealing with issues of dynamic competition in innovation-driven digital markets, there is a significant risk of underappreciating the costs of intervention. The UK’s limited judicial review standard exacerbates this issue, as seen when the Competition Appeal Tribunal imposed a “cross-check” exercise, requiring the CMA to ask itself “what are the disbenefits of intervention ... Intervention may well be necessary, and must occur, where the statutory tests are met. But, equally, intervening where it is unnecessary, where the statutory tests may not be met, can be as damaging.” (emphasis in original).<sup>4</sup>

This cross-check requiring consideration of the disbenefits of intervention, is startlingly absent from the Draft Guidance. At a basic level, these disbenefits or unintended consequences should be assessed when identifying or grouping a firm’s activities into a single “digital activity” (**Draft Guidance Paras 2.13-2.15**). At present, the Draft Guidance does not appear to consider the disbenefits of intervention in the designation process. Failure to do so is likely to lead to over-inclusive designation, or further complicate the process of designing Conduct Requirements (CRs) and Pro-Competition Interventions (PCIs) in a way that minimises error costs.

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<sup>3</sup> CMA “Overview of the CMA’s provisional approach to implement the new Digital Markets competition regime” (11 January 2024), available [here](#), para. 1.2.

<sup>4</sup> CAT Judgment 14239/4/12/21 Meta Platforms, Inc. v CMA (14 June 2022), available [here](#), para. 127.

Relatedly, while there are mentions of “unintended consequences” of CRs in **Chapter 3** and PCIs in **Chapter 4**, these could more clearly acknowledge the important balancing exercise that the CMA is obliged to undertake. Indeed, it should not be assumed that a CR or a PCI, would have positive impacts on dynamic competition or economic growth that the CMA pursues.

Furthermore, the concept of an Adverse Effect on Competition (AEC), which forms the basis of PCIs, must consider the unintended consequence of reducing market growth. Interventions that reallocate rents within a market, or make competition appear more “fair”, by preventing certain players from expanding, may prevent pro-competitive behaviours that would grow the market overall, attract demand, and make all ecosystem participants better off.<sup>5</sup> Static efficiencies and short-term gains should not outweigh the value of long-run dynamic competition. In this respect, **Draft Guidance Paras. 4.13-4.14** could be clarified to ensure that dynamic efficiencies are prioritised over static efficiencies.

## **Part 2. Procedural Suggestions (Chapters 7, 8 and 9)**

The DMCC is designed to address concerns about the length of competition proceedings, but that should not come at the expense of the protection of fundamental rights of defence, particularly not where companies’ property rights and rights to contract are being impacted as severely as is possible under the DMCC. Recent CMA enforcement cases have shown that quick resolution are possible while respecting the procedural balance of the Enterprise Act 2002. The Draft Guidance could be improved to ensure that the appropriate balance is met, and DMCC interventions enjoy similar procedural guarantees against error as competition interventions under the Enterprise Act, while avoiding undue delay.

While the need for flexibility and case-by-case tailoring is an established and inherent feature of the DMCC, there should be minimum timing guarantees for impacted firms to provide responses to the CMA’s provisional findings as detailed in **Draft Guidance Paras. 7.19-7.21**. In a similar respect, interested third-parties and intervenors should also have sufficient time to provide their observations on provisional findings. Minimum timing guarantees for firms and third parties to respond to provisional findings are crucial to ensuring fairness and thorough decision-making

Similarly, given that CRs and (especially) PCIs entail a significant infringement on the liberty of firms, potentially requiring them to invest in and develop technologies to the benefit of their rivals, it is essential that they have the ability to cross-examine third-party

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<sup>5</sup> “An excessive focus on mandated unbundling and static efficiencies can come at the expense of investment incentives and dynamic efficiencies. In sectors characterised by rapid technological innovation, this can result in consumers failing to benefit fully from the latest technologies.” Oxera “How Platforms Create Value” (12 May 2021), available [here](#), pg. 38.

evidence used against them, and provide their observations and rebuttals. To that extent, **Draft Guidance Paras. 7.24-7.26** should clarify that firms' rights of defence will be fully respected.<sup>6</sup> Ultimately, allowing firms to provide more information and more perspective on the CMA's actions will serve to improve the CMA's decision making capabilities and the reasonableness of its decisions.

Another important element to improve the CMA's decision making capabilities is the Countervailing Benefits Exemption (CBE), enshrined in Section 29 of Chapter 3 of the DMCC. With this exception, the legislator wisely considered that over time, new forms of conduct and changes in market dynamics could mean that certain conduct could generate pro-competitive benefits that outweigh the harms to competition that the CRs are meant to address. This Section of the DMCC was heavily debated and the language ultimately decided on purposefully and intentionally avoided the "indispensability" test of antitrust law. It is therefore inappropriate for the CMA to reintroduce "indispensability", as it appears to do in **Draft Guidance, paras 7.68-7.70**. This should be revised to reflect the final statutory wording and legislative intent. This will ultimately help ensure that the CMA's interventions do not cause more unintended consequences than beneficial effects of intervention.

Finally, we welcome the establishment of the Digital Markets Board Committee (DMBC), detailed in **Draft Guidance, paras. 9.29-9.33**. Given the dynamic nature of the digital sector, we suggest that the terms board members of the DMBC be shorter than for the CMA Board, so that fresh perspectives and insights can continually be added.

### **Concluding Remarks**

Several steps could be taken to reduce the risk of errors, overenforcement, and unintended consequences, in the enforcement of the DMCC. In our submission, we have identified key areas in the Draft Guidance for improvement. We look forward to working with the CMA to ensure that the DMCC achieves its objectives of ensuring that dynamic competition stimulates investment and competitive innovation, driving economic growth and productivity in the UK, and that in so doing, the UK can achieve a more inclusive society in which all citizens benefit from technological leaps.

Sincerely,



Kayvan Hazemi-Jebelli  
Senior Director, Europe

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<sup>6</sup> It is acknowledged and appreciated that per footnote 553 of the Draft Guidance, the CMA will not treat the party's full exercise of their rights of defence as unreasonable behaviour.