RESPONSE OF THE JOINT WORKING PARTY OF THE UK BARS AND LAW SOCIETIES TO THE CONSULTATION ON THE CMA'S DRAFT DIGITAL MARKETS COMPETITION REGIME GUIDANCE

1. This is the response of the Joint Working Party of the UK Bars and Law Societies[1] ("**JWP**") to the CMA's consultation on its draft Digital Markets Competition Regime Guidance (CMA 194con DRAFT).

Importance and role of guidance

2. Section 114(1) of the Digital Markets, Competition and Consumers Act 2024 ("**the Act**") provides that "*the CMA must publish guidance on how it will exercise its functions under [Part 1 of the Act]*".

3. In general, as the courts have repeatedly emphasised, adopting a published policy for the application of wide discretionary powers promotes fairness, consistency and efficiency and encourages transparency in decision-making[2], enables those potentially subject to discretionary power to regulate their conduct, and provides a safeguard against arbitrary action[3].

4. Those general observations have even greater force in the context of Part 1 of the Act, given the enormous discretionary powers given to the CMA. In our paper "Scrutiny of CMA Powers to Impose Conduct Requirements under Clause 19 of the Digital Markets, Consumers and Competition Bill", sent to DBT on 10 October 2023, we pointed out (in the context of appropriate scrutiny of CMA decisions under Part 1) one example of the extent of those powers: -

> *[Section] 19 confers a very broad power on the CMA to impose conduct requirements on designated undertakings that it considers "appropriate" in order to achieve broadly defined public policy objectives.*

[1] The members of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law comprise barristers, advocates and solicitors from all three UK jurisdictions; the membership includes both those in private practice and in-house. The JWP is co-chaired by George Peretz KC of Monckton Chambers (GPeretz@monckton.com; tel 020 7405 7211) and Brian Sher, partner, CMS Cameron McKenna Nabarro Olswang LLP (brian.sher@cms-cmno.com; tel 020 7524 6453).

[2] See *R (DJ) v Welsh Ministers* [2019] EWCA Civ 1349 at §68

[3] *R v Chief Constable of North Wales Police ex p AB* [1999] QB 396 at 429H.

Breach of those requirements can lead to the imposition of very substantial penalties (of up to 10% of total worldwide group turnover). … the CMA is left wielding very significant power – effectively a quasi-legislative power – to impose detailed and potentially highly consequential legal requirements on businesses operating at the centre of the UK's economic life, with very limited scope for challenge and accountability. The CMA is not (unlike Ministers) directly accountable to Parliament, and Parliament has no role in approving the exercise of the CMA's quasi legislative power.

5. We believe that the section 114(1) duty to publish guidance has to be seen in that context: such guidance should explain to those potentially affected by the CMA's powers under Part 1 (both those businesses potentially subject to the exercise of those powers and businesses and consumers who are adversely affected by conduct that could be subject to the exercise of those powers) what the CMA's thinking is about: (i) the circumstances in which it will exercise those powers (including its priority areas for considering their exercise and, given the worldwide nature of the industry, how its action will relate to actions by similar regulators in the EU, US and elsewhere); (ii) the way in which it will exercise those powers; and (iii) the processes that it will follow in the course of exercising those powers. That would give both businesses subject to those powers and those who wish to persuade the CMA to use its powers some guidance as to where the CMA will focus its work, the types of measures it is likely to take, and the processes it will adopt, thus enabling businesses to better regulate their conduct and complainants better to focus their complaints.

6. Against that background, we consider that the draft Guidance is a missed opportunity. As we explain further below, the Guidance in large part does little more than restate the relevant statutory provisions, in some cases adding little to what is already provided in the Explanatory Notes to the Act. Although we accept that there is some value in providing such a restatement, we do not consider that that is adequate in order to discharge the section 114(1) duty. Rather, we consider that the section 114(1) duty requires the CMA to set out its policy for the exercise of its powers under the Act.

7. In saying that, we appreciate that this is a new regime and that the CMA will need to develop its thinking on the exercise of its powers as the Act "beds in". Nonetheless, as we explain in more detail below, we expect that the CMA will by now have developed more thinking on the exercise of its powers than is set out in this draft Guidance and that this should be transparently reflected in the Guidance.

SMS designation and Conduct Requirements

8. The parts of the draft Guidance relating to critical concepts such as SMS and Conduct Requirements ("**CRs**") lack detail on how parties might expect the CMA to approach these fundamental questions. We set out illustrative examples below.

SMS conditions

9. *Substantial and entrenched market power***.** The CMA states that "'*substantial' and 'entrenched' are distinct elements and each needs to be demonstrated*" (paragraph 2.42). However, the draft Guidance provides limited detail on how the CMA will properly assess these cumulative conditions. The draft Guidance includes factors and evidence which might be indicative of market power, stating then that "*the mere holding of market power is not in itself sufficient for an undertaking to meet the first SMS condition*" (paragraph 2.42). It is otherwise silent on the threshold or amount of market power which would be regarded as 'substantial'. It is also lacking in detail on what is 'entrenched' market power. This is a material shortcoming of the draft Guidance given the statement that these concepts are distinct from dominance (paragraph 2.45), largely excluding the relevance of established case law and familiar concepts. We would therefore welcome further detail regarding the indicators of market power that the CMA has listed only briefly in the draft Guidance (paragraph 2.41), and how the CMA proposes to approach these analytically to assess whether market power is likely to be substantial and entrenched.

10. In addition, the statement that a finding of substantial market power will generally support a finding that it is entrenched absent "clear and convincing" evidence of developments which might challenge that market power (paragraph 2.52) appears both to conflate the two concepts despite the earlier statements that they are distinct requirements and to inappropriately heighten the standard that must be shown by SMS firms. When read in the round with parts of the draft Guidance relating to strategic significance – and the statement that e.g. "*there is no quantitative threshold for when size or scale of the potential SMS firm can be considered as significant*" – the draft Guidance fails to give a clear indication of how the CMA will indeed ensure that the designation of SMS firms, and exercise of the CMA's powers which follows from that, will be as 'targeted and proportionate' as it claims will be.

11. *Market definition***.** The draft Guidance states that the CMA is not required to undertake a formal market definition exercise, focusing instead on identifying 'competitive constraints'

(paragraph 2.43) and noting that this approach is consistent with the approach in certain market studies. This suggests a concerning potential lack of rigour in the CMA's approach. First, it is unclear how the CMA will consider factors such as "shares of supply" and "customer switching" (paragraph 2.41) without at least defining a frame of reference within which those factors will be considered, e.g. within which customers will be switching and shares of supply will be calculated. Second, the implications of an SMS designation are likely to be far greater, and potentially far more serious for both SMS firms and their directors and officers, than the findings of a market study. At worst, a market study may result in the CMA or a sectoral regulator opening an investigation and taking enforcement action, or making a market investigation reference. In both cases, the authority will undertake significant further work before taking remedial action of a magnitude comparable with the imposition of CRs under the Act.

Conduct Requirements

12. The draft Guidance provides a useful analytical framework for designing and imposing CRs. We welcome the fact that the CMA has clearly sought to set out how it proposes to approach the exercise of these very wide powers under the Act, and expand on the requirements under the legislation. Nonetheless, in several respects the draft Guidance provides scant detail on how the CMA proposes to exercise its functions.

13. *Consumer benefits.* The draft Guidance refers in multiple instances to the need for the CMA to "have regard" to the benefits for consumers which would likely result from CRs or combination of CRs, reflecting the requirement of section 19(10) of the Act. But the draft Guidance fails to spell out *how* the CMA proposes to have regard to those benefits. It includes only a cursory description of the types of possible customer benefits (paragraph 3.10). It is silent on whether the CMA will seek to quantify them; weigh them up in terms of considering whether to impose a CR in the first instance; whether they will influence its choice of CRs, or influence the design of CRs so as to maximise customer benefits (which seems to be the subtle suggestion at paragraph 3.23).

14. *Analytical framework for imposing CRs***.** The draft Guidance does not explain how the analytical framework for considering the imposition of CRs relates to the CMA's prior work of designating a firm as having SMS (or indeed any prior market or enforcement work which may be relevant). It makes a cursory reference to the factors for SMS designation being

"highly relevant" to the identification of issues which the CMA may seek to address through the imposition of CRs (paragraph 3.22). In practice, we would expect the identification of such issues to be the starting point for the identification and design of CRs. The analytical framework for this is not clear. Will the CMA be considering theories of harm, or potential sources of harm, and will it design the CRs to address those?

15. *'Cross-cutting' CRs***.** The draft Guidance refers to the CMA's ability to impose a "cross-cutting" CR under section 20(3)(c), and the possibility of CRs having an impact on non-designated digital activities. But other than provide examples of the types of behaviour which may justify the imposition of such a CR, the draft Guidance does not set out the CMA's analytical approach to the imposition of this type of CR. Given its potential implication for digital activities outside the strict scope of the designation, we would expect the CMA to need to adapt its typical approach to the selection and design of CRs to cater for this specificity. We would welcome further clarity from the CMA on how it proposes to approach this issue.

16. *Assessment of the countervailing benefits exemption ("CBE")*. The draft Guidance indicates that, in relation to benefits which the CMA has considered as part of its proportionality assessment, the CMA will only consider "new" evidence at the stage of its assessment of CBE (paragraph 7.62). This however presupposes that there is no dispute in relation to how the CMA has taken into account any evidence previously submitted on that matter. Where there is such a dispute the CMA should not be entitled to disregard any such benefits or prior evidence submitted in relation to the same. This approach, together with the statement that SMS firms must provide "clear and compelling" evidence that the CBE criteria are met (paragraph 7.60), would appear to constrain SMS firms' ability to rely on the CBE in a way that goes beyond the letter of the legislation.

Pro-competition interventions

17. We also consider that the draft Guidance fails adequately to set out the CMA's policy around scope and implementation of pro-competition interventions ("PCIs"). We set out below some key concerns in relation to this area by reference to Chapter 4.

18. *The AEC assessment***:** As noted by the draft Guidance, the CMA can impose PCIs in relation to an SMS firm where, following a PCI investigation, the CMA finds that a factor or

combination of factors relating to a digital activity is having an "adverse effect on competition" (an "**AEC**").[4] The CMA notes that the concept of an AEC is common to both the PCI regime and the CMA's existing market investigation regime. It also notes that, while the CMA's approach to making PCIs may be similar "in some respects" to its approach under the market investigation regime, there will also be areas of divergence[5], but provides no clearer guidance. Thus, whilst the CMA's broad powers to design and impose PCIs would benefit from clear guidance, the draft Guidance provides little certainty to firms as to its likely approach in practice. In particular, it suggests that the CMA will not seek to engage in detail on either delineating the precise boundaries of the effect on the overall competitive process or describing the competitive conditions to measure an AEC.[6] This raises obvious issues of legal certainty, and may act as a barrier to SMS firms and third parties' ability to make informed submissions and representations if the CMA provides insufficient detail on its analysis.[7]

19. The draft Guidance also explains that, in assessing whether there is an AEC, the CMA may rely on "relevant evidence" gathered and analysis carried out in other cases, including market studies involving SMS firms, SMS investigations and conduct investigations.[8] We consider that the Guidance should also acknowledge limitations on the CMA's use of such evidence (including where economic conditions have changes since a relevant market study) given that PCI investigations will have a distinct legal basis to different types of investigations.

20. *Identifying an appropriate pro-competition intervention:* While stressing the CMA's broad discretion, the draft Guidance fails to provide any meaningful distinction as between the CR and PCI concepts, and indeed provides examples that appear to conflate the two. For instance, paragraph 4.29 provides a list of non-exhaustive examples of behavioural remedies, which the CMA may impose upon SMS firms pursuant to a PCI. These include (i) prohibitions on combining user data collected from different products and/or activities carried out by the SMS firm; (ii) requirements to provide rivals with access to data, infrastructure, some of the products or services on fair, reasonable and non-discriminatory terms; (iii) requirements on

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4 Paragraph 4.1, Draft Guidance

5 Paragraph 4.3, Draft Guidance

6 Paragraphs 4.9 – 4.10, Draft Guidance.

7 Paragraphs 4.55 – 4.56, Draft Guidance.

8 Paragraph 4.19(c), Draft Guidance.

the interoperability of products, applications and services; and (iv) requirements on transparency of operations. These remedies appear to overlap with certain permitted types of CRs under section 20 of the Act, for example in relation to interoperability,[9] unfair use of data[10] and transparency of information about a relevant digital activity to users or potential users.[11] (Similarly CRs can be used very broadly, eg CRs may be framed as either obligations or restrictions, irrespective of whether they fall under subsection (2) or (3) of section 20.[12]) Given the wide-ranging but distinct nature of these procedures and interventions, this gives rise to a real risk of uncertainty and double jeopardy if prospective SMS firms are unable to assess with confidence which basis of intervention may apply to them. This ambiguity may also provide the CMA with incentives to use certain modes of intervention, e.g. preferring PCIs given these can lead to structural remedies and divestments. The draft Guidance appears inconsistent with earlier work by the CMA, where there was a clear distinction: CRs were seen as more limited and capable only of requiring SMS firms to change their behaviour so that that they would no longer be in breach of a CR. But CRs would not allow the implementation of specific remedies to address the underlying competition concern, which is the domain of PCIs. According to this e.g. a CR could therefore not require an SMS firm to proactively make a new service interoperable.[13] More clarity is needed in the Guidance as to the distinction between CRs and PCIs, whether the previous distinction made above is still valid, and the CMA's approach in cases in which both types of intervention may be relevant for an SMS firm.

21. *PCI investigations*: The CMA anticipates considering potential remedies from the outset of a PCI investigation, alongside the AEC assessment.[14] However, the draft Guidance fails to properly articulate how the CMA will avoid prejudging the AEC assessment in this process. In particular, it is not clear whether the same teams within the DMU will both (i) consider potential remedies and (ii) carry out the AEC assessment. We consider that the Guidance should provide clearer examples of how the CMA will avoid prejudice in its PCI

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9 Section 20(3)(e) of the Act.

10 Section 20(3)(g) of the Act.

11 Section 20(2)(c) of the Act.

12 Paragraph 182, Explanatory Notes to the Act.

13 Paragraph 4.63, '*A new pro-competition regime for digital markets*', *Advice of the Digital Markets Taskforce*, December 2020.

14 Paragraph 4.51, Draft Guidance.

investigations, for example the establishment of separate teams to handle remedies discussions and the AEC assessment. See also paragraph 28 below.

22. *Testing and trialling of PCIs:* The practical implications and intrusiveness of the CMA's ability to "test and trial" PCI remedies are potentially very significant – in particular the potential to lock firms into extended iterative remedies processes, at high cost to the firm and potentially to the users or customers of the digital service in question (who will be detrimentally affected by for example services changing regularly to accommodate A/B testing). Given this, the draft Guidance should provide further clarity and limits to the exercise of this power in the interests of proportionality. For example, the draft Guidance envisages that PCI requirements on a trial basis may require firms to "*act differently in respect of different customers (including subsets of users or customers)* " which we consider is too broad without any specification of limits to this.[15] As is the case with various other areas of the Guidance, this fails adequately to expand on the position set out under section 51(4) of the Act, and fails to provide appropriate guidance on what such requirements could look like in practice. We believe that as currently drafted, the draft Guidance provides little practical guidance on this process and should be expanded upon, particularly given the implicit acknowledgement of the potential for multiple rounds of iterative trial parameters which will be detrimental to relevant services.[16]

23. *PCO commitments:* The Act's drafting does not expressly require the CMA to end a PCI investigation following the acceptance of a relevant PCI commitment (given that section 56(3)(b) merely provides that, following the acceptance of a commitment by the CMA as to the conduct of an undertaking, so far as relating to the conduct the CMA **may** give a notice to the undertaking ending a PCI investigation (if it has begun one) without making a PCI decision). While we can understand (as also recognised in the draft Guidance) that the acceptance of a commitment should and would not prevent a PCI investigation from continuing insofar as it relates to conduct other than that to which the commitment relates, there would be no obvious reason for the CMA not ending an investigation in such circumstances where its concerns have been fully addressed by a commitment. Indeed, for it to continue would be contrary to previous practice in relation e.g. to Competition Act 1998 commitments. We consider that the draft Guidance has missed an opportunity by

15 Paragraph 4.66, Draft Guidance.

16 Paragraph 4.74, Draft Guidance

failing to clarify (as we are sure would be the approach in practice) that where a PCI commitment is accepted by the CMA, an investigation would not continue in relation to conduct to which the commitment relates.

Process

24. On process, we would welcome further clarity on the timeline and designation process, development of CRs, and imposition of PCIs. While the draft Guidance provides information regarding consultation on key decisions, it is not clear how SMS investigations, the drafting of CRs, and PCI investigations will be run in practice – i.e. the timescales for evidence gathering, provisional findings and any related consultations and hearings (including the involvement of CMA decision makers). Further input would support both SMS firms and third parties that engage with the CMA, and ensure that such engagement is timely and effective. The Guidance helpfully explains the proposal 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 Guidance of how that Committee will operate would provide essential transparency to those 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 crucially what access stakeholders can expect to have to decision makers.

25. The CMA's ability to begin an investigation "at any time", and to open a new SMS investigation having closed an earlier one, offers effectively unlimited flexibility, and it is therefore essential that 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 also be clearly set out in the Guidance.

26. It is important to provide guidance on the CMA's very broad discretion on the processes that will be applied in connection with the design and implementation of CRs, in particular as regards:

    a. How the CMA will choose between CRs, PCIs (or other tools) to address concerns conceivably addressable by any of these tools;

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

c. 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; and

d. Greater clarity on when the CMA will consider there to be a reason not to offer an opportunity to make oral representations (see paragraph 7.21).

It would also be helpful to provide some examples of bilateral and multilateral engagement with stakeholders and when they will take place.

27. The draft Guidance provides the CMA with significant discretion as to how it will enforce CRs. While some flexibility in the process is necessary in order to respond efficiently and effectively to potential CR breaches, it is critical both to the rights of defence of SMS firms and to ensuring that 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 important 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.

28. In relation to PCIs, in the light of the very short nine-month timetable for conducting them, it is essential for the Guidance to explain how the CMA will ensure that it meaningfully engages with the SMS firm as well as interested third parties throughout the process. It would be helpful if the procedural steps for conducting PCIs could be clarified, for example: whether the CMA will provide the SMS firm with the evidence that it has relied on to open a PCI investigation; the stage at which it will consider remedies; and what type of engagement will take place on the design and terms of a Pro-Competition Order (PCO) in advance of the public consultation.

Prioritisation

29. A further area where clarity would be welcome is on the CMA's approach to prioritisation under the new regime.

30. The draft Guidance states that it should be read alongside the CMA's Prioritisation Principles (CMA188) and refers to these principles at key junctures. For example, the CMA

will have regard to these principles when considering which firms and digital activities to prioritise for SMS investigations and whether to cease an investigation because it no longer merits the continued allocation of resources. With respect to the imposition of both CRs and PCIs, the principles are stated to be relevant to whether and how to address issues in relation to a relevant digital activity, as well as a being a factor taken into account in reviewing existing conduct requirements and deciding whether to initiate a Final Offer Mechanism. Finally, the prioritisation principles may determine whether an investigation into a suspected breach of a competition requirement should be opened.

31. How the regime develops will be heavily influenced by the decisions the CMA takes on prioritisation. There are numerous options open to the CMA when it comes to determining how to proceed. Firms and digital activities could be prioritised on the basis that they are active in newly emerging areas, such as AI, or on the basis that there are existing concerns about conduct. Alternatively, the CMA could take a more quantitative approach and prioritise those areas that potentially affect the greatest number of consumers or account for the largest proportion of revenue or investment. The same is true for competition requirements selected by the CMA; will the CMA's approach to remedial action be more qualitatively than quantitatively driven or vice versa?

32. However, the draft Guidance provides no discussion of how the CMA will approach these questions: as already noted, its approach is simply to refer to the CMA's existing prioritisation principles, namely:

    a) **Strategic significance**: does CMA action in this area fit with the CMA's objectives and strategy?
    b) **Impact**: how substantial is the likely positive impact of CMA action?
    c) **Is the CMA best placed to act**: is there an appropriate alternative to CMA action?
    d) **Resources**: does the CMA have the right capacity in place to act effectively?
    e) **Risk**: what types of risks are associated with CMA action, and how significant are they?

33. We do not consider that that approach is adequate, as it fails to deal with the specific features of the CMA's powers under the Act. As far as those powers are concerned, principles (a), (c) and (d) offer very little guidance, given the powers handed to the CMA by the Government specifically to take action in this sector and the resources committed to the DMU. Further, the principles were not designed specifically for this sector and are intended

to apply across the whole of the UK economy. They themselves refer back to the CMA's annual plan, which again is not specific to this sector. Mere reference to the principles therefore provides little to no indication of how the CMA is actually intending to apply its very considerable powers in this key sector.

34. To provide both SMS firms and third parties that may be relying on the CMA to take action with some indication of what they may face, and allow them to plan accordingly, we would ask that the CMA provide detail of the concrete factors it is likely to take into account when determining which substantive areas and courses of action it intends to prioritise.

International aspects

35. Firms affected by the CMA's powers in this area are, of course, not operating only at the centre of the UK's economic life. They are likely, in many cases, to be operating internationally, indeed globally. The UK will be a significant market for many, though not by any means the most significant. That said, the effects on the UK market and its users and consumers fully deserve the appropriate scrutiny of the CMA charged as it is with looking after their interests in the area of competition and consumer issues.

36. The UK is one of the leading competition regimes in the regulation of digital markets. The CMA will be operating in an environment where other regimes may take a lead from the CMA's work. It may also be possible that the CMA might seek to achieve its objectives by relying on the efforts of, and regulation imposed on undertakings by, other major regulators. Many of the issues between and among jurisdictions will be the same - there is little by way of geographic differentiation but clearly the CMA has to consider the UK markets context and its own statutory responsibilities. The resource devoted by those operating in digital markets in responding to the requirements of those other regimes may be considerable. As such there may be some efficiency in that output being considered by the CMA as potentially sufficient to understand the issue being examined by the CMA, or the particular digital service or products.

37. There are at least three reasons why it would be useful for the CMA's Guidance to at the very least acknowledge that, in that international context, the CMA will be mindful of the need not to create additional burdens unnecessarily.

a. *Comity*: As regards the formal issue of international comity, we would simply note the observation by the CAT in *Meta Platforms v CMA* that "*We are in no doubt that there is jurisdiction for the CMA to intervene in this case, but the demands of comity do require the CMA to be at least conscious of the international dimension.*"[17] We would expect the CMA to be mindful of that dimension without that being regarded as a jurisdictional obstacle or hindrance. As regards the outcome of any process, it would, we would suggest, be to the CMA's credit expressly to acknowledge and factor in the likely impact of any regulation by any other regulator in addressing potential or identified problems. As a related issue, consistency of approach among regulators, where relevant and meaningful, would be beneficial and we would welcome the CMA signalling its desire to continue with a leadership role in that regard.

b. *CMA Resource*: There may be scope for the CMA to maximise the efficiency of its own limited resources to address the issues it identifies at any stage of whatever form of investigation it is undertaking, in a manner which meets the CMA's requirements but with minimal burden on undertakings whether looking at current state of markets or looking forward to expected developments. It would be welcomed if the Guidance indicated that the CMA would wish to ensure that any regulatory requirement was usefully and materially additional in its effect, where and insofar as necessary. We would expect that the CMA would be disinclined to be deploying resource unnecessarily in a "me too" approach to regulation, for the sake of it. That may be stating the obvious but it would be helpful if the CMA Guidance setting out its intended approach addressed this.

c. *Business resource*: There is no doubt that the investigations undertaken will be burdensome for business. Where they are facing parallel investigations in multiple jurisdictions it may be there is scope to avoid or reduce that burden. That may be the case where there is a possibility that further intervention may simply be duplicating that of another regime or where the analysis of markets, potential innovations and development undertaken in the context of another digital markets regime could be adopted at least as a starting point.

[17] [2022] CAT 25, at §127(1)

38. Failure to even address the issue suggests, wrongly we would assume, that the CMA intends to act as if the international dimension is not one which should affect its approach to implementation of the Act.

39. We also believe it would be appropriate for the draft Guidance to address the question of what types of disclosure may be made to equivalent regulators in other jurisdictions using the powers in section 243 of the Enterprise Act 2002 or other relevant provisions.

40. There are provisions in Chapter 5 regarding the CMA providing assistance to an overseas regulator but the assistance the CMA may obtain from an overseas regulator, still less the reliance the CMA might consider placing on such a regulator's research or findings, is not addressed. It would be helpful if the CMA could give an indication of its approach to implementation in this regard, given the importance of the issue: failure to do so leaves a considerable lacuna in the draft Guidance and is a missed opportunity to indicate the role the CMA seeks to carve out in the international regulatory environment for digital markets.