Civil society submission on Draft CMA Guidance on enforcement of the Digital Markets, Competition and Consumers Act

INTRODUCTION

We welcome the opportunity to submit feedback on the CMA's Draft Guidance on enforcement of the Digital Markets, Competition and Consumers Act (DMCCA). We are optimistic about the potential for the CMA to use the strong new powers of the DMCCA to "*address proactively the root causes of competition issues in digital markets*".

The rationale for this new regime, and comparable regulations across the globe, lies in learning from past mistakes. Recent competition approaches failed to stop a handful of Big Tech firms from dominating the digital economy, harming competitors, users and society at large. Concentration is proceeding at speed: dominant firms continue to entrench their dominance through acquisitions, partnerships, investments and an array of anti-competitive, unfair and abusive practices.

Thanks to the DMCCA, the CMA has the power to act more quickly and effectively - both to undo existing harms, and to stop further harm in vital economic sectors such as artificial intelligence. This is a crucial new tool, if the CMA uses it. We urge the CMA to use all of its new powers to build a truly fair and open digital economy, by being proactive and ambitious. The CMA need not, and should not, wait for tech incumbents to lock down new sectors. It should take bold action to break the hold of a few tech monopolists over our digital lives, before we pass the point of no return.

What we support

There are several general aspects of the Guidance which we strongly support:

- We welcome the substantial number of opportunities for third parties, including civil society organisations (CSOs), to engage with the CMA and take part in the implementation and enforcement process. For too long, competition enforcement has excluded voices beyond the largest law firms and economic consultancies; this limits the CMA's ability to defend the public interest and erodes the public legitimacy of enforcement. We look forward to participating in Strategic Market Status (SMS) investigations, the design of conduct requirements (CRs) and pro-competition interventions (PCIs), the acceptance of commitments from SMS firms, the publication of compliance reports and the adoption of enforcement orders. To enable the public to participate, these processes must operate with a principle of "maximum transparency":

only detailed compliance reports will enable the wider public, including CSOs, to scrutinise SMS firms' compliance.

- We welcome the flexibility the CMA enjoys under the DMCCA to tackle a wide range of harms. In particular, we celebrate and anticipate the CMA using its powers to

    - designate any digital service, including emerging and future services;
    - design remedies (either CRs or PCIs) tailored to a firm, competition issue and activity; in particular, we welcome the CMA's ability to impose the same remedies under a PCI as it can after a Market Investigation.

- It is also important not to let enforcement decisions be overtaken by events, so we also welcome the CMA's powers to vary CRs and PCIs. We encourage the CMA to do so as often as needed to address changing behaviour by firms and broader market developments.

A forward looking and robust approach to enforcement

At several instances, the Guidance underlines the importance of taking a forward-looking approach to enforcement of the DMCCA.[1]

We understand this to mean that the CMA will move early to shape markets and keep them competitive - we welcome this approach and encourage the CMA to apply it to all aspects of the new regime. Tech sectors are now so concentrated that some backward-looking enforcement is likely unavoidable; but given the time and difficulty of those undertakings, and the CMA's limited resources, the CMA is right to prioritise actions which look forward and stop further concentration in emerging digital sectors.

We anticipate this requires immediate action to mitigate rising market concentration and emerging harms to competition in generative AI and cloud computing. For those reasons, we support the proactive and dynamic approach the CMA has taken regarding its investigations of recent partnerships between dominant tech firms and leading AI startups. We urge the CMA to scrutinise these alliances that form an emerging pattern that will hurt competition - and to act to deconcentrate the sector.[2]

We understand that the CMA will also adopt this approach when examining the existence of an adverse effect on competition ("AEC") in the context of PCIs. According to the Draft Guidance, the CMA will consider factors that affect potential competition and actual competition since the AEC concept is broad.[3] We wholly support this interpretation.

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[1] For instance, CRs are described as a "*forward-looking intervention*" - see paras 3.21 and 3.80.
[2] Some scholars have described incumbents' pattern of AI investments as a class of ecosystem abuse - "weaponizing networks of interdependence." See Rikap, Cecilia, "Varieties of corporate innovation systems and their interplay with global and national systems: Amazon, Facebook, Google and Microsoft's strategies to produce and appropriate artificial intelligence," Review of International Political Economy, at https://www.tandfonline.com/doi/epdf/10.1080/09692290.2024.2365757?needAccess=true.
[3] Draft Guidance, para 4.8

Separately, we urge the CMA to pursue tailored but robust remedies early, instead of pursuing the weakest remedies theoretically available. With the digital economy as concentrated as it is, robust action is both proportionate and likely to be effective. We invite the CMA to adopt tough remedies early on and relax them later if this is needed.[4] This is particularly true for CRs, as a "forward-looking intervention" that is "*intended to be flexible and capable of being updated over time*."[5] The alternative approach - of hesitating or demanding only weak remedies while digital sectors steadily consolidated - has produced the monopolised situation we now face. It has been shown not to work, and we respectfully suggest the new law offers both the means and the impetus to do more, sooner.

Remedies that truly work

The Guidance is right to deal with structural remedies as a PCI: digital markets are now so consolidated that it will not be enough to stop further mergers downstream. Today's dominant tech platforms are so entrenched, and control such expansive and overlapping ecosystems, that in many instances only structural remedies will revive real competition. Moreover, structural remedies avoid the defects of behavioural remedies, which are difficult to monitor and easily outpaced by technological and market developments, as the CMA has itself acknowledged.[6] We strongly encourage the CMA to use the structural remedies available to it under PCIs.

Given that structural remedies are primarily a matter for PCIs rather than CRs, when tackling the harms inflicted by SMS firms, we encourage the CMA to consider PCIs early instead of treating them as a "last resort". This will prevent unnecessary delays in imposing the remedies best suited to mitigating anti-competitive harms and tackling excessive market concentration.

When the CMA investigates a breach of a CR or when it considers PCIs, it may accept commitments proposed by SMS firms to address its concerns.[7] However, the CMA cannot vary or update these commitments in the same way as CRs or PCIs, giving it has less flexibility to adapt to changes in market conditions or SMS firm behaviour. Conversely, commitments give SMS firms power to dictate how the DMCCA should be applied to their services.They will do so in a way that minimises changes to their monopolistic business models. We encourage the CMA to prioritise CRs and PCIs over commitments in its approach to enforcement.

Additional factors to consider

Experience teaches that dominant tech firms will frustrate competition enforcement by flouting the rules and obligations imposed on them, and taking a confrontational stance towards regulators. Examples include Apple and Meta's non-compliance with the EU's Digital Markets Act, and Google's repeated infringement of commitments agreed with the French Competition

[4] See the numerous monitoring obligations imposed on the CMA and multiple options to vary or revoke competition requirements.
[5] Draft Guidance, 3.80.
[6] See e.g. the CMA's Guidance on Merger Remedies
[7] Instances where the CMA may accept commitments include breaches of CRs or alternatives to imposing PCIs.

Authority on the issue of neighbouring rights. For this reason, some regulators assess such behaviour as an aggravating factor in the adoption of decisions.[8]

This principle should be extended to the enforcement of the DMCCA. The CMA should take due consideration of past infringements of competition law as well as potential obstruction by SMS firms, be this in the UK or abroad. These two points could be added to the Draft Guidance where the CMA reviews the type of CR to adopt and the proportionality of a CR (paras 3.27-3.28 and para 3.81)[9], the existence of an AEC (paras. 4.12 and 4.15), the effectiveness of a PCI and of a commitment (paras 4.31 and 4.88) as well as when it defines a reporting period (para 6.45).

To go further, the CMA could establish a public registry to detect and deter SMS firms that violate competition rules. This registry could be based on the existing US consumer law registry[10]. Such a tool would bolster the application of the UK regime.

Countering attempts to water down enforcement

Several tests in the DMCCA regime risk appropriate competition requirements being seriously weakened. They include the consumer benefits consideration for CRs, the countervailing benefits exemption, the various proportionality tests for CRs and PCIs, and the consideration of efficiencies in the PCI process.

Whilst we appreciate the value of principles like proportionality, there is a risk that SMS firms will exploit the various qualifying provisions, taken together, to evade the DMCCA or make enforcement a nullity. This includes:

- Claiming that CRs or PCIs envisaged by the CMA are disproportionate because they dampen innovation, are burdensome and technically difficult to implement, or bring a loss of scale or scope, while downplaying the harm caused by their own business models and practices;

- Overstating efficiencies linked to an AEC to avoid a PCI. A claim of efficiency savings has been a standard part of the consolidation playbook for over a decade and has produced serious market distortions. The mirage of efficiencies may be abused to distract the CMA from concrete harms to consumers, businesses and citizens;

- Abusing the countervailing benefits exemption to posit implausible, unverifiable benefits for consumers from anti-competitive conduct, such as privacy, security and innovation.

When the CMA considers whether CRs bring consumer benefits, we urge it not to view the consumer interest in isolation, but to consider it alongside other potential beneficiaries of more

[8] See the European Commission's Notice on fines.
[9] In that regard, we believe that the proportionality test should be interpreted even more narrowly and restrictively when an SMS firm repeats the same or similar infringement.
[10] https://www.consumerfinance.gov/about-us/newsroom/cfpb-creates-registry-to-detect-corporate-repeat-offenders/.

competitive digital markets, including suppliers, workers and citizens but also broader societal interests including media plurality, security and resilience. Limiting the beneficiaries to end users does not reflect the current reality of digital markets, nor the ways people participate in them. A single person may at once be a consumer and a supplier, or a consumer and a worker, as well as a citizen, and a competition regime can protect - or undermine - all these interests. We strongly encourage the CMA not to disregard CRs with the potential to benefit these other important interests, merely because they have no immediate link to 'consumer welfare'.

The CMA should anticipate and avoid attempts to stifle enforcement of the DMCCA. We encourage it to apply the legislation's proportionality, efficiency and exemption provisions with care, to ensure that they do not swallow the regime and frustrate the DMCCA's overall objectives.

An open, transparent and inclusive enforcement process

As just discussed, under the DMCCA SMS firms will have plenty of opportunities to urge minimal enforcement that does little to challenge their anti-competitive business models. To prevent SMS firms from unduly influencing enforcement and from steering it in their favour, it is crucial that the CMA hears representations from parties other than SMS firms. This makes it essential that the CMA consults third parties whenever SMS firms put forward claims for weaker enforcement, including in relation to any of the substantive tests discussed above.

Transparency is vital to enable the public and civil society to participate in the enforcement process. If the public is shut out, justice cannot be seen to be done. Whenever the CMA and SMS firms engage in private bilateral exchanges through letters or voluntary undertakings, the CMA should publish these, if necessary via a non-confidential or summarised version. Redactions should be kept to the minimum feasible.

Final Offer Mechanism

We welcome the details provided by the Draft Guidance on the Final Offer Mechanism ("FOM").

The FOM may only be initiated after a conduct investigation finding a breach of a CR and after the subsequent breach of an enforcement order ("EO"). In practice, it will therefore only be initiated after a very lengthy process. To safeguard the interests of media publishers who risk waiting a long time for remediation, we encourage the CMA to expedite the FOM process and to make a final offer order well ahead of the six month statutory deadline, especially where SMS firms refuse to negotiate in good faith.

In addition, we are concerned that during the FOM process, SMS firms will attempt to undermine the DMCCA by refusing to grant fair compensation to media publishers. Big Tech firms have repeatedly sought to frustrate attempts to compensate publishers for their content, including Google and Meta's threats in response to media bargaining provisions passed in Australia, Canada and most recently California.

In that regard, we welcome the CMA's intention to provide additional guidance on the suggested content or format of the parties' bids at the final offer initiation notice stage.[11] This document should detail what fair and reasonable compensation must look like, to minimise the risks of misunderstanding between the parties later in the process. Failing that, SMS firms will evade or undermine efforts by the CMA to ensure fair compensation for publishers.

Finally, since information asymmetries seriously undermine media publishers' ability to negotiate on an equal footing, we urge the CMA to use its powers to share information between parties.[12] This information should include, for example, revenues generated from news, estimates of the value of the news content and estimates of web traffic originating from news content.

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[11] Draft Guidance, para 7.130.
[12] Section 40(8)(b) of the DMCCA.