PREISKEL & CO

Preiskel & Co LLP
4 King's Bench Walk
Temple
London EC4Y 7DL
United Kingdom

t +44 20 7332 5640
e info@preiskel.com
www.preiskel.com

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

For the attention of:
DMGuidance@CMA.gov.uk
[redacted]

By email only

Our Ref: TC/ADM838
12th July 2024

Dear Sirs,

Re: Response to consultation on the CMA Digital markets competition regime guidance

1. We represent Movement for an Open Web ("MOW"), a consortium of digital market players that are seeking an open and decentralised web. We provide below our response to your consultation of 24 May 2024 (the "CMA Guidance")[1] on the Digital Markets, Competition and Consumer Act 2024 ("DMCC" or "Act"). We respond by chapter as requested[2].

A. Section 2: Facts used for assessing Strategic market status

2. The CMA must make a forward-looking assessment of at least five years (paras 2.46 to 2.52). It is not an assessment of dominance *per se* (it does not require a formal market definition) but the test for market power is similar (see guidance on dominance[3]). During the passage of the DMCC Bill through Parliament, the issue arose that current evidence of future market power will be hard to find, if not impossible. This could be an area of future challenge by the SMS firm. It is critical that the CMA's reasonable discretion is clearly based on current evidence and CMA states that it will revisit any assessment if new evidence or developments arise (para 2.48). we agree that the CMA should "not seek to make precise predictions about the likely development of the industry" (para 250). While the approach is like the forward-looking assessment in mergers, that should not be slavishly followed since it is concerned with the immediate post-merger period, not 5 years in the future.

[1] https://assets.publishing.service.gov.uk/media/6650a56d8f90ef31c23ebaa6/Digital_markets_competition_regime_guidance.pdf
[2] https://assets.publishing.service.gov.uk/media/6650a54d7b792ffff71a83ef/Digital_markets_competition_regime_guidance_-_consultation_document.pdf
[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft402.pdf

B. Section 3: Conduct requirements

Compliance and incentive changes

3. Conduct requirements relate to a relevant digital activity. Definition here may be technically, legally or economically challenging to define precisely. Technically, anything defined in current technology terms can be by-passed by different technology deployed to similar effect. Similarly, the precise language of a prohibition or guidance statement may be complied with while the economic outcome that the CMA is seeking to achieve is circumvented or avoided.

4. Changing the incentives to comply are more important than the precise conduct requirement language. Consultation on what the incentives toward compliance could be and how they can be addressed will be a valuable starting point for the CMA with a view to seeking to incentivise changes as well.

Interoperability

5. One type of conduct requirements is to not restrict "interoperability between the relevant service or digital content and products offered by other undertakings" (para 3.7(b)v.). Interoperability is a vital remedy that was highlighted in reports[4] and parliamentary debates[5] as being a key method of levelling out the playing field in digital markets (one of the core purposes of the Act) and the lack of it can have detrimental effects on competition as well as consumers. For example, the lack of interoperability is central to the DOJ's complaint against Apple where it leads to increased switching costs and frictions from Apple products making them more expensive to the consumer.[6]

6. Interoperability is defined elsewhere in the guidance as "***the ability of different devices, applications, systems and platforms to communicate with each other and exchange information and data effectively***" (see footnote 159). This definition is in line with the Ministerial Guidance in the House of Lords that can be referenced in the event of a dispute (under the rules governing statutory interpretation following *Pepper v Hart*).

7. The current wording of the conduct requirement that relates to interoperability risks being limited to vertical interoperability only (pursuant to the "*expressio unis, exclusio alterius*" principle). However, it has been confirmed that provided there is a sufficient link to a designated digital activity and it works to further one of the objectives, it is unlikely that this will be interpreted in a limiting way. In the Lords Report Stage, Viscount Camrose stated that "I would like to reassure the noble Lord that the regime's tools can apply to both interoperability between platforms and between and among apps and platforms and other digital services."[7] This is indeed reassuring but language should be added to the CMA Guidance to reflect the width of the definition.

[4] Jason Furman Report (March 2019) at https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf
[5] Lords Hansard, Tim Clement-Jones and Lord Fox https://hansard.parliament.uk/lords/2024-01-22/debates/F49A1160-6572-4A6F-B146-476FF25D0DD6/DigitalMarketsCompetitionAndConsumersBill
[6] *USA v Apple* (2024), para. 185 at https://www.justice.gov/opa/media/1344546/dl?inline
[7] Lords Hansard from the Report Stage at https://hansard.parliament.uk/lords/2024-03-11/debates/D981BFC6-FDBE-4936-9609-5CDD75CAEB54/DigitalMarketsCompetitionAndConsumersBill

8. Effective interoperability also hinges on the use of web technical standards, which are set by global digital standard bodies such as the W3C and IETF. The Government agreed that standards are "an important tool in supporting good regulatory outcomes"[8] and Viscount Camrose outlined that the CMA already engages with standard setting bodies so the DMU should also[9]. The CMA Guidance does not reflect this engagement so should be amended to highlight this point.

9. Two main issues arise: entrenchment of dominance and exclusion of competition, arising from the central position of the browser.

   (a) **Entrenchment of dominance**. If interoperability were to be applied to promoting interoperability with the SMS firm's platform (vertical interoperability), it could entrench dominance and limit the development of competition for the products and services which are accessed and used. As a remedy to network effects or network externality issues, interoperability works well and should be used, but care is needed in the rationale for the obligation to be imposed so that it does not enable a platform to obtain a benefit. For example, imposing interoperability on Google Search may be an attractive solution to the fact that Google's Search is ubiquitous and may be an essential facility. The underlying relevance engine is the system that feeds responses to queries and is separate from the search engine results and the Google ad network. Currently, the relevance engine is available to others, so an API exists, but Google requires by contract, that the Google ad network has to be used. Interoperability with the relevance engine could be imposed and the contractual link could be broken – enabling competition for ad networks to be combined with relevance engine results in new and different ways.

   (b) **Exclusion of competition.** More importantly, the Internet is based on protocols (such as TCP/IP) that mean it is a decentralised router-based network. This allows digital messages and data packets to be passed in multiple directions at once, finding their way through the network to be reassembled at their destination. The design was intended to avoid centralisation and concentration of risk to the delivery of messages that arises when networks are centrally controlled. The World Wide Web enables hypertext linking of websites, either between each other horizontally or between browsers and platforms and websites, vertically. The World Wide Web takes advantage of the decentralised design of the internet. In other words, it is not just interoperability with the SMS firm's platform that needs to be dealt with in conduct requirements but also the interoperability between and among websites and third-party undertakings.

   (c) **The central position of the browser**. A browser such as Chrome may interfere with interoperability between independent third-party websites by interfering with their use of computer components or functionality (such as short term storage files, aka cookies). Other examples of interference are likely to centre on the functionality of the browser. This is because the browser has become a centralised component that is used by all when taking journeys online. The Chrome browser may enable the technical rendering of Google's own

[8] Lords Hansard from the Committee Stage at https://hansard.parliament.uk/lords/2024-01-22/debates/F49A1160-6572-4A6F-B146-476FF25D0DD6/DigitalMarketsCompetitionAndConsumersBill
[9] Lords Hansard from the Report Stage at https://hansard.parliament.uk/lords/2024-03-11/debates/D981BFC6-FDBE-4936-9609-5CDD75CAEB54/DigitalMarketsCompetitionAndConsumersBill

websites more clearly or quickly than those of others or operate such that different websites are more or less capable of interoperating with each other.

Leveraging

10. The concept of leveraging is the use of existing power to gain power somewhere else, which is especially easy in coding since functionality can be moved anywhere within a vertically integrated firm that controls all software used, whether in its operating system or browser. For example, an SMS firm designated in Search that also has a browser, can leverage its coding to present the user with a search bar and hide the browser, this reduces visibility and choice and promotes its own browser and thus, reduces competition between browsers.

11. One of the conditions for strategic market status is the ability for the firm to "extend its market power to a range of other activities". Competition analysis has been bedevilled with the need for products to be defined with precision so that they can be assessed with relation to a relevant end user markets. Substitutability is required from the perspective of end use. This is a slippery concept when dealing with software functionality.

12. The word "digital activity" may allow the CMA to avoid a lot of time being wasted in relevant market analysis. SSNIP tests would not immediately appear relevant. The underlying problem that the DMCC is designed to address is the fact that as an integrated platform, the nature of the SMS firm is such that it has entrenched and enduring market power derived from scale, scope and network externalities. That is assessed in designation and there is no need to assess activity by market when considering leveraging (as would occur in the traditional assessment of leveraging in abuse of dominance cases). Elimination or exclusion of functionality or "digital activity" is likely to be problematic and needs to be prevented.

13. We also commend that the CMA has enough flexibility to impose conduct requirements to non-designated activities if carrying out practices in the other activity will increase its strategic significance in the relevant digital activity. However, excluding rivals may or may not enhance strategic significance but nevertheless be anticompetitive.

14. We also note that the same emphasis is not considered in the event of breach of a competition requirement under the Act (see feedback under section 7 below).

C. Section 4: Pro-competition interventions ("PCIs")

15. A PCI is a remedy can be imposed on a designated firm where the CMA finds that factors relating to the digital activity are having an adverse effect on competition. This follows the logic we are familiar with from the CMA's Markets regime. It can involve structural remedies such as divestiture as well as behavioural remedies.

16. The remedies can also pertain to a relevant digital activity provided that they are "connected to the designated digital activity". This is unlike competition law since an abuse can take place in markets that are unconnected with the market in which the firm is dominant, and we wonder whether the CMA is likely to miss anticompetitive effects on others perpetrated by SMS firms where there is no obvious link to the SMS firm's activity. The focus should be on creating incentives to comply and act in accordance with the principle of competition on the merits.

D. Section 7: Enforcement of competition requirements

The Countervailing Benefits Exemption ("CBE"), and the risk of making Ultra Vires Decisions.

17. For the CBE to apply, certain conditions must be fulfilled including the conduct needing to give rise to ***benefits*** to users or potential users of the digital activity.

18. The CMA guidelines provide examples of benefits as "protecting user security or privacy, lower prices, higher quality goods or services, or greater innovation in relation to goods or services" (para 7.64). The firm needs to provide the CMA with evidence and the appropriate evidence may vary, sometimes requiring a report by an independent expert (para. 7.65).

19. This condition risks acting as a loophole for designated firms:

    (a) They can in most cases prove that their conduct provides some sort of a consumer benefit (including even a marginal improvement in security, privacy, user experience, etc.).
    (b) The consumer benefit argued will most likely be beyond the CMA's ability to judge. This is a function of the CMA being set up under a statutory remit to examine competition matters. It is not designed to assess privacy matters and does not employ people to assess privacy matters or security matters or whether the asserted benefit is likely to arise or not.
    (c) Legally, this raises an issue of the CMA's *vires*. If it makes a decision that is beyond its statutory remit, it will be subject to a challenge (whether by the defendant or those harmed) that its decision making is *ultra vires*.
    (d) The CMA may also need to bear in mind that it is set up with strategic objective under s. 25(3) 2013 EERA 2013,[10] which requires the CMA "to promote competition … for the benefit of consumers" and which forms the basis of its *vires* and the boundary of its jurisdiction.

20. These risks are already being seen elsewhere now in *USA v Apple* (21 March 2024). The DOJ accuses Apple of putting forward justifications for excluding rivals and restricting competition on spurious privacy and security grounds. Apple's handsets are insulated from competition and likely twice the price they would be in a competitive market where people could freely obtain ads and use the open web.[11] Apple feared the disintermediation of its iPhone platform and undertook a course of conduct that locked in users and developers while protecting its profits.

> "*Apple wraps itself in a cloak of privacy, security, and consumer preferences to justify its anticompetitive conduct. Indeed, it spends billions on marketing and branding to promote the self-serving premise that only Apple can safeguard consumers' privacy and security interests. Apple selectively compromises privacy and security interests when doing so is in Apple's own financial interest—such as degrading the security of text messages, offering governments and certain companies the chance to access more private and secure versions of app stores, or accepting billions of dollars each year for choosing Google as its default search engine when more private options are available. In the end, Apple deploys privacy and security justifications as an elastic shield that can stretch or contract to serve Apple's financial and business interests.*" (see para. 16)

[10] https://www.legislation.gov.uk/ukpga/2013/24/section/25/enacted
[11] *USA v Apple* (2024), para. 71 at https://www.justice.gov/opa/media/1344546/dl?inline

How can the CMA make reasonable and unchallengeable assessments?

21. Broader arguments about other matters (from plurality of the media to security and privacy) create risks for the CMA as described above. Furthermore, it is well established that where those asserting defences concerned with other parties' compliance, such type of claim will fail. In *Hilti*, the defendant claimed that it needed to bundle nails and nail cartridges with its nail gins to ensure user safety (see *Hilti* [1991][12]). The court held that the compliance with health and safety laws (so that third party nails where safe to use in Hilti guns) was a matter for those third parties. As such, *Hilti* could set itself up as the policeman of others compliance with safety laws. Accordingly, data protection is an obligation under our laws that applies to each and every business individually. Each business has to assess what it is doing to understand how it needs to comply with the law. Whether processes are sufficient to protect personal data depends on the context.

22. Nevertheless, it is clearly open for the defendant to use compliance with another law as the basis for a claim that it is seeking to meet the requirements of both competition law and another law. Where that other law is data protection, in the UK, it is under the jurisdiction of the Information Commissioners Office ("ICO").

23. The CMA has established a practice in the Privacy Sandbox case, which may be helpful here. Where privacy defences are asserted, it can call in the ICO. The ICO is entirely within its jurisdiction and powers to make a determination of the compliance (or otherwise) with data protection law, and the CMA may simply defer to the ICO on those matters.

24. To be clear, the CMA would not be determining compliance with data protection law – that is a determination to be made by the ICO. The determination could of course then be considered by the CMA in its decision on competition matters. If the ICO were to decide that the defence was incompatible with privacy law, then it would fail. If the ICO were to determine that the defence was compatible with data protection law, then it would still be open for the CMA to decide that it nevertheless fails, for example, for not being the least restrictive of competition and hence, disproportionate.

25. Big Tech platforms constantly make changes to promote their own products that could also be argued to have a "consumer benefit" as they are easier to use or make adoption swifter. Often, the reduction of choice and competition will improve benefits to some consumers – any choice being an impediment to uptake. For example, Apple's use of a near field communication chip with its payments system discriminates against other payments systems, but benefits the consumer by allowing the consumer to swipe the phone. It is clearly disproportionate as the same chip could be used by competing payments systems.

Process for coordination and evidence gathering.

26. SMS players are likely to seek to advance justifications that are public interest benefits when in fact they are not. To avoid challenge to process, the CMA Guidance should include detailed

[12] Case T-30/89 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989TJ0030

explanation of how it will consult other regulators on public interest matters in their jurisdiction – such as the ICO on privacy matters. In particular, the guidance should cover:

(a) Who it will consult on other matters such as security or privacy or plurality should also be explained in advance.
(b) The process by which the CMA will take into account other bodies' determinations and how it will coordinate with other industry specific regulators.
(c) What the timetable will be for the SMS firm under investigation to make its case, what will be public and what the rights of third parties will be in challenging the assertions of those seeing to rely on the CBE.
(d) How the CBE will operate with the use of independent expert witnesses and witnesses of fact; ensuring that challenges to expertise are not made at a later time by SMS firms who "know more" than the expert and can demonstrate that the expert's views are flawed. Ensuring that such use of knowledge is shared at an early stage in proceedings rather than being used to set aside the CMA's decisions.
(e) Process for use of witnesses also needs to avoid challenges by the SMS firms to independence that commonly arise in US court proceedings (under the *Daubert* line of cases). It is worth noting that SMS firms are likely to be highly familiar with US law.

E. Section 9: Administration

Consultations; their length is an impediment to engaging with smaller businesses.

27. Digital markets have a small number of dominant platforms and a very large number of small businesses being harmed. Information from the smaller businesses in the market is crucial for the CMA to successfully deliver against its remit.

28. We welcome the CMA's involvement of third parties via consultations. However, consultation, guidance and other documents are often very long. This alienates many businesses from engaging with the issues and the CMA. The CMA typically deals with big businesses and those involved in mergers who employ lawyers to read the CMA's material.

29. The CMA's Digital markets competition regime guidance is 188 pages long. This is not a question only of whether the CMA can communicate more concisely since it can present its points in different ways such as:

    a. slide packs,
    b. videos
    c. and infographics.

    Such an approach is common in the modern world.

30. The CMA should also consider outreach programs and a shift in culture where it responds positively to third parties and encourages them to speak up. More active and enduring interest in third party businesses can be taken under a decentralised relationship program which would encourage third parties and businesses to come forward.

We trust the above is useful and remain available should the CMA have any questions.

Yours faithfully,

Preiskel & Co LLP