RESPONSE TO DRAFT GUIDANCE

CCIA response to Draft Guidance for the Digital Markets, Competition and Consumers Act

This response outlines CCIA's views on the draft guidance published by the DMCC. We see three broad areas where it should be possible to achieve an important improvement from the current draft through targeted changes:

- More clarity over expectations for evidence and procedural milestones.
- Greater consideration of consumer interests at important points in the regulatory process.
- Appropriate regulatory weight to choices in the legislation that were intended to address risks with interventions in dynamic digital markets.

In turn, those changes can deliver:

- Improved outcomes for consumers.
- Collaborative engagement with more stakeholders able to engage effectively with the process.
- Predictability, avoiding the risk of unintended impacts on the quality of UK digital services.

As requested, the rest of this submission is structured in line with the guidance document.

2. Strategic Market Status

- 2.13-2.41. The CMA may wish to allow for the possibility that this grouping can be revised to minimise unnecessary disruption if and when conduct requirements are imposed. Experience with the EU Digital Markets Act suggests that, for some requirements where that boundary is meaningful, whether or not services are treated as a single activity or multiple separate activities is highly impactful. Explicit scope to revise these boundaries as part of the conduct requirement setting process would avoid the need for the CMA and regulated companies to guess at the impact on ultimate regulatory requirements and resulting costs.
- 2.43. While the CMA may take the view that a formal market definition is not required, that exercise does have a practical function and the implications of that decision should be considered in other tests, noted in subsequent paragraphs.
- 2.51. If the CMA uses earlier market developments it should consider whether they are analogous in terms of, for example, the nature of the market development, the market participants involved and underlying market trends.
- 2.52. A general assumption that where market power is substantial it is entrenched seems at odds with the intent of the legislation (including the terms separately). It also seems like a distinctive risk in light of 2.43. Market power might appear to be substantial, but not be entrenched because there are companies in adjacent sectors that have the potential to enter. This will be common in ICT markets where there are

multiple well-resourced potential competitors with the technical resources, user relationships and other inputs to entering an adjacent market and has been a common source of dynamic competition.

- Examples of this happening in practice include:
    - Instagram's user base and sign-up system were repurposed to create a similar service (Threads) competing directly with Twitter.
    - In digital advertising, e-commerce businesses (e.g. Amazon), gig economy platforms (e.g. Uber) and others have been entering the market based on their existing relationships with customers. These provide alternatives to social media and search as a means for advertisers to reach customers at a moment they might be interested in making a purchase.
    - TikTok entered the social media and digital advertising markets, becoming a major player in both despite obvious network effects on both sides of the market. It did so on the basis of a form that consumers appreciated (short video) and a resulting ability to recommend videos they would find interesting. In doing so, it repurposed assets from earlier platforms.
    - Google Maps created a new service, competing with existing satellite navigation but also answering a broad class of searches (looking for local amenities). This in turn faced competition from Apple Maps and from existing providers of maps services, including in-car navigation where many buyers of new cars can use Google Maps through their phone or the navigation that the manufacturer provides.
- If the requirement for "clear and convincing evidence" amounts to a requirement to show that this process has already begun, the CMA will discount this kind of dynamic competition by assumption. At a high level, an assessment of whether market power is entrenched should involve considering potential strategic responses (versus an immediate commercial response) within and from other sectors in the event that a platform materially worsened its proposition to consumers or other commercial stakeholders.
- 2.55-2.59. While the CMA may wish to maintain flexibility in how it considers evidence around a firm's size or scale, more clarity over the kinds of evidence that are preferred and how thresholds might vary with context would support both firms and their stakeholders in providing helpful input, avoiding a situation in which different organisations engaging with the CMA 'talk past each other'.
- 2.61. (a) should explicitly consider not just whether a firm has certain assets, but whether those assets are unique and substitutable. Otherwise assessments are likely to exaggerate the strategic significance of digital activities and risk deterring investment in assets to support UK activity.
- 2.61. (b) and (c) risk eliding the basis for dynamic entry to challenge incumbents in adjacent sectors (broadly pro-competitive) with extending market power. Almost any company entering a market will have some kind of asset which it hopes will be the basis for competing with incumbents. In considering both the track record and the assets of the company in question, the CMA should ask whether other firms could (or were able) to continue to compete.
- 2.62. (c) should explicitly consider the impact of other regulations with, particularly, the Online Safety Act already regulating the impact of content moderation and curation on certain classes of business.

- 2.63-2.67. The CMA could retain the ability to make exceptions, reflecting market circumstances, while still providing considerably more clarity over the kinds of evidence it prefers, how that varies with context, and how it will determine whether a company crosses salient thresholds for the legislation (e.g. substantial). There are multiple risks if it does not and waits on the exercise in 2.83:
    - The exercise becomes (or is seen as) arbitrary, with concern that it is possible to fit evidence to preconceived conclusions or political priorities.
    - The quality of evidence received by the CMA is diminished as companies are not able to plan suitable evidence-gathering, particularly if the timelines for consultations are compressed.
    - The relevance of evidence is diminished as stakeholders address different questions and do not answer the most salient points for the CMA.
    - Smaller organisations, or those facing other practical constraints, are disadvantaged as they are not able to cover the very broad range of evidence that might be relevant in the absence of guidance over what is needed most.
    - There is a greater reliance on informal and therefore opaque processes to understand the CMA's priorities with greater potential for regulatory surprise, particularly to the extent that the CMA's priorities are also not clear.
- 2.69. The CMA could outline either initially as part of its implementation of DMCCA or on a regular basis how it believes the Prioritisation Principles apply to UK digital markets. This and other additional milestones in the regulation would provide greater clarity to stakeholders and support early planning, minimising unintended disruption with the regulatory process.
- 2.74. While the CMA may find it inappropriate to provide a full and/or definitive list of products, given the potential for changes over time, clarity over which products are in scope is essential for the CMA, regulated companies and their stakeholders. At worst, and to the extent that the boundaries between products are not entirely clear, conduct requirements could create the disruptions associated with structural separation unintentionally. Options to address this could include:
    - Allowing the CMA to update the list of activities included in the designation decision over time (this is the approach taken in the EU Digital Markets Act).
    - Allowing companies to test their assessment of whether certain products are in scope at the point of regulation with the CMA.
    - Allowing companies to test new or potential products and whether they would be in scope with the CMA.
- 2.79-2.93. The CMA should provide a clear procedural timetable and how it will approach bilateral engagement with firms that might be designated. This should include milestones that regulated companies should expect, with provisional designation well in advance of a final decision so firms have a fair opportunity to engage, and a plan for bilateral engagement to avoid unnecessarily disruptive regulatory surprises.
- 2.82. The specified timeframe should be proportionate to the questions being asked and the novelty of the evidence sought.
- 2.112. The CMA may want to allow for the possibility that it will waive this rule where it confronts more finely-balanced or clearly evolving situations, such that new evidence may materially change its assessment within 12 months.

3. Conduct requirements

- 3.13-3.14. This should be based on an assessment of the overall impact of such a prohibition, otherwise there is a risk that modest impacts on the position of the digital activity will be a pretext for preventing entry in adjacent markets that might materially improve competition in those sectors. This is particularly likely when considering non-designated activities (i.e. often those that do have market power) and could be reflected in section 3.31. The CMA should be clear that it will consider the extent of market power in the related activity; the strength of any link between designated and non-designated activities; and the extent of any likely harm to consumers.
- 3.17. The CMA should consider potential market solutions in line with normal impact assessment best practice and to provide an appropriate baseline that may not be reflected in an overall account of whether market power is "entrenched". This will be particularly important if the assessment of whether market power is entrenched is curtailed, as suggested in the current draft.
- 3.32. The CMA could provide more clarity over its approach to weighting both shorter- and longer-term impacts but also more- or less- robustly evidenced impacts. Otherwise there is a risk of inconsistency across cases and that the evidence anticipated in section 3.33 is less relevant.
- 3.34. The guidance could provide either a broad anticipated timeline, or scenarios for the timeline reflecting different levels of complexity. This would support planning by regulated companies and their stakeholders.
- 3.36. The CMA should aim to only impose additional CRs by exception, given the disruption and therefore additional costs that can be expected if regulated companies and their stakeholders do not have a clear framework around which to implement changes in services. If repeated changes become the norm, the impact on investment in and the quality of UK digital services is likely to be amplified.
- 3.40. While Chapter 5 provides information around information and evidence gathering, it does not provide clarity over how the CMA will seek and make use of specialist expertise and input outside of its core competencies to ensure that the conduct requirements are proportionate; take full account of all consumer benefits; and identify and address any trade-offs. Setting conduct requirements will involve distinctive analytical challenges and, as we noted in response to 2.63-2.67, more clarity over processes will improve the ability of organisations to engage productively.
- 3.61. The implementation period should also be set with a view to minimising disruption for stakeholders that might need to adjust their own systems and business practices. This might include the time needed for the engagement with third parties envisaged in 3.63, time for those third parties to act on that engagement and time for them to make alternative arrangements if those might be required.

4. Pro-competition interventions

- 4.9. As above, not defining a market will again raise the salience of other choices and the CMA should explicitly acknowledge the requirements to substitute for its role in mitigating regulatory risk, particularly under-estimating competition from markets that might be found to be within the scope of a market properly understood.

- 4.10. Outside of commodity markets, some factor or factors will almost always affect competition to some extent and it would be good for the CMA to confirm the extent to which it expects this to conform with prior norms for AEC assessments.
- 4.12 (a). This analysis of rates of return should be cognizant of market differences, such as the requirement for risky innovation in establishing successful services (meaning that comparing post hoc returns to ex ante cost of capital might be inappropriate).
- 4.19. As noted above, more clarity on the CMA's approach to evidence would likely improve the quality received, particularly given the noted constraints on time available).
- 4.41. As noted above, more clarity over how the CMA is translating its Prioritisation Principles to digital markets at any particular point would give regulated companies and their stakeholders more ability to prepare for potential interventions. Milestones would mitigate the time pressure noted in 4.19.

5. Investigatory powers

- 5.14. We welcome the guidance calling for these powers to be used proportionately. The requirement for firms to vary conduct in particular should only be applied to designated firms exceptionally (when other evidence is clearly insufficient) and collaborating closely with the designated firms in designing and operating the test to minimise any resulting disruption.

- While the guidance says that it "may" consider the cost, time and resource implications for firms subject to requirements. It should always consider these impacts in order to ensure that a requirement is proportionate. The CMA should also consider impacts on consumers and trust more broadly. It should assess the risks in terms of consumer attitudes to a regulated company varying conduct explicitly before going ahead and consult the regulated company and other stakeholders on this point.

7. Enforcement of competition requirements

- 7.26-7.28. Given the importance of enforcement decisions and limited time, adopting a case-by-case process by default is likely to be impractical. The CMA should instead default to providing the firm under investigation with access to all non-confidential versions of documents provided by complainants and third parties.
- 7.62. The CMA notes that evidence submitted should be new, "going beyond any previous submissions or representations it has made on the relevant matters", because benefits of conduct may have been taken into account by the CMA already. This could, in turn, be reflected earlier in the guidance with an acknowledgement that the CMA should aim to implement requirements in such a way that firms should not be required to make legitimate appeals to the CBE.
- 7.68. The legislation was specifically amended in Parliament to alter the language and replace references to indispensability, with amendments to restore indispensability rejected. Linking the two concepts in this guidance seems:

    - an inappropriate revision of that Parliamentary process;

  - inconsistent with the Horizontal Agreements Guidance (CMA184, Aug 2023) which refers to several different tests (see pp.43, 75, 119, 195) including the necessity test derived from EU law (p.195, citing the "reasonably necessary" test in paragraph 73 of the EU's 2004 Guidelines on the application of Article 81(3) and requiring the CMA to have regard to this different test under s.60A CA98);

  - unnecessary with the other safeguards around the use of the CBE (e.g. requirement not to eliminate effective competition).

- The CBE fulfils an important role in avoiding regulation punishing and potentially deterring consumer-friendly investments. The language from Parliament should be retained so that it can be used in forward-looking cases such as with innovative new services.

- 7.116-7.119. The CMA should confirm that this tool is intended to regulate payment terms for transactions subject to conduct requirements, not to create a duty to deal with a specific counterparty (unless there is a conduct requirement that specifically imposes such a duty). Requiring companies to deal is problematic in principle and creates significant risks of unintended consequences, it should only be done on a well-defined basis, with a full consideration of the likely effects (including indirect consumer impacts and impacts on future innovation and investment) and where the CMA can define an appropriate scope, not in the context of an enforcement process.