Digital Markets, Competition and Consumers Bill:
Microsoft's submission to the Public Bill Committee

1 Overview

We welcome the opportunity to comment on the Digital Markets, Competition and Consumers (DMCC) Bill. At Microsoft, we have a long history of working with governments, civil society, academia, and others in industry to foster regulation that provides innovators with the right balance between enabling adequate freedom to deliver productivity and investment benefits to economies, and help tackle some of society's largest problems, while ensuring appropriate guardrails are in place to protect citizens and consumers.

We firmly support the Government's ambition for the UK to become a science and technology superpower. We are currently witnessing how the transformative potential of AI is unfolding – it is already supporting the development of new medicines, helping tackle backlogs across public services and driving productivity gains for businesses of all sizes.

To realise the benefits of AI, many of which are yet to be discovered, governments around the world are currently in a competitive race to become pioneering hubs for AI. We now face an inflection point. During a critical period of technological change and advancement, we use our age and experience to act as a trusted partner to government. We can help the UK harness AI to become a science and technology superpower, enabling every individual and organisation to achieve more.

The DMCC Bill will play a key role in contributing to that ambition. The UK's position as a science and tech superpower, alongside that transformative potential, can only be realised if government, regulators, industry and academia can partner to develop frameworks for new and emerging technologies. As the UK's first formal framework for digital regulation, the Bill is a significant development in digital markets and should strike a fair balance between consumers, businesses and regulators. Using our experience, built over decades in jurisdictions across the globe, Microsoft can act as a partner to achieve a balanced regulatory approach.

Microsoft supports in principle the development of rules that will promote competition in digital markets. We know well from our own experience that competition inspires innovation and leads companies to provide better products and drive down costs. However, we have some suggestions to make to the proposed legislative framework and these are set out in further detail in Section 2 of this document.

To ensure the DMCC Bill can provide a pro-innovation framework that enables the UK to achieve science and technology superpower status, we have the following recommendations:

- That the standard of review set out in the Bill is raised to a "merits" standard to ensure decisions under the SMS regime are subject to appropriate judicial scrutiny;
- Define principles of good regulation in the Bill for when ex ante regulatory obligations are imposed on SMS firms or intervening in dynamic markets with pro-competition interventions (PCIs);
- The evidential requirement on the CMA under the SMS regime should be scaled to reflect the "seriousness" and intrusiveness of the decisions, such that all its decisions should be based on "strong and compelling evidence";
- The Bill should include checks to ensure that the decisions made by the CMA are proportionate and only imposed in cases where action is required;

- The CMA should have a duty to have regard to decisions of international regulators in line with ambitions of international cooperation as enshrined in its updated Digital Markets Strategy.

2 Key issues

Microsoft supports the development of new rules and new tools that will more effectively address structural competition problems. We know well from our own experience that competition drives innovation and leads companies to provide better products and drive down costs.

We understand that the UK's position as a science and tech superpower can only be realised if government, regulators, industry and academia can partner to develop frameworks for new and emerging technologies. The Bill will play a key role in contributing to that ambition.

However, since the original proposals for digital competition were set out, the context has changed. The Government has stressed the need for a more proportionate system outside of the EU. The Government committed to "our own course to balance the benefits of reforms for consumers with burdens on businesses".[1] We agree on the need for proportionality in the new system.

Part 1 of the Bill introduces a new regime for digital markets that will apply to firms that are found to have strategic market status (SMS) in relation to a digital activity. The Competition and Markets Authority (CMA) – through its new Digital Market Unit (DMU) – will essentially act as a sectoral regulator for SMS firms.

The Bill gives the CMA extensive powers and vast discretion on how they are exercised. The decisions the CMA will take to impose ex ante rules on SMS firms and make pro-competition interventions (PCIs) when it finds that conduct requirements are not sufficient to force fundamental changes to SMS firms' business models may well increase the uncertainty in which businesses operate and have a chilling effect on investment into the UK. There is also scope for the CMA to impose significant fines for breaches of rules made under the SMS regime.

We believe it is not only in the interests of potential SMS firms, but also the national (and international) public interest that intervention in the UK economy by an independent regulator should be robust, evidence-based, proportionate, and subject to appropriate scrutiny.

We believe that there are seven key areas that need to be addressed to ensure the Bill strikes the right balance between regulating digital markets and encouraging innovation. We propose the following measures to achieve the right balance.

2.1 Standard of Judicial Oversight

Given the UK digital competition regime is new and untested, we believe that robust procedures and mechanisms should be put in place within the DMU, in Parliament and the Courts. These procedures must balance the need for speed and flexibility against the concerns associated with due process and rights of defence.

The standard of review that will apply to nearly all decisions taken under the SMS regime is the light touch judicial review (JR) standard developed for purposes of public law scrutiny of (typically) ministerial decisions by democratically accountable elected officials, quite often on decisions with no "right answer" (e.g. where to build the next airport). This can be contrasted with the Competition Act 1998 (CA98) regime which allows for merits review of decisions of an independent agency on whether conduct of a specific firm amounts to a breach of legislation. The result under the Bill is that

[1] Reforming competition and consumer policy: government response (April 2022)

the financial penalties imposed under the SMS regime will be subject to less judicial oversight than the CA98.

Standards of review higher than Judicial Review (JR), including full merits, have been successfully adopted by other regulated sectors, especially when the regimes were first implemented because it was recognised that specific factual circumstances need to be considered to regulate appropriately.

We propose that the standard of review set out in the Bill is raised to a "merits" standard to ensure decisions under the SMS regime are subject to appropriate judicial scrutiny (See Option A in Annex 1). While this is the only option that adequately resolves our concerns, as an alternative we would also propose that the Bill includes a full merits review for 10 years and then an enhanced judicial review standard after that (See Option B in Annex 1). As detailed above, the SMS regime is entirely new and it grants the CMA significant discretion. Unlike the CA98, obligations are not set out in the statute and the companies do not have the benefit of years of judicial interpretation, the outcome of which is reflected in published CMA guidance. In addition, the operation of an *ex ante* regime necessitates a certain level of speculation about the future of a technology or market which could quickly be shown to be inaccurate; an ability to appeal a decision on full merits allows for a proper and adequate balance to speculative predictions. This alternative will allow decisions taken by the regulator to be thoroughly tested on appeal.

2.2 Statutory duties

At least four other sectoral regulators in the UK – Ofcom, Ofgem, the CAA, and Ofwat – have a statutory obligation to have regard to the principles of best regulatory practice, including the principle under which regulatory activities should be transparent, accountable, proportionate and targeted only at cases where action is needed.[2] Similar principles have been outlined in recent Government publications on the design of economic regulation.[3]

The lack of a similar obligation in the Bill is conspicuous by its absence. We believe the Bill should define principles of good regulation for when *ex ante* regulatory obligations are imposed on SMS firms or intervening in dynamic markets with pro-competition interventions (PCIs).

2.3 Evidential standard

While the CMA should be subject to the general civil standard of proof (i.e. balance of probabilities or "more likely than not") that applies to all but its criminal powers, the current law does not apply a one-size-fits-all approach to the civil standard but instead scales it to the consequences.

The evidential standard that has been applied by the Tribunal when assessing an infringement under Chapter II CA98 is "strong and compelling evidence", on the basis that these are "serious matters" which can attract significant financial penalties.[4] A similar "sufficient and convincing" evidential standard is applied by the Civil Aviation Authority (CAA) when conducting a market power test (an assessment that results in regulating conduct of airports with sufficient market power).

The evidential requirement on the CMA under the SMS regime should also be scaled to reflect the "seriousness" and intrusiveness of the decisions, such that all its decisions should be based on

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[2] s.2(4) Water Industry Act, s. 4AA(5A) Gas Act, s. 3A(5) Electricity Act, s. 4(4) Communication Act.

[3] Smarter regulation to grow the economy (10 May 2023); Economic regulation policy paper (January 2023) and the Better Regulation Frame: Interim Guidance (March 2020).

[4] See Napp v Director General of Fair Trading [2002] CAT 1. "In those circumstances the conclusion we reach is that, formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be."

"strong and compelling evidence". The CMA should be held to the same evidentiary standard in regulating global technology players – whose services are used by the vast majority of the UK population – as the standard to which the CAA holds itself in regulating UK airports or the standard applicable had the CMA opened an abuse of dominance inquiry.

2.4 Proportionality

We do not dispute that the CMA will have to exercise its discretion when determining conduct requirements or PCIs. However, there should be checks to ensure that these decisions are proportionate and only imposed in cases where action is required. These also fall within the principles of best regulatory practice that apply to other sectoral regulators. The principle of proportionality is a core principle of the competition regime but is absent from both the power to impose conduct requirements, and to impose PCIs:

- The Bill allows the CMA to impose conduct requirements when it considers it would be appropriate for the purposes of any of the fair dealing, open choices and trust and transparency objectives.[5] These are broadly drafted as are the permitted conduct requirements set out in Clause 20 and there is no effective fetter on the CMA's discretion.
- The Bill provides that a PCI may be made when the CMA considers that a factor or combination of factors relevant to the digital activity will have an adverse effect on competition; and that making the PCI would likely remedy, mitigate or prevent the adverse effect on competition. [6] The CMA has wide discretion in determining the form and content of a PCI, although it may have regard to any benefits to UK users/customers that have resulted from the factors that have an effect on competition.

This diverges from both CA98, under which proportionality is a core principle, and the CMA's Market Investigation Regime, where the legislation provides that any remedial action must be "reasonable and practicable" and that the CMA shall have regard to any relevant customer benefits.[7] The CAT has found that the principle of proportionality applies and that any remedial decisions must be appropriate, necessary, the least onerous of effective measures, and must not produce disproportionate effects.[8] There is no good reason why an at least equal standard should not apply to decisions under the SMS regime.

2.5 International Cooperation

We believe that it should be uncontroversial that the CMA should have a duty to have regard to decisions of international regulators: this would enshrine ambitions of international cooperation that are in its updated Digital Markets Strategy.[9]

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[5] Clause 19(5) DMCC

[6] Clause 44(1) DMCC.

[7] Section 138 EA02 (MIR): CMA is bound on remedial action for an adverse effect on competition ("AEC") by the limits of what is "reasonable and practicable" (s.138(4)) and the effect of any action on "relevant customer benefits" (s. 138(5)) and shall not take any action where there is "no detrimental effect on customers" from the AEC or where such action does not "remedy, mitigate or prevent" the AEC(s.138(6).

[8] Tesco plc v Competition Commission, [2009] CAT 6 para 137: "…the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued."

[9] The CMA's Digital Markets Strategy: February 2021 refresh - GOV.UK (www.gov.uk). Priority 5: International Cooperation "Many digital firms are active across international boundaries and regulators face many common challenges. It is therefore imperative that we work together, both to understand the issues and in devising solutions. We will continue to forge close relationships with other competition and consumer authorities in relation to their digital work. In particular, we will pursue work with the aim of better co-ordinating our actions and driving a coherent regulatory landscape internationally."

Other jurisdictions, including the EU and US, have competing requirements. The EU's Digital Markets Act (DMA) has a similar aim of identifying and mitigating the risks to competition. It provides the Commission with less discretion – it prescribes quantitative criteria for "gatekeepers" (equivalent to SMS firms) and has behavioral requirements set out in the legislation. The US does not, at present, have equivalent legislation. It follows a more litigation-based approach, so that there is a higher burden of proof on the state to make interventions.

Overall, the Bill provides the CMA with far more regulatory discretion and a lower evidential standard than leading international peer regimes. We recognize that there are certain benefits to this approach, including allowing for greater flexibility in intervention. It also, in theory, allows the CMA to intervene only when it considers it to be necessary (i.e. no one-size fits all approach).

However, it is important that the CMA does not exercise its discretion in a way that is at total odds with international regulators. This is particularly important in digital markets where SMS firms are active across international boundaries, and subject to the rules and decisions taken by a number of other competition and consumer authorities. The CMA should account for how these decisions impact the necessity and efficacy of potential interventions. It is difficult to see how the CMA and the UK is served in terms of intellectual leadership abroad – whereby others take note (and potentially follow) what the CMA is doing – if the CMA pays no heed to what its peers are doing internationally on the same or related issues. Given the UK's ambition to show regulatory leadership it should take steps to minimize regulatory fragmentation and drive a coherent international regulatory landscape.

2.6 Consumer Rights and Disputes

Microsoft welcomes regulation in this area, particularly to the extent that the Bill's overarching objectives of protecting and empowering consumers within online platforms can be an effective means of building consumer confidence within the digital economy. We have concerns that in some areas, for example, Part 4 Chapter 2, Subscription Contracts, the Bill places excessive burdens on businesses offering subscription services as a result of the overly prescriptive nature of the proposals related to the 'Duties of traders'. The level of pre-contract information required, the number of reminder notices and cooling off periods, and in particular, the right for the consumer to bring a subscription contract to an end 'by any means', will all, in practice, prove extremely difficult to comply with and result in businesses that offer subscription services innovating less and providing less consumer choice than they are able to today. We will be happy to work with policy makers to suggest some practical measures to resolve these difficulties while preserving consumer protection and choice.

2.7 Implementation of the new regime

We are aware that far before the introduction of the Bill, the CMA established the Digital Markets Unit, on a non-statutory basis. This was done with the intention of focussing on operationalising and preparing for the new SMS regime.[10] Microsoft has had the opportunity to meet and interact with the leadership and staff of the Digital Markets Unit and has been impressed by their thorough and thoughtful efforts to develop deeper expertise in rapidly evolving digital markets.

The CMA in its 2022 Annual Report said that it has faced "significant challenges arising from the need to assume substantial additional responsibilities as a result of the UK's departure from the European Union" and that it faces "a substantial volume of ongoing work – more so than in previous years".[11] Since 2020, the CMA has had sole responsibility for competition policy and Parliament has passed multiple pieces of legislation that has expanded the role, authority or functions of the CMA

[10] Digital Markets Unit - GOV.UK (www.gov.uk)

[11] CMA Annual Report 2022 (July 2022)

in some way (including the UK Internal Market Act 2020, National Security and Investment Act 2021, the Subsidy Control Act 2022, the Agriculture Act 2020, the Environment Act 2021, and the Health and Care Act 2022).

We are concerned that the DMU will face constraints in devoting adequate resources to decisions to be taken under the SMS regime. There is a risk of over-regulation which could harm digital platform innovation or otherwise reduce consumer welfare. It is therefore particularly important to have robust procedures and mechanisms in place that balance the need for speed and flexibility against the concerns associated with due process, rights of defence, and avoiding misplaced interventions.

Annex 1 Proposed Amendments

#	Issue	Proposal
1	**Standard of review**	
1.1	As set out in Section 2 of the response, the JR standard of review is insufficient to ensure appropriate scrutiny.	**Option A: Full merits review** *Clause 101(6) and (7) Applications for review etc* (6) The Tribunal must determine an application under this section on its merits by reference to the grounds of appeal set out in the application. ~~In determining an application under this section, the Tribunal must apply the same principles as would be applied—~~ ~~(a) in the case of proceedings in England and Wales or Northern Ireland, by the High Court in f~~ ~~(b) in the case of proceedings in Scotland, by the Court of Session on an application to the supervisory jurisdiction of that Court.~~ (7) The Tribunal may — (a) dismiss the application or quash the whole or part of the decision to which it relates, ~~and~~ (b) ~~where it quashes the whole or part of that decision,~~ refer the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal, (c) give such directions, or take such other steps, as the CMA could itself have given or taken, or (d) make any other decision which the CMA could itself have made.
		Option B: Full merits review (for a period of 10 years) and JR+ standard after that *Clause 101(6), (7) and new subsections (10) and (11) Applications for review etc*

#	Issue	Proposal
		(6) In determining an application under this section, the Tribunal may intervene to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds ~~must apply the same principles as would be applied~~ — (a) the CMA failed to have proper regard to its duties under Part 1; (b) the decision was based, wholly or partly, on an error of fact; (c) the decision fails to achieve, in whole or in part, the effect stated by the CMA; (d) the decision was wrong in law; (e) any grounds that would be engaged ~~(a)~~ in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review; or ~~(b)~~ in the case of proceedings in Scotland, by the Court of Session on an application to the supervisory jurisdiction of that Court. (7) The Tribunal may — (a) dismiss the application or quash the whole or part of the decision to which it relates, ~~and~~ (b) ~~where it quashes the whole or part of that decision,~~ refer the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal, (c) substitute the Tribunal's decision for that of the CMA (to the extent that the application is allowed) and given any directions to the CMA or the applicant. (11) Notwithstanding anything set out in sub-section (6), when an application under this section is made within 10 years of this Act coming into force, the Tribunal must determine the application on its merits by reference to the grounds of appeal. (12) Notwithstanding anything set out in sub-section (7), when determining an application made under this section within 10 years of this Act coming into force, the Tribunal may: (a) dismiss the application or quash the whole or part of the decision to which it relates,

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		(b) refer the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal, (c) give such directions, or take such other steps, as the CMA could itself have given or taken, or (d) make any other decision which the CMA could itself have made.
		Option C: JR+ standard for all decisions under the SMS regime *Clause 101(6) and (7) Applications for review etc* (6) In determining an application under this section, the Tribunal may intervene to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds ~~must apply the same principles as would be applied —~~ (a) the CMA failed to have proper regard to its duties under Part 1; (b) the decision was based, wholly or partly, on an error of fact; (c) the decision fails to achieve, in whole or in part, the effect stated by the CMA; (e) any grounds that would be engaged ~~(a)~~ in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review; or ~~(b)~~ in the case of proceedings in Scotland, by the Court of Session on an application to the supervisory jurisdiction of that Court. ~~(a) in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review;~~ ~~(b) in the case of proceedings in Scotland, by the Court of Session on an application to the supervisory jurisdiction of that Court.~~ (7) The Tribunal may —

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		(a) dismiss the application or quash the whole or part of the decision to which it relates, ~~and~~ (b) ~~where it quashes the whole or part of that decision,~~ refer the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal, (c) substitute the Tribunal's decision for that of the CMA (to the extent that the application is allowed) and given any directions to the CMA or the applicant.
2	**Evidential standard and proportionality**	
2.1	**SMS Conditions** The Bill does not specify the evidential standard to be met when assessing the SMS conditions. Given that the CMA must conduct a substantive assessment akin to a dominance assessment, it should be required to have strong and compelling evidence.	*Clause 2(1) Designation of an undertaking* (1) The CMA may designate an undertaking as having strategic market status ("SMS") in respect of a digital activity carried out by the undertaking where the CMA ~~considers that~~ — (a) considers that the digital activity is linked to the United Kingdom (see section 4), and (b) has strong and compelling evidence the undertaking meets the SMS conditions in respect of the digital activity.
2.2	**Conduct Requirements** As set out in Section 3, the Bill fails to enshrine the principle of proportionality. Conduct requirements should only be	*Clause 19(5) Power to impose conduct requirements* (5) The CMA may only impose a conduct requirement on a designated undertaking if it considers that it would be appropriate, necessary and proportionate to do so for the purposes of one or more of the following objectives— (a) the fair dealing objective, (b) the open choices objective, and

#	Issue	Proposal
	imposed when necessary and proportionate to do so.	(c) the trust and transparency objective.
2.3	**Pro-competition interventions** Bill does not provide for the evidential standard to be met to determine whether there is an adverse effect on competition. Unlike the MIR, neither does it enshrine the principle of proportionality so that a PCI is made only when the CMA considers that it would be a reasonable and practicable means to remedy, mitigate or prevent the effect on competition.	*Clause 44(1), (2) and (4) Power to make pro-competition interventions* (1) The CMA may make a pro-competition intervention (a "PCI") in relation to a designated undertaking where, following a PCI investigation (see section 45), the CMA considers that— (a) there is strong and compelling evidence that a factor or combination of factors relating to a relevant digital activity is having an adverse effect on competition, and (b) making the PCI would be proportionate, reasonable and practicable and likely to contribute to, or otherwise be of use for the purpose of, remedying, mitigating or preventing the adverse effect on competition. (2) In considering whether to make a PCI, and the form and content of any PCI, the CMA may have regard to any benefits to UK users or UK customers that the CMA considers have resulted, or may be expected to result, from a factor or combination of factors that is having an adverse effect on competition. (4) A PCI may include provision necessary and proportionate the purposes of remedying, mitigating or preventing any detrimental effect on UK users or UK customers that the CMA considers has resulted, or may be expected to result, from the adverse effect on competition to which the PCI relates.
3	**Statutory Duties**	
3.1	The Bill does not require the CMA to have regard to principles of best regulatory practice when exercising its functions under the SMS regime	**NEW SECTION: Best regulatory practice** In exercising any of the powers under Part 1, the CMA shall have regard to the principles of best regulatory practice, including the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

#	Issue	Proposal
3.2	CMA not required to have regard to decisions of international regulators when exercising its functions under the SMS Regime	**NEW SECTION: International cooperation** In exercising any of its powers under Part 1, the CMA must have regard to regulatory action and decisions taken by authorities in other jurisdictions.