

# Digital markets competition regime guidance

Consultation document

24 May 2024

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## 1. About this consultation

1.1 This consultation seeks the views of interested parties on two pieces of draft guidance on the CMA's functions under the digital markets competition regime established by Part 1 of the Digital Markets, Competition and Consumers Act 2024 (the 'Act'). These guidance documents are:

- Digital markets competition regime guidance
- Guidance on the merger reporting requirement for firms with strategic market status (SMS)

1.2 Section 114 of the Act requires the CMA to consult on and publish guidance on how the CMA will exercise its digital markets functions. In line with this requirement, the CMA is now launching its consultation on the digital markets competition regime guidance.

1.3 We have also produced a [Summary of the digital markets competition regime guidance](#) to provide stakeholders with an accessible overview of the regime and the guidance's key provisions. To the extent there is any conflict between the Summary and the draft guidance, the guidance will prevail.

1.4 The [Digital markets competition regime guidance](#) covers both substantive and procedural matters, and covers the following areas:

- (a) Chapter 2 explains the statutory test for an undertaking to be designated as having strategic market status ('SMS') in respect of a digital activity and how the CMA will approach this assessment. It also explains the procedural steps of both an initial and a further SMS investigation.
- (b) Chapter 3 explains the analytical and procedural approach the CMA will take when imposing conduct requirements ('CRs') on undertakings that have been designated as having SMS ('SMS firms') and when varying or revoking CRs.
- (c) Chapter 4 explains pro-competition interventions ('PCIs'). This includes how the CMA will assess whether there is an adverse effect on competition ('AEC'), and how it will impose effective and proportionate PCIs (which can take the form of a pro-competition order ('PCO') and/or a recommendation to another public authority) and the procedural steps of a PCI investigation.
- (d) Chapter 5 explains the investigatory powers that the CMA may use in carrying out its digital markets functions. This chapter also explains the

CMA's approach to information handling and its powers to provide investigative assistance to overseas regulators.

- (e) Chapter 6 explains the CMA's approach to monitoring compliance, effectiveness and whether to change or revoke the competition requirements imposed on firms.
  - (f) Chapter 7 sets out the CMA's approach in relation to breaches of competition requirements under the regime, including investigations in relation to such breaches. It also sets out the CMA's approach to certain matters specific to enforcement of CRs, namely interim enforcement orders ('IEOs'), the countervailing benefits exemption (the 'CBE'), commitments, enforcement orders ('EOs') and the final offer mechanism (the 'FOM').
  - (g) Chapter 8 explains the CMA's approach to imposing penalties for breaches of competition requirements.
  - (h) Chapter 9 sets out the CMA's approach to the administration of the digital markets competition regime, including decision-making; extensions to statutory deadlines; coordination with relevant regulators; the CMA's approach to consultations; and its power to charge a levy.
- 1.5 This guidance should be read alongside the Act and, as applicable to the digital markets competition regime, the CMA's guidance on administrative penalties (Administrative Penalties: Statement of policy on the CMA's approach). The CMA will be consulting in due course on an updated version of the administrative penalties guidance that sets out the CMA's approach to penalties for breaches of certain of the Act's digital markets provisions.
- 1.6 The [guidance on the merger reporting requirement for SMS firms](#) provides general information and advice to companies and their advisers on the merger reporting duty for firms designated as having SMS, set out by Sections 57 to 68 of the Act. As required by Section 60(1) of the Act, the CMA is also consulting on the [notice](#) of information that should be included in a report. Since the CMA would conduct any merger investigation under the Enterprise Act 2002, stakeholders may wish to read this guidance alongside the [Guidance on the CMA's jurisdiction and procedure](#) (CMA2) and the CMA's guidance on [Interim measures in merger investigations](#) (CMA108).

## **Turnover Statutory Instruments (SIs)**

- 1.7 The CMA understands that the government intends to make Statutory Instruments for the purposes of calculating turnover for the turnover condition

of the SMS test under Section 8 of the Act, and the calculation of turnover for the statutory maxima for penalties under Section 90 ('the Turnover SIs'). The government will consult on these SIs, giving parties the opportunity to comment on the proposed turnover calculation methodologies.

- 1.8 Once the government consultation has concluded and the Turnover SIs have been finalised, the CMA will reflect them in the final digital markets competition regime guidance. At this juncture, the CMA anticipates that the Turnover SIs will likely only necessitate consequential and descriptive additions to the final version of CMA guidance, not requiring separate consultation.

## 2. Consultation questions

- 2.1 The CMA welcomes feedback on any aspect of its draft digital markets competition regime guidance or guidance on the merger reporting requirement for firms with SMS.
- 2.2 The CMA requests that respondents structure their responses to separate out their views in relation to each of the guidance's chapters, namely:
- Strategic market status including the CMA's proposed approach to (a) substantive SMS assessment and (b) SMS investigation procedure.
  - Conduct requirements including the CMA's proposed (a) analytical approach to imposing CRs and (b) procedure for imposing CRs.
  - Pro-competition interventions including the CMA's proposed (a) analytical approach to assessing whether there is an adverse effect on competition, (b) analytical approach to designing PCIs and (c) procedure for PCI investigations.
  - Investigatory powers.
  - Monitoring including the CMA's proposed approach to (a) monitoring compliance, (b) monitoring effectiveness and (c) monitoring whether to impose, vary or revoke competition requirements.
  - Enforcement of competition requirements including the CMA's proposed approach to (a) breaches of competition requirements and (b) enforcement of conduct requirements.
  - Penalties for failure to comply with competition requirements.
  - Administration.
  - The CMA's proposed approach in relation to the merger reporting requirement for SMS firms.

## 3. Consultation process

### How to respond

- 3.1 We encourage you to respond to the consultation either by email using the contact details provided below or through the CMA's [consultation portal](#).
- 3.2 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 3.3 In pursuance of our policy of openness and transparency we will publish a non-confidential version of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive at the same time.

### Duration and contact details

- 3.4 The consultation will run from 24 May 2024 until 12 July 2024. Responses should be submitted no later than 11:55 pm on 12 July 2024. They should be sent to [DMGuidance@CMA.gov.uk](mailto:DMGuidance@CMA.gov.uk) or submitted [here](#).
- 3.5 Any queries about this consultation should also be sent to [DMGuidance@cma.gov.uk](mailto:DMGuidance@cma.gov.uk).

### Compliance with government consultation principles

- 3.6 In preparing this consultation, the CMA has taken into account the published government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

### Statement about how we use information and personal data that is supplied in consultation responses

- 3.7 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.



- 3.8 The CMA is processing this personal data for the purposes of our work under Part 1 of the Digital Markets, Competition and Consumers Act 2024. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account.
- 3.9 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long the CMA retains personal data, see the CMA's Privacy Notice.
- 3.10 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002.<sup>1</sup>
- 3.11 We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business, where we consider that disclosure might significantly harm the interests of that individual or business.
- 3.12 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration representations made by you in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under the Enterprise Act 2002.
- 3.13 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

## **Next steps**

- 3.14 After the consultation, we will consider all responses received and decide whether to make changes to the draft guidance in light of these. We will then seek the approval of the guidance by the Secretary of State, as required by the Act.

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<sup>1</sup> Part 9 of the EA02 imposes a general restriction on the disclosure of information which the CMA obtains during the exercise of any of its functions (referred to as 'specified information') to other persons. This will include the functions of the CMA under the Act, as exercised by the CMA. Guidance on the application of Part 9 EA02 and when disclosure of specified information may be permitted is set out in CMA6.

- 3.15 We will publish a summary of the responses received that fall within the scope of the consultation on our webpages. We propose to publish non-confidential versions of the responses received. These documents will be available on our webpages and respondents will be notified when they are available.
- 3.16 We will publish the guidance on our website after having received approval from the Secretary of State, as required by the Act.<sup>2</sup> The guidance, approved by the Secretary of State, will take effect from the date of its publication.

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<sup>2</sup> Section 114(4)(b) of the Act.