

July 2024

We welcome the opportunity to engage with the Competition and Markets Authority (CMA) on the draft digital markets competition regime guidance, following the passing of the Digital Markets, Competition and Consumers Act (DMCC), to ensure regulations reflect the diversity of the internet.

We welcome the passing of the DMCC Act and support the CMA's proposed implementation as set out in this consultation. Ultimately, the CMA should maintain its proposed flexible and holistic approach to regulating digital markets, because this will ensure that its regime can swiftly adapt to emerging technologies and market developments while fostering transparency, accountability, and engagement with smaller and mid-sized firms.

Below, we have set out our response to each area of the CMA's guidance.

Strategic Market Status

We welcome the CMA's broad approach to defining a digital activity, which is in line with the DMCC Act and avoids limiting where the Digital Markets Unit (DMU) will be able to take corrective action. In particular, by not defining digital activities too narrowly or being overly prescriptive, it will be harder for future SMS firms to avoid their regulatory obligations by simply shifting their conduct to an adjacent activity. We also believe that this approach is more suitable than the EU's Digital Markets Act, which defines ten core practices, and in doing so may not have the flexibility to react to emerging products and services (unlike the CMA's proposed approach).

We also welcome the proposed flexibility to, in certain circumstances, group activities into one overall digital activity. Among other things, this may allow the CMA to deal with more issues more quickly, for the benefit of UK consumers and businesses, as well as helping it to meet its duty of expedition.

We are also very supportive of the proposed approach to the SMS test. In particular, we welcome:

- The CMA will not need to formally define the market. This is in line with the CMA's approach under many of its other tools, including market studies. Market definition exercises are also very time-consuming and would seriously undermine the CMA's ability to conduct an SMS investigation within the statutory nine-month period.
- The ability for the CMA to draw on the same set of evidence when assessing "substantial" and "entrenched" market power, as well as the option for the CMA to rely on relevant evidence gathered and analysis carried out in other cases, where relevant. (2.65). This will allow the CMA to carry out SMS investigations rigorously but also speedily, in line with the nine-month statutory deadline.
- The lack of a prescriptive list of evidence (2.63) grants the CMA the necessary flexibility to use a range of the most suitable quantitative and qualitative evidence for a given case.

We support the CMA's commitment to transparency and broad consultation throughout the digital market's competition regime. This ensures accountability and allows for input from challenger firms and industry stakeholders.

Finally, we would encourage the CMA to ensure that its regime - while focusing on designating companies in relation to specific verticals - is holistic enough to be able to judge the impact having SMS may have on other verticals. The very biggest companies could not only have SMS in multiple verticals

but have the potential to deploy these to rapidly move into and disrupt new verticals, often with the ability to leverage size in one vertical to gain market share in new verticals very rapidly.

Given the ability to remove an SMS designation during the five-year period, we would encourage the CMA to take an agile approach to how it applies SMS designations. In particular, the CMA should ensure that it has the tools and resources to react to the fast-moving tech landscape, particularly in nascent digital activities which have substantial potential for rapid growth or where established businesses are rapidly acquiring a share of a new market which could be considered strategic.

Conduct Requirements

We welcome the CMA's flexible approach to conduct requirements (CRs), allowing for both high-level and more detailed and directive CRs to address specific competitive harms effectively (3.25). The proposed flexibility for the CMA to impose much more detailed CRs, as well as publishing interpretive notes (3.53), should allow it to explicitly identify both what would be non-compliant but also what the CMA believes would be compliant. This provides helpful clarity both to SMS firms and to third-party stakeholders and would be a significant improvement over the DMA. Enabling the CMA to provide such clarity would make discussions between SMS firms, third parties and the CMA much more fruitful, particularly during any conduct investigations where non-compliance is suspected.

The DMU's intent to consult on CRs alongside other investigations (particularly SMS investigations) is appreciated, as it will enable CRs to be imposed swiftly after a finding of Strategic Market Status (SMS). This will mean that UK consumers and businesses reap the benefits of the regime more quickly.

It is crucial that the DMU has the authority and willingness to reject an SMS firm's implementation plan for CRs. We welcome that the CMA plans a range of different forms of engagement with third-party stakeholders, including workshops. Such workshops can be helpful ahead of an implementation deadline, but only when stakeholders have sufficient clarity on the CMA's thinking in relation to an SMS firm's implementation plan (or on what the CMA would consider to be compliant or non-compliant). Otherwise, discussions can become unfocused, especially where different stakeholders have different interests, and this would then make it easier for SMS firms to play different stakeholders off of each other and frustrate implementation. In short, multi-stakeholder engagement needs to be designed thoughtfully.

We strongly welcome the CMA's proposal to consult on both the compliance and effectiveness metrics that it will consider when monitoring the impact of a CR. Enabling all interested parties to provide views on the most suitable metrics to assess compliance with a particular CR (as well as to analyse their effectiveness in remedying competitive harm) will make it more likely that the CMA is focused on the right metrics post-implementation. Having one set of metrics, known to all parties, will also make it much easier for third parties to flag any potential concerns with the CMA early on, and would also make any subsequent conduct investigation into non-compliance much clearer. This is another important improvement on the DMA.

Additionally, guidance on the duration of CR investigations is necessary. We suggest aiming for a swift completion, such as within nine months, similar to the timelines for Pro-Competition Interventions (PCIs) and SMS investigations. Prompt investigations are essential to prevent SMS firms from exploiting lengthy processes to delay compliance.

Finally, the CMA may find that it decides to impose CRs on companies to address similar market failures to those identified by the European regulator, under the DMA. The CMA will be aware of concerns about how some companies have designed and implemented some remedies in that market. Where the CMA

finds it is tackling similar market failures as those that have been tackled in the EU, the CMA should use its power to impose directive CRs to specifically accept or reject specific compliance measures implemented by gatekeeper firms in the EU, to avoid the duplication of inadequate remedies in the UK market.

The CMA's ability to identify potential future market impacts of SMS firms' activity will be critical to establishing effective CRs and preventing further market distortion in parallel verticals. The CMA should, therefore, ensure that the DMU is sufficiently resourced, and has access to sufficient expertise, to determine where this may be the case.

Pro-Competition Interventions

While we welcome the CMA and DMU's enforcement powers, more clarity on the distinction between Pro-Competition Interventions (PCIs) and Conduct Requirements (CRs), and the criteria for deciding between them, would be welcome. We would not want this to jeopardise the CMA's flexibility to decide which intervention is most suitable on a case-by-case basis.

Investigatory Powers and Monitoring

Regarding monitoring compliance, we note that the onus is on SMS firms to ensure adherence to competition measures involving a designated person within the organisation. Additionally, there is a lack of clarity on how the CMA will use Requests for Information (RFIs). Even though the DMU has confirmed that they will discuss RFIs with firms in advance to ensure that the information requested is relevant and the process is efficient, there needs to be further clarity on how RFIs will be used.

Robust and transparent monitoring of compliance, effectiveness, and the imposition, variation, or revocation of competition requirements is essential, and we strongly welcome the CMA's proposals on this front. The DMU should establish clear metrics and regular reporting to ensure SMS firms are held accountable and that competition requirements are effective.

Enforcement, Penalties, and Administration

We support the CMA's approach to enforcement and penalties as outlined in the guidance. Effective enforcement mechanisms and appropriate penalties are crucial for deterring non-compliance, including by other SMS firms. The recognition in the guidance that any financial penalties may have to be suitably high to deter firms with vast financial resources is particularly welcome.

We believe that the guidance also makes it clear that merits-based appeals only apply to certain decisions on a financial penalty and not any regulatory decision. This is crucial to ensure the swift implementation of remedies.

Additionally, we believe that it may be helpful for the CMA to publish a risk register and a list of potential firms or sectors/activities for scrutiny. Such transparency would benefit smaller and mid-sized firms by providing insights into the DMU's focus areas. The CMA should also provide regular updates on the status of investigations and enforcement actions. This would ensure transparency and keep third-party stakeholders informed.

Conclusion

In conclusion, we commend the CMA for its proactive stance in developing a robust digital market's competition regime. Critically, the proposed guidance maintains the correct level of flexibility to allow the CMA to intervene quickly and react to developments in established or new markets.

Ensuring transparency, accountability, and engagement with smaller and mid-sized firms will be key to achieving the regime's objectives. We believe that the CMA's draft guidance, and our recommendations, will contribute to a fairer and more competitive digital market, benefiting consumers and fostering innovation. We are committed to ongoing collaboration with the CMA and DMU to refine these guidelines and ensure their swift and effective implementation. Thank you for considering our feedback. We look forward to continued dialogue and cooperation as the regime evolves.