

Digital Markets, Competition and Consumers Act: CMA consultation on guidance

Response from DMG Media

1. DMG Media is the publisher of the Daily Mail, Mail on Sunday, Metro and i newspapers; MailOnline, metro.co.uk and inews.co.uk websites; and New Scientist magazine. We have a keen interest in the CMA's work in the digital sector and in the success of the new Digital Markets, Competition and Consumers (DMCC) Act. We are therefore pleased to offer our comments on the CMA's current consultation on its proposed guidance document, which was published on 24 May 2024.
2. In our view, the draft guidance document is an excellent piece of work. It describes in clear language how the various processes under the DMCC Act will operate in practice. We believe it will give the CMA and all interested parties a good framework for the new regime.

SMS designations

3. We welcome the CMA's approach to strategic market status (SMS) designations. For example:
 - a. We agree that the CMA should group activities together into a single designation (paragraphs 2.13-2.15). This would avoid leaving gaps between activities. It would also enable the CMA to include Artificial Intelligence tools within a designation for Google Search, which would be especially important where these tools are incorporated into an existing product that has market power.
 - b. We agree that formal market definitions would not be an efficient or helpful process (paragraph 2.43). We believe it would merely give the SMS firms additional grounds of appeal, without any benefit to the CMA's insight into the relevant firms' market power.
 - c. We agree that the existing caselaw on dominance would not be helpful (paragraph 2.45), not least because this caselaw led to a system that operated so slowly and inconclusively that the DMCC regime was needed in the first place.
 - d. We agree that the CMA must not allow the five-year time horizon for its assessments to make designation decisions overly difficult (paragraphs 2.46-2.52). As the CMA frequently says, uncertainty as to future developments should not bias its assessments towards inaction. The regime caters for uncertainty by allowing the CMA to retract designation decisions and remove

conduct requirements wherever necessary within any five-year designation period. In the absence of evidence that proves an SMS firm's market power will wane within five years, the CMA should go ahead with the designation.

- e. We agree that one of the key indicators of strategic significance is the SMS firm's role in standard-setting (paragraph 2.62(a)). We would also add an extra sub-paragraph to address the SMS firm's practices in dictating other firms' terms of business, and/or the SMS firm's practices in blocking other firms' ability to reach their customers (e.g. through the app review process, or by downgrading them in search results, or by demonetising their content). We have experienced numerous instances of arbitrary action of this nature by SMS firms.
 - f. We agree that the CMA should rely on the analysis undertaken in its two market studies (and indeed other work it has done) (paragraph 2.65). We do not believe the market power of the SMS firms has changed materially since those reports were prepared, and we hope that the CMA will be robust enough to withstand arguments to the contrary from SMS firms with an incentive to delay matters.
4. Paragraph 2.68 discusses the bases for launching a designation investigation. We would suggest that a submission from a market participant could be added to this list. Where a substantive submission has been received, that party should always be allowed the opportunity to make oral representations (paragraph 2.83).

Consumer benefits

5. We would welcome an explicit statement in paragraphs 3.10 and 3.23 that quality news journalism is a consumer benefit that will be taken into account when the CMA designs its conduct requirements. The CMA may recall that, at an earlier stage of the legislative process, the Government considered including an explicit duty on the CMA to protect the interests of "citizens". We had understood that this proposal was dropped because it was thought that the interests of "consumers" was already wide enough to include democratic and societal benefits. That is clearly correct as consumers benefit from reliable news from a spectrum of providers. The current drafting of the guidance is too narrowly focused on economic benefits rather than societal benefits.

Leveraging principle

6. We believe the leveraging principle will be an important part of the DMCC regime (paragraphs 3.13-3.15). We encourage the CMA to take a flexible approach to its interpretation. In our view, SMS firms' activities in markets that are adjacent to their main SMS activities will often reinforce their market power in the SMS activities, so the CMA should not find the leveraging principle difficult to employ. We would welcome an explicit statement that building a moat around an SMS activity will always be deemed to have strengthened the market power of the SMS activity.

Pro-competitive interventions

7. We agree that the CMA's sources of information should be broad and should include market participants (paragraph 4.43).

Investigatory powers

8. One issue that will inevitably cause the CMA difficulties is the international nature of the tech sector. We therefore welcome the drafting in the DMCC Act and the CMA's guidance that recognise that the CMA needs access to data held overseas. It is a shame that the power to interview individuals does not apply to persons outside the UK (paragraph 5.39, and section 72(6) of the Act), but we wonder whether the CMA could state that it may invite relevant overseas persons to give interviews voluntarily (instead of sending a more onerous data request, for example), and that the CMA may exercise the formal interview powers when relevant persons visit the UK.

Confidentiality

9. We welcome the CMA's acknowledgement in various places in the guidance document that market participants will be an important source of information. However, we encourage the CMA to revisit its wording on confidentiality (paragraphs 5.85-5.91, 6.15-6.19 and 7.26) so that it can explicitly state that the protection of third-party identities and data are a paramount concern. As the CMA knows, commercial retaliation is a significant factor in this industry, and it can easily be done unilaterally by the SMS firm in ways that are only detected after the event.

Countervailing benefits exemption

10. We welcome the CMA's confirmation that the countervailing benefits exemption is a narrow provision that is "akin to" the test in section 9 of the Competition Act (paragraphs 7.57-7.73). This was clearly Parliament's intention, and it is important that this exemption does not become a significant way in which rule breaches can be justified. We are conscious that the CMA will have already considered security and privacy issues when writing the relevant conduct requirement in the first place, so this exemption should be reserved for truly exceptional situations.

Final offer mechanism (FOM)

11. We have always had concerns about the length of the process through which news providers would benefit from a fair and reasonable price for their content. The FOM was meant to be a backstop process that would encourage the relevant parties to reach a commercial deal earlier in the process. We therefore ask the CMA to bear this in mind when drafting conduct requirements by considering what help and data news providers will need at the earlier stages in order to avoid the FOM process. For

example, the CMA could ensure that the news providers are in a position to negotiate with the SMS firms on an equal footing from the start. The CMA could force the SMS firms to provide full data transparency to enable the news providers to calculate their value to the SMS firms (and the SMS firms' value in return, if any). When writing the conduct requirements, the CMA could also provide a level of detail when setting the methodology that all parties should follow, and thus anticipate some of the tactics that the SMS firms may try to use.

12. In a similar vein, we would welcome the strengthening of the wording in paragraph 7.138. If we reach the stage of needing to submit bids through the FOM process, the CMA should ensure that both sides are on an equal footing. We would therefore require all the relevant data that the SMS firm has. At present, the paragraph only seems to operate when "the information asymmetry is limiting the parties' ability to submit meaningful bids, or where necessary to ensure comparability of bids and supplementary evidence and analysis". We request the right to receive all the data that the SMS firm uses, or considered using, in its own calculation. We request that this must be at a granular level. We also request the right to receive a list of all relevant data that the SMS firm holds, and then the right to receive all data that is reasonably requested by the news provider.
13. We also welcome the careful use of language around the CMA's possible encouragement of collective bargaining in the FOM process (paragraph 7.133-7.135). The draft guidance speaks of the CMA inviting multiple third parties to make a single submission for payment terms. However, while collective bargaining may benefit some players in the industry, others may believe they would not benefit. Would the CMA confirm that it would not seek to impose collective bargaining on businesses if they oppose it?

Transparency

14. More generally, we would welcome additional explicit statements that all interested parties need equality of data, and equality of consultation, if the participative regime is going to succeed. The regime needs to help the industry to move away from the "black box" algorithms that make it so difficult for news providers to plan their businesses.

Conclusion

15. We very much welcome the DMCC regime and are most impressed with the careful thought which has clearly gone into drafting the CMA's guidance document.


DMG Media
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