

Draft Digital Markets Competition Regime Guidance Google's Response to the CMA's Public Consultation

Google welcomes the opportunity to comment on the draft guidance for the digital markets competition regime. The guidance provides a number of helpful clarifications as to how the CMA will administer the new regime.

Our goal has always been to build products that are helpful, innovative and secure. In doing that Google is committed to engaging with the CMA and industry constructively. We know that we have a responsibility to engage with stakeholders in the markets in which we operate.

Our comments reflect this goal: we look at how guidance could work in practice and how we might organise ourselves in concrete terms for the participative process. There are certain places where greater certainty in the guidance would facilitate compliance as well as the new regime's emphasis on open dialogue and fast resolutions.

We will approach compliance with the new regime with transparency and commitment. We do believe that consistent interpretation and enforcement of any new rules across all designated firms will be critical in ensuring a level playing field for UK businesses and consumers in the future.

Scope of SMS designations

Once a designation decision is made, SMS firms need to know which products fall within the scope of the designation and have to meet conduct requirements (**CRs**). Having a clear and shared understanding between the CMA and the SMS firm of which products are in and out of scope is essential to ensure effective compliance.

Designation decisions need to capture that shared understanding of what is designated at that point in time (with safeguards to future-proof the list), for example, with an exhaustive list of products in the designation decision subject to amendment by the CMA down the line. The reference in the guidance to a non-exhaustive list or brief activity description does not achieve this (para. 2.89(b)).

Stakeholder engagement

The guidance provides a useful outline of how participative resolutions can work. An important part of this is how the CMA intends to filter the complaints it receives. The reference to the CMA's prioritisation principles could be supplemented to reflect the regime's goal of fast resolutions.

For example, the guidance could add as a prioritisation factor for the CMA to take into account whether the complainant has engaged with the SMS firm in good faith to try to resolve matters (para. 6.17). That would encourage complainants to engage directly and give SMS firms and complainants a chance to correct factual misunderstandings or technical issues quickly.

When the CMA is considering opening an investigation, the CMA's deliberations and assessment against the prioritisation principles would be helped if the guidance said the CMA would provide a non-confidential version of the complaint to the SMS firm when possible (para. 6.18). Again, this would help SMS firms give initial feedback and product input to point out any factual errors, and enable the CMA to prioritise accordingly.

We think these changes would enable the CMA to focus its formal enforcement activity on well-substantiated, credible concerns that, for whatever reason, have proven incapable of earlier resolution.



Countervailing benefits exemption

Google welcomes the guidance providing additional clarity on the countervailing benefits exemption (CBE). We want to ensure we continue to offer products and services that are helpful, safe and compliant to people and businesses in the UK. It is foreseeable that new rules involve trade-offs that impact the people and businesses who use our products. There may be places where we are in a position to evidence consumer benefits others don't see and we think it's important for us to be able to do that. The CBE is a critical and welcome part of considering the trade-offs.

For example, where an SMS firm seeks to rely on the CBE, and the CMA already considered those benefits when drafting the CR, the CMA will expect "new evidence going beyond any previous submissions or representations" (para. 7.62). We understand from this that evidence derivative of evidence provided at the CR stage will be admissible at CBE stage: in particular, that the CMA has in mind that CBE defences should be substantiated and tailored to the allegations of breach. The guidance should be amended to make it clear that all relevant countervailing benefits are admissible under the CBE (para 7.62) to ensure that the CBE operates effectively.

Access to file

The guidance confirms that SMS firms will have access to the case file in enforcement proceedings under the DMCC Act. However, it sets out a potentially complex, multi-step process for seeking access to relevant documents that may not prove compatible with the short statutory timeframes for investigation. A simpler access to file process – where the starting point is SMS firm access to all non-confidential versions of documents submitted by third parties – would avoid these issues.

Private enforcement

The guidance is silent on the CMA's posture towards private standalone litigation under the DMCC Act. Given the potential for standalone claims to disrupt the new regime's swift, participative procedures, it would be useful if the guidance, or future editions of it, described how the CMA would typically approach such litigation.

Final Offer Mechanism (FOM)

The guidance should clarify that the FOM does not create a duty to deal with a specific counterparty (absent a CR that imposes such a duty); rather, it is about establishing the 'fair' price that should apply to in-scope deals (paras. 7.116 - 7.125). Duties to deal are well-understood as involving significant trade-offs and should be imposed narrowly only after a full assessment of the effects. The FOM is not designed to accommodate this assessment.

Relationship between CRs and PCIs

The guidance does not specify which "relevant circumstances" the CMA will take into account when deciding whether to remedy a concern via a CR or a more intrusive PCI (para. 3.12). Further guidance on this would provide SMS firms and business users with greater certainty about how the new regime will work. It will also ensure that the different purposes of PCIs and CRs are better understood.



Fines for senior managers

The CMA's Administrative Penalties: Statement of Policy on the CMA's approach (CMA4) guidance (which the CMA proposes to update) should clarify that penalties would only be imposed on senior managers in exceptional cases – for example, cases of bad faith.

Mergers - Information requirements

The SMS merger reporting notice requests certain information that SMS firms may not have when making minority investments (e.g., explanations of "any pipeline or planned future products/services of the Target" - see SMS merger reporting notice, question 7). The guidance should acknowledge that an SMS firm may not (and, in some cases should not) have access to this information and indicate that a notification will still be deemed sufficient where an SMS firm has acted in good faith to provide the information requested in the Notice (para 5.9).

Mergers - Outcomes from the reporting process

The guidance currently contemplates that an SMS firm may receive a response that the CMA "is continuing to assess whether to open an investigation" following the end of the Waiting Period (para. 5.13). This proposed response will result in a lack of clarity for SMS firms about whether they are able to proceed with their transaction, and risks leaving deals in limbo. The CMA should commit to giving SMS firms a steer on its intended next steps regarding their transaction at the end of the Waiting Period, rather than a potentially ambiguous response.

Mergers - Publicity

The guidance currently suggests that there may be circumstances in which the CMA would contact third parties in relation to transactions that are not in the public domain (para. 5.20). This risks harming the interests of the SMS firm and other party(s) to the transaction. It would be preferable for the guidance instead to make clear that the CMA will not disclose the existence of a non-public deal absent it opening an investigation in the normal way (consistent with the position taken in CMA56).

Google stands ready to engage constructively with the CMA on the new UK regime.