



Response to Consultation

Guidance on the new Digital markets
Competition Regime as set out in the Digital
Markets, Competition and Consumers Act
2024

July 2024

Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Competition Law sub-committee welcome the opportunity to consider and provide comments on the Competition and Market's Authority (**CMA**) consultation on the new Digital markets Competition Regime (**Regime**) guidance (**Guidance**). The Committee also commends the CMA for consulting on the Guidance as soon as the Digital Markets, Competition and Consumer Act 2024 (**Act**) received Royal Assent (**Consultation**).

General Remarks

We welcome the additional detail provided by the Guidance for stakeholders and their advisers. The Guidance is substantial and goes some way to laying out how the Regime will work in practice.

However, we consider that in certain discrete areas the Guidance could be enhanced. Section 114(1) of the Act provides that *"the CMA must publish guidance on how it will exercise its functions under [Part 1 of the Act]"*... To meet that obligation, we believe it is important that the CMA should go beyond summarising the provisions of the Act and describe how it will approach the exercise of those statutory functions. As the Guidance stands, we do not believe that duty has been discharged.

As requested in the Consultation, we have structured our submissions in line with each of the chapters of the Guidance. Our comments focus on the core substance of the Regime – the assessment of SMS status and the imposition of remedies.

Specific Remarks

Strategic market status including the CMA's proposed approach to (a) substantive SMS assessment and (b) SMS investigation procedure

We welcome the additional guidance beyond the terms of the Act which the Guidance provides as regards the constituent elements of the substantive SMS assessment. We also recognise that the Regime is a new regulatory framework and that it will take time for a body of decisional practice or judicial precedent to be built up; and that the CMA may, therefore, be reticent to commit to firm views on certain, more difficult or contentious, aspects of the substantive SMS assessment at this juncture.

Nonetheless, we think that some further guidance on certain aspects would be welcome in line with the CMA's statutory duty noted above, and could sensibly be given at this stage of the development of the Regime, particularly in light of Parliament's stated intention that *"only a handful of the most powerful global technology companies will be subject to (the new regime)....."*¹ Specifically, we consider that it would be beneficial for the guidance provided to be clearer or to provide greater legal certainty to stakeholders in respect of the following:

- **Digital activities:** we consider that the approach to identifying "digital activities" set out, in particular, at paragraphs 2.10 – 2.11 of the Guidance, whilst a helpful overarching statement of the CMA's approach, should be expanded to further explain how the CMA will, in practice, seek to assess the products that are *"offered and consumed"*. In particular, we would welcome more detailed guidance on the types of evidence that the CMA would seek to assess, and what types of fact patterns it would see as leading to particular conclusions when considering *"how the potential SMS firm structures itself and its business model, how businesses and consumers use and access its products and any interlinkages among them"*. Currently the Guidance is notably "high-level" in this regard. Additional content would be helpful to stakeholders and their advisers, and minimise the risk of disputes regarding the proper meaning of this aspect of the Guidance.
- **Substantial and entrenched market power:** we agree with the CMA that the Act has created a distinctive concept of *"significant and entrenched market power"* which is distinct from the standard "dominant position" concept developed under the Competition Act 1998 (**CA98**) (and EU competition law). In this context, we consider that it would be very helpful for the CMA to expand on paragraph 2.42 of the Guidance to provide more advice on how it will approach the concepts of *"substantiality"* and *"entrenchment"* (we note

¹ Government Press Release – Digital Markets, Competition and Consumers Act receives Royal Assent – [link here](#)

that some limited guidance on “*entrenchment*” is provided at paragraph 2.51). If stakeholders are unable to rely on case law and decisional practice as regards “*dominant position*” under the CA98, we are of the view that providing more detailed guidance on the novel aspects of the new “*substantial and entrenched market power*” should form a key part of this chapter of the Guidance.

We also note that the CMA downplays the role of formal market definition in assessing whether “*substantial and entrenched market power*” has been achieved by a particular firm (see, for example, paragraph 2.43). While we agree that an overly formalistic approach to market definition is not helpful, and that the purpose of market definition should be identifying the competitive constraints on a prospective SMS firm, we believe this cannot come at the expense of an appropriate degree of legal certainty. Stakeholders and their advisers must clearly understand what activities any CMA SMS finding relates to and what constraints the CMA considers the SMS firm faces. In this regard, we note by analogy the CAT’s finding in its judgment in ***Meta Platforms INC v Competition and Markets Authority [2022] CAT 26*** that in the context of the Enterprise Act 2002 merger control regime “*it is important to define the relevant market or markets. Unless such a market definition is carried out, it is difficult to assess whether there has been a substantial lessening of competition.*”²

- **Position of strategic significance:** we welcome the CMA setting out various specific factors which it will take into account when assessing this aspect of the substantive SMS assessment (see paragraphs 2.55 and 2.58 of the Guidance, in particular). We also generally accept the CMA’s view that it would not be feasible to set hard quantitative thresholds as regards size or scale to apply in assessing these aspects of the “*position of strategic significance*” test. In this context, again, more detailed guidance on the types of evidence that the CMA would seek to assess and what types of fact patterns it would see as leading to particular conclusions would be helpful to stakeholders and advisers seeking to navigate the Regime.

² *Meta Platforms INC v Competition and Markets Authority [2022] CAT 26* – paragraph 24 (Section B (2) (3)), pg17 of the Judgment of Sir Marcus Smith (President), Professor John Cubbin and Simon Holmes

Conduct requirements (CRs) including the CMA's proposed (a) analytical approach to imposing CRs and (b) procedure for imposing CRs; and

Pro-competition interventions (PCIs) 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.

We welcome the additional guidance provided on both CRs and PCIs. In particular, we welcome the CMA's articulation of the (essentially) same three step process that the CMA proposes to undertake before imposing a CR or PCI (in particular, see paragraphs 3.17 and 4.20 of the Guidance).

In particular, we note that the third step of this process will be carefully assessing the proportionality of the proposed CR or PCI. In the context of such significant remedial interventions being subject to appeal on judicial review grounds only, we consider it appropriate that the CMA seeks to build in a robust proportionality assessment as part of the CMA's administrative process.

We consider, however, that the Guidance would benefit from further clarity on when the CMA will seek to impose a CR as opposed to a PCI and vice versa. In this regard, we note that the Digital Taskforce Advice (CMA135, December 2020) included the following statement (at paragraph 11 of Appendix D):

*"The DMU will need to consider the most appropriate tool to address a concern. Where conduct is covered within scope of the code, then we would expect the DMU to first consider whether the code is an appropriate tool to address the concern. However, PCIs will need to be available to the DMU when the issue lies outside the scope of the code or where the code clearly is, or proves to be, insufficient and there are steps that could be taken to better promote competition and innovation. This stepped approach to regulation highlights how PCIs would play a vital complementary role to the code of conduct to address these competition concerns."*³


Understanding what type of remedies will be imposed and when is of central importance to stakeholders and their advisers seeking to navigate the Regime. Accordingly, including further advice in the same vein – or a confirmation that the CMA now sees the appropriate use of its CR and PCI making powers differently, and if so how – would be a very helpful addition to the Guidance.

We note that paragraph 3.29 of the Guidance is the only reference to attempting coherence with interventions taken in other jurisdictions. The regulatory interventions expected of the CMA are likely to be mirrored by other regimes concerned with digital markets and assessments which the CMA undertakes of, for example, forward looking assessments of markets, may duplicate, or be

³ Digital Markets Taskforce Advice – link to advice found here

duplicated by, the actions taken by other regulatory regimes. Digital markets may be expected to exhibit little differentiation on a geographic basis; they are likely to be very similar. It would be helpful for the CMA to address this context in a more appropriate amount of detail and how it proposes to interact with other relevant regimes which may impact on its activity or which may even obviate the need for additional CMA intervention.

For further information, please contact:


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