Online Travel UK consultation response: to Digital Markets Guidance

About Online Travel UK

Online Travel UK (OTUK) represents leading UK online travel services. Our members facilitate seamless travel experiences for consumers by providing comparison shopping services and access to the best deals on the market. We are committed to fostering competition and transparency to drive growth in the travel sector while prioritising consumer welfare.

Collectively, we offer valuable insights that help deliver better outcomes for consumers and advocate for policies that promote fair and open digital markets. Our group strongly welcomed the new digital markets regime when it passed into law and supports the work of the CMA to implement it. Indeed, we believe it is vital that the regime is implemented as quickly as possible. We also support the CMA's approach outlined in this draft guidance, commitment to robust enforcement, and engagement with stakeholders.

Therefore, we are pleased to provide feedback on the CMA's digital markets guidance and welcome the commitment to continued consultation on many aspects of the regime.

Support for proposed approach

Overall, we are strongly supportive of the approach to implementation outlined by the CMA in its draft guidance. It strikes the right balance between providing clarity and certainty to all stakeholders, including firms to be regulated, while also maintaining the required flexibility and agility needed to impose effective remedies in what are fast-moving and ever-evolving digital markets. The approach set out by the CMA in its draft guidance will enable it to learn from and improve upon the implementation of similar regimes in other markets, and to constantly hone and (if needed) revoke remedies to ensure they remain effective and relevant.

Given the tight statutory deadlines imposed by the legislation on certain investigations and remedies, and the fact that one of the overriding policy objectives of the new regime is to provide quicker (and therefore more effective) remedies in fast-moving digital markets, it is particularly welcome to see the various proposals for ensuring that the CMA can act at speed and with flexibility where needed.

These proposals include: the ability to group similar digital activities together; the ability to use previous evidence gathered by the CMA in other contexts (such as the use of its other tools like market studies) for SMS investigations/conduct investigations/PCI investigations; the lack of a requirement to define the market in SMS/CR/PCI investigations; the ability to carry out CR investigations and SMS investigations in parallel; the proposal to consult on and consider PCOs in parallel to the separate assessment of whether an AEC is present (and so a PCO is warranted); the clear expectation that commitments, or proposed PCI remedies, should be provided by SMS firms as early in an investigation as possible.

All these elements are vital to ensuring the regime can operate effectively within the statutory timelines imposed by the Act, and that the regime can deliver quick and effective benefits to UK consumers.

In short, we believe the draft guidance is fully in line with the spirit and the letter of Part 1 of the Digital Markets, Competition and Consumers Act (DMCCA), and we do not judge that any meaningful amendments are needed before the guidance is finalised. Although, we suggest some areas that could benefit from additional clarity below.

SMS: investigations and status

We support the Competition and Markets Authority's (CMA) autonomy and its commitment to transparency and public consultation throughout the digital markets regime. This ensures accountability and allows for input from challenger firms and stakeholders. We call on the CMA and Digital Markets Unit (DMU) to maintain latitude in its approach to this regime and its ability to act decisively and independently.

We believe the CMA's proposed approach to defining digital activities is correct. Flexibility given to the CMA to vary its approach to defining a digital activity on a case-by-case basis is suitable, as the regime will apply to a range of different activities, the contours of which often evolve rapidly. For this reason, we also strongly welcome the overall approach of not seeking to define digital activities too narrowly. While this might reduce clarity and certainty somewhat, the proposed approach will make it far harder for a potential SMS firm to simply shift activity at risk of being regulated into an adjacent area. By mitigating the risk of circumvention, the proposed approach to defining digital activities will make the regime more effective.

Grouping investigations by different digital activities when appropriate, such as search and app stores, would ensure comprehensive oversight. Furthermore, the DMU must be able to investigate multiple firms in a digital activity at the same time, to ensure appropriate regulation.

Concerning the SMS test itself, we agree the CMA should not need to undertake a formal market definition exercise. This approach is in line with many of the CMA's tools, such as market studies, where it does not have to formally define the market. It also ensures the CMA can complete robust but swift SMS investigations within the relatively tight statutory deadline. Finally, it protects against the risk that remedies are not implemented if activity is moved outside of a market defined by arbitrary bright lines.

Conduct Requirements: process and implementation

We support the CMA's approach to conduct requirements (CRs), allowing for either high-level or detailed CRs. This approach ensures CRs can be tailored to address specific competitive harms. The ability of the CMA to impose prescriptive CRs (either from the start or over time, for example where there are persistent compliance or effectiveness issues), and to outline what it thinks would be compliant (or not) in interpretive notes, is extremely welcome. This means CRs will remain effective as markets develop and reduces the scope for circumvention. It will also allow the CMA to learn from any solutions being introduced by SMS firms under similar regimes in different markets, and to apply those learnings quickly in the UK. We also appreciate that the DMU will be able to consult on CRs during an SMS investigation, allowing for immediate application afterwards.

We support the different approaches to consultation on CRs including measurements for compliance and effectiveness. This will help market participants know how the CMA will approach implementation and enforcement. The numerous ways in which stakeholders will be able to engage in the design of CRs is also very welcome, especially at the very start of the investigation. This will allow stakeholders to play a role in the design of any proposed draft CRs. The possibility to engage in more flexible and participative ways, beyond providing written submissions, is also welcome given that some stakeholders may not have the resources to provide lots of written submissions.

It is important, however, in any participative engagement process involving multiple stakeholders, such as a workshop on a proposed compliance solution, for the CMA to be clear about its views on any solution proposed. This will avoid the risk of different stakeholders providing contradictory feedback. Providing clarity in this way will help ensure SMS firms engage meaningfully with input from stakeholders and avoid reaching the implementation deadline with non-compliant solutions from those firms.

As such, we would welcome some additional clarity in the guidance as to how the "implementation period" for CRs will be run. From our experience of the implementation of the EU's Digital Markets Act, much of the substantive discussion and feedback from other relevant companies happens once the SMS firm has put forward a proposal for how it will comply with a CR. This is an area we would particularly like the CMA to help arbitrate on until a suitable compliance solution is found.

Pro-Competition Interventions: process and implementation

The variety of pro-competition powers available in the new digital markets regime is something Online Travel UK supported throughout the legislative process. However, some further detail on how the DMU will decide whether a CR or PCI is needed would be welcome. It is not immediately clear under what circumstances the CMA may decide to impose a PCI to implement a general restriction on conduct (as at 4.24) as opposed to a Conduct Requirement. However, we strongly support the CMA having sufficient flexibility to decide which instrument is more suitable, depending on the circumstances. As with Conduct Requirements, we agree that the CMA does not need to formally define the market to be able to impose a PCI. This will help ensure that PCI investigations can be conducted within their nine-month statutory deadline.

The fact that both behavioural and structural remedies, or a combination of both, are available, is crucial to enabling the CMA to be able to tackle the root causes of market power and to provide more transformative solutions for UK consumers and businesses.

Finally, the ability of the CMA to include provisions within a Pro Competition Order (PCO) imposing requirements for an SMS firm to test and trial different remedies is vital to ensuring effective remedies.

Monitoring the regime

Monitoring needs to be strong – whether on compliance or efficacy of competition requirements themselves. As the guidance makes clear, the DMU's approach will provide clarity for all stakeholders on the metrics used to assess both compliance and effectiveness (the presumption should be that these metrics will always be consulted on.) We support this. Compliance or efficacy issues should be more easily and quickly identified where all stakeholders understand the metrics being assessed.

SMS firms are required to appoint a designated person to oversee compliance. However, we would appreciate further clarification about how the Requests for Information will be used: these are important for stakeholder input into the process and the guidance states that the CMA will give advance notice where appropriate.

We believe that the draft guidance is clear on the range of information-gathering powers available to the CMA, who these apply to, and how they might be used. Similarly, the CMA's approach to monitoring is welcome. While understanding the desire for a participative approach to compliance issues where possible and appropriate, the CMA must be ready to intervene and enforce at pace and in a meaningful fashion. At 6.58, for example, we believe the guidance could be strengthened to make clear that the CMA <u>will</u> intervene in cases where an SMS firm has not engaged directly with other stakeholders to resolve compliance complaints, or such engagement has been ineffective. This will prevent delays to enforcement.

Enforcement guidance

We welcome the draft guidance for enforcement and penalties. Given the scale of SMS firms that are likely to be in scope, we note the draft guidance indicates clearly that significant financial penalties, when warranted, are likely to be needed to provide a deterrent. It is also welcome that the draft guidance affirms that financial penalties can be imposed (and their level determined) concerning the need to deter other SMS firms from breaching their competition obligations.

The draft guidance is suitably clear about the fact that the bar for an SMS firm to invoke the countervailing benefits exemption during a conduct investigation is set very high, requiring all the relevant criteria to be met.

We also suggest the CMA publishes a register of risks, firms, or markets it will consider in future. This would be similar in purpose to Ofcom's list of services that are close to the Category 1 status threshold for the Online Safety Act regime and helpful to all stakeholders. Knowing which areas are under scrutiny and for what reasons would help the market understand the regulatory landscape and adjust practices accordingly. Any such list would not preclude the CMA from acting outside of the identified risks, firms or markets when warranted.