

Digital markets competition guidance – Skyscanner’s response

Introduction

- Skyscanner welcomes the opportunity to provide our views on the CMA’s draft digital markets competition guidance.
- We believe that the guidance is clear, and accurately reflects both the Digital Markets, Competition and Consumers Act (DMCCA) and the policy intent behind the legislation.
- The guidance strikes the right balance between clarity regarding the CMA’s approach for all stakeholders, including SMS firms, and flexibility, to allow the CMA to act as effectively and quickly as possible in fast-moving digital markets.
- We also recognise that the CMA may depart from this guidance where an appropriate and reasonable justification exists (1.7), and we fully support the CMA’s ability to do so. The CMA’s ability to exercise its regulatory expertise flexibly is essential to ensuring it can deal with issues in the most effective way possible.
- As currently drafted, the guidance offers the best chance in years for UK consumers and businesses to reap the benefits of digital markets, including more choice.
- The CMA’s proposed approach also contains numerous improvements on similar regimes being implemented elsewhere, which we will cover in more detail in our response below.
- In short, Skyscanner does not believe that this draft guidance needs any significant changes before it is finalised. We hope that the guidance can be finalised and approved as soon as possible.
- In our response, we only comment on the aspects of the guidance that are of most interest to us.

Strategic Market Status (SMS)

Digital activities

- Skyscanner firmly agrees with the CMA that it does not need to define a market when assessing SMS (2.10). Such exercises, which involve tightly defining the limits of the market, and deciding which products are in or out, is ill-suited to the reality of digital markets. Given how fast-moving they are, a market definition could quickly become out of date. Not having to define a market (or digital activity) too strictly also protects against the risk that an SMS firm simply shifts conduct into an adjacent digital activity and avoids its regulatory responsibilities.
- Having to perform a formal market definition would also be very time-consuming, and would make it much harder for the CMA to complete an SMS investigation within the statutory nine months. Given that speed is one of the most important features of the new regime, this approach is in line with both the DMCCA and also the CMA’s approach in some of its other tools.
- Treating two or more of a potential SMS firm’s digital activities as a single digital activity (provided that they either have substantially the same or similar purposes or they can be carried out in combination to fulfil a specific purpose) (2.13) will allow the CMA to deal with more issues more quickly, where appropriate.

Strategic market status conditions

- The CMA's proposed approach to assessing market power (that it is primarily an assessment of the available alternatives and the extent to which they are substitutable) (2.40) is correct, and in line with how we believe consumers experience market power.
- It is also very welcome to see the CMA acknowledge that market power is not just about the ability to raise prices, but that it can also relate to worsening quality, service, business models and innovation. Given that many online services are offered to consumers for free, this broader understanding of market power is essential to enable the CMA to address competition issues in the digital economy.
- We agree that the assessment of 'substantial' and 'entrenched' market power is not entirely separate (2.42), since they will often draw on the same set of evidence on market power. Allowing the CMA to draw on the same set of evidence where appropriate will ensure that the SMS investigation is completed in a timely manner, and within the statutory deadline.
- As we have noted previously, we agree that assessing substantial and entrenched market power does not require the CMA to undertake a formal market definition exercise, given how fast moving and fluid digital markets are (2.43).
- That the CMA will not typically seek to draw on case law relating to the assessment of dominance when undertaking an SMS assessment is the correct approach, given that this is a novel legal regime (2.45). The guidance is also very clear on the circumstances in which the CMA may have regard to the underlying evidence and analysis from the CMA's investigations under the CA98 (or other tools) where relevant to the extent and persistence of the potential SMS firm's market power, but not any specific finding of 'dominance'. Enabling the CMA to make use of previously gathered evidence and analysis (where relevant, appropriate and up to date) will make it easier for the CMA to complete an SMS investigation within the statutory nine month deadline.
- It is absolutely correct that the starting point for an assessment of substantial and entrenched market power will be market conditions and market power at the time of the SMS investigation (2.47). Similarly, it is right that the CMA can consider what the sources of the firm's market power have been, and the extent to which the firm's market power has persisted in the past, including whether such power has persisted through earlier market developments (2.51). This will ensure that the assessment is based on solid evidence, and will allow the CMA to make a more informed assessment of the likely impact of any future market developments.
- The acknowledgement in the guidance that "there will necessarily be some uncertainty" as to the evolution of a sector, but that such uncertainty does not preclude the CMA making a finding of substantial and entrenched market power, is welcome (2.48). That is, after all, the nature of ex-ante assessments. The guidance also makes clear that the assessments will be based on the evidence available to the CMA at the time, and that the CMA will not seek to make precise predictions about the development of a market (2.50). This is the right approach, and will ensure that SMS decisions are rigorous.

The CMA's approach to assessing the SMS conditions

- We welcome the fact that there will be no set hierarchy between quantitative and qualitative evidence (2.64), given that different kinds of evidence will be more relevant to particular digital activities or business models.
- As noted previously, we strongly support the ability of the CMA to rely on relevant evidence and analysis from other cases, where relevant. This will be key in enabling the CMA to meet its statutory deadline of nine months for an SMS investigation.
- Given some of the uncertainties inherent in an ex-ante assessment, as the guidance recognises, an assessment on the balance of probabilities and an in-the-round assessment of evidence is appropriate (2.67).

Procedure of an SMS investigation

- The fact that the description of the digital activity will be relatively brief is welcome (2.74), as is the fact that any list of the products in scope will be non-exhaustive. This will make it much harder for likely SMS firms to move conduct out of the activity being investigated.
- While allowing the CMA to change its view on the purpose or scope of an SMS investigation (including its view on the products in scope) is sensible, any change should be communicated to all stakeholders in a timely manner.
- Publishing an SMS investigation notice on the CMA's website "as soon as reasonably practicable" (2.78) is welcome, although the CMA should strive to make sure there is no meaningful gap between sharing a notice with the SMS firm and publishing it on its site, as this would undermine the ability of interested third-party stakeholders to engage meaningfully with the CMA during the crucial early part of an investigation. This comment also relates to the other parts of the regime where the CMA must publish a notice on its website.
- The ability for third-party stakeholders to provide views and evidence is a key strength of the CMA's proposals. We think it is particularly welcome that stakeholders will be able to provide input at the start of an SMS investigation (2.82), allowing the evidence they submit to help shape the proposed decision, which will also be consulted on. Only providing an opportunity to comment on a proposed decision would severely limit the ability of third-parties to influence the CMA's thinking.
- In order to save time, and also to make it possible for any conduct requirements to be imposed immediately after the end of an SMS investigation, we welcome the ability for the CMA to hold a consultation on a proposed decision in an SMS investigation at the same time as a consultation on the imposition of a conduct requirement (2.84).
- One of the key ways in which the CMA will be able to respond to market developments, and to ensure that SMS designations remain up to date, is its power to bring a further SMS investigation at any time during the designation period (2.108). One motive could be that there have been developments which indicate that changes to the definition of the relevant activity need to be made (2.110). This will be really important in allowing the regime to respond to significant changes in digital markets, such as the integration of generative AI into online search.
- While it is also right that SMS firms are able to submit evidence to the CMA at any time and provide evidence if they believe their designation is no longer appropriate, this ability cannot be used to constantly inundate the CMA with requests for an end to an SMS firm's designation. That is why the fact that the CMA will not consider evidence submitted by a firm within twelve months of declining a previous request is so important (2.112).

Conduct requirements (CR)

- The imposition of a conduct requirement on an SMS firm is one of the most important tools in the new digital markets regime. It is appropriate that the CMA consider the benefits to consumers from imposing a CR, but the benefits to consumers are often indirect. For example, a ban on self-preferencing which enables competing firms to be discovered by consumers on the same terms (and makes it easier for new firms to emerge) will, over time, lead to more choice, lower prices and more competition and thus innovation. All of this is of indirect benefit to consumers. We welcome the fact that the indirect benefits to consumers from a proposed CR will be considered (3.10).
- It is vital that the CMA can impose CRs on non-designated activities. This is due not only to the interlinkages between many different digital activities (particularly for the products of firms that control a whole ecosystem of products), but also to make it hard for an SMS firm to circumvent a CR by acting in a way that boosts its position in the designated activity. It is also particularly welcome that the guidance recognises that a CR for the purposes of preventing self-preferencing within a relevant digital activity will potentially impact activities outside of the relevant digital activity. (3.15).

- The approach to imposing CRs set out by the guidance is particularly welcome.
- The ability of the CMA to impose outcome-based CRs, action-focussed CRs, higher-level CRs, or more directive CRs, will ensure that the CR is as effective as possible. This is because, as the guidance notes, certain competition harms or digital activities will lend themselves more to a certain type of CR. This approach also represents a significant advantage over that in the EU's Digital Markets Act (DMA), which contains only a list of high-level do's and don'ts.
- The guidance at 3.26 gives the impression that the CMA will generally first opt for higher-level CRs, and only move to more directive ones where a firm has failed to comply with higher-level requirements or when persistent issues have been identified, due to the higher risk of unintended consequences and their potential to have a greater impact on innovation. We are somewhat concerned by this framing. In some cases, moving straight to a directive CR will be appropriate, including where the same SMS firm has sought to implement a non-compliant solution for the same digital activity in another market. Anything else simply risks further delaying relief for UK consumers and businesses.
- The guidance is, in our view, very clear on how the CMA will consider the proportionality of a CR. It is right that the CMA will not seek to quantify the effects (both positive and negative) of a CR on those most likely to be affected by it, given that this will not always be able to be done. It is still possible, however, to make a robust assessment in the round (3.32).
- The ability for the CMA to impose additional CRs, and/or vary or revoke them, during the designation period, is vital to enable the CMA to keep CRs up-to-date and ensure the regime's ongoing effectiveness (3.36).
- We welcome the opportunity for the CMA to carry out a consultation on more than one proposed CR at the same time – this will speed up the process and see consumers and businesses experience the benefits of the regime more quickly.
- We very much welcome the potential for the CMA to consult on the appropriate length of any implementation period, because this recognises that some interventions will be much easier for SMS firms to implement (and for other stakeholders to adjust to) than others (3.46). It is also a real strength of the proposed regime that the CMA may consult on what information firms should be required to provide in compliance reports. Allowing stakeholders to provide input on the information that will help them most in assessing an SMS firm's compliance will make the compliance reports much more useful.
- The option of holding bilateral meetings, workshops or roundtables to gather views on proposed CRs, in addition to written consultations, is welcome (3.47). Allowing firms to input in multiple ways should go some way to addressing the resource disadvantage that smaller stakeholders will have in providing numerous written submissions. However, the way in which workshops or roundtables are held is vital to their utility. If the CMA is to chair these, then it must play a leading role – that is, it must be clear with all stakeholders on whether it believes any implementation proposals put forward by an SMS firm are compliant or not. Only when all participants are clear about the guardrails within which a discussion is taking place will such meetings be useful.
- Interpretive notes could play a really important role in ensuring swift implementation and compliance of CRs. It is a significant advantage of this regime over the DMA that the CMA can include illustrative examples of not only what it believes would be non-compliant, but also what it believes would be compliant (3.54). Having such clarity up front from the regulator will make it much easier for third-parties to engage both with SMS firms and the CMA, and also make it harder for an SMS firm to implement a clearly non-compliant solution.

Pro-competition interventions (PCIs)

- PCIs offer the chance for the CMA to address the root causes of market power, and to more fundamentally open up competition. Given that the DMCCA gives the CMA broad scope to intervene in a wide variety of different digital activities, all with different characteristics and factors impacting the overall competitive process, it is right that the guidance acknowledges the CMA's broad flexibility (4.5).
- As elsewhere, we strongly support the fact that the CMA will not have to define a relevant market, focussing instead on the impact of the factors on the overall competitive process (4.9). This will help the CMA complete a PCI investigation within the nine-month statutory deadline while still providing a robust assessment.
- While we believe the guidance is clear on how the CMA will approach PCIs, it is somewhat unclear when the CMA may choose to impose a CR and when it may choose to impose a PCI focussed on general restrictions on conduct (4.24). It would be helpful if the guidance provided some further insight on how the CMA may approach such a decision (while still retaining the CMA's vital flexibility to act in the most effective way).
- The guidance is very clear that the CMA hopes for a participative approach to the imposition of a PCI. The guidance is right to make clear, however, that a lack of sufficiently early engagement on remedies may prevent it from making a proper assessment of whether the proposed PCI would be effective (4.52). Given the statutory deadline of nine months, the CMA will need to consider potential PCIs from the start of the investigation in order to give them sufficient assessment (4.51).
- The ability for third-parties to comment at the start of a PCI investigation, as well as on any proposed PCIs, is very welcome, as it gives more scope for third-parties to meaningfully shape PCIs that could affect them (4.54).
- We strongly welcome the guidance's recognition that, in order for the CMA to accept a commitment in lieu of making a Pro-Competition Order (PCO), it is likely to need a more extensive remedy than might be needed if the CMA were to impose a PCO at the end of a PCI investigation (4.86). This is because the CAM cannot unilaterally vary a commitment once accepted. It will also prevent SMS firms from attempting to evade more meaningful PCOs by offering limited and less effective commitments, and wasting the CMA's time.

Monitoring

- While we generally support the CMA's desire to seek a participative resolution of any compliance concerns where appropriate (6.59), including by the SMS firm engaging directly with its users and other stakeholders (6.58), the CMA should not seek to give too much credit to a firm that has "engaged in good faith" with users and stakeholders. Engagement can be used to delay enforcement or avoid scrutiny, and has been used well by some gatekeepers under the DMA. The CMA must be clear that engagement cannot be allowed to drag on too long before it gets involved.
- The ability for the CMA to consult on the metrics that it may consider in its review of effectiveness is very welcome. This will allow stakeholders to provide their views on what metrics are most suitable, given that they may be indirectly affected by the competition requirement. Having such clarity on the metrics and evidence used will make it far easier for the CMA and other stakeholders to monitor effectiveness and spot problems earlier. This will enable the CMA to respond more quickly (6.67). We would encourage the CMA to consult in all cases.
- Similarly, the CMA should consult on the metrics that it will use to assess compliance with a competition requirement, and it should be as transparent about the metrics it decides on as possible. Enabling third parties to provide input on the compliance metrics to be used raises the likelihood that the CMA is focused on the correct ones. Similarly, when all stakeholders are clear on what the compliance metrics are, it will make monitoring compliance much easier, and enforcing against non-

compliance swifter too. The lack of clarity from the start over what metrics regulators are considering in non-compliance investigations under the DMA has made it harder for third parties to assess the SMS firms' compliance or provide meaningful input into the non-compliance investigations.

Enforcement of competition requirements

- It is important that the CMA consult with stakeholders at the outset of a conduct investigation, in line with its practice elsewhere in the regime (and not just “where appropriate to do so”, as noted at 7.18). This will enable stakeholders to provide important evidence. We believe that the guidance could make clearer that third parties will be included in an investigation normally, rather than only maybe including them (7.27). Relevant market participants will have important data that they can share to help the CMA assess an SMS firm's compliance.
- The timeline for conduct investigations (of six months) is very welcome (7.35). This will ensure the speedy resolution of cases, to the benefit of UK consumers.
- The ability to impose an interim enforcement order (IEO) is a vital tool to ensure that any non-compliant conduct cannot significantly undermine the efficacy of any eventual EO, or cause harm to third parties. This power is especially important in digital markets, because of how quickly they move.
- We believe that the guidance is suitably clear that the threshold for invoking the countervailing benefits exemption is very high. We particularly welcome that the guidance:
 - Notes that the SMS firm must provide clear and compelling evidence (7.60) that goes beyond evidence previously submitted;
 - States that the third condition imposes a standard that is “akin” to the indispensability test of the CA98 (7.68). This is very much in line with repeated assurances given by Ministers that the final wording of the exemption imposes the same threshold as the indispensability test;
 - Recognises that effective dynamic competition is key to delivering better outcomes for users in the long term (7.73).

Penalties for failure to comply with competition requirements

- That the CMA highlights that a decision to impose a penalty is separate from a decision as to whether there has been a breach at the very start of this section is very welcome (8.3). It makes it extremely clear, from the start, that the process for any subsequent appeals is also separate. This is made clear at 8.43, by referencing the relevant section of the EA02. The appeals process for a penalty decision and that for other decisions is completely separate, and we ask that the CMA ensure this is as clear as possible in the final guidance.
- We also appreciate that the guidance is clear on the circumstances in which the CMA is more likely to impose a penalty, and we believe that these circumstances are all fair/reasonable (8.11). We particularly welcome that the CMA may take a decision to impose a penalty in order to deter an SMS firm or others from further breaches.
- Given the need for speedy enforcement, it is particularly welcome to see the guidance state that the CMA will have regard to the need to incentivise swift compliance (8.13), and that it will run a penalty case and an investigation into a breach of competition requirements together, and to issue a provisional penalty notice at the same time as provisional findings of the breach (8.45).

Conclusion

- Our submission has only focussed on the parts of the guidance that are of most interest to us. However, as a whole, we believe that the guidance is incredibly well considered, reflects the powers given to the CMA by the DMCCA, and is in line with the policy intent behind the law.



- It is vital that the numerous opportunities for third party engagement are maintained (and enhanced in a couple of areas) in the final guidance, and that the CMA's flexibility to act is maintained, given how quickly digital markets change.
- As currently drafted, this guidance will provide the CMA with a real opportunity to make a success of the new digital markets regime, and could provide a blueprint for other jurisdictions considering similar regimes.
- The CMA does not, in our view, need to make any significant changes to the guidance, and we look forward to seeing the final version published in due course.