

# The Digital Markets, Competition and Consumers Act

## Digital markets regime

The long-awaited Digital Markets, Competition and Consumers (DMCC) Act received Royal Assent on 24 May. It is the most significant overhaul in years of the UK's competition and consumer law regimes.

In this guide, we cover the key takeaways from the new **digital markets regime**, and what actions businesses should take before many of the key provisions come into force in late 2024.

## New digital markets regime under the DMCC Act?

The Act allows the Competition and Markets Authority (CMA) to impose unique obligations on firms deemed to hold Strategic Market Status (SMS), similar to the obligations on the core platform services of gatekeepers under the EU Digital Markets Act.

## Scope of the regime

The Act empowers the CMA (through the Digital Markets Unit) to designate firms as having SMS in a digital activity. A firm will have SMS:

- where it carries out a **digital activity** – i.e. the provision of a service by means of the internet or the provision of digital content (such as internet search, app distribution or an online marketplace);
- with a **link to the UK** (e.g. the activity has a significant number of UK users);
- the firm meets a **minimum turnover threshold** – i.e. in a defined 12-month period, the firm's UK turnover exceeds £1bn, or global turnover exceeds £25bn; and
- in respect of that digital activity, the firm holds **substantial and entrenched market power** and a **position of strategic significance** – this

requires an evidence-based assessment of the firm's market power and of wider market conditions (e.g. does the firm have significant numbers of users and transactions, and is the digital activity important for third party businesses?).

The CMA can launch an SMS investigation where it has reasonable grounds to consider that a firm may meet the SMS conditions. It has nine months to complete an investigation and SMS designation lasts for five years.

## SMS firms' obligations

SMS firms will face three categories of requirements under the Act:

- 1) **Conduct requirements.** The CMA may impose one or more conduct requirements on a designated firm for the purpose of ensuring "fair dealing", "open choices" or "trust and transparency".

The Act prescribes permitted types of conduct requirements, including requiring an SMS firm to trade on fair and reasonable terms, have effective processes for handling complaints and provide clear, relevant, accurate and accessible information about the relevant digital activity to users.

There is a "countervailing benefits exemption" available to firms that are considered to be in breach of conduct requirements. This is similar

to the exemption from competition law breaches under section 9 of the Competition Act 1998. The firm must show that its conduct gives rise to benefits for users of the digital activity, that these outweigh the harm to competition arising from the conduct, that the conduct is proportionate to realising those benefits and that competition is not prevented or eliminated.

2) **Pro-competition interventions (PCIs).** The CMA can make PCIs to remedy adverse effects on competition as a result of the firm's digital activities, which may take the form of structural or behavioural remedies and/or non-binding recommendations.

3) **Mandatory reporting of certain mergers.** The Act requires the mandatory reporting by undertakings with SMS in relation to two possible merger situations. A report will be necessary where:

- the SMS undertaking (i) crosses the 15%, 25% or 50% thresholds with regard to the percentage of shares in another UK corporate body; and (ii) provides consideration of £25 million or above; or
- the SMS undertaking forms a UK joint venture where (i) the SMS undertaking holds at least 15% of the shares in this venture; and (ii) the total value of capital and asset contributions and/or other consideration from the SMS undertaking to the UK joint venture amounts to at least £25 million.

## The CMA's investigation, monitoring and enforcement powers

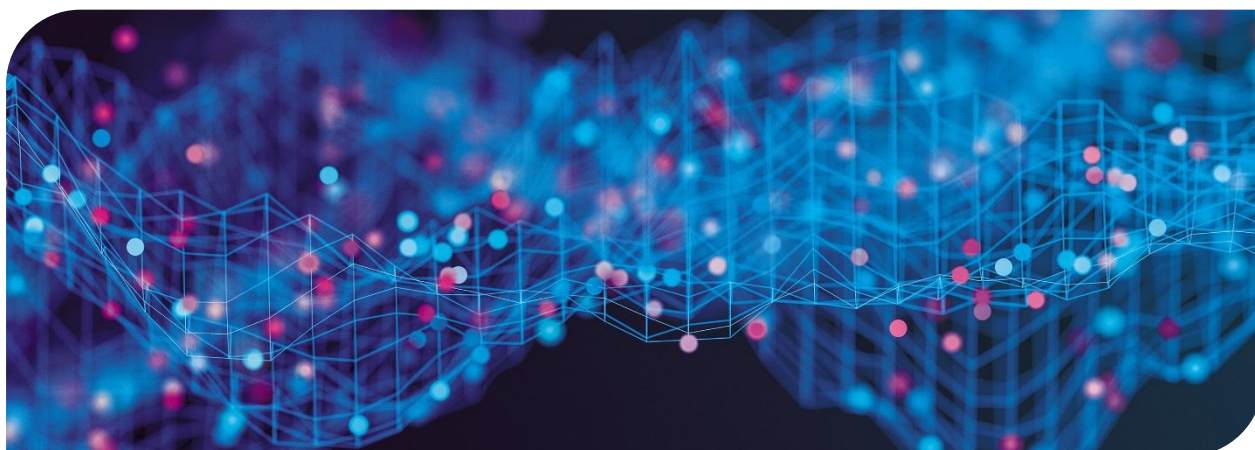
The CMA will have new powers to require information, interview individuals, carry out raids on business premises and require reporting from SMS firms.

It will also have powers to monitor SMS firms' compliance with competition requirements, monitor the effectiveness of existing requirements, and assess whether to impose, vary or revoke existing requirements.

SMS businesses that breach a regulatory requirement (a PCI order or conduct requirement) without a reasonable excuse can face penalties of up to 10% of worldwide turnover, as well as smaller penalties for breaches of administrative requirements.

Non-compliance can also result in significant consequences for individuals. In particular:

- the CMA can issue penalties against individuals who fail to comply with investigation requirements;
- officers of companies will commit an offence (and be liable to fines and imprisonment) where, whether through their knowledge or negligence, the relevant company destroys or falsifies information, provides false or misleading information or obstructs a CMA officer; and
- the CMA can in certain circumstances seek to disqualify directors.





*"The CMA is likely to consider seeking disqualification against directors of designated SMS firms which infringe their obligations under the Act, emphasising the importance of individual accountability in maintaining competitive digital markets. Some of these firms might be considered by regulators as "too big to fail", and the CMA may take the view that disqualification may prove more effective as a sanction / future deterrent than individual monetary fines."*

### **Jessica Gardner, Partner**

It is worth noting that the CMA cannot get a disqualification order against a director in all cases where the relevant company breaches competition law (including a breach of the DMCC Act). The CMA also has to show that the director is unfit to be involved in the management of the company. There is a low bar to prove unfitness (e.g. the bar is met even if the director did not know, but it is considered that they ought to have known, that the company committed a breach), but it is nonetheless an extra step before the CMA can obtain the sanction.

A disqualified director can also apply to the court for leave to act as a director notwithstanding their disqualification. This is not the same as appealing a disqualification, but it means that they can continue to serve subject to court-imposed conditions, and is an achievable route to redemption. Our team acted on a successful application last year, despite opposition from the CMA.

## **How might the Act affect your business?**

The digital markets regime will be of most immediate relevance to firms that are likely to meet the SMS thresholds in respect of any their digital activities. This may only be a handful of firms for now, but it does not stop the CMA from designating more SMS firms in the future.

Partner **Nick Pimlott** considers the potential implications for smaller businesses: *"It is possible (or even likely) that, contractually, SMS firms could require third parties to contribute to any costs related to content review obligations/engagement with the authorities where they incur costs as a result of their content. It is also possible that SMS firms will contractually require third parties to provide them with timely information that will help them to meet their regulatory obligations, including assisting them with responding to requests for information from regulators, or with meeting their transparency and reporting obligations."*

Senior Associate **James Groves** also notes that *"we further expect that SMS firms may seek to shift the financial burden of compliance to third parties indirectly, via increased fees for their services."*

## **How to prepare for the Act coming into force**

Many of the provisions of the Act are expected to come into force in Autumn 2024. The CMA is consulting on the digital markets regime.

*"Market participants' evidence will be crucial to ensuring that the regime is targeted appropriately and that businesses impacted by the activities of potential SMS firms can derive the maximum benefit from the regime".*

### **Stephen Critchley, Partner**

*"Digital markets are complicated and it will be important for market participants to provide evidence of how their businesses and sectors are impacted by the activities of potential SMS firms. We would recommend that anyone participating in digital markets, whether buying, selling, advertising, developing apps, products or content online should take an interest in the designation and conduct requirement process, and take advantage of avenues to participate – confidentially, if needed – to ensure that outcomes are robust and workable."*

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