

# DMCC Briefing Series – Part 2: Digital Markets – What customers and competitors of regulated 'Big Tech' need to know

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In this instalment of our briefing series on the Digital Markets, Competition and Consumers Act 2024, we focus on the reforms introducing the new digital markets regime, what they mean for customers and competitors of the big tech firms that will be regulated, and how the UK can learn from challenges in early implementation of the EU regime.

## Overview

On 24 May 2024, the Digital Markets, Competition and Consumers Act (**DMCCA**) received Royal Assent and the Competition and Markets Authority (**CMA**) published [draft guidance](#) on its plans to implement the new digital markets regime (the **Draft Guidance**). Implementation dates will be set by the new Government, but we expect that it will be implemented in Q4 this year. Once in force, the regime will regulate the tech firms whose activities have the greatest impact on UK businesses and consumers through five main regulatory tools:

1. **Designation** – the CMA's Digital Markets Unit (**DMU**) will identify tech firms considered to have "strategic market status" (**SMS firms**);
2. **Merger notification requirement** – SMS firms will be required to notify the CMA about certain mergers before completion – we covered this in [Part 1](#) of our DMCCA briefing series;
3. **Conduct requirements** – SMS firms will be subject to tailored conduct requirements to ensure fair dealings with stakeholders;
4. **Pro-Competition Interventions** – the DMU will be able to investigate an SMS firm's digital activities and take measures to address any harmful effects on competition identified; and
5. **Monitoring** – the DMU will monitor the activities of SMS firms, including by obtaining compliance reports and exercising strong information gathering powers.

In this briefing, we highlight the features SMS firms' customers and competitors should know about the new rules.

**The new UK digital markets regime offers stakeholders significant opportunity to influence the rules that the largest tech firms will need to follow, ensuring that**

## effective and workable solutions are put in place to address commercial challenges.

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SMS Designation

Following investigation by the DMU, a firm may be designated as having SMS in relation to a particular digital activity if:

1. the **digital activity** is **linked to the UK**, and in respect of it:
  - a. the firm has **substantial and entrenched market power**; and
  - b. a **position of strategic significance**; and
2. the firm has group worldwide turnover exceeding £25bn or group UK turnover exceeding £1bn.

While the CMA's [Draft Guidance](#) provides some colour on the meaning of these concepts, they remain largely open to interpretation.

### Key takeaways

- **Having SMS is not the same as being considered "dominant"**. These are different legal tests under different regulatory tools. The DMU eschews the notion of defining a relevant market for its assessment of SMS and makes clear that dominance case law is not considered directly relevant. In practice, we expect that it will be easier to establish that a tech firm has SMS than a dominant position.
- **SMS is activity-specific**. The regime is concerned with regulating particular activities of an SMS firm rather than all of its business interests. An SMS firm may be regulated in relation to multiple activities, but broader areas of its business will be out of scope.
- **SMS designation will initially be limited to a small number of firms**. In year one, the DMU will prioritise investigating whether some or all of Alphabet, Amazon, Apple, Meta and Microsoft have SMS in certain activities, and what rules governing their future conduct should be imposed. Some of the digital activities considered by the CMA in recent market investigations (such as mobile browsers and cloud computing) and by the CMA and European Commission in relation to abuse of dominance enforcement (such as mobile payments and terms of access to app stores) are likely targets.
- **SMS is different to "gatekeeper" status under the EU's Digital Markets Act (DMA)**. Under the DMA, gatekeeper designation hinges on three criteria underpinned by specific numeric thresholds. Firms that meet the thresholds are presumed to be gatekeepers, a presumption only rebuttable in "exceptional" circumstances. By comparison, the UK regime is more flexible both in the primary legislation and the CMA's planned approach to implementation. For example, the Draft Guidance states that there is no quantitative threshold for when an SMS firm will be considered to have a 'significant' number of business users, the thresholds in question being qualitative and their satisfaction context-specific.

## **What should we expect in the first year?**

The CMA intends to open three or four investigations within the first year to determine whether firms have SMS. We expect initial investigations to start immediately after the DMCCA comes into force (expected to be in Q4 2024), and to conclude in Q3-Q4 2025. Conduct rules can be imposed at the same time as an SMS firm is designated (see below).

### Implications of SMS designation

If a firm has SMS, the DMU can impose Conduct Requirements and Pro-Competition Interventions to head off or tackle any issues identified.

### **Conduct requirements (CRs)**

The DMU may impose CRs on a SMS firm at any time to ensure fair dealings by the SMS firm, open choices for users, or to improve trust and transparency. CRs require SMS firms to take, or refrain from taking, certain action, such as:

- requiring an SMS firm to trade with customers on fair and reasonable terms; or
- preventing SMS firms from treat their own products more favourably than those of competitors.

### **Pro-Competition Interventions (PCIs)**

PCIs can be imposed following an investigation into an SMS firm's digital activities to address any identified harmful effects on competition. The DMU has broad powers to impose remedies including:

- restrictions on conduct (e.g. a prohibition on combining user data collected from different activities);
- obligations to be performed (e.g. a requirement to make a service interoperable with a competitor's);
- requiring structural changes (e.g. the divestment of part of a business); and/or
- requiring the supply and publishing of information (e.g. a requirement to supply user data to competitors).

These powers will enable the DMU to address concerns in digital markets without needing to conduct complex, lengthy and expensive abuse of dominance investigations and will allow the DMU to be more ambitious and prescriptive in the remedies sought. Moreover, there is scope for remedies to be adjusted over time so the regime is far more flexible than the one-time fix of commitments to end an investigation under the CMA's antitrust tool.

### How can customers engage?

The DMU plans to adopt a "participative approach" to engaging with the SMS candidate firms and those affected by their conduct when exercising its duties under the new regime. In practice, this means that it will seek and welcome views from a range of stakeholders, including customers, competitors and content creators in the course of its SMS investigations and when considering what rules or other interventions should be put in place to govern SMS firms' conduct and address any concerns about the underlying sources of market power.

For that reason, it is worth considering how these new rules may impact your business. There are several opportunities to engage with the DMU on this, including:

1. **SMS investigations:** Stakeholders can influence the DMU's thinking on whether a firm under investigation meets the SMS criteria. Stakeholders can offer views, for example, on whether the company can exert strong influence over the ways in which other companies conduct themselves;
2. **Scoping CRs:** The DMU will publicly consult and engage in discussion with relevant stakeholders on the potential CRs that an SMS firm may be required to follow. Stakeholders can express views on the issues to be addressed through CRs (e.g. the advantage that an SMS firm may have due to extensive data access), the type of rules that users or smaller competitors would find effective to address the issues (e.g. a conduct requirement to make sure that data is used fairly), and the length of the CR implementation period;
3. **Adverse effect on competition investigations:** The DMU can open this type of investigation based on information received from stakeholders or other sources. During the investigation, stakeholders can share views on a range of issues, e.g. the merits of competitor offerings vs those of the SMS firm, how the firm and its competitors respond to each other and broader market developments, and how easy it is to switch between providers;
4. **Consultations on PCIs:** Stakeholders can share views on whether a proposed course of action would be effective and proportionate to address the concern identified by the DMU including, for example, any user/ customer benefits, whether there might be unintended consequences and any practical considerations to bear in mind.

#### DMA insights around potential implementation challenges

The DMA's implementation over the past year has triggered several legal challenges regarding the gatekeeper designation amongst other points. Firms will be able to challenge the DMU's decision that they have SMS in relation to certain digital activities, on judicial review principles. The DMU will be keen to avoid the early years of the UK regime being mired by extensive and costly litigation, slowing down its ability to realise practical benefits for users and competitors. There are reasons for optimism.

Unlike the DMA, the UK regime does not take a "one size fits all" approach to the rules imposed on a firm once designated as having SMS. Accordingly, the immediate impact of being designated is less stark: SMS firms have significant opportunity influence the scope of tailored CRs and PCIs, and they benefit from legislative protections to ensure the reasonableness and proportionality of measures imposed. The CMA should work constructively with SMS firms and affected stakeholders to ensure that effective and pragmatic remedies are put in place where the need is identified.

Further, the UK regime provides for the DMU to be able to group different activities into a single 'digital activity' for which a firm is identified as having SMS. This may help avoid some problematic aspects of the DMA implementation where gatekeepers' activities have been segmented into separate "core services" that do not reflect the commercial reality of how products and services are offered to users, making implementation difficult to navigate. The DMU has an opportunity to learn from the DMA experience by scoping 'digital activities' in a sensible manner that reflects commercial realities.

These differences in the regimes could, if implemented thoughtfully, reduce the likelihood and/or extent of legal challenge from the largest tech companies on the question of SMS designation, in favour of firms waiting to see whether the design of CRs and PCIs is appropriate. Significant uncertainty remains, however, since the DMU's approach to the Draft Guidance implies that it does not intend to compromise the flexibility of the UK regime by offering more clarity on its approach to interpreting and implementing some key provisions.

#### Consequences of breach and private enforcement

Should an SMS firm breach its obligations under the DMCCA, the DMU can take enforcement action, including levying significant fines on the company, pursuing criminal and civil penalties against certain individuals, imposing fines for senior managers, and/or seeking director disqualification, depending on the circumstances.

Separately, the DMCCA allows third parties affected by a breach to take private enforcement action in the High Court (or, in Scotland, the Court of Session or a sheriff court of any sheriffdom) including for damages or an injunction. Claimants need not wait for the CMA to issue a decision that the SMS firm has committed a breach (e.g. of a CR or PCI), although the courts are bound by a CMA breach decision once it has become final.

#### **Creative approaches in UK class actions could permeate to digital markets disputes**

While class actions remain limited to competition law breaches, we have seen some creativity in recent Competition Appeal Tribunal proceedings whereby claimants have sought to 'shoe-horn' consumer protection issues into a competition law claim (e.g. the *Boundary Fares* litigation). We may similarly see the emergence of class actions seeking to rely on evidence of breaches of the SMS firm's obligations (e.g. as set out in a compliance report or a CMA breach decision) to establish liability in a competition context and obtain damages for a pool of claimants.

#### **Next steps**

To find out more about what these reforms mean for your business, or discuss training opportunities, please get in touch with our Competition & Regulation team.