

# CMA Proposes New UK Competition Regime for Large Tech Firms

12 / 23 / 20

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West  
New York, NY 10001  
212.735.3000

Avenue Louise 523  
1050 Brussels, Belgium  
322.639.0300

The U.K. Competition and Markets Authority (CMA) has advised the U.K. government to create additional competition rules for large tech firms and platforms:<sup>1</sup>

- Large tech firms considered to have “strategic market status” (SMS) should be subject to an enforceable code of conduct to prevent exploitative or exclusionary abuses. SMS would be a lower threshold than a “dominant” market position under existing U.K. competition law;
- The legislation would empower the CMA’s Digital Markets Unit (DMU) to direct the conduct of SMS companies, *e.g.*, to require data mobility, interoperability or access on “fair, reasonable and non-discriminatory” (FRAND) terms, or operational and functional separation of business units within an SMS;
- The legislation also would establish special merger control rules that would require mandatory notification for certain mergers by companies with SMS and apply a lower threshold for intervention at Phase 2 (based on a “realistic prospect” of a substantial lessening of competition rather than the existing balance of probabilities test); and
- The DMU would enforce the new rules, with investigative and sanctioning powers, up to 10% of global turnover. The DMU’s decisions (and penalties) would not be subject to merits review but only appealable to a judicial review standard.

The U.K. government already has announced its support for the creation of the DMU within the CMA, which is expected to occur in April 2021, and will consult on the form and function of the DMU in early 2021 and legislate as soon as parliamentary time allows.<sup>2</sup>

The recommendations came out ahead of the EU’s proposed Digital Services Act and Digital Markets Act legislation published on 15 December 2020 and is part of a wider set of measures to promote competition in digital markets in the U.K., including the recently launched consultation on revised merger assessment guidelines codifying the CMA’s evolving practice in the digital sector and addressing recommendations made by the Furman and Lear reports.

Although the CMA’s proposal, contrary to that of the European Commission (EC), would appear to require some showing of market power, SMS firms would have to comply with a far-reaching set of rules, the detail and application of which remain largely unclear. The report envisages that the DMU’s decisions should be “judicially reviewable on ordinary judicial review principles”. However, recent challenges to CMA decisions such as *Tobii/Smartbox* have shown that the Competition Appeals Tribunal accords the CMA a high degree of deference on both factual and procedural questions. The judicial review standard is particularly challenging where enforcement is based on evaluative judgements.

## Designating SMS Firms

The proposed new competition regime is intended for firms that have an SMS in relation to a designated activity. The regime — like the EU’s Digital Markets Act — appears intended to capture the big social media and search platforms considered “gatekeepers”.

<sup>1</sup> <https://www.gov.uk/cma-cases/digital-markets-taskforce#taskforce-advice>

<sup>2</sup> <https://www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated>

# CMA Proposes New UK Competition Regime for Large Tech Firms

The proposal recommends that the DMU takes a decision on whether a firm meets the SMS test based on a two-step assessment. First, it evaluates whether a firm has substantial and entrenched market power in relation to a specific activity and, second, whether that power provides the firm with a strategic position.

The CMA considers that the market power assessment under the first limb should not require a “formal market definition exercise”, as this would not recognize the interconnected nature of digital products and services and risk underestimating the importance of dynamic competition. The assessment would instead focus on a “specific activity”, meaning “a collection of products and services supplied by a firm that have a similar function or which, in combination, fulfil a specific function”. (paras 4.14-4.15).

In assessing whether a firm has a “strategic position” under the second limb of the test, the DMU should identify when the effects of a firm’s market power in an activity are “particularly widespread or significant”. The report sets out a list of non-exhaustive factors such as the firm’s size and scale, its rule-setting power in relation to a specific market segment, the extent to which it plays a “gatekeeper” function or provides an input for a wide range of other businesses and the extent to which this firm can leverage its market position from one market segment to another through the development of an ecosystem of services.

The CMA expects that only a small number of firms will meet the SMS test but, in order to ensure legal certainty, recommends that the DMU issues formal guidance laying out the framework of the prioritization rules for designation assessments. Critical factors for prioritization would include the firm’s revenue (firms with annual U.K. revenue in excess of £1 billion and particularly those that also have annual global revenue in excess of £25 billion) and the nature of the activity undertaken by the firm, with priority given to online marketplaces, app stores, social networks, online search engines, operating systems, cloud computing and web browsers.

The DMU would have a statutory deadline of 12 months to conclude the designation assessment.

## Code of Conduct

The report recommends the adoption of an enforceable code of conduct for firms with SMS designation. The idea is to set the “rules of the game” upfront and prevent companies from engaging in exploitative or exclusionary practices by guiding firms’ commercial decisions before they materialize. The code of conduct would apply only to the specific SMS designated activities.

SMS firms will be required to ensure compliance with the requirements set out in the code of conduct including designating senior staff members responsible for complying with the envisaged regulatory requirements.

The code of conduct will comprise three main building blocks: objectives, principles and guidance.

The proposed objectives of the code of conduct are:

- Fair trading: ensuring that users are treated fairly and can trade on reasonable commercial terms with SMS firms.
- Open choices: ensuring that users face no barriers to choosing freely and easily between services provided by SMS firms and other firms.
- Trust and transparency: ensuring that users have clear and relevant information to understand what services SMS firms are providing and to make informed decisions about how they interact with the SMS firm.

The report proposes that these objectives should be set out in legislation, while the principles and guidance should be set by the DMU in consultation with third parties based on the circumstances of each case.

## Pro-Competitive Interventions

The CMA also recommends introducing a framework for pro-competitive interventions to drive dynamic competition and innovation in markets where SMS firms operate.

The report proposes giving the DMU powers to impose far-reaching remedies that could be imposed on any part of an SMS firm in order to address a concern related to the designated specific activity. While remedies involving structural unbundling and full ownership separation will remain with the CMA under its traditional antitrust powers or following a market investigation, the DMU should otherwise “not be limited in the types of remedies it is able to apply”. (para 4.67) These could include measures ensuring personal data mobility, data and licensing interoperability, access on fair and reasonable terms and separation remedies, and allowing the DMU to impose operational and functional separation between different units within an SMS firm.

The DMU would have a statutory deadline of 12 months to implement a pro-competitive intervention.

## Merger Control for SMS Firms

The proposal sets out a framework for a distinct merger control regime for SMS firms to address perceived historical underenforcement against digital mergers. Unlike the code of conduct,

# CMA Proposes New UK Competition Regime for Large Tech Firms

the merger control rules for SMS firms would apply to the firm as a whole and not just the SMS designated activities.

The Taskforce recommends that SMS firms should be required to report (but not notify) all transactions to the CMA within a short period after signing. A full mandatory notification regime would apply to transactions by an SMS firm that meet certain bright-line thresholds. The CMA's preliminary view is that the relevant threshold for full notification should be based on transaction value. Transactions that meet the thresholds would be subject to a bar on closing as well as sanctions in the form of fines where SMS firms fail to comply. The mandatory notification regime would be limited to acquisitions of control and would not cover an acquisition of less clear-cut rights granting "material influence".

The report recommends that the legal test to block a merger or impose remedies should remain the same, *i.e.*, significant lessening of competition (SLC). However, it proposes using a lower and more cautious standard of proof, allowing the CMA to intervene at Phase 2 where there is a "realistic prospect" that a merger gives rise to an SLC. Currently, the CMA can only block a merger at this stage if it is more likely than not to result in an SLC (*i.e.*, on the balance of probabilities) and the "realistic prospect" standard is applied only at Phase 1.

## Conclusion

The proposals are part of a broader push by authorities around the world to adapt competition and merger control rules to digital markets. The European Commission published its Digital Markets Act and Digital Services Act on 15 December 2020, setting out proposals to regulate digital markets in the EU. The EU proposals set certain criteria that would subject large tech firms to additional obligations, including granting third parties access to their own services and limiting their ability to use data obtained from business users to compete with these business users.

---

## Contacts

### Bill Batchelor

Partner / Brussels  
32.2.639.0312  
bill.batchelor@skadden.com

### Ingrid Vandenborre

Partner / Brussels  
32.2.639.0336  
ingrid.vandenborre@skadden.com

### Aurora Luoma

Counsel / London  
44.20.7519.7255  
aurora.luoma@skadden.com

### Michael J. Frese

Associate / Brussels  
32.2.639.0315  
michael.frese@skadden.com

The initiative also is part of a wider set of measures seeking to promote competition in digital markets in the U.K., including the recently launched consultation on revised merger assessment guidelines codifying the CMA's evolving practice in the digital sector and addressing recommendations made by the Furman and Lear reports. The CMA has indicated that in practice the rules should only apply to a few of the largest digital firms. However, SMS designation would impose a significant additional burden on these firms. Within the specified activity, SMS firms would have to comply with a far-reaching set of rules, the detail and application of which remains largely unclear. SMS firms as a whole also would be subject to a more stringent and mandatory merger control regime and fall under the scope of yet another information gathering and enforcement regime. The CMA has not to date taken any enforcement action under existing antitrust rules against tech sector companies. It therefore may be queried whether there is evidence of market failure or a regulatory gap that requires these potentially onerous and prescriptive rules.

The report envisages that the DMU's decisions should be "judicially reviewable on ordinary judicial review principles". Recent challenges to CMA decisions such as *Tobii/Smartbox* have shown that the Competition Appeals Tribunal accords the CMA a high degree of deference on both factual and procedural questions, given that the judicial review standard permits appeal only where the decision is irrational, illegal or procedurally defective. Many of the proposals contain evaluative judgements (as to strategic market status, data portability and access) as well as weaker standards for review of mergers (lowering the ordinary civil standard of "balance of probabilities" to a "realistic prospect" of an SLC) for which judicial review may not provide effective recourse. Given the significant sanctions that may apply for breach, and the absence of democratic oversight into the proposed rulemaking powers of the DMU, it may be questioned whether that level of judicial accountability is appropriate.