

New UK Law Will Give CMA Broad Powers To Boost Competition in Digital Markets

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On April 25, 2023, the UK Government published its long-awaited [Digital Markets, Competition and Consumers Bill](#) (Bill) which, among other things, introduces a new *ex ante* regulatory regime for digital markets. The Bill largely follows the Spring 2022 proposals made in the government's [consultation response](#) on the new regime.

- The new regime will apply to large firms with “strategic market status” (SMS) in relation to a digital activity, a lower threshold than a “dominant” market position under UK competition law.
- The legislation will empower the UK antitrust regulator, the Competition and Markets Authority (CMA), to impose tailored conduct requirements as well as address what it considers to be the source of a firm’s SMS. SMS firms will also be required to report certain transactions to the CMA before completion.
- The CMA’s Digital Markets Unit will in practice oversee and enforce the new rules, which include sanctioning powers of up to 10% of global turnover.
- The legislation is not expected to come into force until late 2024, and the new measures would then apply to SMS firms following a nine-month designation process.

The Bill also introduces reforms to UK competition and consumer law more generally, which are considered in our 2 May 2023 client alert, [“UK To Revamp Merger Control Regime, Expanding CMA’s Jurisdiction and Making Procedures More Flexible”](#).

SMS Designations

The new regime will apply to firms that are designated by the CMA as having SMS in relation to at least one digital activity.

Safe harbour. Only firms with global turnover exceeding £25 billion *or* UK turnover exceeding £1 billion can be subject to SMS designation.

Digital activity. A digital activity is defined broadly as the provision of a service via the internet or the provision of digital content, including any activities carried out for these two purposes. The digital activity must have a UK nexus.

SMS. The CMA will decide whether a firm meets the SMS test based on a range of broad and qualitative factors, which provide the CMA with considerable discretion when determining which firms to designate, although the CMA may publish guidance on their application in due course.

- First, the CMA will evaluate whether the firm has “substantial and entrenched” market power in relation to the digital activity, which involves a forward-looking assessment to confirm whether the market power and influence is “neither small nor transient”.
- Second, the CMA will determine if the firm has a position of “strategic significance” in relation to the digital activity by virtue of, *e.g.*, the ability to determine how other firms conduct themselves or to extend its market power to other activities.

Firms that satisfy these conditions are not automatically designated with SMS. Designation can only occur after an SMS investigation. The CMA may start an SMS investigation into a firm at any time if it has reasonable grounds to consider that the firm may meet the designation criteria. The CMA will then have a statutory deadline of nine months (extendable by three months in exceptional circumstances) to conclude the particular designation assessment. The SMS designation will apply for a five-year period. The CMA will therefore have discretion regarding which firms it assesses, and when. It is expected to prioritise firms in sectors that have previously been examined through market studies and antitrust investigations.

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Conduct Requirements

SMS firms will be required to comply with bespoke conduct requirements setting out how they must (and must not) behave in respect of the specific digital activities (rather than the firm's business more generally).

The conduct requirements imposed on SMS firms will need to fall within a prescribed set of categories based on the objectives of fair trading, open choices and trust and transparency. Each category is broadly framed, which will enable the CMA to carefully tailor and fine-tune the requirements for each SMS firm. This flexible approach contrasts with the EU's Digital Markets Act, which provides a list of generally applicable obligations and prohibitions.

An SMS firm may be exempt from complying with the CMA's conduct requirements if it can show that its conduct gives rise to net benefits for users, and is indispensable and proportionate to attain those benefits.

The permitted categories include a set of obligations to:

- Trade on fair and reasonable terms.
- Have effective processes for handling complaints and disputes.
- Provide clear, relevant, accurate and accessible information.
- Give advance notice and explanations of material changes in relation to the digital activity.
- Provide options or default settings in a way that enables users to take informed and effective decisions.

The CMA will also be permitted to impose restrictions on:

- Applying terms, conditions or policies differently to different users or types of users.
- Self-preferencing.
- Carrying out activities in any part of an SMS firm's business which could materially enhance its market power or strategic position in relation to the relevant digital activity.
- Engaging in tying/bundling practices.
- Restricting interoperability.
- Restricting use of and access to the digital activity.
- Using data unfairly.
- Restricting the use of other firm products.

The CMA will be able to consult on a firm's proposed set of conduct requirements in parallel with its nine-month designation investigation, making it possible for the CMA to impose conduct requirements at the same time it announces SMS designations or very shortly afterwards.

Pro-Competition Interventions

The CMA will also be able to design and implement targeted pro-competition interventions (PCIs) to address the identified "root causes" of a firm's SMS where that cannot be achieved by the conduct requirements.

The threshold for intervention will be met where the CMA finds that a factor relating to a digital activity has an adverse effect on competition, which mirrors the test under the CMA's market investigation regime.

The CMA will be able to impose structural or behavioural remedies on any part of an SMS firm's business. This could include divestments, ownership separation or measures relating to data sharing with competitors and interoperability.

The CMA has a statutory deadline of nine months (extendable by three months) from the start of its PCI investigation to decide what action to take, if any, followed by a four-month period to implement the PCI (extendable by two months). It is not yet clear which areas the CMA will target with this new tool.

Mandatory Reporting of Possible Transactions

SMS firms will be required to report transactions to the CMA (but not notify) where:

- The SMS firm acquires at least 15% of the shares or voting rights in a company carrying on activities in the UK or supplying goods or services in the UK, with further reports required if its stake passes 25% or 50%.
- The value of the SMS firm's *total* holding is at least £25 million.

A similar reporting requirement applies to the creation of joint ventures.

In a move away from the UK's non-suspensory merger control regime, unless the CMA consents, the transaction may not close until five working days after the report has been accepted as sufficient by the CMA. This gives the CMA sufficient information and time to decide, before the transaction is completed, whether to open an investigation under the merger control regime as well as to make a "hold separate" order. The CMA will publish information on the required form and content of a transaction report.

Enforcement and Appeals

SMS firms will be required to appoint a compliance officer and provide the CMA with reports detailing how they are complying with the conduct requirements.

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The CMA will gain powers to address non-compliance by SMS firms, which includes the ability to:

- Impose fines of up to 10% of annual global turnover for breaches, plus an additional 5% of daily turnover for each day of continued non-compliance in some cases.
- Accept commitments from an SMS firm to address potential conduct requirement breaches or potential concerns identified in a PCI investigation.
- Disqualify individuals from serving as directors for up to 15 years for non-compliance relating to conduct requirements or PCIs.
- Impose civil penalties on a senior manager of a SMS firm that does not comply with information requests or provides false or misleading material.
- Enforce conduct requirements to trade on “fair and reasonable terms” through a “Final Offer Mechanism”, which is designed as a backstop measure to resolve disputes between an SMS firm and a third party (such as an online publisher) and will allow the CMA to choose between final offers made by the parties.

Firms may appeal CMA decisions under the new digital markets regime to the Competition Appeal Tribunal on a judicial review basis (subject to limited exceptions for certain financial penalties), rather than on the merits. Such challenges can be brought by any party with sufficient interest, including third parties.

Third parties will also be able to bring private actions for damages against an SMS firm in respect of certain breaches.

Next Steps

The Bill will need to pass through Parliament and receive royal assent before it becomes law. Royal assent is currently expected in Spring 2024. The legislation is then set to come into effect as soon as possible, subject to secondary legislation and the publication of supporting CMA guidance. The new measures for SMS firms would then start to apply following the CMA’s nine-month designation process, subject to any appeals.

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