

A new regime to regulate digital markets in the UK

What is it and how does it work?

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Overview

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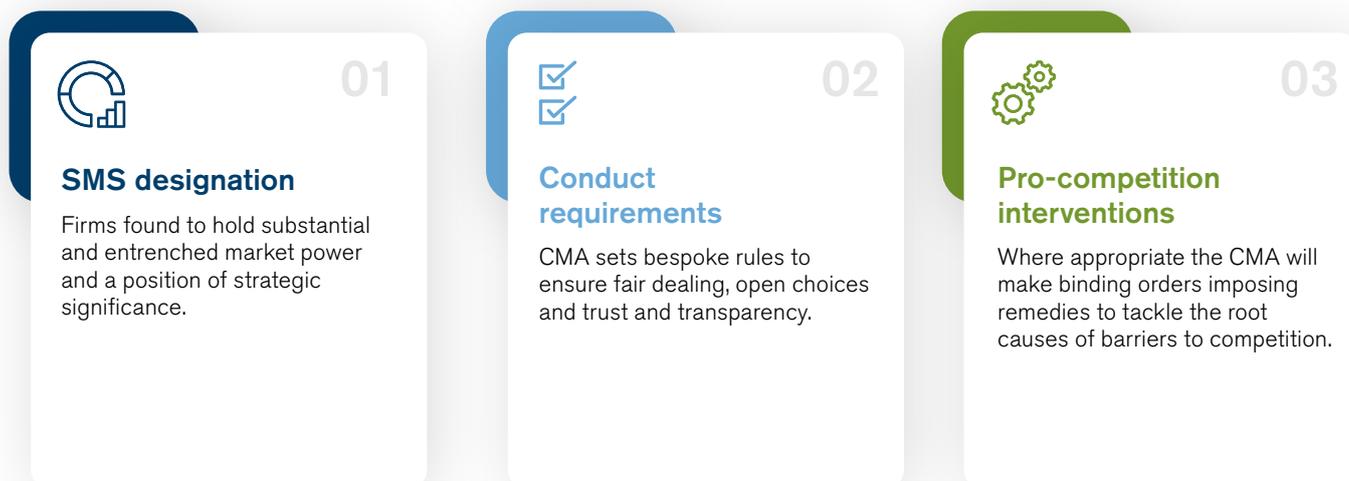
The Digital Markets, Competition and Consumers Act 2024 (DMCCA) entered into force on 1 January 2025, establishing a pro-competition regime to address the conduct and market power of so-called “Big Tech” firms (the “digital markets competition regime”, or “DMCR”).

The scope of the regime is broad but, in practice, enforcement is likely to focus on Microsoft, Apple, Google, Meta and Amazon.

To the extent a business uses or relies upon the products and services of any of these companies, the DMCR has the potential to benefit it.

How does the regime work?

The CMA can investigate and designate large firms with a link to the UK and a turnover of either over £1bn in the UK or over £25bn globally as having Strategic Market Status (“SMS”) in relation to one or more digital activities. The CMA can then regulate the conduct of designated firms by imposing conduct requirements and/or measures to address the root causes of market power.



SMS firms are also required to report all mergers and acquisitions above a certain threshold to the CMA. The relevant threshold is acquiring shares or voting rights worth over £25 million or forming a joint venture where the capital and assets are worth over £25 million. After studying and accepting a report, the CMA may choose to open an investigation using its existing merger powers (given changes to the mergers regime introduced by the DMCCA, the CMA is very likely to have jurisdiction to investigate any such merger reported to it).

Enforcement

The CMA intends to foster a “participative” approach with SMS firms, with many concerns resolved through informal and cooperative engagement rather than enforcement. However, the CMA has robust powers to address non-compliance, including by fining firms up to 10 percent of global turnover and making senior managers responsible for ensuring firm compliance with information requests.

Appeals

Parties can appeal CMA decisions to the Competition Appeal Tribunal (“CAT”). The CAT will apply judicial review principles – i.e. it will consider the legality of the decision that was made rather than reconsidering all the facts, except in respect of appeals against the imposition of penalties, which will be heard “on the merits”.

How does the regime work?

SMS Designation

CMA launches an **SMS investigation** where it suspects that the firm may meet the conditions to be designated with SMS

Firms found to hold **substantial and entrenched market power and a position of strategic significance** are designated with SMS

Pro-Competition Interventions

CMA can launch a **PCI investigation** to tackle root causes of barriers to competition

Conduct requirements

CMA sets **rules** to ensure fair dealing, open choices, and trust and transparency

Where appropriate, CMA makes a **binding pro-competition order** imposing remedies

CMA may **trial remedies** and **iterate a PCI** to ensure effectiveness

If firms don't comply, CMA may issue an **enforcement order***

** Where necessary, the Final Offer Mechanism can be used to tackle non-compliance relating to payment terms*

Enforcement

If firms don't comply the CMA may issue **finances**, and could apply for **director disqualification** or **court orders**

Mergers

Designated firms **must report certain mergers** to the CMA, or face fines

If a reported merger raises concerns, the CMA can take this forward through the existing merger investigation process

How does the UK's regime fit with the EU's regime?

The DMCR is the UK's equivalent to the EU's Digital Markets Act (DMA). At their heart, the two regimes share broadly the same purpose: regulating the conduct of Big Tech. This can be seen in the qualitative criteria for designation under each regime:

EU

An undertaking:

- has a significant impact on the internal market;
- provides a core platform service which is an important gateway for business users to reach end users; and
- enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future.

UK

An undertaking has:

- substantial and entrenched market power; and
- a position of strategic significance in respect of a digital activity.

That said, there are some important differences:

EU

Presumptive designation where certain thresholds are met.

Pre-defined list of activities which are caught.

Pre-defined list of obligations that apply to all designated firms.

No tool specifically to tackle a firm's market power.

UK

UK regulator must investigate and designate a firm in relation to a "digital activity".

UK regulator has discretion to determine the relevant "digital activity" and there is no exhaustive list.

UK regulator has discretion to design and set "bespoke" rules for each firm.

Specific powers to investigate and take action against the root causes of market power.

The UK's regime is perceived to be more flexible, adaptable and targeted than the EU's regime and has been described as "best in class". However, it will ultimately be judged on its results.

Convergence or Divergence – will the UK regime align with the DMA?

Designated firms have had to comply with the DMA's conduct obligations since March 2024. While the DMA is not applicable in the UK, the CMA will look at whether and, if so, how the DMA has addressed certain harms when deciding which firms to designate and when designing conduct requirements.

At the same time, the DMCR is far more flexible than the DMA – both in terms of the activities that can be designated and the rules and obligations that can be imposed on firms. It is quite possible the CMA will take a materially different approach in relation to both. This could pose challenges for firms that have made global changes to their business models in order to comply with the DMA. They may prefer their obligations to be the same across both regimes or, at least, be capable of being met by implementing one set of measures.

In depth

SMS Designation

As noted above, the CMA can designate an undertaking as having SMS in respect of a digital activity where the undertaking has:

- substantial and entrenched market power; and
- a position of strategic significance,

in respect of that activity.

Designation is not automatic and the CMA must undertake an investigation and establish that the relevant criteria are met before it can designate. The CMA may begin an investigation where it has reasonable grounds to consider these criteria are met for a digital activity. The undertaking must be served with an 'SMS investigation notice' setting out the reasonable grounds and the purpose and scope of the investigation.

Digital activity

A key component of the regime is the flexibility the CMA enjoys in identifying a "digital activity" that should be subject to SMS. The definition of "digital activity" includes the provision of a service over the internet and the provision of digital content. It also covers any activity carried out for these purposes. The CMA can treat two or more activities as a single digital activity if they have similar purposes or the activities are carried out in combination to fulfil a specific purpose.

The intention here is for the CMA to be able to react to changing technology (hence no pre-determined list of activities) and to limit the number of designations the CMA needs to undertake. For example, this definition may enable the CMA to designate an entire "ecosystem" (such as an operating system and the apps that run within it).

There is some ambiguity around the definition, and it may well be tested in the courts. It likely excludes any "physical" elements of an activity; however, even this delineation may not be straightforward. For example, whilst a smartphone may not be in scope of the definition, the "digital" and "physical" parts of other businesses may be more difficult to separate.

Substantial and entrenched market power and a position of strategic significance

In determining whether a firm has substantial and entrenched market power, the CMA will assess the competitive constraints faced by the potential SMS firm in respect of the relevant activity. It must also carry out a forward-looking assessment over a period of at least five years. However, CMA guidance suggests that, unless it has clear evidence that developments over that period are likely to dissipate the firm's market power, the CMA is likely to presume that substantial market power identified at the time of the SMS investigation is "entrenched".

For an undertaking to have a position of strategic significance, at least one of the following conditions must be met:

- (a) the undertaking has achieved a position of significant size or scale in respect of the digital activity;
- (b) a significant number of other undertakings use the digital activity as carried out by the SMS firm in carrying on their businesses;
- (c) the undertaking's position in respect of the digital activity would allow it to extend its market power to a range of other activities;
- (d) the undertaking's position in respect of the digital activity allows it to determine the "rules of the game".

In depth

Conduct Requirements

The CMA can impose “Conduct Requirements” on designated firms. These prescribe how a firm must conduct itself in relation to the relevant digital activity.

The CMA can design “bespoke” conduct requirements for each firm and activity. There is no minimum or maximum number of requirements that the CMA must set, nor is the CMA required to set the same conduct requirements for different firms designated in respect of the same activity (e.g. Apple for iOS and Google for Android). Further, there is no requirement as to how specific the conduct requirements must be, although the CMA will generally impose “outcome-focused” conduct requirements where it can, and only use more specific “action-focused” conduct requirements where necessary.

The DMCCA also prescribes the aims and types of conduct requirements that may be imposed:

Conduct requirements must pursue one or more of the following objectives

Fair Dealing

Users are treated fairly and able to interact, whether directly or indirectly, with the designated firm on reasonable terms.

Open Choices

Users and potential users are able to choose freely and easily between the services provided by the designated firm and another firm.

Trust and Transparency

Users and potential users have the information they require to understand the services being provided (including the terms of provision) and enable them to make informed choices.

Permitted types of conduct requirement

SMS firms are obliged to:

- trade on fair and reasonable terms;
- have effective processes for handling complaints and disputes;
- provide clear, relevant, accurate and accessible information;
- give explanations and reasonable notice before making changes which are likely to be material; and
- present to users or potential users any options or default settings in a way which allows them to make informed decisions.

SMS firms prevented from:

- applying discriminatory terms, conditions or policies;
- using their position in relation to the relevant digital activity to treat their own products more favourably (including through access to data);
- using another activity in a way that entrenches their position in relation to the designated digital activity;
- bundling or tying services, or incentivising use of other products and services alongside those comprised in the relevant digital activity;
- restricting interoperability with services offered by other undertakings;
- restricting how users can use the relevant digital activity;
- using data unfairly; and
- restricting the ability of users to use products of other firms.

Conduct requirements must be imposed by the CMA via a notice setting out certain details in respect of the requirements, including the reasons for imposition, their objective(s), benefits, and the permitted type of conduct requirement. The CMA is also required to set out how each conduct requirement interacts with any other conduct requirement that has been imposed.

There are limits to the sorts of interoperability obligations that can be included in conduct requirements. In particular, they can only involve allowing business users to benefit from the same interoperability as the SMS firm itself enjoys. To require a firm to develop new interoperability, the CMA must use a PCI.

All but one of the types of permitted conduct requirement must relate to the designated activity. The exception is the type preventing the designated firm from “carrying on activities other than the relevant digital activity in a way that is likely to increase the undertaking’s market power materially, or bolster the strategic significance of its position in relation to the relevant digital activity”.

In depth

Enforcing Conduct Requirements

The CMA has various powers to enforce conduct requirements, including through an ability to impose orders on firms – both interim and final – and to impose penalties. Of particular note are the following:

1. Countervailing benefits exemption

The CMA must close an investigation into a breach of a conduct requirement where the designated firm has successfully argued that the “countervailing benefits exemption” applies.

The burden of proof is on the designated firm to show that:

- the conduct under investigation gives rise to benefits for the users or potential users of the relevant digital activity;
- those benefits outweigh any detrimental impact on competition resulting from the alleged breach;
- the conduct is indispensable and proportionate to realising the claimed benefits; and
- the conduct does not eliminate or prevent effective competition.

2. Final offer mechanism

The final offer mechanism is intended as a backstop to be used when normal enforcement processes are insufficient to resolve continuing breaches of conduct requirements relating to fair and reasonable payment terms as between SMS firms and their trading partners. There is a high threshold for using the tool but, when it is used, the CMA will ask the SMS firm and relevant third party to each submit what they believe are fair payment terms—their final offers—and the CMA will then choose one of those offers. The regime does not limit the types of payments to which the mechanism can apply, but it is worth noting that this feature was considered in the context of payments for news content.

3. Nominated officer and compliance report

A designated undertaking must appoint an employee to act as the “nominated officer” with responsibility for compliance with the relevant conduct requirement(s). The individual must be sufficiently senior and qualified for the role. Among their responsibilities is an obligation to author a compliance report setting out how the SMS firm has complied and will comply with the conduct requirement(s).

In depth

Pro-competition Interventions

The CMA has the power to intervene to tackle the sources of SMS firms' market power. In particular, "Pro-competition Interventions" allow the CMA to launch investigations with a view to imposing targeted remedies addressing the root causes of any "adverse effect on competition" (AEC) identified by the CMA in respect of the relevant digital activities.

- Interventions can be made in relation to any part of the SMS firm's business (i.e. they are not limited to the designated digital activity).
- There is no prescribed list of remedy types – they can include restrictions on conduct, performance obligations and, at their most extensive, the forced divestment of parts of a business.
- Remedies must be set out in "Pro-competition Orders", which may allow for extensive trialling and subsequent amendment of remedies.

Ability to trial and review

CMA has reasonable grounds for concern there is an AEC relating to the designated activity of an SMS firm



CMA opens a PCI investigation



CMA investigates whether there is an AEC



CMA consults on proposed PCI decision and the intervention it is considering



PCI decision is issued



Pro-competition order is made



Trialling of remedies (if required)



Implementation and ongoing review of pro-competition order.



Review of pro-competition order

Possible types of pro-competition intervention

- Terminating agreements
- Prohibitions on withholding goods/services
- Tying/bundling bans
- Preferencing bans
- Prohibitions on discrimination
- Price regulation
- Prohibitions on share voting
- Acquisition bans
- Divestment orders

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