



## **The Digital Aspects of the Digital Markets, Competition and Consumers Act 2024**

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**Date:** Tuesday 8 October 2024

### **INTRODUCTION**

The digital aspects of the Digital Markets, Competition and Consumers Act 2024 (**DMCA 2024**) are expected to enter force in December 2024 or January 2025. This talk gave the speakers a chance to address expectations surrounding implementation of the digital markets regime.

### **BACKGROUND TO THE REGIME - Verity Egerton-Doyle**

Initial recommendations were made in the Digital Competition Expert Panel's Furman review in 2019, which was expanded on by the CMA's Digital Markets Taskforce in 2020. They recommended a Strategic Market Status (**SMS**) regime which is remarkably similar to the one that has made it into law as part of the DMCC 2024. The only major proposal which was not adopted was a lower threshold for tech mergers at phase 2, as this is an area where big tech and challenger tech interests align.

### **Mechanics**

To be designated as having SMS, a firm must fulfil five conditions: (i) digital activity, (ii) a link to the UK, (iii) minimum turnover, (iv) substantial and entrenched market power and (v) a position of strategic significance.

It is clear who the likely targets of the regime are but the CMA must pursue an investigation before designating a firm as having SMS. Once designated, the CMA will impose a bespoke code of conduct on the firm and the firm may be subject to pro-competition investigations. SMS firms will also need to report most acquisitions to the CMA. The merger reporting requirement is the only mandatory aspect of the code of conduct, with the CMA having discretion to decide other parts of the bespoke code of conduct. This is unlike the EU's Digital Markets Act (**DMA**) where the conduct requirements are written into statute.

The CMA plans to run two SMS investigations at once so three to four designations can be expected in the first year, but nothing will change on day one.

### **HOW THE CMA IS PREPARING - Matthew Braovac**

#### **The Digital Markets Unit**

The CMA is well prepared to launch investigations on day one of the regime as the Digital Markets Unit (**DMU**) has been working in shadow form for two years. The DMU is pro digital markets and the DMU aims to preserve such markets' benefit on the UK economy, as part of the Government's growth agenda. The DMU is ramping up capacity by planning to more than double the headcount associated with DMCC 2024 digital issues by the regime's launch.

DMU staff have been involved in numerous digital investigations to deepen their understanding of digital issues. This has included: (i) the ongoing investigation into cloud services, (ii) the ongoing mobile browsers and cloud gaming market investigation, (iii) the Google privacy sandbox investigation and, (iv) the ad tech Competition Act 1998 investigation.

## **Guidance**

Guidance has aimed to strike a balance between providing detail on the CMA's enforcement approach and with maintaining flexibility, given that the approach will evolve over time. The CMA's guidelines consultation, which was received a good response rate (83 responses), closed in July 2024. Guidelines will be published in time for the regime starting, they currently await Secretary of State sign off.

Stakeholders have expressed a desire for more guidance and have drawn comparisons with the mergers or markets regimes, and their level of detail. However, these are the wrong benchmarks to compare against as there cannot be the same level of certainty as with such long-running regimes.

Stakeholders want more information on when and how they can engage with the CMA, but the CMA wants to avoid a series of set piece discussions. The regime is intended to be deliberately participative and the intention is to have constructive discussions. The regime will develop as the DMU gains more experience and there is a legal requirement for the regime to be kept under review.

## **Investigation and code of conduct**

The CMA is looking to launch investigations on day one, with an evidence-based approach. Firms have commented that the EU's DMA lacks flexibility and that some firms have been caught in the cross-fire. It is true that the DMCC 2024 has greater flexibility as the rules imposed will be very specific and tailored to the firm, having been written alongside the evidence-based investigation.

The Prioritisation Principles apply to the SMS regime. Firms are urged to address the Principles directly when making submissions to the DMU, as well as the eleven operating principles which the CMA published in January 2024.

## **UNCERTAINTY WITHIN THE SMS REGIME - James Harvey**

In the face of uncertainty, when should the CMA wait and see, and when should the CMA change its mind when it knows more?

### **Decision to designate**

SMS firms are required to have entrenched market power as the CMA does not want to designate if market power is short-lived. However, a forward-looking designation will always be uncertain. What constitutes clear and convincing evidence regarding entrenchment? How will the CMA tell, for example, whether a recent market entry will dissipate market power or if it will not?

Will the CMA decide to defer designation where there is uncertainty, and wait till they know more? This may be based on how easy it is to design conduct requirements.

### **Varying of conduct requirements**

The CMA has the power to vary or revoke conduct requirements. When will this mean that the CMA chooses to impose lighter requirements, with the option to impose more restrictive ones later on? Firms may need to pay attention to whatever is the next most interventionist conduct requirement as they may be subject to it in the future. Firms may decide to accept more interventionist requirements now to avoid the uncertainty of future variation.

SMS firms will also need to consider how they implement conduct requirements. Should this be done in a manner which makes variation difficult, in order to show commitment to the code of conduct? Or in a way that is flexible to allow for future variation.