

United Kingdom

Rules Under Development

There are currently no digital-specific competition law rules in force in the UK. Digital firms are subject to general competition and consumer protection laws applicable to all firms. The Government has agreed to move forward with a digital regulation regime targeting firms with “*strategic market status*” when parliamentary time allows.

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1. What rules govern competition in digital markets in the UK?

There are currently no digital-specific competition law rules in force in the UK. Digital firms are subject to general competition and consumer protection laws applicable to all firms (e.g., the Competition Act 1998, the Enterprise Act 2002, and the Consumer Rights Act 2015). Digital firms may also be subject to other sectoral regulation, depending on their activities (e.g., telecommunications rules under the Communications Act 2003).

The Government has proposed a new “*pro-competition regime for digital markets*”. The new regime is not expected to come into force until 2024 at the earliest. Once introduced, the regime

is intended to “*proactively shape the behaviour of the most powerful technology firms.*”¹

2. What is the status of the forthcoming pro-competition regime for digital markets in the UK?

The Government has proposed a new “*pro-competition regime for digital markets*” targeting a small number of firms designated as having so-called strategic market status (“**SMS**”) in relation to specific digital activities. The Government consulted on the introduction of the new regime in July 2021,² and published its response in May 2022.³

The Government has stated that it will bring forward legislation to implement the new regime

¹ HM Government, [Government response to the consultation on a new pro-competition regime for digital markets](#) (May 2022), p. 5 (hereinafter “**Government Consultation Response**”).

² HM Government, [Consultation Document: A new pro-competition regime for digital markets](#) (July 2021).

³ Government Consultation Response.

“when parliamentary time allows.”⁴ In October 2022, the House of Commons Business, Energy, and Industrial Strategy Committee issued a report in which it urged the Government “to publish the Draft Bill before the end of November 2022.”⁵ In November 2022, although a bill still had not been published, the UK finance minister Jeremy Hunt stated that a “Digital Markets Competition & Consumers Bill” would be brought forward by May 2023. Subsequent comments by CMA officials expressed a wish that the regime would be in place by October 2023.

The Competition and Markets Authority (“CMA”) has said that it supports the Government’s proposals and “will work with the government on the draft measures and with Parliament and stakeholders.”⁶ Former CMA Chief Executive Andrea Coscelli expressed frustration at the delay to the legislation: the UK was initially “ahead of the European legislation” regulating digital firms, while now it risks being a “rule taker.”⁷

3. How is the pro-competition regime for digital markets expected to be enforced?

The new regime will be enforced by the “Digital Markets Unit” (“DMU”), a specialist team within the CMA. Since April 2021, the DMU has been operating in shadow form pending establishment of the new regime. The DMU is currently reported to have approximately 70 staff members.⁸



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The UK pro-competition regime for digital markets has not been finalized, but is anticipated to be structured as follows:

- The DMU will designate firms as having SMS in relation to specific digital activities following evidence-driven assessments, based on criteria that will be set out in legislation.
- Firms that are designated as having SMS will be required to comply with: (1) a set of overarching principles set out in legislation; and (2) firm-specific conduct requirements developed by the DMU. The legislative and firm-specific conduct requirements will pursue three overarching objectives, defined in legislation: “fair trading,” “open choices,” and “trust and transparency”.
- The DMU will have the power to impose remedies on firms that breach the conduct rules (e.g., fines and/or behavioral interventions). It will also be able to issue interim orders in order to pause or reverse actions taken by SMS firms if they breach conduct requirements.
- The DMU will be able to impose targeted “pro-competitive interventions” (“PCIs”) on SMS firms to remedy adverse effects on competition. The Government has stated that PCIs “will not be limited to a constrained list of specific remedies set in legislation”.⁹ Instead, the DMU “will have broad discretion” over what

⁴ Government Consultation Response, para. 16.

⁵ House of Commons Business, Energy and Industrial Strategy Committee, [Post-pandemic economic growth: state aid and post-Brexit competition policy](#) (Fourth Report of Session 2022–23) (October 25, 2022).

⁶ Will Hayter, CMA Blog, [Digital markets and the new pro-competition regime](#) (May 10, 2022).

⁷ Kate Beioley, Financial Times, [UK risks being a ‘rule taker’ on tech regulation, warns CMA chief](#) (June 20, 2022).

⁸ Will Hayter, CMA Blog, [Digital markets and the new pro-competition regime](#) (May 10, 2022).

⁹ Government Consultation Response, para. 78.

remedies to deploy, as in the existing market investigations regime.¹⁰

4. Which firms will the pro-competition regime for digital markets apply to?

The new regime will apply to firms designated as having SMS. An undertaking as a whole will be designated as having SMS, but the rules will only apply to designated activities.¹¹

In particular, to establish SMS, the DMU must conclude that a firm has “*substantial and entrenched market power*” in respect of at least one “*digital activity*”, providing it with a “*strategic position*”.¹² The Government expects that a “*small number of the most powerful firms*” will be designated in practice, and intends to introduce further substantive guidance and minimum revenue thresholds to make clear which firms are in scope.¹³

THE GOVERNMENT’S PROPOSED TEST FOR STRATEGIC MARKET STATUS COMPRISES THE FOLLOWING FOUR COMPONENTS:



Digital Activities



Substantial and Entrenched Market Power



Strategic Position



UK Nexus

The Government’s proposed test for SMS comprises the following four components:¹⁴

- **Digital activities**, *i.e.*, products, services, or processes that have or fulfill a similar or specific function, and which have digital technologies as a core component.
- **Substantial and entrenched market power**, *i.e.*, where a product or service lacks good alternatives, there is limited threat of entry or expansion, and the firm’s position is likely to persist over time. This assessment is expected to follow the approach the CMA currently takes in market studies and investigations.
- **Strategic position**, *i.e.*, where the effects of a firm’s market power are likely to be particularly widespread or significant. The Government has set out proposed criteria for the DMU to consider when assessing the extent of a strategic position (*e.g.*, the size or scale of the activity, whether the firm is an important access point for consumers, whether the firm can use the activity to determine the “*rules of the game*”, and whether the activity enables the firm to entrench or extend its market power).¹⁵
- **UK nexus**. The DMU must establish that the designated activity has a UK nexus.

The DMU will have discretion to decide which firms to prioritize for SMS assessments. It will, however, be required to publish guidance on its enforcement priorities and on the concepts of “*digital activities*” and “*strategic position*” and their application. The costs of the new regime

¹⁰ Ibid.

¹¹ By contrast, under the German laws applicable to digital firms (Section 19a of the Act Against Restraints of Competition), the Federal Cartel Office can designate an undertaking as a whole as having “*paramount cross-market significance*,” then implement rules that apply across the entire firm.

¹² Government Consultation Response, para. 44.

¹³ Government Consultation Response, paras. 44-46.

¹⁴ Government Consultation Response, paras. 44-48.

¹⁵ The list of criteria used to assess whether a firm has a strategic position will be exhaustive and set out in legislation.

will be partially recouped through a levy on SMS firms.¹⁶

There will be a statutory deadline of nine months for the DMU to complete SMS designations, extendable by three months in exceptional circumstances.¹⁷

The CMA's final report in its Mobile Ecosystems market study¹⁸ gives some indication as to its anticipated approach to SMS designation once the new regime is in place. The CMA concluded that Apple and Google would both meet the currently proposed test for SMS in relation to the supply of mobile operating systems (and, in Apple's case, the devices on which they are installed), native app distribution, mobile browsers, and browser engines.

5. What are the main substantive rules that will govern firms covered by the pro-competition regime for digital markets

The Government has proposed that firms designated with SMS would be required to follow legally enforceable conduct requirements, which would manage the effects of market power by setting out how firms with SMS are expected to behave. In particular, the rules governing SMS firms will consist of the following elements:¹⁹

OVERARCHING OBJECTIVES:



Fair Trading



Open Choices



Trust and Transparency

— **Overarching objectives.** The Government has proposed three overarching objectives to guide the aims and scope of SMS firms' conduct requirements. These objectives are:

- **Fair trading:** users should be treated fairly and be able to trade on reasonable commercial terms with firms with SMS.
- **Open choices:** users should not face any barriers to choosing freely and easily between services provided by firms designated with SMS and other firms.
- **Trust and transparency:** users should have access to clear and relevant information to understand what services SMS firms are providing, and to make informed decisions about how they interact with the firm.

— **Legislative categories of conduct requirements.** The legislation will define categories of conduct requirements that can be used by the DMU to develop firm-specific conduct requirements. The categories are likely to include: requiring SMS firms not to apply discriminatory terms, conditions, or policies to certain users or categories of users, compared with equivalent transactions; preventing tying or bundling designated activities with non-designated activities; and providing clear, relevant, accurate, and accessible information to users.

— **Firm-specific conduct requirements.** The DMU will specify legally binding, tailored conduct requirements defining the behavior expected of each SMS firm. The DMU will also have the power to remove or amend conduct requirements. The Government has stated that it will define the circumstances in which the DMU can make such changes.²⁰

¹⁶ Government Consultation Response, para 5.

¹⁷ Government Consultation Response, para. 48.

¹⁸ See CMA, [Mobile Ecosystems Final Report, Appendix L: Assessment of strategic market status](#) (June 10, 2022).

¹⁹ Government Consultation Response, paras. 56-68.

²⁰ Government Consultation Response, para 59.

In the CMA's final report in the Mobile Ecosystems market study, the CMA presented examples of Apple's and Google's practices that it anticipates could be addressed by conduct requirements.²¹ For example, responding to concerns that Apple prevents users switching from iOS mobile devices to Android mobile devices, the CMA is considering rules that would prevent Apple from denying or restricting interoperability between its software and hardware with Android devices.

- **Firm-specific guidance.** The DMU will have the ability to develop firm-specific guidance in which it will set out its view on how the firm-specific conduct requirements apply to that firm. The guidance would not itself be legally binding.
- **Pro-Competitive Interventions.** The Government proposes that the DMU should have a broad discretion to impose PCIs in order to address SMS firms' market power and undermine it over time.²² The remedies available to the DMU through PCIs—and the process of imposing them—will resemble the existing market investigations regime under the Enterprise Act 2002.²³ Potential remedies will include behavioral, structural, and informational interventions.

The DMU will be required to publish guidance on the types of PCIs it will consider implementing in different circumstances, how remedy trials will be run, and how interventions will be monitored and reviewed.

PCI investigations will have a statutory deadline of nine months, extendable by up to three months in exceptional circumstances. The publication of conduct requirements will

not be subject to a statutory deadline, but the DMU is expected normally to publish conduct requirements along with its SMS designation decisions.

6. Are there specific rules governing digital platforms' relationships with publishers in the UK?

The CMA and the UK telecommunications regulator, Ofcom, have published preliminary advice on how the proposed regime could apply to the relationship between digital platforms and online publishers.²⁴

The advice makes three principal proposals to address publishers' concerns: (1) payment for publishers' content, to be agreed between the parties with a "*backstop*" if no agreement is reached; (2) increased transparency about the algorithms used by platforms, and equal treatment rules regarding their application; and (3) a requirement for platforms only to collect data that is "*reasonably linked*" to the services they provide.

This advice is preliminary and states that further work and consultation would be required before any specific requirements are ultimately put forward.

7. Does the Digital Markets Unit need to establish the anticompetitive effects in order to establish a breach of the rules?

It is unlikely that the DMU will be required to demonstrate the competitive effects of SMS firms' conduct in order to establish a breach of their conduct requirements. It will, however, need to consider firms' arguments that their

²¹ See CMA, *Mobile Ecosystems Final Report, Appendix M: Examples of practices that could be addressed by SMS Conduct Requirements Introduction* (June 10, 2022).

²² Government Consultation Response, paras. 77-85.

²³ In particular, the remedies imposed must be proportionate, evidence-driven, address an adverse effect on competition, and take into consideration any countervailing consumer benefits.

²⁴ See CMA and Ofcom, *Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct* (May 6, 2022).

conduct is justified by reference to consumer benefits (*see* Question 8). Whether conduct creates anticompetitive effects may therefore be considered as part of the overall assessment of whether an alleged breach results in a net adverse impact on competition.

In addition, the Government has emphasized that SMS designations and conduct requirements will be implemented “*according to the evidence.*”²⁵ There is therefore expected to be scope for engagement with the DMU as it develops conduct requirements, during which firms will be able to adduce evidence about the effects of their conduct.



THE GOVERNMENT HAS EMPHASIZED THAT SMS DESIGNATIONS AND CONDUCT REQUIREMENTS WILL BE IMPLEMENTED “ACCORDING TO THE EVIDENCE.”

In order to impose PCIs, the DMU will need to demonstrate an adverse effect on competition. This standard of proof is well developed as a measure of anticompetitive effects in the market investigations regime under the Enterprise Act 2002.

8. Can firms defend or objectively justify their conduct under the pro-competition regime for digital markets?

The Government has stated that it will introduce an exemption in order to ensure that conduct which results in net consumer benefits will not breach conduct requirements. This reflects the recognition, as stated by the CMA, that “*conduct which may in some circumstances be harmful, in others may be permissible or desirable as it produces*

sufficient countervailing benefits.”²⁶ Firms would be exempted from conduct requirements where their conduct is “*necessary, or objectively justified, based on the efficiency, innovation, or other competition benefits it brings.*”²⁷

Before imposing PCIs, the DMU will need to take into account any countervailing benefits when considering whether an adverse effect on competition exists and consider the impact of any proposed remedies on benefits enjoyed by consumers.

9. What procedural safeguards does the pro-competition regime for digital markets include?

Details of specific procedures have not yet been finalized, though the Government has stated that the DMU’s range of information gathering tools will be “*subject to appropriate safeguards.*”²⁸ We would expect investigations under the regime to include common procedural rights such as the ability to comment on preliminary findings and proposed remedies, an oral hearing, and an independent decision maker.

The Government currently proposes that firms will be able to appeal decisions of the DMU (including SMS designation decisions, decisions finding violations of conduct requirements, and PCIs) to the Competition Appeal Tribunal. The standard of appeal will be ordinary judicial review grounds, as in the UK mergers and markets regimes (as opposed to full merits appeals, as in Competition Act 1998 investigations).

The DMU will likely have a duty to consult publicly before taking SMS designation decisions, imposing PCIs, finding breaches of conduct requirements, or modifying conduct requirements.²⁹

²⁵ Government Consultation Response, paras. 7; 44.

²⁶ CMA, [A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce](#) (December 2020), para. 4.40 (“**Digital Markets Taskforce Advice**”).

²⁷ *Ibid.*

²⁸ Government Consultation Response, para. 100.

²⁹ Digital Markets Taskforce Advice, paras. 4.110-4.112.

Affected parties and third parties would therefore have an opportunity to provide input on the DMU's decisions.

10. What kinds of penalties or remedies can be imposed following a breach of the rules?

SMS firms in breach of DMU decisions will face financial penalties of up to 10% of global turnover for the most serious offenses, and up to 5% of daily worldwide turnover for continued breaches. A lower level of 1% of global turnover (and up to 5% for each day of ongoing non-compliance) will apply to information offenses.



SMS FIRMS IN BREACH OF DMU DECISIONS WILL FACE FINANCIAL PENALTIES OF UP TO 10% OF GLOBAL TURNOVER FOR THE MOST SERIOUS OFFENSES, AND UP TO 5% OF DAILY WORLDWIDE TURNOVER FOR CONTINUED BREACHES.

The DMU will be able to apply to the court to disqualify individuals from holding company directorships in the UK and also to impose civil penalties on named senior managers who fail to ensure that their firms comply with information requests. It will also be empowered to apply criminal penalties where false or misleading information is provided (as is already the case for other CMA functions).

The DMU will be able to issue interim orders for breaches of conduct requirements (to pause or reverse actions taken by SMS firms, or require a firm to take action to comply with the relevant requirement). In addition, as explained at Question 5, the DMU will be able to impose targeted PCIs on firms.

11. Has the CMA or Digital Markets Unit issued any guidance or reports regarding the pro-competition regime for digital markets?

The Government's response to the consultation regarding the proposed pro-competition regime for digital markets represents the most up to date guidance on how the new regime will operate. This builds on the recommendations of the Digital Competition Expert Panel led by Professor Jason Furman³⁰ and advice from the CMA's Digital Markets Taskforce.³¹

The CMA's final reports in the Online Platforms and Digital Advertising and Mobile Ecosystems market studies, include recommendations on how the new regime might apply to the markets considered.³²

12. Is the pro-competition regime for digital markets competition based, or does it target other types of conduct, such as consumer protection, moderation of content, or privacy?

The proposed regime is principally competition based. It is likely, however, to touch on conduct relating to a range of related issues, such as data usage, consumer protection (*e.g.*, in relation to online choice architecture), and online privacy. The Government has separately introduced an Online Safety Bill that would apply to firms which host user-generated content.³³

³⁰ See [Digital Competition Expert Panel, Unlocking digital competition](#) (March 2019).

³¹ See Digital Markets Taskforce Advice.

³² See CMA, [Online Platforms and Digital Advertising Final Report](#) (July 1, 2020), and CMA, [Mobile Ecosystems Final Report](#) (June 10, 2022).

³³ See UK Government, [Online Safety Bill: factsheet](#) (April 19, 2022).

13. What is the current enforcement practice with respect to conduct that is expected to be addressed by the pro-competition regime for digital markets?

In light of delays to legislation introducing the proposed regime, the CMA has doubled down on its use of existing enforcement tools in digital markets. Ongoing investigations into companies expected to be covered by the proposed regime include:

- **Investigation into Google’s “Privacy Sandbox” browser changes (opened in January 2021).** The CMA carried out an investigation of Google’s proposals to remove third party cookies on Chrome on desktop and replace third party cookies and other functionality with a range of different tools.³⁴ The CMA accepted commitments from Google in February 2022.³⁵
- **Investigation into Apple App Store (opened in March 2021).** The CMA is investigating suspected breaches of UK competition law by Apple in relation to the distribution of apps on iOS and iPadOS devices, in particular the terms and conditions governing app developers’ access to the App Store.³⁶
- **Investigation into Meta’s use of ad data (opened in June 2021).** The CMA is investigating Meta’s conduct in relation to the collection and use of data in the context of providing online advertising services and Facebook’s single sign-on function, and whether this results in a competitive advantage over downstream competitors.³⁷
- **Investigation into Google’s and Meta’s conduct in online display advertising services (opened in March 2022).** The CMA is investigating whether an agreement between Google and Meta restricted or prevented the uptake of header bidding services, and whether Google also affected the ability of other firms to compete with its products in this area.³⁸
- **Investigation into Google’s conduct in ad-tech (opened in May 2022).** The CMA is investigating whether Google’s practices in three parts of the ad-tech chain (demand-side platforms, ad exchanges, and publisher ad servers) distort competition.³⁹
- **Market investigation reference into mobile browsers and cloud gaming (November 2022).** Following its Mobile Ecosystems market study,⁴⁰ the CMA launched a market investigation into mobile browsers and cloud gaming. The investigation will focus on Apple’s requirement on browser developers on iOS to use Apple’s own web rendering engine and Apple’s restrictions on the distribution of cloud gaming apps through its app store.⁴¹ The decision to launch a market investigation reference was driven in part by the delays to the legislation introducing the pro-competition regime.⁴² The CMA had initially concluded in its Ecosystems interim report that a market investigation would be inappropriate as the new regime would in principle be best placed to address the concerns it identified.

³⁴ See CMA, [Press release: CMA to investigate Google’s ‘Privacy Sandbox’ browser changes](#) (January 8, 2021).

³⁵ See CMA, [Press release: CMA to keep ‘close eye’ on Google as it secures final Privacy Sandbox commitments](#) (February 11, 2022).

³⁶ See CMA, [Press release: CMA investigates Apple over suspected anti-competitive behaviour](#) (March 4, 2021).

³⁷ See CMA, [Press release: CMA investigates Facebook’s use of ad data](#) (June 4, 2021).

³⁸ See CMA, [Press release: CMA investigates Google and Meta over ad tech concerns](#) (March 11, 2022).

³⁹ See CMA, [Press release: Google probed over potential abuse of dominance in ad tech](#) (May 26, 2022).

⁴⁰ See CMA, [Mobile ecosystems market study](#) (June 10, 2022).

⁴¹ See CMA, [Mobile browsers and cloud gaming: Decision to make a market investigation reference](#) (November 22, 2022).

⁴² CMA, [Mobile Ecosystems Final Report](#) (June 10, 2022), para. 9.14.

- **Investigation into Google’s conduct in the distribution of apps on Android devices (opened June 2022).** The CMA is investigating Google’s conduct in relation to distribution of apps on Android devices in the UK, in particular Google’s Play Store rules which require certain app developers to use Google’s own payment system for in-app purchases.⁴³
- **Investigation into Amazon’s Marketplace (opened in July 2022).** The CMA is investigating Amazon’s conduct in relation to the way non-public third party seller data may be used within Amazon’s retail business, how Amazon sets criteria for selecting which product offer is placed in the “Buy Box”, and which sellers can list products under Amazon’s “Prime label” on its Marketplace in the UK.⁴⁴

The CMA has also carried out several consumer protection investigations into digital firms under UK consumer legislation, including:

- **Investigation into anti-virus software (opened in December 2018).** Following an investigation into the anti-virus software sector, in particular the automatic renewal of anti-virus subscriptions, the CMA agreed commitments with McAfee and Norton.⁴⁵
- **Investigation into online console video gaming (opened in April 2019).** Following an investigation into auto-renewal practices in respect of Nintendo Switch, Play Station, and Xbox, the CMA agreed commitments with Sony, Nintendo, and Microsoft.⁴⁶

- **Investigation into fake reviews (opened in June 2019).** The CMA is currently investigating whether Amazon and Google took sufficient action to protect users from fake reviews.⁴⁷ This investigation follows an initial probe of several other digital businesses (e.g., eBay and Meta) on the same topic.⁴⁸

14. Are there merger rules specific to for digital platforms in the UK?

The Government’s proposals for the new regime contain a mandatory reporting regime for certain mergers before the relevant transaction can be completed. SMS firms will have to report any transaction where:

- The SMS firm acquires a 15%+ equity or voting share in the target;
- The value of the SMS firm’s holding is over £25 million; and
- The transaction meets a UK nexus test (this has not yet been defined, but will likely be similar to the existing nexus test under the UK’s merger control regime).

In addition, the Government intends to introduce changes to its merger notification thresholds for all firms under a wider set of reforms to competition law. These changes, intended to capture so-called “killer acquisitions”, will result in the CMA having jurisdiction to review transactions where the acquirer has both:

⁴³ See CMA, [Investigation into suspected anti-competitive conduct by Google](#) (June 10, 2022).

⁴⁴ See CMA, [Press release: CMA investigates Amazon over suspected anti-competitive practices](#) (July 6, 2022).

⁴⁵ See CMA, [Press release: CMA secures refund rights for McAfee customers](#) (May 25, 2021); and CMA, [Press release: Norton extends refund rights after CMA action](#) (June 14, 2021).

⁴⁶ See CMA, [Press release: CMA to investigate online gaming companies’ roll-over contracts](#) (April 5, 2019).

⁴⁷ See CMA, [Press release: CMA to investigate Amazon and Google over fake review](#) (June 25, 2021).

⁴⁸ See CMA, [Press release: Facebook and eBay pledge to combat trading in fake reviews](#) (January 8, 2020).

- An existing 33% share of supply of goods or services of any description in the UK; and
- £350 million of UK turnover.⁴⁹

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⁴⁹ See further Cleary Gottlieb, Cleary Antitrust Watch, [The Proposed Widening Scope of UK Merger Control](#) (July 1, 2022).