



## DIGITAL MARKETS, COMPETITION AND CONSUMERS ACT 2024

The Digital Markets, Competition and Consumers Bill (the **Act**) received Royal Assent on 24 May 2024. Tracing its roots back to the 2019 Furman Report, the long-awaited legislation establishes a new, targeted regulatory regime for digital markets, presents broader UK competition law reforms outside the digital space, and gives the Competition and Markets Authority (CMA) much broader powers to protect consumers (including the ability directly to impose fines on businesses which infringe consumer protection legislation).

The legislation also finally puts the Digital Markets Unit (**DMU**), established within the CMA in 2021, on a statutory footing.

Sarah Cardell, Chief Executive of the CMA, said: *“This has the potential to be a watershed moment in the way we protect consumers in the UK and the way we ensure digital markets work for the UK economy, supporting economic growth, investment and innovation”*.<sup>1</sup>

## Overview and aims of the Act

The main aims of the Act are to ensure *“free and vigorous competition amongst businesses – both online and on the high street”* and to empower the CMA to *“crack down on unfair practices”*.<sup>2</sup>

The Act has three main areas of focus:

### 1. Regulation of digital markets.

The new targeted digital markets competition regime aims to tackle the perceived excessive dominance of a small number of firms in the technology sector.

It gives the CMA the power to designate undertakings as having ‘Strategic Market Status’ (SMS) for a digital activity, and to intervene either through the imposition of conduct requirements (CRs) or pro-competition interventions (PCIs).

### 2. Wider promotion of competition.

The Act adjusts the existing merger and fine thresholds for inflation, introduces a new acquirer-focused merger control threshold and a de minimis safe harbour for small mergers, implements discrete changes to merger situations involving energy network enterprises and newspaper enterprises, and strengthens the CMA’s investigative and enforcement powers to expedite competition investigations.

### 3. Consumer protection.

The Act aims to clamp down on unfair practices that dupe consumers into spending, including subscription traps, drip-pricing, fake reviews, secondary ticketing,

and pressure selling. The CMA will be able to enforce consumer law directly rather than going through the courts, and will be empowered to fine businesses which do break the law up to 10% of their global turnover, as in the case of infringements of competition law.

## Digital markets

The new regime for digital markets consists of five key elements: (i) Strategic Market Status (SMS); (ii) conduct requirements (CRs); (iii) pro-competition interventions (PCIs); (iv) merger reporting; and (v) enforcement.

### Strategic Market Status

The new regime will apply to companies that the CMA has designated as having Strategic Market Status (“SMS”), i.e. those that have *“substantial and entrenched market power”* and a *“position of strategic significance”* in a digital activity linked to the UK.

- **Digital activities** include the provision of services by means of the internet and the provision of digital content (in both cases whether paid for or not), as well as activities carried out for these purposes.
- **A link to the UK** will be established if the digital activity has a significant number of UK users, if the undertaking carries on business in the UK in the digital activity, or if the activity (or the way it is carried out) is likely to have an immediate, substantial and foreseeable effect on trade in the UK.
- When determining whether an undertaking has **substantial and entrenched market power**, the CMA will carry out a forward-looking assessment covering a period of at least five years. This will include a counterfactual assessment of the expected or foreseeable developments if the undertaking in question were not designated as having SMS.

- An undertaking will be established as having a **position of strategic significance** if at least one of the following conditions are met:

- it has achieved a position of significant size or scale for the digital activity;
- a significant number of other undertakings use the digital activity in carrying on their business;
- its position in the digital activity would allow it to extend its market power to a range of other activities; or
- its position in the digital activity allows it to determine or substantially influence the ways in which other undertakings conduct themselves.

Even if an undertaking satisfies these conditions, it must meet the revenue condition to be designated as having SMS:

- the group’s total global turnover arising out of any of its activities exceeds £25 billion; or
- the group’s total UK turnover arising out of any of its activities exceeds £1 billion.

If the CMA has reasonable grounds to believe that it may be able to impose an SMS designation on an undertaking, it must complete an *“initial SMS investigation”* which can last up to nine months (extendable by three months in certain circumstances). Once designated, an undertaking will be considered as having SMS for five years. In this period, the CMA has discretion to undertake *“further SMS investigations”* which can also last up to nine months (extendable by three months in certain circumstances) to determine whether an SMS designation should be renewed or revoked.

The CMA has wide discretion in SMS designation, and there is no obligation to investigate every undertaking which potentially meets the above conditions. In practice, the CMA only *“expects to start 3 to 4 SMS*

<sup>1</sup> Competition and Markets Authority. *New bill to stamp out unfair practices and promote competition in digital markets*. Available at: [New bill to stamp out unfair practices and promote competition in digital markets - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/new-bill-to-stamp-out-unfair-practices-and-promote-competition-in-digital-markets)

<sup>2</sup> Ibid.

# The main aims of the Act are to ensure “free and vigorous competition amongst businesses – both online and on the high street” and to empower the CMA to “crack down on unfair practices.”

*investigations within the first year of the new regime coming into force”.<sup>3</sup>*

## Conduct Requirements

The new regime enables the CMA to impose conduct requirements (“CRs”) on designated undertakings, setting out “*how the SMS firm must conduct itself in relation to the digital activity for which it has been designated*”.<sup>4</sup>

The CMA will only impose CRs on designated undertakings if it considers it proportionate for at least one of the following legislative objectives:

- **fair dealing:** to ensure users are treated fairly and able to interact with the SMS firm on reasonable terms;
- **open choices:** to ensure users are able to choose freely and easily between services or content provided by the SMS firm and other firms;
- **trust and transparency:** to ensure users have the information they require to understand the services or digital content being provided by the SMS firm and are able to make informed decisions about them.<sup>5</sup>

The Act limits the CMA's discretion in this area by setting out “*permitted purposes*” for which CRs may be imposed. These include:

- **obliging** a designated undertaking to take certain actions, for example, to trade on fair and reasonable terms; to have effective complaints handling procedures; and to provide clear, relevant, accurate and accessible information about the relevant digital activity to users; or
- **preventing** a designated undertaking from taking certain actions, for example, applying discriminatory terms, conditions or policies to certain users; using its position in the relevant digital activity to treat its own products more favourably; restricting interoperability; and using data unfairly.

When imposing CRs, the CMA must publish a notice explaining its reasoning, including why it considers it proportionate to impose the CR, and what benefits it considers would likely result from it.<sup>6</sup>

## Pro-competition interventions

The new regime also empowers the CMA to impose pro-competition interventions (**PCIs**) on designated undertakings where it considers that:

- factors relevant to a digital activity are having an adverse effect on competition (i.e. preventing, restricting or distorting competition); and
- making a PCI would be likely to contribute to, or otherwise be of use for the purpose of, remedying, mitigating or preventing the adverse effect on competition.

Before imposing a PCI, the CMA must conduct a “*PCI investigation*” alongside a public consultation to determine whether the above conditions are met.

PCIs can include a range of behavioural and/or structural remedies, including: (i) giving people the power easily to transfer their data from one provider to another; (ii) requiring different products and services to be interoperable; or (iii) implementing ownership separation within SMS undertakings.

<sup>3</sup> Competition and Markets Authority. *CMA sets out approach to new digital markets regime*. Available at: [CMA sets out approach to new digital markets regime - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

<sup>4</sup> Competition and Markets Authority. *Overview of the CMA's provisional approach to implement the new Digital Markets competition regime*. Available at: [Overview of the CMA's provisional approach to implement the new Digital Markets competition regime \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

The overarching aim of PCIs is “to create longer-term dynamic changes in these activities, opening up opportunities for greater competition and innovation”.<sup>7</sup>

### Merger reporting

SMS undertakings must report to the CMA all transactions in which they:

- achieve “**qualifying status**”, i.e. the designated undertaking increases its share or voting rights in the undertaking above thresholds of 15%, 25% or 50%;
- in a “**UK-connected body corporate**”, i.e. an undertaking that carries on activities in the UK, or supplies goods and services to person(s) in the UK; and
- for a **consideration of at least £25 million**.

### Enforcement

The Act gives the CMA a range of powers to investigate breaches of the new digital markets regime and impose consequent penalties.

The CMA will have broad information-gathering powers and may request information (including information stored outside the UK) by issuing an information notice to the relevant person. If an information notice was issued to a designated undertaking, and the CMA considers that the designated undertaking has not complied with such notice, the CMA has the power to access (including without a warrant) its premises, equipment, services, information or employees. Designated undertakings must also nominate a senior manager to be responsible for monitoring and ensuring compliance with all undertakings and for cooperating with the CMA.

The new regime also allows the CMA to impose considerable fines:

- designated undertakings which have, without reasonable excuse, failed to comply with an imposed requirement or a given commitment under a CR or PCI may be **fined up to 10% of global turnover** (with an additional 5% of daily global turnover for each day the breach continues);

- persons (other than individuals) that fail to comply, without reasonable excuse, with an investigative requirement, or provide false or misleading information, may be **fined up to 1% of global turnover** (with an additional 5% of daily global turnover for each day the breach continues).

The CMA is also entitled to impose fines on individuals (e.g. senior managers or nominated officers) for similar breaches, which may not exceed a **maximum of £30,000** (for a fixed fine) or **£15,000 per day** (for a daily fine). The CMA may disqualify individuals from serving as directors for **up to 15 years** for non-compliance with the new regime.

The Act establishes a “**countervailing benefits**” exemption which designated undertakings can seek to rely on when under investigation by the CMA for breach of a CR. Under the exemption, no breach of conduct will be found if an undertaking can show that its alleged breach brought benefits to users that outweigh any harm caused. These benefits must be so connected to the conduct in question that they “*could not have been realised*” without it.

Appeals against CMA decisions made under its new digital markets functions will be subject to review by the Competition Appeal Tribunal (**CAT**), under a merits-based approach for penalty decisions, and on judicial review principles for all other decisions. The latter restricts the grounds on which non-penalty decisions can be challenged, as in such cases the CAT will only be able to intervene on grounds such as procedural unfairness and errors of law.

### Updated competition regime

The Act also includes changes to the UK’s existing competition regime for merger control set out in the Enterprise Act 2002 (**EA 2002**), particularly for turnover thresholds:

- a new “**acquirer-focused**” **threshold** will be met if one of the parties supplies at least 33% of goods or services of a particular description in the UK and has UK turnover of over £350 million, and

the other party is a UK business, carries on at least part of its activities in the UK, or supplies goods and services in the UK;

- the target’s UK **turnover threshold** will be increased from £70 million to £100 million, in line with inflation;
- mergers where each party’s UK turnover does not exceed £10 million will not constitute “*relevant merger situations*” for the purposes of the EA 2002.

The Act also implements a new regime for mergers involving energy network enterprises (i.e. those involved in gas transportation, transmission of electricity or distribution of electricity) first introduced by the Energy Act 2023, and includes discrete provisions aimed at preventing foreign powers from gaining control or influence over newspaper enterprises. “*Foreign power*” is widely defined and includes senior members of a foreign government and officers of a governing political party acting in a private capacity.

In addition, the Act broadens the CMA’s extra-territorial powers. In cases where anti-competitive agreements are only implemented outside the UK, but there are (or are likely to be) direct, substantial, and foreseeable effects within the UK, the CMA will be empowered to conduct an investigation and, if required, take enforcement action.

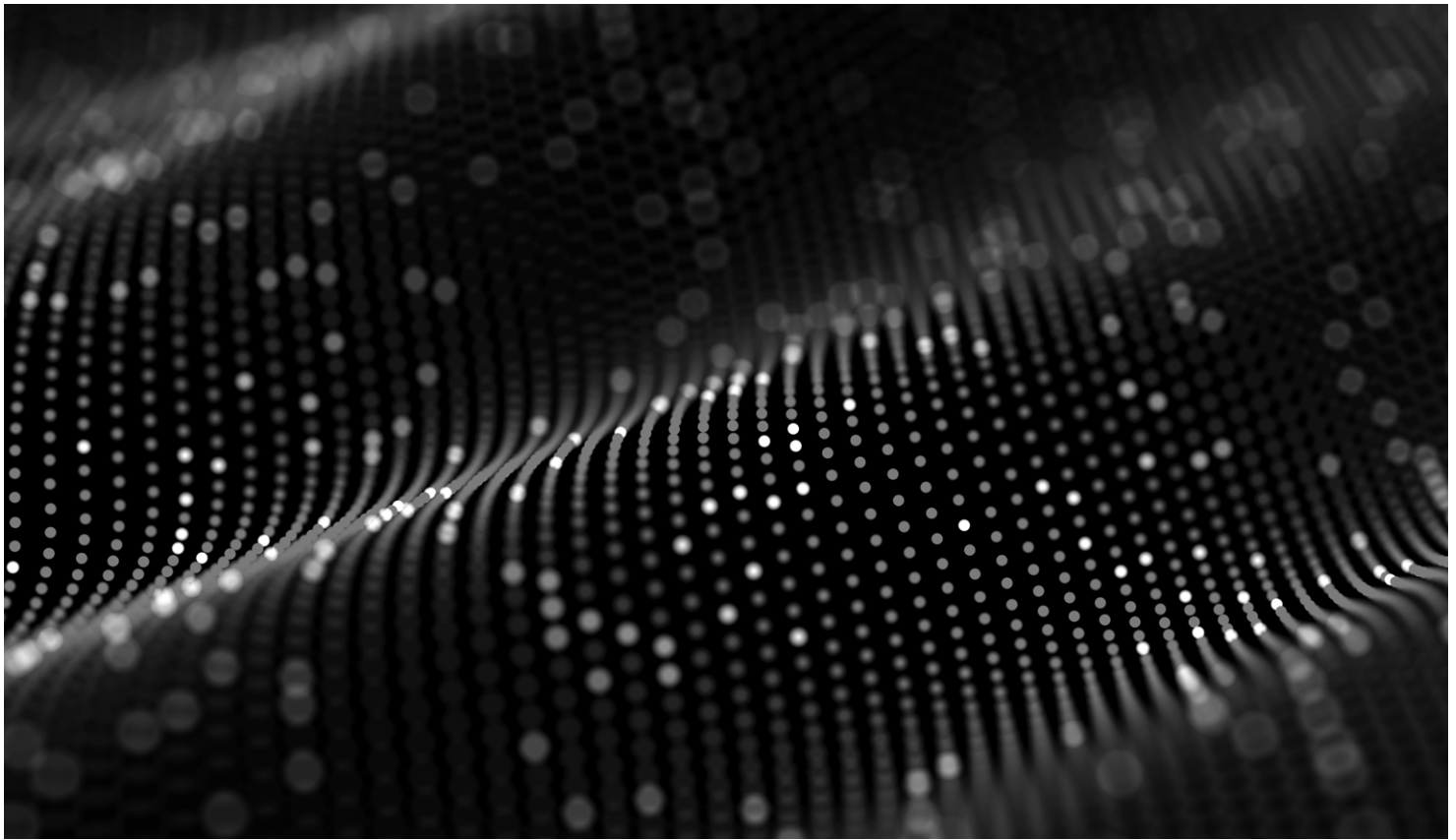
The Act also introduces procedural changes to the UK’s merger control regime, including:

- allowing a fast-track Phase 2 reference on request from the merging parties; and
- extending the Phase 2 timetable following consent of the parties.

### Enhanced consumer protection

The Act introduces a new direct enforcement regime for consumer protection which is anticipated to dispense with lengthy court processes. The CMA will, for the first time, be empowered to make determinations of consumer law breaches and impose considerable fines directly upon infringing businesses.





### Subscription traps

In an effort to clamp down on subscription traps that lock consumers in and cost them “£1.6bn a year”,<sup>8</sup> the Act imposes specific obligations on businesses that provide “subscription contracts”:

- providing clear “pre-contract information” to consumers before they enter a subscription contract;
- issuing clear reminders before a free-trial or low-cost offer comes to an end, and before a contract auto-renews;
- allowing customers to exit a subscription contract in a straightforward, cost-effective and timely way.

### Fake reviews

In response to an increase in companies using fake online reviews to dupe clients, the Act seeks to add these practices to the list of commercial practices prohibited under the Consumer Protection Regulations (CPR).

In particular, this will prohibit businesses from:

- commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services;
- hosting consumer reviews without taking reasonable and proportionate steps to check they are genuine; and
- offering to submit, commission or facilitate fake reviews (or advertising to do the same).

### Drip-pricing

To combat the rising number of businesses “drip-feeding” additional costs to consumers throughout the transaction process, hence turning what appears to be a low headline rate into a much higher final price, the Act introduces the following rules:

- ‘invitations to purchase’ will be required to include all material information, setting out the total price of a product including any fees, taxes, charges, or other payments the customer will incur;
- if a total price cannot reasonably be calculated in advance, the customer must be informed of the existence of any additional costs and how they will be calculated.

### Financial penalties

The Act sets out a range of fines for non-compliance with consumer laws. These represent a significant new risk for businesses, with the fines for consumer law breaches in some cases reaching as high as those for competition law infringements:

- for **breaching consumer laws**, businesses and their accessories may be fined up to 10% of global annual turnover (or £300,000 if higher);
- for **non-compliance with information requests**, businesses and their accessories may be fined up to 1% of global annual turnover (or £30,000 if higher) with an additional fine of 5% of daily global turnover for each day the non-compliance continues (or £15,000 if higher);
- for **failure to comply with a direction**, businesses and their accessories may be fined up to 5% of global annual turnover (or £150,000 if higher) with an additional fine of 5% of daily global turnover for each day the non-compliance continues (or £15,000 if higher).

<sup>8</sup> Department for Science, Innovation, and Technology. *New Bill to crack down on rip-offs, protect consumer cash online and boost competition in digital markets*. Available at: [New Bill to crack down on rip-offs, protect consumer cash online and boost competition in digital markets - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/new-bill-to-crack-down-on-rip-offs-protect-consumer-cash-online-and-boost-competition-in-digital-markets)

## Next steps

Now that the Digital Markets, Competition and Consumers Bill has received Royal Assent, the CMA proposes to consult publicly on supporting guidance on the Act's implementation and intended effects. The CMA published its first draft guidance for consultation on 24 May 2024, specifically on the digital markets competition regime, in which it is seeking views on the SMS designation process, the CRs, the approach to PCI investigations, and merger reporting obligations for SMS undertakings, amongst other topics.<sup>9</sup> The guidance will be important in understanding how the new UK competition and consumer regime is going to work in practice.

Most substantive provisions of the Act, including the new digital markets regime, are expected to enter into force in autumn 2024, following consultation on CMA guidance.<sup>10</sup> However, given that the designation process for SMS undertakings can take up to nine months (with a possible extension of three months), it is unlikely that we will see major changes in the digital markets until at least 2025. Big tech companies are likely to feel the strongest impacts of the new legislation, but given the new merger thresholds and the new significant penalties for consumer law breaches, all businesses active in the UK should familiarise themselves with the provisions relevant to them.

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<sup>9</sup> Competition and Markets Authority. *Digital markets competition regime guidance*. Available at: [Digital markets competition regime guidance \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/guidance/digital-markets-competition-regime-guidance)

<sup>10</sup> The provisions on mergers involving newspaper enterprises and foreign powers entered into force on 24 May 2024, and the provisions on mergers involving energy network enterprises will enter into force on 24 July 2024.

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