

# e-Competitions

Antitrust Case Laws e-Bulletin

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## The UK Government publishes proposals for a new regulatory regime for digital markets alongside accompanying consultation documents

**UNITED KINGDOM, COMPETENCE, THRESHOLDS, MERGER (NOTION), REFORM, MARKET POWER, MERGER CLEARANCE (PHASE II), INSTITUTIONS, INTERNET, COMPETITION POLICY, ONLINE PLATFORMS, BIG TECH, GENERAL ANTITRUST**

UK Government, *A new pro-competition regime for digital markets*, Consultation, 20 July 2021

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On 20 July 2021, the UK Government's Department for Digital, Culture, Media & Sport ("DCMS") and Department for Business, Energy & Industrial Strategy ("BEIS") published proposals for a new regulatory regime for digital markets alongside accompanying consultation documents (the "Consultation"). The Consultation seeks views from interested parties and closes on 1 October 2021.

### Background

The proposed new regime builds on a series of policy reviews and regulatory interventions in the digital sector. These include: (i) the report to government of the Digital Competition Expert Panel Report, headed by economist Jason Furman (the "Furman Report"); (ii) the Competition and Markets Authority ("CMA") market study into online platforms and digital advertising and subsequent proposals for further actions to address the concerns identified; (iii) the recommendations for the design and scope of a new digital markets regulatory regime put forward by the Digital Markets Taskforce ("Taskforce"), many of which has been adopted in the Consultation proposals; and (iv) the establishment in April 2021 of the Digital Markets Unit ("DMU"). The DMU, which sits within in the CMA and will be responsible for administering the new regime, has been doing preparatory work in relation to the new regime since April this year.

Further information on the background to the proposed regime can be found in our previous article (See **James Marshall, Thomas Reilly**, *The UK Competition Authority publishes recommendations for the regulation of digital markets*, 8 December 2020, *e-Competitions December 2020*, Art. N° 98357).

## The new regime

The Consultation proposes a regime that will apply to certain digital firms that are designated as having Strategic Market Status, or “SMS”. The ex-ante regime will govern key activities of these SMS firms via a mandatory code of conduct, enforcement mechanisms such as “pro-competitive interventions” and fines, and a mandatory merger filing regime for certain transactions involving SMS firms.

## Scope and SMS designation

The Government’s current preferred approach is to limit the scope of the regime to digital activities – i.e., where digital technologies are a “core component” of the products and services provided. The intention is to exclude from the scope of the regime activities which have a digital component but are essentially non-digital, e.g. airlines that provide online booking services for flights or firms that provide information about their services on their websites.

In terms of designation of SMS firms, the DMU will consider whether a candidate firm has “substantial and entrenched market power in at least one [digital] activity”, giving the firm a “strategic position”. This will be assessed using the following criteria:

- whether the firm has a very significant size or scale in a digital activity;
- whether the firm serves as an important access point to consumers;
- whether the firm can use the activity to further entrench or protect its market power in that activity or to extend its market power into a range of other activities; or
- whether the firm can use the activity to determine the “rules of the game”.

Notably, the Government has moved away from the idea of a quantitative (e.g., revenue) threshold, claiming this would lead to an overly mechanistic approach and “insufficiently nuanced” designation assessments. The proposed approach to assessing SMS would be similar to that applied in market studies and investigations currently, with the DMU assessing relevant competitive dynamics, including the quality and range of alternative or substitute products and services available to users, barriers to entry and expansion, competitive pressure between firms, customer switching and behavior, and shares of supply or market shares.

The SMS designation is intended to be predictable and transparent. There will be a statutory deadline of less than 12 months and both the candidate firm and third parties will have the opportunity to make representations to the DMU. SMS designation would apply to the entire corporate group (meaning that, for example, the new merger rules will apply to the whole group), although the regulatory interventions and remedies would be principally targeted to the part of the business which raises digital competition concerns. SMS designation will extend for a 5 year period. Decisions will be subject to judicial review and there will be provision for the SMS firm to seek an interim review of its designation status if there has been a material change in circumstances relating to the designated activities.

## Enforceable code of conduct: outcomes-based regulation

The Consultation proposes that SMS firms will be subject to a binding Code of Conduct (“Code”). The Code will consist of high-level objectives and principles that specify the behaviour expected of firms and any breaches will be enforceable by the DMU. The Government’s preference is to specify the high-level principles and objectives in

legislation, but give the DMU the power to develop legally binding requirements relating to those principles. The intention in doing so is to strike a balance between flexibility to take account of different business models and upfront clarity for SMS designated firms.

The proposed principles set out in the Consultation match the CMA's and Taskforce's recommendations (fair trading; open choices; and trust and transparency). They cover behaviour such as:

- not bundling or tying services in a way that adversely effects users;
- taking reasonable steps to support interoperability with third party technologies where not doing so would have an adverse effect on customers; or
- not making changes to non-designated activities that further entrench the firms' position unless the change can be shown to benefit users.

To aid compliance, the DMU will provide non-binding guidance specific to individual SMS firms.

## **Code orders, pro-competitive interventions, fines and other enforcement mechanisms**

The DMU will also have extensive enforcement powers, including the power to conduct investigations and issue code orders or binding Code orders to address and remedy any breaches of the Code. The DMU could also issue interim Code orders to allow it the chance to intervene before further or irreversible harm could occur.

In addition to enforcement of any Code breaches, the DMU will have significant power to undertake 'pro-competitive interventions' ("PCIs") where it identifies individual and/or market-wide concerns. PCIs would enable the DMU to design and implement measures that address the "root cause" of substantial and entrenched market power, where the DMU can prove the existence of an adverse effect on competition. The Consultation is seeking views on whether the recommendation that the DMU should not be able to impose ownership separation (e.g., divestment or transfer of assets or technology) is appropriate.

Where the DMU finds a breach of the Code has occurred, it can impose penalties of up to 10% of an undertaking's worldwide turnover, in line with the level of fines levied in antitrust cases. Fines for procedural breaches (e.g., failing to comply with information requests) could also apply to SMS firms. The proposals also consider a number of other enforcement mechanisms such as court orders requiring an SMS firm and its officers to comply with a code order or a PCI, as well as senior management liability (e.g., director disqualification).

## **Reforms to the merger control regime**

As expected, the Consultation also outlines reforms to the UK merger regime for SMS firms. Proposed changes include:

- A new "advance notice" reporting requirement requiring SMS firms to inform the CMA of all "mergers" (yet to be defined);
- Broader jurisdiction for the CMA to review SMS firm mergers, via: (1) a transaction value threshold applicable to SMS firms (e.g., £100 or £200 million); alongside (2) a UK nexus test;

- Mandatory merger review prior to completion for a subset of the largest transactions by SMS firms (with a value threshold above the jurisdictional threshold mentioned above); and
- Changes to the probability threshold used in Phase 2 investigations of SMS firms to require that, instead of showing that an SLC is more likely than not (on the balance of probabilities), the CMA would be able to find there is a “realistic prospect” of an SLC, thereby lowering the threshold at which the CMA can intervene in transactions.

The proposals do note that the Government is aware of the burdens that a mandatory merger regime would impose on businesses. The Government is open to views on whether the regime for the largest SMS transactions should, in fact, be a voluntary one with the CMA maintaining its call-in powers for mergers that meet the jurisdictional tests.

## The Consultation

The Government is seeking feedback on its proposals, and as noted above, the consultation closes on 1 October 2021.