



## Preparing for the Digital Markets Competition and Consumers Act

Understanding and responding to  
the potential requirements

**July 2024**

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# Overview of the key elements of the new regime

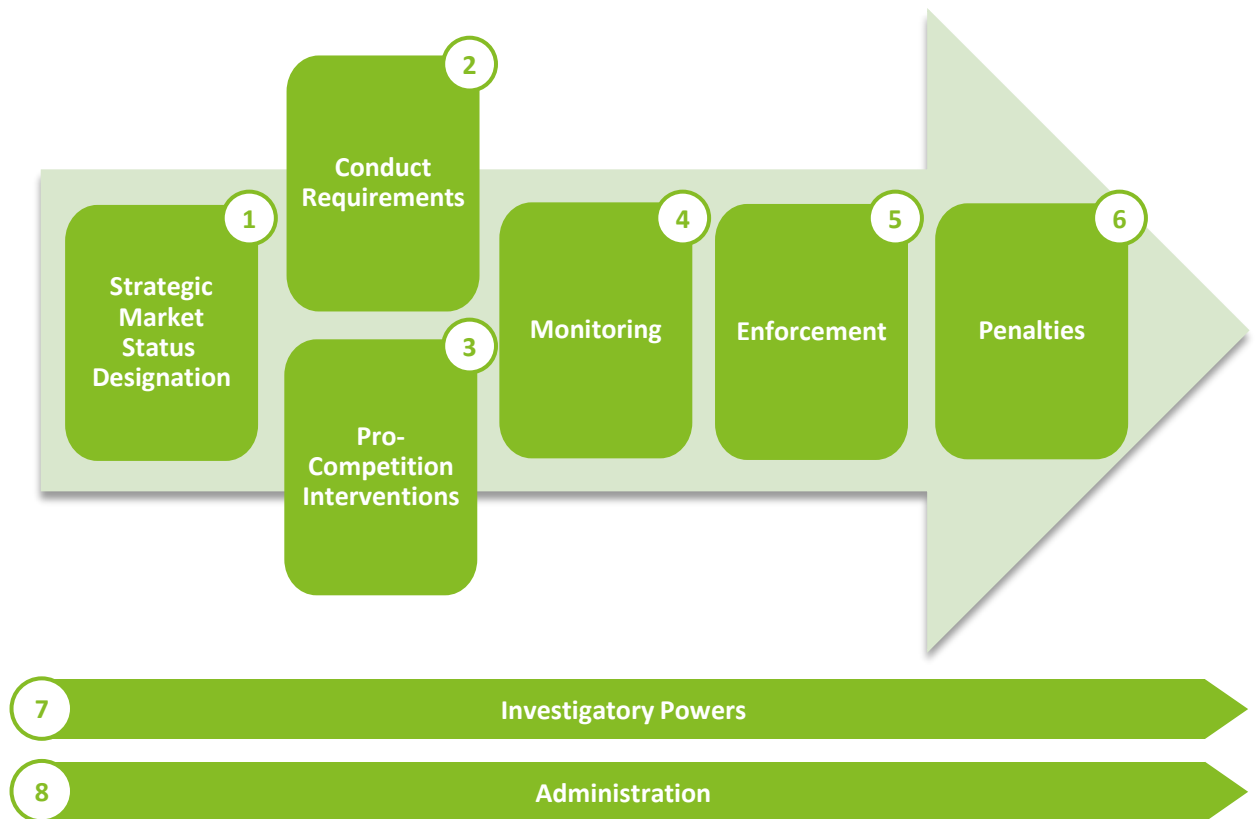
The competition provisions of the Digital Markets Competition and Consumers Act ('the Act') will apply to the largest digital platforms operating in the UK. The Competition and Markets Authority ('CMA') will determine which companies should be in scope, and the rules they must comply with.<sup>1</sup> Consistent with the provisions of the Act, the CMA breaks down this regime into eight distinct areas,<sup>2</sup> which we set out in Figure 1 below.

As can be seen by Figure 1:

- **Strategic Market Status ('SMS') Designation** of a company in respect of one or more digital activities marks the first procedural step, referred to by the CMA as the 'gateway into the regime.'
- Once a company has been designated as having SMS, the CMA may impose:
  - **Conduct Requirements ('CRs')** to guide how the company must behave in relation to a digital activity, and/or
  - **Pro-competition Interventions ('PCIs')** to remedy, mitigate or prevent factors relating to a digital activity which are having an adverse effect on competition.
- On-going **Monitoring** of compliance, effectiveness, and whether to change competition requirements will be integral to the regime.
- **Enforcement** will follow in the event of a breach, which may include the imposition of **Penalties**.
- The CMA's **Investigatory Powers** and **Administration** functions underpin the operation of the new regime.

The procedural and regulatory considerations for each element of the regime are extensive and we do not cover them in full in this document. Instead, we focus on a number of key takeaways relevant to the companies that might need to comply with the new regime, as well as actionable steps that can be taken to prepare.

**Figure 1: Digital Markets competition regime overview**



<sup>1</sup> – Following Royal Assent, the CMA published [draft guidance](#) on how it proposes to exercise these new powers, covering a range of substantive and procedural matters. The content of this document is consistent with the CMA's proposed approach. The CMA is expected to publish its final guidance in Autumn 2024.

<sup>2</sup> – This document does not consider merger reporting requirements imposed on SMS companies, which have been addressed by the CMA in a separate consultation.

# 1. SMS Designation

The CMA will launch an SMS investigation once it considers that there are ‘reasonable grounds’ to consider that a company meets the SMS designation conditions. This investigation enables the CMA to take a formal view on whether or not the company meets the required SMS conditions and is expected to last up to nine months, unless special circumstances apply. The CMA has previously stated it intends to initiate three to four SMS designations in the first year, following commencement of its responsibilities in Autumn 2024.

Key question arising	Key considerations	Corresponding action
What tests need to be met for a company to be designated as having SMS?	First, the jurisdictional and turnover tests in relation to: <ul style="list-style-type: none"><li>Whether a company’s ‘digital activity’ is linked to the UK; and, if so,</li><li>Whether the company meets the turnover threshold (i.e., global turnover of £25bn, or UK turnover of £1bn, for the relevant period).</li></ul>	Companies that may be in scope of the regime should assess whether they meet these tests, consistent with established accounting principles.
	Second, the more analytically demanding evidence-based assessment of whether the company has both ‘substantial and entrenched market power’ and ‘a position of strategic significance’ in respect of their digital activity (e.g., significant size and scale, number of users, capacity to extend market power in adjacent markets). Also, whether it is likely to retain this status for a period of at least five years (the length of the SMS designation).	These considerations will require thorough economic analysis by potentially affected companies, covering topics such as sources of market power, substitutability, competitive rivalry and barriers to entry and expansion. Companies may also want to complete studies on expected market and regulatory developments that may impact the position and contestability of their digital activities.
What is a digital activity?	This includes the provision of a service by means of the internet (e.g., the provision of internet search, app distribution or an online marketplace). It also includes the provision of one or more pieces of digital content (e.g., software, music, computer games and apps).	Potentially affected companies should consider how their activities map to the definition of digital activity in the Act.
What internal steps can be taken by companies potentially in scope?	If a company considers it may be in scope, it will be important to put in place the necessary internal processes to prepare for the designation investigation.	Provide awareness to the Board on the impact of being designated. Identify a single point of contact. Map out the key dates and activities required to prepare for designation investigation, considering application of the abovementioned tests.

## 2. Conduct Requirements (1/2)

CRs may be imposed to guide how an SMS company must behave in relation to a digital activity, for the purposes of promoting 'fair dealing', 'open choices' and 'trust and transparency'. The CMA has highlighted that its process for designing CRs may run in parallel with, or follow, an SMS investigation.

Key question arising	Key considerations	Corresponding action
When will the CMA impose CRs?	<p>The CMA does not have unlimited resources. It will need to prioritise whether and, if so, how it addresses issues in relation to a digital activity. The CMA will consider whether the CR meets the required statutory conditions (see below).</p> <p>The CMA may also impose one or more CRs regarding an SMS company's conduct in an activity <i>other than</i> the relevant digital activity if it materially increases the SMS company's market power or materially strengthens its position of strategic significance in relation to the relevant digital activity.</p>	<p>Companies should reflect on the <a href="#">CMA's Prioritisation Principles</a> to assess how the CMA may prioritise its activities (i.e., 'Strategic Significance', 'Impact', 'Is the CMA best placed to act', 'Resources' and 'Risk').</p> <p>Companies may also want to evaluate how some of their conduct, such as 'tying &amp; bundling offers', may be seen by the CMA as strengthening the market power or strategic significance of activity likely to be designated, and what other (non-designated) activities could be impacted.</p>
What are the criteria for imposing CRs?	<p>The CMA may impose CRs where it considers them proportionate and an effective way to meet the statutory objectives of fair dealing, open choices or trust and transparency.</p>	<p>Consider the rationale for potential CRs that could be imposed, particularly in light of previous CMA activity in digital markets. Companies designated as gatekeepers under the DMA may also want to look at the comparable DMA obligations to identify potential CRs that may be imposed by the CMA.</p>
What types of CR might be imposed in practice?	<p>The Act specifies a list of permitted types of CR. For example, obliging a SMS company to trade on fair &amp; reasonable terms, or preventing a SMS company from using data unfairly. CRs may be diverse, taking the form of outcome-focused or action-focused requirements. They may also vary in detail, ranging from high-level requirements offering flexibility in compliance, to more detailed and directive specifications.</p>	<p>Consider previous CMA digital markets activities, such as those highlighted in our blog <a href="#">'What's in the DMU's in-tray'</a>, for insights on the types of CRs that may be imposed on SMS companies.</p>

## 2. Conduct Requirements (2/2)

CRs may be imposed to guide how an SMS company must behave in relation to a digital activity, for the purposes of promoting ‘fair dealing’, ‘open choices’ and ‘trust and transparency’. The CMA has highlighted that its process for designing CRs may run in parallel with, or follow, an SMS investigation.

Key question arising	Key considerations	Corresponding action
What is the process for imposing CRs?	The CMA is required to consult on CRs, including the substance of compliance reporting obligations (see Administration section below). Following consultation and when imposing a CR, the CMA will provide the SMS company with a notice providing information relevant to the CR. The CMA may ask the SMS company to explain its plans for compliance where a CR has an implementation period (including engagement with any affected third parties).	Companies may want to identify third parties such as business users and other market players who may have a view on potential CRs. This can include a mapping and risk score analysis of impacted parties and come up with associated action plans for each.
What is the interplay with the EU Digital Markets Act?	The approach under the Act is more tailored than under the Digital Markets Act, as the CMA will consider specific requirements from the start to guide the behaviour of SMS designated companies. This contrasts with the situation in the EU, where there is a common set of core platform service obligations which may be interpreted by designated gatekeepers in different ways (of course, subject to ongoing European Commission oversight).	Set a coherent UK/EU compliance strategy, in light of differences between the prevailing UK and EU regulation. Undertake an options appraisal relevant to both approaches, taking input from different internal teams (e.g., legal and compliance teams), in order to align on an overall strategy.

### 3. Pro-competition interventions

Once a company has been designated as having SMS in respect of a digital activity, the CMA may launch a nine-month PCI investigation (which can be extended by three months for special reasons). An investigation can be launched if the CMA considers there are factors relating to a digital activity that may have an adverse effect on competition ('AEC') in the UK (i.e., it prevents, restricts or distorts competition). In practice, this gives the CMA additional options to address the source of a company's market power.

Key question arising	Key considerations	Corresponding action
What are the criteria for imposing PCIs?	<p>Under the Act, the CMA has the flexibility to investigate a broad spectrum of possible factors relating to a relevant digital activity, and their potential effects on different aspects of competition.</p> <p>The CMA will seek to assess whether any factors, such as an SMS company's conduct, action or agreement with other businesses, is preventing, restricting or distorting competition in connection with the relevant activity. Indicators considered by the CMA may include whether a SMS company's profits reflect a reasonable rate of return based on the nature of competition and whether the competitive positions of an SMS company and its rivals are based on the merits of their respective offerings.</p>	<p>As with CRs, potentially affected companies should consider CMA prioritisation framework relevant to a selection of PCIs. They also may want to identify factors that may be considered by the CMA in their (future or potential) PCI investigations in relation to specific digital activities, and internally assess whether these factors could be evidenced as having an AEC (e.g., assess factors such as the nature of competition, characteristics of the sector and position in the market).</p>
What could a PCI require?	<p>There could be a wide range of possible remedies. They can be behavioural (e.g., requiring the SMS company to make its service interoperable with that of a competitor) or structural (e.g., requiring the divestment of an aspect of an SMS company's business).</p>	<p>Consider the types of remedy that could be imposed in practice, taking into account relevant tests and also representations that could be made by affected third parties.</p>
How will the CMA decide whether to impose a PCI and/or a CR?	<p>The CMA will consider which is the most appropriate tool given the nature and scope of the issue to be addressed, the nature, scope and purpose of potential interventions and the statutory conditions which must be satisfied in relation to use of each tool.</p>	<p>Map out the interrelationship between the types of remedy that could be introduced under a CR, vis-à-vis the types of remedy that could be introduced following a PCI. Identify any preferred options that could address the outcomes the CMA is trying to achieve.</p>

## 4. Investigatory powers

The Act contains a variety of powers that the CMA may use to gather information in order to administer the regime. For example, it can require companies to provide information and carry out testing. It may also exercise its power of access, its power to interview and its power of entering premises.

Key question arising	Key considerations	Corresponding action
How may the CMA require information to be provided?	The CMA may issue a written information notice requiring any person to provide specified information where it considers that the information is relevant to a digital markets function.	Companies can develop scaled processes and technologies to provide information and data, e.g., by using automated and consolidated information reviews, combined with mappings of databases and systems and cross-functional alignment. Data can often be spread across systems in non-standardised ways, so this is also something that may need to be factored into the design of the overall approach.
Who is responsible for ensuring compliance with an information notice?	The CMA may require a company to name an individual who it considers to be a senior manager (likely to be a senior executive or Board member) to ensure compliance with an information notice. The CMA can impose a penalty both on the individual named as a senior manager, as well as on the company, for non-compliance.	Consider the senior manager who could be responsible for complying with such a requirement.
What is the geographic scope of the CMA's information gathering powers?	The CMA can gather information extraterritorially, by sending an information notice to a person outside the United Kingdom.	Identify any non-UK activities or individuals that could be relevant to the scope of the CMA's new powers, including its information gathering powers.
Can the CMA require testing to be undertaken?	The CMA may ask a company to perform a demonstration or test, for example in relation to compliance with CRs (e.g., how an algorithm operates, or the effect of online choice architecture).	Companies should ensure they are able to provide accessible and accurate explanations of technical systems' design, operating effectiveness, and processes. Processes, governance and controls should be documented where required.
Can the CMA ask for third party evidence to be provided?	The CMA may require a skilled person to report to it on a matter relevant to the operation of the regime. A skilled person could be any external third party with relevant expertise, such as an accounting firm, management consultancy or an individual with technical expertise such as a software engineer.	Consider the circumstances in which the CMA might require the nomination of a skilled person to report to it on a matter relevant to the operation of the regime (e.g., algorithm explainability).



## 5. Monitoring

The CMA has stated that monitoring will be a key part of its role in overseeing the new regime. First, it will allow the CMA to respond quickly where it considers that companies fail to comply with the various competition requirements under the regime (i.e., compliance monitoring). Second, the CMA can identify where new or varied competition requirements may be necessary (i.e., assess effectiveness of competition requirements). Third, the CMA can assess potential new competition issues in digital markets (e.g., launch new SMS investigation(s)) Below, we focus on the first monitoring area, i.e., how the CMA proposes to monitor SMS company compliance.

Key question arising	Key considerations	Corresponding action
What is the role of a nominated officer?	An SMS company must have in place a nominated officer responsible for each competition requirement to which it is subject. The nominated officer must monitor the SMS company's compliance with applicable obligations, cooperating with the CMA to secure compliance and compliance reporting.	Plan for potential identification of nominated officer(s) who may need to demonstrate compliance with these requirements. A key consideration will be in relation to the scope of the conduct requirement. Given the potentially substantive nature of the obligations across different business units, individuals could require upskilling.
How often do compliance reports have to be provided?	Companies subject to a relevant competition requirement must provide the CMA with periodic compliance reports. The compliance report will have to set out: <ul style="list-style-type: none"> <li>• The assessment of compliance with requirements during the reporting period,</li> <li>• Details of how the SMS company has complied and intends to continue to comply, and</li> <li>• Any additional information requested by the CMA regarding compliance.</li> </ul>	Affected companies can plan for a future discussion with CMA on manner and form of reporting, given this will be such an important element of the regime. Frequency and scope of reports will likely differ between competition requirements.
Are compliance reports published?	The CMA may issue a notice requiring a company to publish a compliance report or a summary of a compliance report.	Ensure processes are in place to produce non-confidential versions of compliance reports, with sufficient operational controls to underpin the reporting.
How can companies best prepare?	There are potentially a wide range of interlinked compliance reporting obligations across different elements of the regime.	Prepare to establish an effective monitoring plan to enable assessment of ongoing effectiveness and appropriateness of measures and their controls. Develop a reporting and governance framework for monitoring activities.

## 6. Enforcement

The CMA may investigate and take enforcement action where it suspects that there has been a breach of a requirement imposed under the regime. The CMA must complete an investigation into a breach of a competition requirement within six months (with a possible three-month extension for special reasons). Where the CMA concludes that a company has breached a requirement, it will take appropriate action to remedy the breach.

Key question arising	Key considerations	Corresponding action
What actions can the CMA take for non-compliance with a competition requirement?	<p>Potential actions include, but are not limited to:</p> <ul style="list-style-type: none"> <li>• Imposition of an order or directions addressing the breach,</li> <li>• Financial penalties (including on senior managers and nominated officers), and/or</li> <li>• Enforcement action against senior managers and nominated officers such as proceedings for criminal offences.</li> </ul>	Ensure that all relevant internal teams and individuals are aware of potential enforcement actions, and that appropriate processes are in place to mitigate risks of non-compliance.
Are there potential mitigating factors relevant to non-compliance with a CR?	The CMA must close a conduct investigation where representations made by the company under investigation lead the CMA to consider that all conditions relevant to a Countervailing Benefit Exemption ('CBE') apply. There are stringent requirements that all need to be met for a CBE to apply, which will require thorough economic analysis supported by compelling evidence.	Companies may want to carry out studies on market developments relevant to the CBE tests (e.g., benefits of conduct to users of digital activity in question).
How might non-compliance relevant to CR pricing be resolved?	The Act's new Final Offer Mechanism ('FOM') is designed to resolve breaches of CRs relating to payment terms for goods or services between an SMS company and one or more third parties. Under the FOM, final offers are received in relation to payment terms that each party regards as fair and reasonable, with the CMA choosing one of those two offers and making an order to give effect to the terms of that preferred offer. The FOM is a significant new remedy for the CMA, which includes pricing disagreements related to digital content.	Keep an eye out for further guidance from the CMA on this new provision. Consider the types of digital content that could potentially be seen as relevant to a FOM (e.g., news content).
How to evidence compliance in the event of an investigation?	Following the launch of an investigation, the CMA will conduct evidence gathering and review as needed to assess whether the company is breaching or has breached the competition requirement concerned.	Ensure governance processes are effective and that rationale relevant to business decisions is properly documented. Ensure aligned approach across the relevant internal teams.

## 7. Penalties

The CMA may impose penalties for failures to comply with competition requirements under the Act.<sup>3</sup>

Key question arising	Key considerations	Corresponding action
Are there any limits on when the CMA may impose a penalty?	Yes. The CMA may only impose a penalty where it considers that a failure to comply with a requirement is 'without reasonable excuse'.	The CMA is clear that companies should bring any such reasons to the CMA's attention at the earliest opportunity, and not to raise them for the first time during an investigation.
How are penalties calculated?	<p>The CMA will use a four-step approach to calculate a financial penalty:</p> <ul style="list-style-type: none"><li>• Step 1: Assessment of the starting penalty having regard to relevant turnover and seriousness.</li><li>• Step 2: Adjustment for deterrence.</li><li>• Step 3: Adjustment for aggravating and/or mitigating factors, and</li><li>• Step 4: Check to ensure the penalty is proportionate and does not exceed the statutory maximum.</li></ul>	Communicate key penalty setting considerations to relevant internal teams, such as aggravating factors (e.g., involvement of directors, senior management or officers) or mitigating factors (e.g., cessation of non-compliance as soon as possible after the CMA intervenes). Build in suitable operational controls where required.
What level of penalties may the CMA impose?	<p>These are subject to the statutory maximums, for example:</p> <ul style="list-style-type: none"><li>• In the case of a fixed penalty - 10% of total value of the worldwide turnover, or (if applicable) group turnover, and</li><li>• In the case of a daily penalty, for each day 5% of the total value of the daily worldwide turnover of the undertaking, or (if applicable) group turnover.</li></ul>	Communicate the full impact of potential financial penalties so that compliance with applicable requirements is properly embedded.

<sup>3</sup> – The CMA's approach to imposing penalties and procedure for failure to comply with investigative requirements is set out under separate guidance ([Administrative Penalties: Statement of Policy on the CMA's approach](#)), which the CMA states in its draft guidance it will be consulting on in due course.

# 8. Administration

The CMA intends to exercise its functions under the new digital markets competition regime in a transparent and participative manner.

Key question arising	Key considerations	Corresponding action
Is third party consultation expected?	Yes. For example, the CMA’s intended approach is to develop CRs consistent with the obligations in the Act, on a case-by-case basis. It will include a consultation and dialogue with relevant stakeholders. There are numerous other consultation requirements built into the various provisions.	There is a benefit to being proactive and evidencing positive outcomes right from the start.
What engagement ‘style’ does the CMA intend to adopt as part of implementation?	The CMA has clearly described this new regime as ‘participative.’ In so doing it will engage with a wide range of stakeholders as part of its invitation to comment or consultation processes, in order to inform its decision-making.	Identify the key stakeholders relevant or potentially relevant to company activities under the new regime. Companies can establish a cohesive, systematic communications plan for engaging with stakeholders in relation to the new regime.
How will the CMA coordinate with other regulators?	The CMA has stated that it will consult Ofcom, the Information Commissioner’s Office, Financial Conduct Authority (FCA), Bank of England and Prudential Regulatory Authority where required. Ofcom and the FCA can also make recommendations to the CMA on how it should exercise its functions. The CMA has stated it will publish bilateral Memoranda of Understanding on how it coordinates with other regulators. This will complement existing cooperation mechanisms including through the Digital Regulation Cooperation Forum (DRCF).	For companies whose digital activities span the remits and responsibilities of these regulators, consider the potential circumstances in which they may be engaged. For example, the FCA has already stated that it may refer any issues relating to data asymmetry between ‘Big Tech’ and firms in financial services to the CMA for consideration as part of its implementation of the Act.

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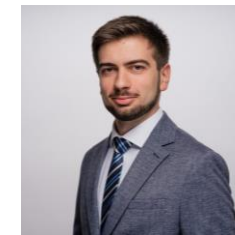
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