

June 2024

A shot in the arm for digital regulations and competition powers – the DMCCA receives Royal Assent

On 24 May 2024, the Digital Markets, Competition and Consumers Act ("**DMCCA**") received Royal Assent. As we [previously reported](#), the DMCCA was first introduced to the UK Parliament over a year ago and has been subject to considerable scrutiny during the legislative process. The DMCCA introduces the most significant reforms to the UK's merger control regime in over 20 years, as well as more stringent antitrust and consumer protection rules. These are areas which have long needed a regulatory upgrade. The DMCCA's purpose is to help consumers, businesses and the overall UK economy by introducing more stringent regulations for the most powerful digital firms and bolstering the existing competition regime, whilst also facilitating market growth and innovation.¹ The DMCCA is expected to come into effect in autumn 2024.

This briefing focuses both on the significant reforms that have been made to the regulation of the UK's digital markets and on the wider changes to the UK's wider competition laws. Please note that we have covered the changes to the UK's consumer protection rules and wider enforcement regime introduced by the DMCCA in a separate briefing.²

Headline changes include:

- The most powerful digital firms which provide their products and/or services in the UK can now be designated as having strategic market status ("**SMS**"), if they are found to have: (i) substantial and entrenched market power; (ii) a position of strategic significance, in a particular digital market; and (iii) meet certain turnover-based thresholds. The Digital Markets Unit ("**DMU**"), a new specialist division within the Competition & Markets Authority ("**CMA**"), will be responsible for issuing SMS designations.
- In effect, firms that receive an SMS designation may need to comply with bespoke conduct requirements ("**CRs**") imposed by the DMU, and additionally, the DMU is empowered to make pro-competitive interventions ("**PCIs**") to impose any structural or behavioural remedies that it deems appropriate to address any threats to effective competition that a particular SMS firm may pose. To monitor the risk of further consolidation through acquisitions, SMS firms will be subject to mandatory merger reporting obligations.
- Outside digital markets and SMS firms, the DMCCA also introduces significant reforms to the UK's existing merger control regime. Most significantly, a new threshold has been introduced such that a transaction can be reviewed by the CMA if any merging party has a pre-existing share of supply of 33% or more in any relevant UK market and UK turnover in excess of £350 million. This new threshold is aimed at capturing so-called "killer acquisitions". Procedural changes – including a new fast-track Phase 2 reference procedure and a new *de minimis* exception for Phase 2 referrals – have also been introduced.
- The DMCCA also amends the CMA's antitrust enforcement powers. The extraterritorial reach of the CMA's jurisdiction has been expanded such that any infringements of the Chapter I prohibition on anti-competitive agreements are in scope even if these are implemented outside the UK, provided that they have direct, substantial and foreseeable effects in the UK. Moreover, the CMA has gained more stringent information gathering powers in the context of its market studies and market investigations and dawn raids of private homes.

¹ In accordance with the CMA's long-term strategy, set out in 2023. See [CMA Annual Plan 2023 to 2024](#).

² For our previous briefings in this area, please see: (i) [Digital Decade: Digital Markets Act and Digital Markets, Competition and Consumer Bill](#); and (ii) [Here at last – new laws proposed on digital markets, competition powers and consumer rights](#).

Strategic Market Status ("SMS") designations

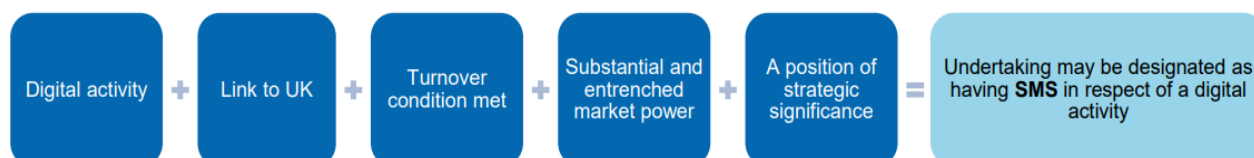
Overview

The new SMS regime is one of the flagship changes introduced by the DMCCA. Under these new rules, digital firms³ which the CMA consider to be the most powerful and whose activities have the most potential to cause harm will be issued with an SMS designation.⁴ As a first step, such firms must be found to have both: (i) substantial and entrenched market power; and (ii) a position of strategic significance.

The DMU, a specialist division within the UK's CMA, will enforce the new digital regime under the DMCCA and be responsible for issuing SMS designations. The DMU will have a wide discretion in determining whether these particular criteria are met. Whilst the DMCCA provides a list of factors that will indicate whether a firm has a position of strategic significance,⁵ the concept of substantial and entrenched market power is not defined.⁶ This approach will allow the DMU more flexibility in determining whether a firm should receive an SMS designation. If it can be shown that a particular firm has market power *per se* – i.e., the ability to act independently of ordinary competitive constraints by, for example, profitably raising prices or reducing innovation without losing customers or damaging its competitive position – the evidential burden in establishing that such market power is substantial and entrenched is not likely to be a high one. Such flexibility being afforded to the DMU likely reflects the fact that digital markets can quickly evolve. The risk is that, if the DMU must base its assessments on criteria that is codified by the DMCCA, any such criteria could be outpaced by the development of digital markets, such that they become obsolete or unable to adequately capture the applicable competitive dynamics. The DMU does not want its hands to be tied, particularly as the inability of regulations to keep up with digital markets was a key driver behind the DMCCA's introduction in the first place.

Additionally, for a firm to be eligible for SMS designation, it must have total turnover (individually or across its wider corporate group) of more than £25 billion globally or more than £1 billion in the UK. It should be noted too that the digital activities being conducted need only be linked to the UK – that is, a firm need not be located or incorporated in the UK itself. If, say, a digital firm has a significant number of users who are themselves based within the UK, this will be sufficient to establish a UK link.

The full test for an SMS designation is represented below:



Source: CMA. *Digital markets competition regime draft guidance summary*. 24 May 2024. Available [here](#)

Before designating a firm as having SMS, the DMU must undertake a thorough, evidence-based investigation within a timeframe of nine months.⁷ The DMU can be expected to target its resources at those firms that are considered most at risk of harming competition. Factors that the DMU will consider in this regard will include the firm's revenue, the characteristics of the digital activity it conducts and the appropriateness of the DMU's intervention to address any theories of harm.⁸ Thus, the likelihood is that SMS designations will, in practice, only apply to a few of the largest tech firms.

³ This covers any firms which conduct a "digital activity", which is defined as the provision of a service by means of the internet, the provision of digital content (including software) or any activity which is being carried out for the purposes of providing an internet service or digital content.

⁴ CMA. *Digital markets competition regime draft guidance summary*. 24 May 2024. Page 6.

⁵ Factors which will indicate strategic significance, which are set out in Section 6 of the DMCCA, are where one or more of the following factors are met: (i) the undertaking has achieved a position of significant size or scale in respect of the digital activity in question; (ii) a significant number of other undertakings use the digital activity (as provided by the relevant undertaking) in carrying on their respective businesses; (iii) the undertaking's position in respect of the digital activity would allow it to extend its market power to a range of other activities; and/or (iv) the undertaking's position in respect of the digital activity allows it to determine, or substantially influence, the ways in which other undertakings conduct themselves in respect of the digital activity or otherwise.

⁶ Rather, the CMA has addressed this issue in its draft guidance documents published for consultation – see below.

⁷ More detail on the procedural requirements for the investigations is set out in Sections 9 – 18 of the DMCCA 2024 - [Digital Markets, Competition and Consumers Bill \(parliament.uk\)](#).

⁸ CMA. *Digital markets competition regime draft guidance summary*. 24 May 2024. Page 7.

An SMS designation will last for a maximum of five years ("**Designation Period**"). At least nine months before the end of the applicable Designation Period, the DMU will conduct a further SMS investigation to determine if the relevant firm should be issued with another SMS designation.

Conduct requirements

A key consequence of an SMS designation is that the DMU may impose CRs on these digital firms.

The purpose of CRs is to guide the practices of SMS-designated firms and tackle any existing or future conduct in which they might otherwise engage (to the detriment of digital markets and consumers) as a result of their entrenched market power and position of strategic significance.⁹

The DMU is limited to imposing CRs which are proportionate and in line with one or more of three statutory objectives set out in the DMCCA, namely: (i) fair dealing; (ii) open choices; and/or (iii) trust and transparency. The types of CRs that can be imposed may be either preventative (i.e., requiring an SMS firm to cease certain conduct or refrain from engaging in such conduct in future)¹⁰ or prescriptive (i.e., requiring an SMS firm to actively do something).¹¹

Interestingly, the DMU will have the discretion to apply CRs that are tailored to each individual firm with an SMS designation. This can be contrasted with the position under the EU's Digital Markets Act ("**DMA**"), where those undertakings which are classified as "Gatekeepers" under the DMA will all be subject to the same behavioural obligations. There are some clear advantages in the DMU's ability to tailor CRs. Apart from allowing CRs to be suitably customised to the dynamics of a particular digital market, it will allow the DMU to consult on a range of different views before it adopts any CR. This is because the DMU intends to issue invitations to comment ("**ITCs**") to allow interested parties to submit views on any potential CRs. The DMU will also engage in a public consultation before any CR is ultimately imposed. This will allow smaller rivals and other companies dependent on the services of the SMS firm to voice their concerns to the CMA and explain whether and how the proposed CRs are likely or not to address the (actual or anticipated) harm. However, the counterargument to this is that such a

lengthy process could be cumbersome and give rise to potential delays.

CRs may be imposed on SMS firms at any point during their relevant Designation Period and will generally remain in force for the remainder of the Designation Period (unless varied or revoked by the DMU).



Pro-competition interventions ("**PCIs**")

SMS firms may also find themselves subject to PCIs. PCIs are targeted measures which the DMU can use to address factors which, in its view, are having an adverse effect on competition ("**AEC**") in a digital market.

The difference between CRs and PCIs is that the latter are more intrusive and are intended to bring about a fundamental change in how an SMS firm is able to conduct itself in a digital market. Indeed, PCIs are more akin to the imposition of structural or behavioural remedies. A PCI may, for example, force an SMS firm to divest part of its business (structural remedy) or oblige an SMS firm to change the nature of its business model by, for example, making its service interoperable with a competitor's (behavioural remedy).

If the DMU intends to impose a PCI, it will have nine months¹² to conduct an investigation to determine if there are reasonable grounds to do so. If, at the end of this process, the DMU concludes that it will impose a PCI on an SMS firm, it must issue a notice of its decision¹³ to the SMS firm and implement its decision within four months.

⁹ Ibid. Page 8.

¹⁰ For example, CRs may be imposed for the purpose of obliging a designated undertaking to trade on fair and reasonable terms, or to establish proper mechanisms for complaint-handling and the provision of information to users. See *Section 20 of the DMCCA 2024* ([Digital Markets, Competition and Consumers Bill \(parliament.uk\)](#)).

¹¹ For example, CRs may be imposed for the purpose of preventing a designated undertaking from applying discriminatory practices to certain users, treating its own products more favourably or using data unfairly. See Section 20 of the DMCCA.

¹² This can be extended by a further three months if special reasons exist.

¹³ A decision to impose a PCI is called a pro-competition order ("**PCO**").

Merger reporting obligations

SMS firms will also be subject to a mandatory and suspensory obligation to report to the CMA any transactions which:

- 1) Would involve the acquisition of "qualifying status" in a target company or a newly incorporated joint venture, where "qualifying status" is obtained by acquiring shares and/or voting rights in excess of specified thresholds;¹⁴
- 2) Concern a target entity which has a UK nexus as a result of carrying on activities in the UK and/or supplying goods or services to customers in the UK; and
- 3) Have a consideration value of at least £25 million.

If these criteria are met, the SMS firm in question must submit a report of the anticipated transaction. Once the CMA is in receipt of this report, the CMA will determine whether it wishes to open an investigation into the transaction. If the CMA makes such a determination, the SMS firm will be required to go through the formal merger investigation process.



Alternatively, the CMA will inform the SMS acquirer that it has not yet made a decision to investigate or that it has no further questions at this stage. Importantly, whilst an SMS firm may proceed with its acquisition in either eventuality, this does not preclude the CMA either from opening a formal merger investigation within the ordinary four-month limitation period or from

requiring the parties to provide information on the deal via requests for information ("**RFIs**").

This merger reporting obligation for SMS firms represents a fundamental shift in the UK's merger control regime, which has always been a voluntary one. Whilst the reporting requirement is not akin to a mandatory and suspensory obligation to formally notify all deals which meet the applicable thresholds, it nonetheless is a notable change to the *status quo*.

Penalties and appeals of DMU decisions

Where firms designated as having SMS fail, without a reasonable excuse, to comply with any CRs or PCIs that have been imposed, the CMA may have recourse to a range of enforcement mechanisms. These include the disqualification of directors and the imposition of financial penalties of up to 10% of the SMS firm's annual global turnover.

Any decisions taken by the DMU – such as the initial decision to issue an SMS designation or the imposition of a CR or PCI – can be appealed by the relevant party to the Competition Appeal Tribunal ("**CAT**"). However, any such appeals will be subject to a review by the CAT on judicial review standards. Consequently, parties cannot appeal any such decisions on their merits. Rather, they may only be contested if the relevant decision has, for example, been taken in breach of the proper procedure.

Wider competition law changes introduced by the DMCCA

Although the SMS regime, and all features connected to it, is a key part of the DMCCA, it is important to note that the legislation has also introduced changes which are applicable to all sectors of the UK economy.

Merger control regime

The DMCCA has introduced key amendments to the UK's overall voluntary merger control regime.

Firstly, the jurisdictional thresholds have been such amended such that:

- 1) The UK turnover threshold has been increased from £70 million to £100 million.
- 2) A new *de minimis* safe harbour has been introduced which will exempt any transaction from triggering either the Turnover Test¹⁵ or the Share

¹⁴ "Qualifying status" is obtained where, as a result of the transaction, the SMS designated firm increases its level of shares and/or voting rights in a UK-connected target: (i) from less than 15% to 15% or more; (ii) from 25% or less to more than 25%; or (iii) from 50% or less to more than 50%. For newly incorporated JVs, "qualifying status" will be acquired where the SMS firm acquires at least 15% of the shares and/or voting rights in this entity.

¹⁵ The UK's Turnover Test is triggered where a target entity generated turnover of £70 million or more in the UK in the most recent financial year. As above, this threshold of £70 million is increased to £100 million under the DMCCA.

of Supply Test¹⁶ where the UK turnover of each of the merging parties is less than £10 million.

- 3) The UK's Share of Supply Test has been amended such that the CMA will now have an additional basis for claiming jurisdiction to review a transaction, namely where one of the merging parties has: (i) an existing share of supply in any UK market of 33%; and (ii) UK turnover of more than £350 million.

The third amendment to the UK's merger control regime means that the CMA can review transactions even where there is no increment in the applicable shares of supply post-merger. This will provide greater scope for the CMA to investigate, for instance, mergers between non-competitors active in vertical markets which may have otherwise fallen outside the thresholds. Clearly, the aim is that this additional threshold will be more capable of capturing so-called "killer acquisitions", i.e., acquisitions by an incumbent firm in a given market which may leverage its market power by acquiring nascent competitors who may have little turnover and/or share of supply but yet represent a future competitive threat.



Additionally:

- The CMA has introduced procedural amendments to its Phase 2 merger review procedure, by allowing a fast-track Phase 2 reference and by extending the applicable timetables for a Phase 2 review (in each case, with the consent and/or at the request of the merging parties). These revised elements of a Phase 2 review will apply to all future merger cases and to all existing cases currently under a Phase 1 review which commenced on or after 25 April 2024.
- The CMA will no longer send an Issues statement during the Phase 1 review process. This is intended

to make the Phase 1 investigation more flexible in terms of gathering evidence and disclosing this to the parties involved.

- The *de minimis* exception market size threshold has been increased whereby the CMA may decide not to refer a merger to a Phase 2 review if the size of the UK market in question is less than £30 million (increased from £15 million).

Market studies and antitrust investigations

The DMCCA has increased the CMA's power to conduct market studies and antitrust investigations, particularly in regard to its ability to gather information.

- The CMA will be able to accept binding undertakings from businesses at any stage during a market study or market investigation.
- The CMA will gain additional flexibility to make a market investigation reference ("**MIR**") after conducting a market study. Specifically, the CMA will be able to make a MIR even if it has previously decided not to do so, provided either: (i) two years or more have passed; or (ii) there has been a material change of circumstances, since the publication of the market study report.
- Under its traditional dawn raid powers, the CMA is now specifically authorised to seize documents and devices from the private homes of individuals who are suspected of having relevant information in connection with alleged infringements of competition law.
- Additionally, the CMA will be able to compel interviews from any person, even if they are unconnected to the firm or matter under investigation.
- Additionally, if third parties are aware or suspect that the CMA is conducting an investigation, they are now required to preserve pertinent evidence.

These new information gathering powers reflect the concern that, owing to the rise in home working since the COVID pandemic, there is more of a risk that important materials which would assist the CMA in conducting an antitrust investigation will increasingly be found in the homes of a company's employees as well as, or instead of, in a company's offices.

Wider antitrust extra-territorial reach

The DMCCA provides a long-awaited clarification that the Chapter I prohibition on anti-competitive agreements/arrangements will apply to those which

¹⁶ The UK's Share of Supply Test is triggered where, post-transaction, the relevant parties would collectively supply (or acquire) at least 25%

of particular goods or services in the UK (or within a substantial part of the UK).

have been implemented outside the UK. This on the condition that the agreement(s)/arrangement(s) in question will have direct, substantial and foreseeable effects within the UK.

Stronger penalties for obstruction

The CMA's enforcement powers have also been beefed up to deter and sanction infringing behaviours. Entities can now be subject to fines of up to 1% of annual global turnover, or up to 5% of global daily turnover, for obstructing investigations. Further, businesses that breach commitments or undertakings, directions, orders or interim measures can be subject to fixed fines of up to 5% of the company's annual worldwide turnover or recurring fines 5% of daily global turnover.

No silver bullet for UK class actions

The broad scope of the DMCCA is such that, during its lengthy period of parliamentary scrutiny, many amendments were proposed to this legislation that were ultimately rejected.

Possibly the most significant amendment that failed to pass related to the *PACCAR*¹⁷ judgment handed down by the UK's Supreme Court in July 2023. By way of background, the ruling in *PACCAR* dealt a significant blow to the burgeoning regime in the UK surrounding collective proceedings orders ("CPOs"). A CPO is a form of group litigation similar to class actions in the U.S which is being increasingly used to try and seek collective redress for victims of competition law infringements.¹⁸ In *PACCAR*, the Supreme Court held that litigation funding arrangements ("LFAs") – a type of financial agreement whereby a third-party funder pays for a litigant's costs in return for a share of the damages awarded if the case is won and often used to fund CPOs¹⁹ – were damages-based agreements ("DBAs"). The consequence of this is that DBAs are subject to strict financial regulations and cannot be used to fund CPOs. As CPOs often require significant financial backing – where, for example, financial firms could be incentivised to support a CPO as a potential investment vehicle – the inability to rely on LFAs to

fund these claims risks derailing this new type of litigation.

The UK Government had proposed an amendment to the DMCCA which would effectively have circumvented the ruling in *PACCAR*, but this did not survive the legislative process. Stakeholders hoping that *PACCAR* can be overturned through legislation will now need to pin their hopes on the Litigation Funding Agreements (Enforceability) Bill, which has been proposed to Parliament but whose fate largely depends on whether the next elected Government in the UK chooses to pursue this legislation as part of its agenda. Watch this space.

Comment and next Steps

The DMCCA represents a seismic change in the landscape of competition law in the UK, particularly for digital firms but also for others who may potentially be affected by the wider changes. The regulatory landscape has been significantly tightened and businesses (directors and employees) will wish to familiarise themselves with the new rules.

Following the DMCCA's Royal Assent, the CMA has published a series of draft guidance documents on the SMS regime and the merger reporting requirements for SMS firms. These draft documents will be subject to a public consultation which will run from 24 May 2024 until 12 July 2024. The draft guidance provides highly useful indications as to how the CMA intends to approach its enforcement role in practice. Moreover, the consultation is an excellent opportunity for stakeholders to make their views known and to potentially influence the guidance before it is finalised.

Should you require further information or assistance regarding any aspect of the new regime, we would be delighted to assist.

Authors

Marta Isabel Garcia, Partner

Will Spens, Associate

Octavia Banks, Trainee solicitor

Jenna Hill, Trainee solicitor

¹⁷ *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)*.

¹⁸ See our previous briefing here: [unchartered-waters-emerging-trends-in-collective-proceedings-orders.pdf \(shlegal.com\)](#)

¹⁹ See [Litigation Funding Agreements \(Enforceability\) Bill \[HL\]: HL Bill 56 of 2023–24 - House of Lords Library \(parliament.uk\)](#)

Contacts

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our Group Actions and Competition Team.



Genevieve Quierin

Partner, Group actions & competition

T: +44 20 7809 2174

E: genevieve.quierin@shlegal.com



Marta Isabel Garcia

Partner, Group actions & competition

T: +44 20 7809 2141

E: marta.garcia@shlegal.com



Trudy Feaster-Gee

Partner, Group actions & competition

T: +44 20 7809 2977

E: trudy.feaster-gee@shlegal.com



Bryony Roy

Managing associate, Group actions & competition

T: +44 20 7809 2379

E: bryony.roy@shlegal.com



Adam Polonsky

Managing associate, Group actions & competition

T: +44 20 7809 2780

E: adam.polonsky@shlegal.com



Will Spens

Associate, Group actions & competition

T: +44 20 7809 2365

E: will.spens@shlegal.com



Alex Athanasopoulos

Associate, Group actions & competition

T: +44 20 7809 2147

E: alex.athanasopoulos@shlegal.com



Marcus Watkinson

Associate, Group actions & competition

T: +44 20 7809 2516

E: marcus.watkinson@shlegal.com



Octavia Banks

Trainee solicitor, Group actions & competition

T: +44 20 7809 2188

E: octavia.banks@shlegal.com