

# DIGITAL MARKETS

## THE UK GOVERNMENT'S PLANS FOR A PRO- COMPETITION REGIME

The United Kingdom has overtaken China in terms of investment in technology startups, and is second only to the US. Technology companies in the UK are vital to the British economy, and in its desire to help the sector, the government has expressed concerns about the 'unprecedented concentration of power amongst a small number of digital firms' which it claims is holding back innovation and growth. To address those concerns, the government has been working on a pro-competition regime for digital markets.

In this paper, Inline explains how the government's proposed digital markets regime is expected to work, what it will mean for businesses, the next steps in the policymaking process, and finally the political debates surrounding it.

“ In December 2020 the Digital Markets Taskforce issued recommendations for a regime to regulate the most powerful tech companies operating in the UK.

# THE UK'S PLANS FOR A PRO- COMPETITION REGIME FOR DIGITAL MARKETS

Following the work of the Digital Competition Expert Panel, in December 2020 the Digital Markets Taskforce issued [recommendations for a regime to regulate the most powerful tech companies operating in the UK](#).

This included establishing a code of conduct for firms with 'strategic market status' (SMS) and creating a Digital Markets Unit (DMU) to enforce the code. The Taskforce is led by the Competition and Markets Authority (CMA) and includes Ofcom and the Information Commissioner's Office (ICO).

Based on the taskforce's advice, the government issued a [public consultation](#) on a pro-competition regime for digital markets in July 2021. The [government's response](#), published in May 2022, significantly reflects the Digital Markets Taskforce's recommendations and the government confirmed it will progress with the regime. Soon thereafter, as part of the Queen's Speech, [the government announced the Draft Digital Markets, Competition and Consumer Bill](#), which will provide additional clarity on the regime and statutory powers to enforce it.

The DMU sits within the Competition and Markets Authority (CMA) and will ensure the regulatory framework is successfully implemented and executed. Because the DMU was initially established on a non-statutory footing in 2021, it does not yet have legislative power to make any interventions. The Digital Markets, Competition and Consumer Bill will provide the DMU with the statutory powers to enforce the regime.

The purpose of the regime is to encourage and promote competition in the UK's digital markets for the benefit of consumers by providing the DMU with tools to regulate the largest tech companies' activities. The scope of the regime will be limited to 'digital activities', with the definition still to be determined, and targeted at a small number of firms with substantial and entrenched market power, which gives them a 'strategic market status', or SMS, in one or more digital activities.



While the DMU will have flexibility in using qualitative and quantitative criteria when applying the SMS designation onto companies, the government has decided to introduce a minimum revenue threshold in legislation to make it clearer which firms are out of scope.

The government has not yet decided what this threshold will be. When a company's revenues exceed the threshold, the DMU has nine months to assess and decide whether the company meets the SMS designation (there will be other factors beyond the revenue threshold). While the government's response to the consultation does not mention for how long the SMS designation would apply, the CMA has recommended five years. However, the DMU will have the authority to initiate a formal review earlier if it believes the SMS designation is no longer necessary.

“ While the government's response to the consultation does not mention for how long the SMS designation would apply, the CMA has recommended five years.

## CONDUCT REQUIREMENTS FOR IN-SCOPE BUSINESSES

One of the DMU's primary tools will be the ability to require certain forms of conduct from in-scope businesses.

The DMU's power will apply to the digital activities which the DMU determines as part of a firm's SMS designation, and seeks to prevent the abuse of market power by the biggest digital companies. Digital activities could include online search services, online payment systems, or mobile operating systems. The types of behaviour that the conduct requirements will address are: fair trading, open choices, and trust and transparency. The government is finalising the definition of these requirements.

While the government will specify the 'categories of conduct requirements' in legislation, the DMU will determine the requirements within these categories, depending on the activity and associated harms of each SMS firm. If an SMS firm has more than one designated activity, for example an online search service, it could face different conduct requirements for each activity.

While most conduct requirements will only apply to an SMS firm's designated activities, the government will also develop a cross-cutting category of conduct requirements for a company's designated activity as well as a non-designated activity. This seeks to prevent companies from anti-competitive leveraging into a designated activity. This would stop SMS firms from making changes in their non-designated activities that bolster its market position in its designated activity.



*For example, a firm providing an online search service may also provide its own mobile operating system. The firm could receive SMS status for its search service, but not its mobile operating system. The cross-cutting category of conduct requirements would prevent the firm from striking deals with mobile device manufacturers which make the use of its mobile operating system conditional on, for instance, pre-installing its search service.*

The DMU will produce guidance on how each SMS firm’s conduct requirements will operate in practice. In any case, businesses that are likely to receive SMS status, will have to pay close attention to how their business activities correlate to the DMU’s specific cross-cutting category of conduct requirements.

The DMU will be able to remove or amend conduct requirements, and to impose interim orders, although the details are still to be decided. This will allow the DMU to act in a quicker and more flexible way than the CMA can with its existing competition tools.

Meanwhile, the government will introduce an exemption for conduct that brings about ‘net consumer benefits’. SMS firms will be able to submit evidence proving that a particular form of conduct which would otherwise breach a conduct requirement actually provides benefits to consumers. The government states in its response that “the DMU will need to be satisfied that these arguments prove that the conduct is indispensable to achieving the benefits and that the benefits outweigh the potential harm”.

## THE DMU'S POWER TO MAKE PRO-COMPETITIVE INTERVENTIONS

Furthermore, the new regime gives the DMU the power to make pro-competitive interventions (PCIs). These interventions will seek to address the root cause of market power, with a view to opening up markets and ultimately removing the need for conduct requirements. It will be able to impose a PCI anywhere within an SMS firm, provided it relates to a competition concern in a designated activity. The DMU will have broad discretion to design and implement PCIs. This includes the authority to impose measures to separate a company's ownerships, and to monitor, amend, and trial PCIs.

## PROACTIVE APPROACH TO MERGER CONTROLS

The new regime also includes merger controls. SMS firms will be required to pre-notify mergers to the CMA, which will review them. Under the regime, the CMA will play a more proactive approach than it does currently in intervening with competition concerns, particularly regarding mergers.

In cases of non-compliance with the new regime, the DMU can impose fines of up to 10% of a firm's global turnover for the most serious offences, with further daily penalties of up to 5% of daily worldwide turnover for continued breaches. Fines of up to 1% of the firm's global turnover will be available for information offences, with additional daily penalties of up to 5% of daily worldwide turnover available.

## NEXT STEPS

The draft bill is scheduled to be published during this Parliamentary session, with the final bill being introduced “when Parliamentary time allows.” This is unlikely before the second half of 2023.

When asked if the DMU will receive statutory powers in this Parliamentary session, the government only said “as soon as parliamentary time allows”, an answer given shortly after cabinet ministers had started to resign from Mr Johnson’s government in June 2022. In terms of next steps, the government is likely to confirm the outstanding details of the regime when it publishes the draft bill. This would then, under normal Parliamentary procedure, be examined by the Digital, Culture, Media and Sport Select Committee and/or the Business, Energy and Industrial Strategy Select Committee respectively, and possibly a Joint Committee of both Houses of Parliament. This process allows the government to gather further evidence and feedback from stakeholders as well as recommendations for changes to the draft legislation before the final bill is introduced to Parliament.

The government’s consultation response and draft bill to regulate digital markets comes soon after the EU approved its Digital Markets Act (DMA). Although the US has lagged behind on digital markets regulations, a fresh wind is coming from the EU-US Trade and Technology Council which set up the Joint Technology Competition Policy Dialogue to develop common approaches and strengthen cooperation on competition policy and enforcement in the tech sectors. Congress has addressed the matter of digital competition with its American Innovation and Choice Online Bill to tackle self-preferencing activities (defined as actions which are designed to favour a company’s own products or services over those of its competitors), and the Open App Markets Act to prohibit anti-competitive actions on app stores.

“ When asked if the DMU will receive statutory powers in this Parliamentary session, the government only said “as soon as parliamentary time allows”, an answer given shortly after cabinet ministers had started to resign from Mr Johnson’s government in June 2022.

**The decision to publish the bill in draft form reflects the government's priority to focus on other areas of the government's digital policy agenda, particularly data protection reforms, in this Parliamentary session. It also suggests some ideological opposition to more regulation within the governing Conservative Party.**

However, international regulatory developments could force the UK Government to adapt its regulatory regime to stay competitive globally. If the EU and the US continue to move ahead with their digital competition regimes, the UK risks falling behind in influencing international standards for a digital markets regulatory framework. Andrea Coscelli, the outgoing CEO of the CMA, has warned that the UK risks being a 'rule taker' due to the delay to the new regime.

The Competition and Markets Authority currently experiences a lack of orderly succession planning which could further delay putting the DMU on statutory footing and demonstrating UK leadership in digital competition. After two years of seeking a new chair of the CMA, the government has now selected Marcus Bokkerink as the preferred candidate. Bokkerink's appointment will allow the government to find a permanent CMA chief executive, which has been on hold. Sarah Cardell will be the CMA's interim CEO and is in a strong position to remain CEO, according to people close to the process.



## WHAT THIS WILL MEAN FOR BUSINESSES

The new pro-competition regime is a tailored and targeted approach to regulate the largest tech companies to enable greater competition for smaller tech firms and create benefits for the consumer. Ministers have indicated that fewer than ten firms are likely to be designated with SMS status, possibly around five. It is substantially more targeted than the EU's DMA, and the decision to introduce a revenue threshold will provide further certainty as to which companies are in scope.

The DMU will have flexibility to design and implement interventions in companies' activities if they do not meet their designated conduct requirements.



*This flexibility means that interventions could ultimately be more effective at achieving the DMU's objectives than a one-size-fits-all prescriptive approach, since the interventions will be specifically designed for a designated digital activity and its associated harms.*

That is welcome for digital firms that are harmed by the dominance of the biggest tech firms likely to be in scope (such as Apple, Amazon, Alphabet and Meta). However, this non-prescriptive approach means there will be less visibility for SMS firms regarding the exact requirements to which they will be subject, which could create uncertainty. At the same time, the Digital Markets Taskforce's recommendations and recent CMA output, including the market study into mobile ecosystems, give an indication of the types of interventions that are likely to apply.

SMS companies will experience greater scrutiny if they plan significantly large mergers. Considering the DMU's substantial enforcement powers, the DMU will be given sufficient capacity to monitor companies' activities closely and appropriately implement the regime.

**In terms of companies being able to appeal the DMU’s decisions, the government believes revising the judicial review principles is most appropriate. The principles include revising the checks and balances of the government, public bodies, and regulators; the accessibility and affordability of bringing a judicial review claim; the scope of judicial reviews, & the range of remedies judges can use to ensure a fair outcome.**

Companies will have less leeway once the DMU has confirmed SMS designation assessments and code requirement designs for tech companies. This means that businesses will want to inform policymakers of any unforeseen ramifications of the regime early on in the policymaking process to avoid the danger of regulators making ill informed decisions.

The DMU’s scope of work will be tailored to the designated digital activities of each company with SMS. For businesses, it will be crucial to understand as early as possible whether they will fall within the scope of strategic market status, what this would entail, and which additional conduct requirements will apply to them. Considering the DMU’s bespoke approach, it will be difficult to predict uniform consequences for the sector. Companies will want to monitor regulatory developments and engage with authorities to be well-prepared for the new regime for digital markets.

The government’s intention to regulate digital markets by introducing the draft bill allows more time for businesses and the public to provide feedback and educate policymakers on any possible unintended consequences.





## OUTSTANDING DEBATES

While much thought has gone into the concept of a pro-competition regime for digital markets, some questions remain.

This includes the level of the minimum threshold and defining 'digital activities' which determines which firms fall inside or outside the scope of strategic market status. Generally, the government's intention is to target only the biggest tech firms, namely Google, Apple, Microsoft, Amazon, and Meta. There is less clarity on the scope for digital activities, although it will most likely include activities concerning online search functions, advertising, mobile operating systems and app distribution. The government also needs to finalise the categories of conduct requirements that it will address. This will most likely impact how companies plan their business operations.

Another question is around the Conservative Party's position towards regulating Big Tech and how far it should go. This has become prominent with Liz Truss being elected as the new leader of the Conservative Party and UK Prime Minister, which could result in a potential shift in policies. Truss has suggested dedicating "priority Parliamentary time" for the Digital Markets, Competition and Consumer Bill in the autumn of 2022. Truss's commitment would represent an acceleration of the proposals. According to the Financial Times, David Canzini, Boris Johnson's former deputy chief of staff, has told colleagues to scale back their legislative demands because "Conservative governments don't legislate their way to prosperity and growth". Meanwhile, the Financial Times quotes a Conservative official who suggests that if "the reluctance to legislate is because 'Conservative governments don't legislate their way to prosperity and growth', that indicates a fundamental misunderstanding of how the digital economy works".

“ The government also needs to finalise the categories of conduct requirements that it will address. This will most likely impact how companies plan their business operations.”

**Although Canzini is unlikely to remain in post now that Liz Truss has succeeded Boris Johnson as Prime Minister, Canzini is expected to remain in Downing Street and may influence certain corners of the Conservative Party.**

Prior to the Queen’s Speech in May 2022, Julian Knight, Conservative chair of the House of Commons Digital, Culture, Media and Sport Committee, said that if legislation to empower the DMU was not in the Queen’s Speech, it would “damage the credibility of the whole enterprise”.

With Liz Truss elected as the new Conservative Party leader in September 2022, there is the possibility of an early general election. Labour supports providing the DMU with full statutory powers as soon as possible, as expressed by Chris Elmore, former Shadow Minister for Digital, Culture, Media and Sport. Seema Malhotra, Shadow Minister for Business, Energy, and Industrial Strategy, also stressed the need for the DMU to “be moved to a statutory footing and be given the teeth it needs.”

The pre-legislative scrutiny process of the draft bill could provide a good opportunity to steer the direction of the bill, especially as the scope and details of the regime remain contested by MPs of the Conservative Party. Meanwhile, the international pressure to regulate Big Tech could speed up the process in the UK. Inline will continue to follow the developments of the regime throughout its legislative process.



## GET IN TOUCH

Inline Policy was founded in 2013 to meet a gap in the market for a consultancy that could provide in-depth policy and regulatory analysis to fast-moving innovative businesses. With technology transforming every aspect of our economy and society, we provide strategic insight into what policy makers and regulators are thinking and how best to influence their decisions.

Our policy experts in London and Brussels work across a wide range of sectors where technology and regulation meet. From collaborative economy marketplaces, through travel-technology platforms, to European energy markets, we are proud of our record of successfully improving the regulatory position of market entrants and established players.

**LONDON** Inline Policy Ltd, 310 Vox Studios, London SE11 5JH

**BRUSSELS** Inline Policy Sprl, Avenue Marnix 17, 1000 Brussels



**QUENTIN BROWELL**

Executive Director, London

[quentin.browell@inlinepolicy.com](mailto:quentin.browell@inlinepolicy.com)



**HANNAH FUCHS**

Senior Policy Analyst

[hannah.fuchs@inlinepolicy.com](mailto:hannah.fuchs@inlinepolicy.com)



**MATTHEW NIBLETT**

Account Manager

[matthew.niblett@inlinepolicy.com](mailto:matthew.niblett@inlinepolicy.com)