

## THE UK'S NEW COMPETITION REGIME FOR DIGITAL PLATFORMS WITH STRATEGIC MARKET STATUS

On 27 November 2020, the UK Government announced its intention to establish a new regime to govern the behaviour of "digital platforms" funded by online advertising that have Strategic Market Status. This regime will comprise a mandatory code of conduct and will be enforced by a new Digital Markets Unit to be established within the Competition and Markets Authority in April 2021.

### Why is the UK seeking to adopt new legislation?

On 1 July 2020, the UK Competition and Markets Authority (**CMA**) issued its market study into online platforms and digital advertising (the **CMA's Market Study**). The CMA's Market Study focused on the markets for search, social media and online advertising services, finding that power in these markets has long been concentrated among a small number of companies, resulting, among other things, in restricted innovation and harm to businesses and consumers. In particular, the CMA found that Google and Facebook were protected by "such strong incumbency advantages" that "potential rivals can no longer compete on equal terms". The CMA's recommendations included:

- the adoption of a mandatory and enforceable code of conduct for platforms funded by digital advertising that have Strategic Market Status (**SMS**); and
- the creation of a new Digital Markets Unit (**DMU**) within the CMA, to implement the code of conduct and make other pro-competitive interventions.

On 27 November 2020, the UK Government responded to the CMA's Market Study, endorsing its findings and announcing its intention to pursue its recommendations (the **Government's Response**). The Government also expects the new regime to address the recommendation of the Cairncross Review into sustainable journalism to introduce codes governing the relationships between online platforms and news publishers, seeking to ensure the sustainability of high-quality journalism and news publishing.

The UK's legislative initiative comes at a time of global debate around antitrust regulation of "digital platforms", with several European jurisdictions (including the EU) working on adopting new competition laws and ex-ante regulation governing the digital economy.

### At a glance

- From April 2021, the UK will establish a Digital Markets Unit (**DMU**) to enforce a new mandatory code of conduct for digital companies.
- The code of conduct will apply to companies designated by the DMU as having Strategic Market Status, at least initially in markets funded by digital advertising.
- The code of conduct will enforce principles of fair trading, open choices, trust and transparency.
- The Government's statements foreshadow that Facebook and Google are likely to be designated as having SMS.

## What will the code of conduct include?

The aim of the code of conduct is to provide companies with sufficient clarity over what represents acceptable behaviour when interacting with their customers, users and competitors. Only conduct by companies designated as having SMS will be governed by the new code of conduct. It remains to be seen to what extent a code of conduct might also apply to business activities in relation to which designated companies do not have market power.

While the list of (prohibited and mandated) behaviours included in the code of conduct remains to be confirmed, the Government's Response indicates that, under the code, platforms could be:

- required to be more transparent about the services they provide and how they are using consumers' data;
- required to give consumers a choice over whether to receive personalised advertising; and
- prevented from placing restrictions on their customers that make it hard for them to use rival platforms.

Notably, the Government has opted to make the code mandatory and enforceable. The contents of the code of conduct will be informed by the work of the CMA's Digital Markets Taskforce (**DMT**) which, since March 2020, has been engaging with stakeholders to advise the Government on designing what the CMA refers to as "a pro-competition approach to digital markets".

The new regime as currently anticipated is, at least at this stage, more narrowly focused on digital advertising, general search and social media. In contrast, other European jurisdictions have opted for more far-reaching proposals to restrict the conduct of a wider range of companies operating in the digital sector. In particular, the European Commission is expected to publish its legislative proposal for a Digital Markets Act on 9 December 2020, which will include a list of prohibitions and obligations for companies designated as "digital gatekeepers", as well as new powers of competition law enforcement specific to the digital economy (**New Competition Tool**).

The DMU, once established, is likely to determine which companies should be designated as having SMS, possibly based on additional inquiries to establish whether additional regulation is required. The Government noted that it was "*committed to taking action to protect businesses and users from the potential harms associated with substantial and enduring market power in digital platform markets*". It is therefore likely that a code of conduct will ultimately also apply to companies operating outside of digital advertising, general search and social media.

## What is SMS?

The concept of SMS first appeared in the report of the Digital Competition Expert Panel, which was commissioned by the UK Government and chaired by Professor Jason Furman (the **Furman Report**). The Government's Response does not define the criteria for designating SMS, but seems to anticipate the existence of "*substantial and enduring market power*" to be determinative.

The Furman Report finds SMS to arise from being in a position to exercise market power over a gateway or bottleneck in a "digital market", where a company controls others' market access.

The Government's response and the CMA's Market Study foreshadow that at least Google and Facebook are highly likely to be designated as having SMS under the new regime.

## The Digital Markets Unit

The DMU will be tasked with introducing and implementing the code of conduct. The Government intends to establish it in April 2021 as part of the CMA, but details of its decision-making powers remain to be determined (e.g., legal nature of its decisions, how decisions are appealed). It is expected that, once the DMU is established, there will be a lead time during the course of which the DMU will determine its priorities and recruit members of staff.

The DMU will have a significant budget and will be empowered to:

- designate companies with SMS;
- introduce and maintain the code of conduct and produce supporting guidance; and
- enforce the code in a timely manner (*i.e.*, *inter alia* suspend, block and reverse decisions of SMS firms, order conduct to achieve compliance and impose financial penalties for non-compliance) and amend its principles in line with market conditions.

Notably, the UK Government is considering empowering the DMU to undertake a range of other pro-competitive interventions to tackle the underlying sources of market power and promote competition. Such interventions could include mandating data access, enforcing greater interoperability, changing choices and defaults for consumers, and imposing separation remedies. The Government acknowledges that these interventions can give rise to unintended consequences, noting that a careful risk assessment is required before granting such powers to the DMU.

## What is the implementation timeline for the new regime?

The Government will:

- consider the DMT's advice on the design and implementation of the regime by **end of 2020**;
- consult on proposals for the new regime in **early 2021**, drawing on industry and technical expertise. This is expected to create opportunities for stakeholders seeking to influence the scope of the new regime to express their views; and
- legislate the reforms **as soon as parliamentary time allows**.

### Useful links

- [The UK Government's press release on the new regime](#)
- [The UK Government's full response to the CMA's Market Study](#)
- [The CMA's Market Study](#)
- [The Furman Report \(Unlocking Digital Competition\)](#)
- [The Cairncross Review into sustainable journalism](#)
- [The CMA's Digital Markets Taskforce](#)

## CONTACTS

**Jenine Hulsmann**  
Partner  
T +44 20 7006 8216  
E [jenine.hulsmann@cliffordchance.com](mailto:jenine.hulsmann@cliffordchance.com)

**Nelson Jung**  
Partner  
T +44 20 7006 6675  
E [nelson.jung@cliffordchance.com](mailto:nelson.jung@cliffordchance.com)

**Alex Nourry**  
Partner  
T +44 20 7006 8001  
E [alex.nourry@cliffordchance.com](mailto:alex.nourry@cliffordchance.com)

**Greg Olsen**  
Partner & Head of  
London Antitrust  
Practice  
T +44 20 7006 2327  
E [greg.olsen@cliffordchance.com](mailto:greg.olsen@cliffordchance.com)

**Jennifer Storey**  
Partner  
T +44 20 7006 8482  
E [jennifer.storey@cliffordchance.com](mailto:jennifer.storey@cliffordchance.com)

**Stavroula Vryna**  
Senior Associate  
T +44 20 7006 4106  
E [stavroula.vryna@cliffordchance.com](mailto:stavroula.vryna@cliffordchance.com)

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London, E14 5JJ

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