

techUK summary of responses to survey of members for the CMA's consultation on the guidance for the digital markets competition regime

On 24 May, the CMA published [draft guidance](#) that will inform how the CMA's Digital Markets Unit will implement the Pro-competition Regime for Digital Markets legislated for in the Digital Markets, Competition and Consumer Act 2024.

The consultation was open for feedback between 24 May and 12 July. This overlapped with the UK General Election campaign, which ran from 22 May to 4 July.

To help inform the CMA on this guidance, techUK opened a survey to our members to gather perspectives on the guidance issued and feed responses from our membership into the public consultation.

techUK hoped to work with the CMA to reach out to members that had not engaged with this regime in the past, including through a proposed webinar for members to raise awareness and educate members on the guidance, which could be circulated across techUK's wide contact base.

Unfortunately, due to the pre-election period, the CMA felt unable to run this webinar. techUK ran a closed-door workshop with the CMA during the consultation window to engage some businesses in the process, however interest in this workshop was low.

techUK reached out to a wide range of contacts across our membership, with 3353 contacts reached, and there was a particular focus in our outreach towards SMEs, scale-ups and businesses who had not engaged with this regime in the past. However, despite this targeted outreach, interest in this consultation remained low.

Despite extending our feedback window, we received 6 responses in total.

Furthermore, the responses summarised below come from businesses who have previously engaged with this regime and already have a working knowledge of the regulatory regime.

The summary below therefore reflects the views of this grouping of companies **and not the wider techUK membership.**

While there are circumstances that impacted the response rate of this survey, it has been observed by techUK that this regime has not had the same level of interest or engagement across our membership as other major digital regulation files. For example: online safety, data protection or AI regulation.

To ensure this regime is well understood and the CMA operates with insight from a broad range of businesses, we encourage the CMA to continue engaging with stakeholders in the tech sector beyond the consultation window on this guidance.

techUK summary of responses:

Who responded

In total, techUK received 6 responses to the survey. All respondents were large multinational companies. Five of these had HQs outside the UK while one had its HQ in the UK.

The respondents were a mix of companies who identified as 'those who believed they could be regulated by the regime', 'challenger' companies and companies that did not believe they would be regulated nor that identified as challengers.

Strategic Market Status:

Across our respondents, there was a general request for the CMA to provide further detail on how it will seek to define digital activities and how the 'Strategic Market Status' (SMS) threshold will be measured.

Three firms asked for further clarification on how the CMA would seek to designate multiple digital activities in relation to the SMS threshold. One firm raised concerns about the possibility of grouping digital activities where one of these activities is in a nascent market. This was raised within the context of the forward looking assessment the CMA must run to designate SMS.

Two businesses asked for clearer guidance on the kinds of digital activities that would be in or out of scope of the regime.

One firm also raised concerns about uncertainty created by the current guidance, expressing concerns about how predictable the impact of the regime would be on their business without clearer guidance.

However, one business believed that the guidance on Strategic Market Status outlined was generally strong and further agreed that "clear and convincing" is the right evidentiary standard for successful counter arguments to a finding of entrenched market power.

Conduct Requirements:

Overall, all respondents asked for a greater degree of clarity in how conduct requirements are set out and consulted on. However, there were different perspectives on what this increased clarity should look like.

One firm encouraged the CMA to seek to anticipate moves to evade the effect of conduct requirements and therefore be as specific as possible in the design of conduct requirements.

Some respondents raised concerns about the open-ended nature of the conduct requirements and a lack of clarity on how these will impact on non-designated activities.

Respondents raised questions about the consultation process around the design of conduct requirements. Concerns raised included what proactive role the CMA will undertake to inform potentially interested firms of the consultation process. This included a question of

how the CMA will seek to streamline the process in the event the remedy crossed regulatory boundaries. Another question was raised about how the consultation process will work and the nature of the participative approach when it comes to developing and monitoring conduct requirements.

One firm asked for greater clarity on how assessments of proportionality and the role of the so called 'countervailing benefits exemption' will be included in the design of conduct requirements.

One respondent flagged a potential omission from the guidance. The firm in question pointed to a discrepancy between the list of factors set out in the guidance for consideration, when assessing whether it would be proportionate to impose a conduct requirement, and those in the explanatory notes to the Digital Markets Competition and Consumer Act. The respondent said that "freedom of contract and property rights" was included in the explanatory notes, but not in the guidance.

Pro-competition interventions:

One firm who responded to the survey expressed a view that Pro-competition Interventions (PCIs) work well as relatively open, allowing for flexibility and for their existence to be used as an incentive for compliance with conduct requirements.

Other respondents raised a number of clarificatory questions, these included requesting further detail on the thresholds for determining whether there exists an adverse effect on competition, the role of both proportionality and consumer benefit tests when developing a PCI and more detail on the role of the participative approach when designing PCIs.

Additionally, one firm asked for further detail on the role that choice screens may have on other services connected to any digital activity that may be subject to a choice screen. This company requested that the CMA provide more detail to consumers on the impact of their choices particularly where this may impact on connected services.

Investigatory Powers

Only two companies replied to this section of the survey.

One respondent raised their concerns about the far-reaching information gathering powers conferred on the CMA and the need for these to be used proportionally. The firm requested more detail on how the CMA will exercise its powers and asked for further guidance on how 'skilled persons' will be assessed and identified.

Additionally, the firm suggested that requests for information could be shared in draft for discussion before the CMA submits its final request.

The other respondent raised concerns about the transparency of the regime and expressed their view that firms assessed as having SMS should have full access to any disclosures that relate to them.

Monitoring

There were a wide range of responses from members to this question.

One respondent asked for more guidance on the types of information sources that the CMA would factor into its decision making and monitoring of the regime. This firm also asked that firms with SMS be kept informed of any evidence submitted that relates their business as well as asking that information gathering powers are used proportionately.

Two firms disagreed over compliance obligations with one believing that placing the burden on SMS firms to be the correct approach while another asked for more consistency in compliance across different regimes.

One firm raised a specific point related to merger control.

Enforcement of Competition Requirements

Only three responses were recorded to this question.

One firm raised concerns that SMS firms would use security or privacy grounds to resist enforcement and stressed the importance of the high threshold of the indispensability test in the guidance.

Additionally, this firm raised its support for the final offer mechanism approach to resolving disputes as an effective form of arbitration.

Another firm requested clarity on how the final offer mechanism be used. Their response raised concerns around how the mechanism may breach 'freedom of contract' principles. This firm requested that further guidance be provided to state that SMS firms will maintain an ability to exit a contract that they do not wish to remain a part of and that the CMA sets out further details on the factors it will consider as part of bids under the final offer process. They specified this should include assessments of costs and benefits.

Another firm requested that SMS firms be given the full list of evidence related to their case held by the CMA. Additionally, this firm requested that the guidance allow for SMS firms to request non-confidential versions of evidence submitted against them and that the guidance specify what evidence the CMA will provide to SMS firms during the initial assessment of whether to open an investigation.

Penalties for Failure to comply with competition requirements

Only three responses were received to this question.

One firm set out its support for penalties as an important part of compliance to the regime.

Another wished for the ease of making a complaint to be improved. The firm said that it would be useful for template forms to be provided or more guidance to users to be given in respect of the types of information the CMA would require to consider a complaint. Further to this, the firm is seeking clarity on whether the CMA will provide more information to any complainants beyond that which is made public about the investigation.

Further another firm requested that the guidance gives SMS firms a meaningful opportunity to comment on a provisional penalty notice and for the CMA to provide a detailed assessment of the perceived gains the firm has received from a failure to comply. Additionally, this firm requested further guidance on how the CMA intends to do this and that further consultation in this area be considered.

Administration:

Four responses were received for this question.

One firm provided a very detailed response on this topic, raising several topics. The firm outlined the need for clarification surrounding the relevance of future interactions between existing CMA tools and the new regulatory regime, providing recommendations for how the CMA could do this under a 'One CMA' umbrella. The firm also proposed that the CMA avoid consideration of issues that are similar or the same repeatedly in order to reduce inconsistency. The firm also proposed that the CMA, in a manner similar to other sector regulators, should consider whether acting under competition powers is more appropriate before their regulatory powers. Similarly, this firm said the CMA should consider whether the DMU is always best placed to act in a given case, and that lead Departments should be established for cases in ways that mirror existing sectoral regulation duty. The firm finished by emphasising that the DMU could provide the CMA with the digital sector regulatory expertise necessary to inform on behavioural remedies, potentially allowing greater flexibility without establishing new functions.

One firm made clear they wanted the CMA to confirm advanced notice of consultation timetables would be given to relevant stakeholders was their default position. They also asked the CMA to commit to ensuring transparency when using a range of methods to consult stakeholders. Additionally, this firm expressed a belief that public, rather than bilateral, engagement was more transparent and therefore preferable, with the reasonings for bilateral engagement outlined when used.

Another firm supported the CMA's approach to confidentiality for the regime. However, they asked the CMA to confirm that the redaction process for information prior to disclosure and publication, located in paragraph 7.26, includes the CMA engaging with the relevant third party. This is to allow those parties to put forward their case for redacting confidential information.

Another firm expressed support for a levy on SMS firms to pay for their digital markets functions in order to reduce the burden on smaller UK firms.

Merger reporting requirements for Regulated (SMS) firms:

We received just one response to this question where one firm requested further guidance on the meaning of *unconditionally obliged* in line with the explanatory notes and commentary on the Bill during the House of Lords readings. They felt these would benefit the guidance if included.