



July 2024

Response: Consultation on the CMA digital markets competition regime guidance

BritishAmerican Business (BAB) and the U.S. Chamber of Commerce's U.S.-UK Business Council (USUKBC) welcome the opportunity to respond to the CMA consultation on the draft guidance concerning operation of the new UK digital markets competition regime (further referred to as 'regime'), established by the Digital Markets, Competition and Consumers Act 2024 (further referred to as 'DMCC').

BritishAmerican Business is the leading US-UK transatlantic trade association, incorporating the British-American Chamber of Commerce in the US and the American Chamber of Commerce in the UK. We are committed to strengthening the economic corridor between the US and the UK, and US and EU, and support policies and actions that enhance the environment for transatlantic trade and investment on behalf of our 450+ members.

The U.S. Chamber of Commerce (the Chamber) is the world's largest business federation, representing the interests of millions of businesses of every size, sector, and region. Our membership includes global companies, small businesses, state and local chambers of commerce, sectoral associations, and 130 American Chambers of Commerce abroad. The Chamber's U.S.-UK Business Council has consistently advocated for strong commercial ties between the United States and the United Kingdom. We are each other's most steadfast allies, and the economic ties between our two countries are substantial, with more than \$2tn in two-way trade and investment, supporting 2.8mn jobs on both sides of the Atlantic. That economic relationship bolsters our shared commitment to security, prosperity, and rule of law.

BAB and the USUKBC believe that business input on the operation of and conduct within UK digital markets is fundamental. Considering the breadth and depth of the regime's impact on firms of all sizes and across various streams of digital business activity, we appreciate that industry has been given the opportunity to share our perspective.

Summary

BAB and USUKBC support the development of proportionate, transparent, and evidence-based regulation which ensures that firms operate in an environment that promotes competition. We believe competition is the best way to drive innovation and create an environment for companies to develop better products and services at lower cost. The guidance presents an opportunity to enable stakeholders to engage with the regime, while also ensuring transparency in decision-making is maintained.



Our respective members have raised serious concerns regarding the CMA’s draft guidance given its lack of detail. They have also flagged concerns that the draft guidance could be approved (given the unique timing) by the incoming government in haste, without full understanding of its impact (should guidance be presented in its current form). BAB and USUKBC believe the current draft does not provide sufficient clarity or certainty about how the regime will operate, which is problematic for those currently operating in the market (including for firms with Strategic Market Significance) (SMS) (and third parties that use or interact with designated platforms & services), as well as for potential investors. The guidance should deliver on the core objectives of transparency, predictability, and consistency in terms of both substance and procedure and should reflect the CMA’s stated intent to: *“adopt a participative approach” and take “a targeted, evidence-based and proportionate approach to implementing” the new digital markets regime.*

Our members’ concerns relate to three issues:

- 1. Process & Decision Making**, including how the CMA will conduct its work in practice.
- 2. Engagement**, including how and at which points businesses will engage with the CMA.
- 3. Information & Data Handling**, including which information touchpoints are important and in information management.

Process & Decision Making

Clarity is needed throughout the guidance on how the CMA will operate in practice, with sufficient checks and balances on decision-making given the extensive powers afforded, and considering the core principles of transparency, predictability, and consistency. For example, the guidance does not define how interventionist the CMA will be in the application of competition policy. How the CMA will fulfill its mandate, including market definition, should be addressed and clarified. While we understand that operationalizing the DMCC will require new procedures that will evolve and iterate over time, we request more detailed guidelines up front, with the ability to adjust these as needed.

We recommend that the guidance delineate formal internal review processes that are led at a senior level and cover key decision-making points within the relevant DMU processes to ensure adequate scrutiny (within and outside of the Board Committees). These processes should include a strategic assessment of key evidence, including cross-checking of economic information on which pivotal decisions are made. Implementing established mechanisms for quality assurance in regulatory decision-making which have been widely adopted in other contexts in the UK, will ensure the CMA’s conclusions are as robust as possible. More clarity on the Digital Markets Board Committee and how it will operate and work in the context of the CMA is also needed, including on such issues as appointment, selection, tenure, and involvement with other non-digital CMA work. More broadly, the CMA’s approach to digital regulation must fit into the existing regulatory framework in a way that limits potential for double jeopardy and duplication of work by different concurrent workstreams.

We also note ambiguity on how the prospective, forward-looking analysis required in the application of the DMCC will be established, considering the dynamic and fast-paced evolution of digital space.



This is especially important for SMS designation and how assessments will be made across different types of business and across different digital activities.

Engagement

The CMA has said it wants to “*adopt a participative approach*” in its implementation of the new digital markets regime. In its current form, the guidance does not provide sufficient mechanisms for interested parties to meaningfully engage with the CMA. Among the concerns: lack of details on specific touchpoints, how feedback will be handled and addressed, and how different stakeholders’ views will be weighed (e.g. third parties). Without such mechanisms in place, there is a risk that the regime will not achieve the desired outcomes. Deep engagement with digital stakeholders is essential to successfully enhance policymakers’ understanding about complex technical matters, to support capacity building within regulating bodies, as well as in receiving feedback on how the procedural aspects are working in practice. This will ensure any evolution of the regime is sensible and robust. It also enables the regime to start on the right footing, understanding how differently it is intended to operate compared with existing tools open to the CMA.

Information & Data Handling

The CMA has said it will take “*a targeted, evidence-based*” approach to implementing the new digital markets regime. In its current form, the draft guidance does not reflect this aim and risks limiting the robust information needed to inform decision-making. For example, industry requires greater clarity on the types of evidence the CMA is likely to consider relevant to its decision-making process, as well as the factors it will consider in assessing that evidence. Clarity will ensure that all parties are able to prepare, allocate resources, and deliver the right information to assist the CMA within the short time frames in the legislation. Some data sets take a long time to extract, and as such, it essential that greater detail on requirements be provided.

Further, the guidance does not clearly set forth how the CMA will exercise its discretion in critical areas where there is potential for adverse outcomes, creating significant uncertainty for all parties affected by the regime. Firms rightly wish to preserve their rights to defense through better transparency mechanisms and clarity on how sensitive information will be handled by the CMA. This includes the right to access evidence at a sufficiently early stage in the process, should a case be made against a firm.

Lastly, the DMCC gives the CMA broad information-gathering powers, potentially from any business or person. As such, the agency has the power to require SMS firms to vary their conduct and/or carry out live testing on consumers. We believe such powers could result in a host of unintended consequences on business models, operations and performance, which would in turn undermine competition & innovation in the UK. It is important that such authority is used proportionately, with effective guardrails put in place to reduce the risk of unintended consequences.



Conclusion

As drafted, we believe the proposed guidance does not sufficiently deliver on its stated aims of *“adopt(ing) a participative approach” and taking “a targeted, evidence-based and proportionate approach to implementing” the new digital markets regime.* Given the CMA’s extensive powers and its ability to shape the UK digital market landscape through the DMCC Act, we ask for more clearly defined operational parameters, as well as clarity on the agency’s approach to decision-making and sufficient checks and balances to ensure relevant processes are robust and transparent. We stress the need for greater detail about how CMA will interact with businesses to ensure effective stakeholder engagement. Lastly, we call for greater detail on information and evidence management within the CMA, to ensure businesses’ rights are protected and that industry can work with the agency to deliver efficient outcomes. We believe additional detail and clarity on the points above will minimize the risk of unintended consequences, not just for firms operating in the digital marketplace, but for the entire digital ecosystem and wider UK economy.

Our organizations support the development of proportionate, transparent, and evidence-based regulations that promote competition and spur innovation. We stand ready to discuss these concerns in greater detail to ensure mutually acceptable outcomes that benefit UK consumers and businesses alike.

Thank you for your consideration of our views.

Sincerely

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