

CMA CONSULTATION ON DIGITAL MARKETS COMPETITION REGIME GUIDANCE

MOZILLA RESPONSE

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Introduction

Mozilla is a unique public benefit organisation and open source community formed as a non-profit foundation. It is guided by a set of principles¹ recognising that, among other things, the internet must remain open and accessible; individuals must have the ability to shape the internet and their own experiences there; and that security and privacy are fundamental.

As the developer of products including the Firefox browser and the Gecko browser engine, Mozilla aims not only to advocate for a better online experience for people everywhere, but also to provide products that live up to those principles.

Given the nature of concentration in digital markets and the resulting harm for UK consumers², Mozilla supported the passage of the Digital Markets Competition and Consumers Act 2024 (DMCCA) and continues to advocate for fair and effective competition.

Digital markets competition regime guidance

Overall, Mozilla welcomes the CMA's approach to exercising its new powers under the DMCCA as set out in the draft guidance.

We consider that the guidance demonstrates the CMA's intent to take an approach which is transparent, flexible and proportionate. These attributes will be critical to ensuring that the DMCCA is a competition regulatory regime which fosters innovation and consumer choice by tackling the well-evidenced issues which led to its creation - as well as nascent and future issues which may arise.

There are also a number of areas where the CMA could provide more clarity for SMS firms and third parties which we also note below. However, we also recognise that the regime is not yet operational therefore providing examples and more detail will, in some cases, limit the CMA's ability to intervene effectively. We also recognise that, in order to assist both SMS firms and third parties to understand how the CMA will approach its digital markets functions under the DMCCA and to create legal and regulatory certainty, the CMA has provided 188 pages of detailed guidance.

¹ [Mozilla Manifesto](#)

² [Unlocking digital competition. Report of the Digital Competition Expert Panel.](#) Furman et al, April 2019

We have set out below our comments on the draft guidance under three main categories: ecosystems/products; role of third parties; and importance of trialling and testing.

Ecosystems and products

Several points of the CMA's guidance recognises the importance of interlinkages between different products. For example, in the context of identifying digital activities (paragraph 210) and in the context of assessing the role of market power in the SMS conditions (paragraph 4.43), the CMA states that it "*may consider evidence relevant to market power of individual products and whether and how any interlinkages between these may contribute to market power across the digital activity...*".

In Mozilla's view this is an extremely important consideration given widespread vertical integration and/or the prevalence of companies leveraging their market power in one product to direct consumers to another which competes downstream. It is also relevant from a technical perspective, since products from one company (such as a dominant operating system provider) are often designed to interoperate better with other products from the same company - creating barriers to entry for others.

This consideration of the interlinkages between products in the context of digital activity and SMS designations would benefit from further expansion. The CMA should expressly recognise the role of digital ecosystems, both in SMS designations and in imposing competition requirements.

In the context of SMS designations, we welcome the CMA's express recognition that the legislation provides for two or more products being treated as a single digital activity, where they have substantially the same purpose or can be carried out in combination for a specific purpose. This is clearly the intention of the DMCCA given that many potential SMS firms operate multiple platforms with the same product (or different versions of the same product) distributed across them.

Being clear that the legislation enables the CMA to designate such products as a single digital activity is essential for the effectiveness of the regime and it rightly expresses the need to interpret these conditions broadly, including from a consumer perspective. However, there may be further instances beyond an alignment of purpose. For example, there may be a scenario where multiple products together create an ecosystem which serves a distinct purpose. This possibility should be reflected in the guidance, particularly given the forward-looking nature of the regime and pace of technological and commercial developments in digital markets.

In the context of imposing competition obligations, we welcome the CMA's guidance around digital activities beyond the SMS firm's designated activity. For example, the CMA's approach to section 20(3)(c) (such as paragraph 3.14 onwards) rightly recognises that non-designated activities may be used to reinforce the position of the firm's relevant digital activity. It is also

applicable to section 20(3)(b) and (d). Failing to do so would risk undermining the effectiveness of the regime.

Role of third parties

The DMCCA imposes a range of public consultation obligations on the CMA. This is necessary to ensure that not only does the CMA take into account all relevant views when making decisions under its new power, but also that it has input from market participants, technical experts and civil society organisations who have relevant information and experience to assist the CMA's implementation of the regime.

The guidance expands on various elements of the DMCCA which enshrine an important role for third parties. In addition to the consultation requirements in the guidance which directly reflect obligations as set out in the Act, we welcome the following (non-exhaustive) aspects of the guidance:

- *The recognition that, while transparency is essential, some material may need to be kept confidential* (paragraphs 5.85-91). However, we would also note that this can be used by SMS firms to shield themselves from appropriate scrutiny and can prevent third parties from being able to input usefully. Lack of appropriate transparency can also prevent competitors from conducting product planning, giving SMS firms a competitive advantage in knowing the precise scope of future platform changes.
- *The CMA's willingness to consult on SMS designations and conduct requirements at the same time* (paragraph 3.45). This may help to allay concerns about the lengthy timescales involved and the harm to competition that will continue to occur in the interim and is expressly provided for at section 24(3).
- *The recognition that third parties should be able to input on the appropriate timeline for the implementation of conduct requirements (CR)* (paragraph 3.62).
- *Consulting relevant stakeholders on the substance of CR reporting obligations* (paragraph 6.46). As noted above, transparency for market participants is particularly important to allow business and product planning and to avoid giving SMS firms a further competitive advantage. This will only be possible if the compliance reports are sufficiently detailed and easily accessible online.
- *The expectation that SMS firms should engage with stakeholders on compliance concerns* (paragraph 6.58). However, the CMA must ensure that market participants or other third parties are not effectively required to monitor and negotiate compliance; the burden must be placed on SMS firms to resolve concerns and explain their decisions.
- *The possibility of directing an SMS firm to consult with third parties when putting forward voluntary commitments to address compliance concerns* (paragraph 6.60(c)). We note that this should be done as a matter of course for voluntary commitments.

There remain areas where the CMA could provide further clarity on its plans for consultation and the role of third parties. For example, it would be helpful to have further information on the stages at which third parties will be able to input on the regulatory processes and indicative timescales. In addition, the CMA could consider advice for how a broad range of stakeholders (including small businesses and individual developers) can ensure they are informed of potential for input so that they can provide relevant information to the CMA.

Test and trialling

In Mozilla's experience, competition remedies in the browser space have historically failed to have the intended impact. This is consistent with the CMA's previous findings, for example in the Mobile Ecosystems Market Study.³

Accordingly, we consider it vital that competition requirements imposed by the CMA are tested and trialled to ensure their effectiveness. This is particularly the case for user interface design changes; such changes would typically be assessed through A/B and multivariate testing by technology companies of all sizes and is consistent with the requirements of section 51(3) in the context of pro-competitive orders. We encourage the CMA to extend this approach so that testing and trialling of competition requirements is included as standard and that compliance reports set out in detail the testing and related research conducted by SMS firms so that it may be scrutinised.

We would also note that the possibility of using the CMA's powers of access to supervise testing (paragraph 5.30) is a welcome solution to ensure that competition requirements are efficiently and effectively implemented.

³ Final report, June 2022, paragraphs 5.100-5.101