

United Kingdom

ANTI-COMPETITIVE PRACTICES

Investigation—alleged abuse of dominance—Apple and Google—Digital Markets, Competition and Consumer Act—Digital Markets Unit—investigations closed

☞ Abuse of dominant position; App stores; Competition and Markets Authority; Competition policy; Digital markets; Investigations; Mobile applications; Online intermediaries

Competition and Markets Authority closes investigations into Apple and Google

In anticipation of the new powers which will be available to it under the Digital Markets, Competition and Consumer Act (the “DMCCA”), the Competition and Markets Authority (the “CMA”) has closed its investigations into Apple’s App Store and Google’s Play Store. It began these investigations in 2021 and 2022 respectively.

Background

These investigations related to suspected breaches by the parties of Chapter II of the Competition Act 1998, which prohibits the abuse of a dominant position.

Specifically, in the Apple investigation, the CMA was assessing the terms and conditions governing app developers’ access to the App Store. The Google investigation centred on the obligation to use Google Play’s own billing system, which was enforced upon all app developers offering content in the Play Store. Overall, the CMA’s concern was that the terms the companies were imposing on developers limited their choice and made it more difficult for them to deal directly with consumers. In turn, the CMA was considering whether this was restricting competition and consumer choice and leading to higher prices.

Google’s proposed commitments

In 2023, Google had offered commitments to address the CMA’s concerns. The proposals included offering a new payment system chosen by the app developers themselves, or offering users a choice between Google Play’s billing system and an alternative payment system. In Google’s view, this would have allowed other payment service providers to market their services to app developers, introducing competition in Google Play’s in-app payment services. According to Google, this could also have allowed for a direct relationship between developers and end-consumers.

The CMA published a notice of an intention to accept the commitments in April 2023, when it put forward the proposals for public consultation. However, in light of the representations it received, it announced in August 2024 that it would not accept the commitments. Among the reasons for this, the CMA noted the concern expressed by third parties around the level of commission which app developers would still be bound to pay to Google. This announcement came on the same day on which the investigation was closed.

Apple had not offered commitments at the time the investigation was closed.

The new digital markets regime

In closing the investigations, the CMA has referenced the powers it will soon have under the UK’s digital markets regime. The CMA will obtain new powers to regulate digital markets once the DMCCA comes into force, and will carry out these new functions through its Digital Markets Unit (the “DMU”). Whilst no formal decision has been taken by the DMU on what its strategic priorities under the new regime will be, it is expected that the team will leverage on areas which the CMA has already studied, including app stores.

Under the DMCCA, the DMU will be able, following an investigation, to designate certain entities as having strategic market status (“SMS”). SMS designation will be made in respect of a digital activity linked to the UK, and will apply to the whole corporate group of the relevant firm. Following a designation, the DMU will have powers to impose conduct requirements on SMS firms, which will consist of high-level objectives and principles that specify the behaviour expected of a business with respect to their SMS-designated activity. Specific conduct requirements can also be imposed, such as an obligation not to use data unfairly, or not to restrict the use of third-party products.¹

Application of the new regime to Apple and Google

The CMA’s view is that, if Apple and Google are designated as having SMS under the DMCCA (which appears to be inevitable), it will “be able to use its new powers to consider the range of issues raised by parties more holistically than it otherwise could” under the now-abandoned Competition Act investigations.² In its case closure statement for the Apple case, the CMA specifically noted that:³

1. Enforcement under the Competition Act would take longer (for example, the CMA would need to publish a statement of objections and consider representations before taking a final decision).
2. Decisions issued at the end of the Competition Act investigation could only relate to the specific conduct being investigated rather than wider activity in the sector.

Another (albeit unstated) factor may have been that decisions of the CMA regarding the content of obligations to be imposed on SMS firms under the new regime can be appealed to the courts only on the “judicial review” standard, which subjects CMA decisions to much less rigorous scrutiny than the “on the merits” standard that applies to Competition Act decisions.

Further considerations

Businesses should take note of the new powers available to the CMA under the DMCCA. These relate not just to digital markets, but also the existing competition and merger control regimes, as well as consumer protection law. On the latter, the CMA will for the first time have powers to impose civil penalties for breach of such laws, in the form of fines of up to 10% of a business’s group worldwide turnover, without having to seek a court order first. The reforms to the competition regime and the introduction of the SMS regime are expected to come into force late in 2024 or early in 2025.

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¹ For more information on the DMCCA, see Clifford Chance’s briefing on the topic (May 2024), available at: https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2024/05/digital_markets_competition_consumers_act.pdf.

² CMA press release, 21 August 2024, available at <https://www.gov.uk/government/news/cma-looks-to-new-digital-markets-competition-regime-to-resolve-app-store-concerns>.

³ CMA, Case closure summary, 21 August 2024, available at: https://assets.publishing.service.gov.uk/media/66c5991067dbaeb97a13e513/Case_closure_statement.pdf.