

Insights

THE UK GOVERNMENT'S DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL IS PUBLISHED

DIGITAL SPEAKS SERIES

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SUMMARY

On 25 April 2023, the UK Government published the long-awaited Digital Markets, Competition and Consumers Bill (the “Bill”). The legislative framework that will be provided for the Digital Markets Unit (“DMU”) is arguably the most eye-catching feature of the Bill. However, it also contains hugely important changes to competition and consumer law that will have far-reaching impacts across the UK economy.

This short article provides an overview of the key points arising from the Bill in its current form.

A FIRST LOOK AT THE DMU'S LEGAL FRAMEWORK

The Bill sets out the process for designating a digital business as having strategic market status (“SMS”). The CMA may make a SMS designation for businesses with digital activities (e.g. the provision of services over the internet or of digital content) linked to the UK, provided that one of the turnover thresholds - global turnover exceeding £25 billion or UK turnover exceeding £1 billion - is satisfied. To be designated, the businesses must have “*substantial and entrenched market power*” and a “*position of strategic significance*” in respect of the digital activity.

The CMA will have the power to impose conduct requirements on SMS businesses that dictate how the business must conduct itself in relation to a relevant digital activity. Unlike the EU's Digital Markets Act, the Bill does not specify the particular obligations that will apply to all SMS firms. Rather, it allows the CMA to impose requirements on a bespoke basis that are appropriate to particular designated firms for the purposes of one or more of the following objectives: fair dealing, open choices and trust and transparency.

The CMA will be able to investigate suspected breaches of conduct requirements by a SMS firm. It will also enjoy beefed-up enforcement powers, including the ability to make “pro-competition

interventions” to remedy competition problems relating to a SMS firm’s digital activities.

SMS firms will also have to report certain transactions to the CMA before they close. The reporting requirement is triggered where specified ownership or voting thresholds are met for businesses with a UK connection and where the deal value is at least £25 million. Similar thresholds exist for the creation of a joint venture. Once the CMA has accepted a report as being complete, the transaction cannot close for five working days while the CMA decides whether to open a Phase 1 merger control review. This is, in effect, a mandatory, short-term suspensory reporting regime for SMS firms.

LONG-AWAITED CHANGES TO THE UK’S COMPETITION REGIME - INCLUDING FOR CHAPTER I, THE CAT, MERGER CONTROL AND INVESTIGATIONS

A number of significant amendments to competition law have been proposed. Amongst these is an expansion of the territorial reach of the UK’s Chapter I prohibition on anti-competitive agreements and concerted practices (akin to the EU’s Article 101 TFEU). The Bill extends the Chapter I prohibition to arrangements implemented outside the UK which are likely to have an immediate, substantial and foreseeable effect on trade within the UK. Currently, the prohibition applies only to arrangements that are, or will be, implemented in the UK.

At the judicial level, the Competition Appeal Tribunal (“CAT”) would be given the power to make legally binding statements on the application of the law to particular sets of facts in individual or collective claims arising from infringements of the Chapter I or II (abuse of dominance) prohibitions. The Bill also provides the opportunity for the CAT to award exemplary damages in individual, but not collective, cases.

Changes to the merger control regime have been discussed for a number of years. The Bill now seeks to amend the current thresholds at which the CMA can claim jurisdiction to review a transaction:

- the target’s UK turnover threshold would increase from £70 million to £100 million;
- a safe harbour against CMA jurisdiction would be introduced to the share of supply test where no transaction party has more than £10 million of UK turnover; and
- a new threshold would be implemented, granting the CMA jurisdiction to review transactions where one party (typically the acquirer) has a share of supply of at least 33% and UK turnover exceeding £350 million.

The Bill will amend certain aspects of the CMA’s investigatory arsenal, including its ability to collect documents and information. The proposals also include amendments to the CMA’s market study powers.

CONSUMER PROTECTION AND CONSUMER RIGHTS

The consumer protection reforms set out in the Bill (which is to revoke the EU-derived Consumer Protection from Unfair Trading Regulations 2008 (“CPUT”)) broadly respond to the areas of concern identified in the UK’s [July 2021 consultation](#) and the April 2022 [Government response](#). Whilst the Bill replicates much of the CPUT Regulations, key areas of reform include:

- new rules on transparency of subscription contracts. These rules require increased information provision at the pre-contract stage as well as ensuring that consumers entering into subscription contracts online are made aware at the time of entry into the contract that the contract imposes a payment obligation. Traders will also need to provide regular reminder notices (at specified intervals, depending on the time the recurrent payments fall due) and ensure there is a clear and accessible mechanism for a consumer to exercise a right to terminate during the term, as well as additional rights to terminate during the cooling off period;
- the addition of new unfair practices (such as the omission of material information from the seller’s invitation to purchase and the failure to meet requirements of professional diligence – to tackle the practice of using fake reviews);
- a new power for the government to add/remove/amend the list of automatically unfair commercial practices to the current list of unfair practices in Schedule 18 of the Bill; and
- significantly enhanced CMA enforcement rights (including the right to fine non-compliant traders up to 10% of global turnover and to award compensation to consumers).

WANT TO KNOW MORE?

BCLP will be tracking the progress of the Bill, and publishing more detailed insights into its digital, competition and consumer aspects.

If you would like to discuss how the Bill might affect your business, please get in touch with any of the authors or your usual BCLP contact.

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