

Insights

THE DIGITAL MARKETS, COMPETITION & CONSUMERS BILL: KEY ASPECTS FOR PRIVATE ENFORCEMENT

Jul 03, 2023

SUMMARY

On 25 April 2023, the UK Government published the [Digital Markets, Competition and Consumers Bill](#). In this Insight, we consider three key aspects of this draft legislation that are of particular relevance to the private enforcement of competition law in the UK:

- i. provisions enabling private actions to be brought against any person that has breached a 'relevant requirement' under the new regulatory regime for digital markets that the Bill introduces;
- ii. the route for decisions made by the CMA exercising its new digital markets functions to be challenged by undertakings designated by the CMA as having strategic market status or by any person with a sufficient interest in the decision; and
- iii. the planned expansion of the jurisdiction of the Competition Appeal Tribunal to grant declaratory relief and award exemplary damages in competition claims.

This is part of a series of articles by BCLP focussing on the [Digital Markets, Competition and Consumers Bill](#) (the "**Bill**"), which the UK Government published on 25 April 2023. ([Read our overview of the Bill](#)). In this Insight, we consider aspects of the Bill of particular relevance to the private enforcement of competition law in the UK.

The Bill is divided into four parts. Part 1 would establish a new ex-ante regulatory regime focussed on digital markets, including:

- conferring new powers and duties on the Competition and Markets Authority ("**CMA**") – powers which would in practice be exercised by its Digital Markets Unit – to regulate digital markets, which includes the designation of undertakings as having 'strategic market status' in respect of a digital activity linked to the UK ("**SMS**");

- empowering the CMA to impose duties on SMS-designated undertakings in the form of Codes of Conduct and pro-competitive interventions;
- enabling private enforcement in the courts and the Competition Appeal Tribunal (“**CAT**”) in respect of the aforementioned duties imposed on SMS-designated undertakings; and
- providing for the review of the CMA’s exercise of its new powers under the Bill.

These proposals follow hot on the heels of the EU’s Digital Markets Act (“**DMA**”) becoming applicable on 2 May 2023. The DMA (as explained in our [previous insight](#)) is similarly focussed on the regulation of digital activities (specifically, the DMA covers ‘core platform services’) and there are many parallels between the Bill and DMA (but also some key differences) – we will be comparing the Bill and DMA in more detail in a future Insight.

Part 2 of the Bill includes amendments to the existing competition regime, including:

- equipping the CAT with the power to grant declaratory relief in competition claims; and
- restoring the availability of exemplary damages in competition claims (albeit in limited circumstances).

We have addressed in a separate Insight the aspects of the Bill that impact the UK’s merger control and competition law enforcement framework and how these changes may impact businesses operating across the UK.

Parts 3 and 4 of the Bill concern consumer protection and are not considered in this Insight. If you are interested in this aspect of the Bill then you may wish to read BCLP’s Insights on the impact of the Bill from a consumer protection perspective and its significance for subscription contracts.

We set out below our thoughts on what the features of Parts 1 and 2 of the Bill identified above will mean for private enforcement of competition law in the UK.

By way of a health warning, the Bill is at an early stage of the legislative process (at the time of finalising this Insight it is at Committee stage and the Public Bill Committee is expected to report on the Bill by 18 July 2023) and it is yet to be debated in Parliament. The Bill is therefore liable to substantive amendments.

PART 1 OF THE BILL

BINDING FORCE OF CMA BREACH DECISIONS AND PRIVATE ENFORCEMENT

The Bill establishes a private enforcement regime enabling claims to be brought by third parties affected by an SMS-designated undertaking’s breach of a ‘relevant requirement’.

As is the case with CMA competition infringement decisions under Chapters I and II of the Competition Act 1998 (“**CA98**”), the CAT/courts would be bound by a CMA decision finding that an undertaking has breached a “relevant requirement” in connection with the Bill once it has become final (a “**CMA breach decision**”). A “relevant requirement” means:

- i. a conduct requirement imposed by the CMA on an undertaking designated as having SMS (by virtue of a conduct requirement notice made under clause 19);
- ii. a requirement imposed by the CMA on an SMS-designated undertaking following a pro-competition intervention (by virtue of a pro-competition order made under clause 44); or
- iii. a requirement to comply with a commitment given by an SMS-designated undertaking:
 - 1. that has been subject to a conduct investigation as to its behaviour in respect of a conduct requirement (a commitment given under clause 36); or
 - 2. as to its conduct in respect of an adverse effect on competition or a detrimental effect on UK users/customers that the CMA considers has resulted from, or may be expected to result from, an adverse effect on competition (a commitment given under clause 54).

In terms of the specific provisions enabling private enforcement:

- i. a relevant requirement would constitute a statutory duty owed by the person that is subject to the requirement to any person who may be affected by a breach of the requirement (pursuant to clause 99(1)); and
- ii. third parties affected by a breach of statutory duty (arising by virtue of clause 99(1)) can bring a claim for damages and/or an injunction (declaratory relief would not be available) against the person subject to the requirement for (pursuant to clause 99(2)).

Accordingly, a CMA breach decision would establish the liability of the addressee of that decision for the purposes of a third party claimant relying on that decision (known as a ‘follow-on’ claim).

It appears that claims can also be brought by third parties on a ‘standalone’ basis in the absence of a CMA breach decision. This means that the third party claimant has the burden of pleading and proving the breach of the relevant requirement.

The broad nature of the obligations that the CMA could impose on firms pursuant to its new digital markets function, such as the potential to impose conduct requirements obliging a firm to trade on ‘fair and reasonable terms’, means that a single relevant requirement imposed on one firm could yield a multitude of claims focussing on various different aspects of the firm’s conduct.

The Bill would not establish a collective proceedings regime for these types of claims. However, there is potential for substantive overlap between relevant requirements arising in connection with the Bill (particularly in respect of conduct requirements) and Chapter II CA98. Take exploitative

terms of supply for example, which might amount to both an abuse of a dominant position and the breach of a conduct requirement. We therefore see the potential for collective (and individual private) proceedings to be brought as standalone Chapter II abuse of dominance claims relying on a CMA breach decision as persuasive evidence of an alleged Chapter II infringement.

Although the Bill would therefore (if enacted) open the door to a potentially significant volume of new claims being brought under clause 99 in relation to the relevant requirements, in practice it would only be possible to bring such claims (standalone or follow-on) once there has been both: (i) the SMS designation of an undertaking by the CMA; and (ii) the adoption by the CMA of a relevant measure (i.e. either a notice imposing a conduct requirement or a pro-competition order) or the acceptance by the CMA of commitments from an SMS-designated undertaking following an investigation.

It will necessarily take some time for private enforcement under the Bill to materialise given that the CMA cannot exercise its new powers unless and until the Bill is enacted and it will then take some time for SMS designations to be consulted on and made, investigations to run their course, and (subject to the outcome of those investigations) relevant requirements to arise. However, even before any relevant requirements are imposed on SMS-designated undertakings, we may well see claimants or proposed class representatives in Chapter II claims pointing to the designation of a firm as an SMS as an indicator of dominance.

APPLICATIONS FOR REVIEW OF THE CMA'S EXERCISE OF ITS NEW POWERS UNDER THE BILL

Any person with a sufficient interest in a decision of the CMA in connection with its digital market functions (including a decision not to exercise a function) would be able to apply to the CAT for a review of that decision (clause 101). Accordingly, decisions may be challenged by the SMS-designated undertaking that is the addressee of a decision and also third parties, such as competitors of the undertaking who have a sufficient interest in the decision.

In determining any such application, the CAT would apply judicial review principles, including the standard judicial review grounds (illegality, irrationality, procedural impropriety, and legitimate expectation).

PART 2 OF THE BILL

JURISDICTION TO GRANT DECLARATORY RELIEF

The inability of the CAT to grant declaratory relief, which stands in contrast to the jurisdiction of the High Court to make such declarations, is an anomalous feature of the competition litigation landscape following the entry into force of the Consumer Rights Act 2015, which broadened the jurisdiction of the CAT in line with that of the High Court in other ways. The Bill would address this

jurisdictional lacuna by granting the CAT the power to make declarations in private and collective actions in respect of infringements of competition law.

In particular, clause 121 and Schedule 3 of the Bill would enable claimants to obtain a declaration in respect of an infringement of Chapter I or II CA98, either as the sole remedy sought or in addition to other relief.

The CAT would be required to apply the same principles that the High Court applies when deciding whether to grant a declaration. Where granted, any such declaration would have the same legal effects as a declaration granted by the High Court.

These changes are likely to have the greatest impact in proceedings brought under the collective actions regime for competition claims, as while claimants seeking declaratory relief in private damages actions have the option of bringing those claims in the High Court, these types of collective actions can only be started in the CAT. There have been at least two cases we are aware of under the collective proceedings regime (*McLaren Class Representative Limited v MOL Ltd & ors* and *Gutmann v London South Eastern Railway Limited*) where class representatives have sought declaratory relief only for the CAT to rule that those claims cannot be pursued because it lacks jurisdiction to hear them, which suggests there is potential for the CAT to hear more of these types of claims once it is empowered to do so.

RESTORING THE AVAILABILITY OF EXEMPLARY DAMAGES IN COMPETITION CLAIMS

Subject to certain restrictions (see below), clause 122 of the Bill would restore the power of the CAT (and the High Court) to award exemplary damages under the common law jurisdiction for claims brought in respect of the infringement of Chapter I or II CA98. This would repeal (subject to transitional provisions) the prohibition on such awards enacted by regulations that came into force in 2017 implementing the EU Damages Directive.

However there are various circumstances where exemplary damages would remain unavailable:

- i. collective proceedings;
- ii. claims in respect of an infringement of competition law or loss/damage in respect of an infringement where any part of that infringement or the relevant loss/damage occurred before the coming into force of clause 122; and
- iii. as against any recipient of immunity from fines in respect of cartel conduct for loss or damage sought in relation to a product or service that was the object of the cartel but was acquired from a person other than that immunity recipient.

The Bill is otherwise silent as to the types of cases in which exemplary damages may be awarded. However, the CAT has previously held in *2 Travel Group plc v Cardiff City Transport Services Limited* (“**Cardiff Bus**”) that the test for awarding exemplary damages is one of ‘outrageousness’,

and in practice, a claimant must plead and prove that the infringement was executed either intentionally in breach of the law or recklessly. That was a follow-on damages claim in respect of an OFT infringement decision finding that Cardiff Bus had abused its dominant position, although notably no fine had been imposed because it benefited from immunity from fines. Finding that the test of outrageousness had been met, the CAT made an exemplary damages award of almost double the principal claim for loss of profits.

Looking beyond the jurisprudence of the CAT, the High Court in *Devenish Nutrition Limited v Sanofi-Aventis SA & ors* (a follow-on damages claim brought against addressees of the European Commission's infringement decision in respect of a vitamins cartel) held that the fact of a defendant being fined for their conduct by a regulator was a powerful factor militating against the award of exemplary damages. The court also held that as a matter of policy it would undermine the Commission's leniency regime to award exemplary damages against a successful leniency applicant whose fines had been commuted to zero because they had blown the whistle on the cartel.

The decision in *Cardiff Bus* was not inconsistent with *Devenish* because although Cardiff Bus had benefitted from immunity from fines, this was not for whistleblowing but rather on account of its turnover deeming the abuse conduct of minor significance by force of section 40 CA98.

These judgments are instructive for understanding the CAT's jurisdiction for exemplary damages and demonstrate the challenges of obtaining an award in follow-on damages actions.

Given that the jurisdiction to award exemplary damages arises under the common law in the case of tort claims, exemplary damages will also be available in principle in private actions as against SMS-designated undertakings that have breached a relevant requirement under the new digital markets regulatory regime.

We are monitoring [the Bill](#) as it progresses through Parliament and will address any material updates in a future Insight.

If you would like to discuss private enforcement or other aspects of the Bill, please contact Ed Coulson, Alexandra Hildyard, or Sam Brown.

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