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Regulating the Digital Sector, Transforming Consumer Protection Regulation – UK Government Proposes Significant Reforms With Draft Bill

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We finally have sight of the long-awaited Digital Markets, Competition and Consumers Bill. Warning: It is a sizeable and ambitious piece of legislation, but the following is our summary take on the key competition and consumer issues. The legislation is just at the start of its journey, so it is difficult to estimate how long it will be before it becomes law – and in what form – and, therefore, how long before its real impact is felt. However, now is the time for businesses to evaluate potential impacts so they can be prepared as the legislation progresses.

Background

After significant delays, the UK government has introduced draft legislation representing a major shift in digital, competition and consumer protection regulation. The wide-ranging reforms contained in the bill will significantly strengthen the powers and remit of the UK's antitrust regulator, the Competition and Markets Authority (CMA).

The bill reflects the intention of the UK government for the CMA to have a much broader and more robust toolkit of competition, digital regulatory and consumer protection powers from which it can take forward enforcement action in digital markets and intervene to protect consumers. The legislation would see consumer rights infringement afforded a much higher platform in terms of enforcement, more akin to how we see competition infringement dealt with.

Key competition and digital markets elements of the bill

Large digital companies with UK activities subject to new digital markets regulatory framework

The CMA will have the power to designate companies engaging in the provision of internet services and digital content in the UK as having strategic market status (SMS). Only those companies designated as having SMS will be subject to the digital markets regime.

SMS designations will be determined by the CMA according to whether a company has substantial and entrenched market power, a position of strategic significance in the market and a turnover exceeding £25 billion globally or £1 billion in the UK.

The approach is similar to that adopted by the EU in the Digital Markets Act (DMA). That is, the focus of the new regulatory regime is on large digital companies with strong market positions. As such, many firms in the digital sector will face no new compliance obligations.

The regime will require the CMA to conduct a formal evaluation process to determine who should be designated as having SMS. However, the tests and approach used to determine those companies with SMS differ from those of the EU. Whilst there will be commonality between the two regimes, it is possible that there may be some differences between the companies subject to regulation in the UK and EU.

Each designated SMS firm subject to its own bespoke set of obligations focused on three core principles – fair dealing, open choice, and trust and transparency

There is no one-size-fits-all approach taken in the bill in respect of the obligations each designated SMS firm will

be subject to (as is the case under the EU's DMA). Rather, each company will be subject to requirements that are appropriate to its activities, position in the market and potential CMA concerns. The UK government considers this provides more flexibility and will enhance the effectiveness of the regime.

For SMS firms, the CMA will have the power to select appropriate "conduct requirements" to achieve one or more of the following objectives:

- **Fair dealing** to ensure fair treatment of users and potential users.
- **Open choice** to enable free and easy choices for users and potential users between the services and content offered by designated undertakings and those offered by other companies.
- **Trust and transparency** to ensure those using or seeking to use services or content provided by designated companies have the information they need to inform their decision-making.

Conduct requirements, which will be of relevance to all third parties who deal with SMS firms, will either oblige the SMS firm to take certain actions (for example, requirements to provide clear and accessible information to users) or to avoid certain actions and behaviours (for example, the prevention of discriminatory terms, conditions or policies).

SMS firms will be required to provide the CMA with compliance reports explaining how they are complying with the requirements. There also will be obligations on each SMS firm to appoint compliance officers to take responsibility for complying with the conduct requirements.

Proposed reforms give CMA significantly expanded toolkit to use in digital markets

The CMA also will have the power to make "pro-competitive interventions" in relation to SMS firms, designed to address any factors that the CMA identifies, after an investigation, as having an adverse effect on competition. These powers are potentially wide-ranging and intrusive, including the power to order structural remedies and divestments against SMS firms.

The bill provides for the use of a final offer mechanism that will act as a backstop tool to enforce conduct requirements to offer fair and reasonable payment terms. This will enable the CMA to require the SMS firm and an invited third party to submit what they consider to be fair payment terms for a proposed transaction, and the CMA will make a determination.

In addition, the CMA will have robust enforcement powers. The CMA will be able to impose fines of up to 10% of global turnover for breaches of the conduct requirements, along with daily fines of up to 5% of global turnover for continued breaches.

But, more generally, the draft legislation will provide the CMA with a choice – whether to use its normal competition law powers or its digital regulatory powers when taking forward enforcement action in the digital space. As such, we can expect to see greater regulatory activity.

CMA widening net of reviewable mergers, including in tech sector

The bill proposes an additional merger control threshold allowing the CMA to review mergers where either party has at least a 33% share of supply or purchases of goods/services in the UK (or a substantial part of it), that party has more than £350 million of turnover in the UK, and a UK nexus test is met with respect to the other party.

The test is designed to close a gap in the current UK merger control regime and more easily enable the CMA to intervene in mergers where there may not be any clear competitive overlap between the parties, and/or where the target is particularly small but is being acquired by a purchaser with a sizeable market position. The UK nexus requirement, however, suggests that the CMA's jurisdiction will not automatically extend to acquisitions of targets that have not yet commercialised any products – to the extent that the target's activities are fully conducted outside of the UK.

Whilst this change will apply to all sectors, a more sector-targeted proposal is the requirement for all SMS firms and their groups to report to the CMA all acquisitions worth at least £25 million, where such acquisitions involve passing an equity or voting gateway of 15%, 25% or 50% (including joint ventures), and the transaction has a UK nexus. The SMS firm will not be able to close the transaction until the expiry of a five-day waiting period, which

starts once the CMA has confirmed that the report provided is complete. This change will give the CMA better knowledge of the investment activities of SMS firms, as well as providing it the opportunity to "call-in" and review investments and acquisitions using its existing powers, if desired. The requirement is similar to one included in the EU's DMA, pursuant to which gatekeepers must report all planned acquisitions to the European Commission before completion.

Key consumer rights elements of the bill

UK consumers have an existing set of statutory rights to enforce consumer law, but research carried out by the Department of Business, Energy and Industrial Strategy (replaced now by the Department for Business and Trade) identified various weaknesses that needed to be remedied (see the Consumer Protection Study 2022).

The research suggested that consumers are losing out on £54.2 billion a year from unresolved disputes with traders, and that enforcement action is slow, lengthening the time it takes for consumers to receive redress. There also is little to deter traders from breaching consumer protection law. Unlike the other countries in the G7, the UK is the only country not to have civil penalties for common consumer protection breaches.

Bill introduces extensive new enforcement powers for breaches of consumer protection law, including aggressive fining powers

The bill proposes to significantly strengthen the enforcement of consumer protection law by introducing new penalty powers for the civil courts, along with out-of-court powers for the CMA to determine and sanction breaches of certain consumer laws.

- The bill will provide civil courts with new powers to impose civil monetary penalties for breaches of consumer protection law. Authorities, such as the CMA and local authority trading standards, will be able to apply to the courts to impose penalties of up to £300,000, or 10% of the total value of a business' global turnover, whichever is higher.
- The bill introduces an administrative model for consumer protection law enforcement, allowing the CMA to determine if certain consumer laws have been breached and impose monetary penalties (up to 10% of the total value of a business' global turnover), without having to go through the courts. This will mirror the CMA's existing competition enforcement powers.
- The CMA also will have additional investigative powers to gather evidence, impose higher penalties for failure to comply with investigative requirements (e.g. failing to comply with information notices or providing false or misleading information), and levy penalties based on business turnover for noncompliance with CMA orders, undertakings and accepted commitments.
- The intention for these powers is to enable the CMA to act faster and take on more cases to safeguard the interests of consumers and create a level playing field for compliant businesses.

Bill introduces enhanced, expanded consumer rights

The bill revokes the Consumer Protection from Unfair Trading (CPUT) Regulations 2008 (which is the UK's implementation of the EU's Unfair Commercial Practices Directive). That said, these regulations are not going anywhere, as the bill largely recreates the prohibitions of unfair commercial practices (e.g., misleading actions, omissions and aggressive practices) set out in the CPUT Regulations, with the same objective of preventing harm to the collective interests of consumers.

New measures are proposed to regulate consumer saving schemes and to protect consumers from inertia selling (the sending of unsolicited goods to potential customers in the hope of making a sale) and entering into subscription traps.

Consumer-related proposals will lead to increased enforcement, shift in compliance focus

The CMA's broader investigative powers and ability to impose higher, turnover-based penalties for failure to comply with its information notices, orders, undertakings and commitments means that businesses should examine their processes to ensure they are robust enough to allow for a prompt response to CMA requests for information – and for the business to remain compliant with any undertakings, orders or commitments.

Further, the CMA's administrative powers to determine breaches of consumer law and impose significant turnover-based fines without having to go to court will likely result in a significant increase in CMA consumer law enforcement. Whilst the bill does provide for a merits-based appeal of the CMA's enforcement decisions, the

explanatory notes to the bill suggest that a court should interfere only if it concludes that the decision is wrong 'in a material respect'. As a result, businesses should carefully review their consumer-facing communications and practices to ensure they are found compliant under the new regime.

Recently, the CMA has focused on online choice architecture, with the aim of tackling potentially harmful online selling practices to UK consumers. On 29 March 2023, the CMA wrote an open letter to online businesses in the UK, setting out its compliance advice in relation to urgency and price reduction claims in digital retail spaces. In view of the significant expansion of the CMA's enforcement powers, businesses should ensure that their online choice architecture and selling practices are compliant with the CMA's advice in this area.

Next steps

The bill has begun the legislative process and, subject to the parliamentary timetable, is expected to come into force in spring 2024.

If you would like assistance in assessing the impact of the new bill on your business, please contact a member of the Cooley team.

Associate Anushi Amin also contributed to this alert.

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