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Here at last – new laws proposed on digital markets, competition powers and consumer rights

On 25 April 2023, the hotly anticipated Digital Markets, Competition and Consumer Bill ("**DMCCB**") was proposed to the UK Parliament¹. The UK Government has been signalling for some time its intention to (in its own words) reform competition and consumer policy, as well as introduce a new bespoke regulatory regime to tackle the perceived market failures stemming from the dominance of the largest digital platforms. The DMCCB is an ambitious piece of legislation intended to strengthen the applicable competition and consumer laws in the UK, as well as to give the Competition & Markets Authority ("**CMA**") new and broader powers of enforcement.

This briefing will explore the main features of the DMCCB and its key takeaways.

New digital markets regime

One of the most prominent features of the DMCCB is the codification of the long-standing proposals for a new regulatory regime for digital firms in the UK. Proposals for a standalone regime for digital markets date back to the Furman Review published in March 2019.² Regulators in the UK, the EU and elsewhere have long indicated that existing competition powers are not equipped to address the market power of digital platforms, particularly 'Big Tech'.³ This is due both to the fast-developing nature of digital markets (which makes it difficult for regulators to keep pace with new technologies and developments) and the fact that competition in the digital space represents, to a degree, a new and distinct ecosystem which the existing rules (first introduced, in some cases, as much as twenty years ago) are just not fit to adequately address (the old adage of "square peg, round hole" springs to mind).

As such, the DMCCB introduces an *ex ante* regulatory regime for digital markets, intended to empower the CMA to "stay ahead" of digital firms and pre-emptively

take steps to address digital market failures, as opposed to merely dealing with them *ex post*. A new bespoke unit within the CMA, called the Digital Markets Unit ("**DMU**"), will be responsible for overseeing this new regime. The DMU has been operating for over a year, but the DMCCB officially gives this new unit a statutory footing.⁴

SMS designations

The principal power of the DMU will be to issue certain digital firms with Strategic Market Status ("**SMS**"). Any firms issued with an SMS designation will be subject to strict behavioural obligations and a mandatory merger reporting requirement (more on this below).

In order for a firm to be eligible for SMS, it must meet the following cumulative criteria:

- 1) The firm must conduct a "digital activity", which is broadly defined in the DMCCB. It captures, in essence, any service provided by means of the internet (whether for consideration or not) and the provision of any digital content;
- 2) The digital activity must be linked to the UK (i.e., have a sufficient UK nexus). This is met if: (i) the relevant entity has a significant number of UK users; (ii) the relevant entity carries on business in the UK; and/or (iii) the digital activity in question has an immediate, substantial and foreseeable effect on trade in the UK. This test is expected to be easily met;
- 3) The firm must have "substantial and entrenched market power". This concept does not have any definition in the DMCCB, though it is noted that the DMU will conduct a forward-looking assessment covering a five-year period in order to make this determination. It is likely that guidance documents relating to the DMCCB will put more flesh on the bones of this concept in due course;

¹ The present draft of the DMCCB is available at:

<https://publications.parliament.uk/pa/bills/cbill/58-03/0294/220294.pdf>

² Unlocking Digital Competition – Report of the Digital Competition Expert Panel ("**Furman Review**"). March 2019. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

³ The term 'Big Tech' is often used (and is intended here) to refer to any digital firm with significant market power in a particular digital market(s). Typically, the example entities given as constituting 'Big Tech' are the so-called GAMMA group of companies, namely Google (Alphabet), Amazon, Meta, Microsoft and Apple.

⁴ The DMU plans to increase in size to around 200 staff (where it had around 70 staff as of November 2022). These staff will comprise a mix of legal and technical experts.

- 4) The firm must have a "position of strategic significance". The DMCCB provides an exhaustive list of factors which can (individually or collectively) indicate that a firm has such a market position;⁵ and
- 5) The firm must meet specified turnover thresholds, namely that it must have global turnover of £25 billion and/or UK turnover of £1 billion.

Saliently, the turnover threshold was not included within any of the proposals which preceded (and led up to) the DMCCB. It is likely that its inclusion has been made in response to criticisms that the SMS criteria were otherwise too broad and lacked certainty as to the firms that could be issued with an SMS designation. The turnover threshold also brings the SMS criteria into more alignment with the scope of the EU's Digital Markets Act ("**DMA**"), which has applicable quantitative thresholds which must be met for a firm to be eligible for the so-called Gatekeeper status.

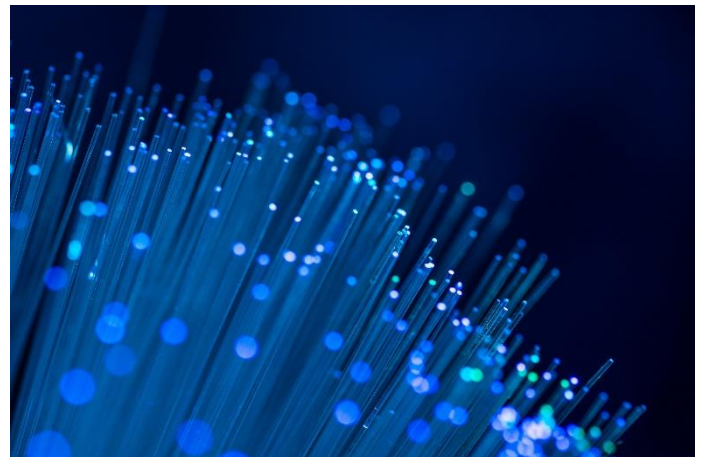
The DMU itself will be responsible for issuing firms with SMS designation (unlike the position under the DMA, where potential Gatekeepers are required to self-notify to the European Commission). To do this, the DMU will need to undertake a so-called SMS investigation, which can last up to nine months.

Obligations for SMS firms

If a firm is issued with an SMS designation, it will be subject to:

1. Conduct requirements: Each SMS firm will be subject to strict behavioural obligations, the provisions of which will revolve around three key concepts – namely, fair trading, open choices, and trust and transparency – but the specific nature of which will be specifically designed by the DMU and issued bespoke to each SMS firm in question allowing the DMU significant discretion.⁶ Such conduct requirements may include for instance, to trade on fair and reasonable terms, have effective processes for handling complaints and disputes by users and to not use data unfairly; and

2. Mandatory merger reporting requirement: SMS firms will be required to pre-emptively report contemplated acquisitions (which meet certain thresholds)⁷ to the DMU. The parties will need to wait for a period of 5 working days before completion and that period only starts once the DMU has accepted the form as "sufficient". Therefore, this will not amount to a requirement to obtain prior merger control clearance, but this reporting requirement will have a suspensory effect given that the CMA may opt within this 5 working day period to open a Phase 1 investigation in line with usual merger control investigation procedures. Should the CMA decide to do this, the CMA will likely impose hold separate orders to prevent closing until its merger control review is complete. Otherwise, if the CMA decides not to open any investigation, SMS firms can proceed to closing these deals without prior merger control approval.



Pro-competitive interventions ("PCIs")

The DMCCB will further empower the DMU to instigate PCIs against any aspect of an SMS firm's business model which it believes is having an adverse effect on competition. A PCI can only be made after the DMU has conducted a tailored investigation, akin to a traditional CMA market investigation, which will be concluded within nine months (and opened up to a public consultation before this).⁸ PCIs are intended to supplement the applicable Code of Conduct to a relevant SMS firm by enabling the DMU to tackle the

⁵ Section 6(1) of the DMCCB provides that a firm will be deemed to have a position of strategic significance if: (a) the firm has achieved a position of significant size or scale in respect of the digital activity in question; (b) there are a significant number of users vis-à-vis the relevant digital activity; (c) the firm's position in respect of the digital activity would allow it to extend its market power to a range of other activities; and (d) the firm's position in respect of the digital activity allows it to determine or substantially influence the ways in which other undertakings conduct themselves, in respect of the relevant digital activity or otherwise.

⁶ This, again, is a departure from the position under the DMA, where the list of obligations that Gatekeepers will be subject to is included in an exhaustive list under this legislation.

⁷ SMS firms will be required to notify any acquisition which involves: (1) a consideration of £25 million or more in a UK-connected body corporate (in effect a target which carries on activities in the UK or supplies goods or services to persons in the UK (whether for consideration or otherwise)); and (2) an acquisition of shares/voting rights from less than 15% to more than 15%, less than 25% to more than 25%, or less than 50% to more than 50%.

⁸ Albeit, this time period of 9 months may be extendable where there are special reasons to do so.

root causes of a particular SMS firm's market power. A PCI may, for example, take the form of either an order imposing requirements as to how an SMS firm must conduct itself in respect of a designated activity or a recommendation as to steps to be taken by anyone exercising public functions.

Appeals and enforcement

Any breaches of the new digital markets regime by an SMS firm can be sanctioned by the DMU to the tune of up to 10% of its annual global turnover⁹. Additionally, daily penalties may apply in certain circumstances, for instance where the SMS firm has failed to implement an applicable PCI. In these cases, the CMA may issue daily fines of up to 5% of the SMS firm's daily worldwide turnover.

SMS firms will be able to appeal most aspects of the new regime to the Competition Appeal Tribunal ("CAT"), which will review the DMU's decision-making practices on judicial review grounds. As such, there will be no ability to appeal a DMU decision on its particular merits, but rather only if there has been some breach of procedure, error of law or other material impropriety.



New merger control thresholds

In addition to the new mandatory merger reporting requirement for SMS firms, the DMCCB introduces new changes to the applicable merger control thresholds in the UK that will apply to all relevant entities and undertakings.

The DMCCB introduces the following changes to the UK's merger control thresholds:

1. New (additional) share of supply threshold

A transaction will be reviewable by the CMA if it involves: (i) one party with a share of supply of 33% or more of any goods or services in the UK (or a substantial part of the UK) and a UK turnover of £350 million; and (ii) another party which is a UK business (or else supplies goods/services to customers based in the UK).

This is the most significant change to the applicable merger control rules and will afford the CMA even greater leeway to claim jurisdiction over transactions affecting the UK. The CMA has already displayed remarkable dexterity in identifying a requisite nexus to the relevant UK markets – the case of [Sabre / Farelogix](#) being a classic example – and, as such, the nexus element of this new threshold will not change the *status quo* very much. However, the fact that the 33% share of supply element can be met by one party alone (i.e., with no required increment in the combined market share post-transaction) gives the CMA more ability to review so-called "killer acquisitions" regardless of the sector and without the target having to exceed the £100 million UK turnover threshold (see below).

These new thresholds will complement the existing thresholds and the new merger thresholds for the review of digital mergers.

2. New £100 million turnover threshold

The UK's turnover test will be triggered if the relevant target generates £100 million of turnover in the UK, as opposed to £70 million¹⁰. This change really just reflects the impact of inflation since the turnover test was first introduced under the Enterprise Act 2002.

3. New safe harbour

The DMCCB introduces a new *de minimis* threshold where deals which would otherwise trigger the UK's merger control rules will not be reviewable by the CMA if each party's turnover is less than £10 million.

New CMA enforcement powers

True to the UK Government's repeated promises to strengthen the CMA's overall powers of competition law enforcement, the DMCCB contains important new proposals to the general antitrust regime in the UK.

⁹ Note that for breaches of the conduct requirements, a fine can only be imposed once an enforcement order has been issued (i.e., requiring the SMS firm to stop the breach, prevent it from happening and/or address any damage) and there is a breach of the enforcement order.

¹⁰ For public interest interventions in media mergers, the threshold will remain at £70 million.

Among the most important new amendments to be introduced by the DMCCB in this regard are the following:

- *Effects Doctrine*: Amending the scope of the Chapter I prohibition, such that it will now also capture agreements and arrangements implemented outside the UK, if they are likely to have an "immediate, substantial and foreseeable effect" effect on trade within the UK. This is an important change given the CMA's ability to investigate breaches of EU competition rules post-Brexit¹¹.
- *Market Inquiries*: The current two-stage market inquiry process will be retained (i.e., market study followed by a more in-depth market investigation where required), but with certain changes. For instance, the CMA will be able to accept binding remedies from the relevant undertakings at any stage of the market inquiry process and will have greater flexibility to define the scope of market investigations to target investigations more easily. Additionally, the DMCCB removes the need for the CMA to conduct a public consultation before any market investigation is launched and permits the CMA to conduct trials to assess the likely effectiveness of final undertakings and orders. The new regime will also introduce civil penalties for breaches of market investigation orders, directions, undertakings and interim measures. The DMCCB also, interestingly, allows the CMA to adopt an improved remedy for a period of up to 10 years following the finding of an adverse effect on competition without needing to carry out a new market investigation (though any proposed remedy would still require a consultation process).
- *Investigative Powers*: The DMCCB will grant the CMA a number of measures to strengthen its investigation powers, such as the ability to: (i) compel interviews from any person and not just individuals connected to the business under investigation; (ii) issue notices to persons outside the UK and require the production of documents and information held outside of the UK; as well as (iii) "seize and sift" evidence when inspecting domestic premises under warrant and to obtain documents in cloud storage that are "accessible" from the premises rather than only documents "on" the premises. The CMA will also be given powers to

impose more and larger administrative penalties on undertakings for failure to comply with investigative measures or providing false or misleading responses to requests for information ("**RFI**") (e.g., up to 1% of an undertaking's worldwide turnover) and, for the first time, fines on individuals for the same.

- *Other Reforms*: Similar to the process of preliminary references in the EU, the CAT will be empowered to provide declaratory rulings as to how the relevant competition laws relating to the Chapter I and/or Chapter II prohibitions apply to undertakings and/or individuals in a particular case the CMA is pursuing. The DMCCB will give the CAT and the courts the discretion to award exemplary damages in competition law claims (with the exception of collective proceedings). This was prohibited by the EU Damages Directive and will now provide an additional deterrent for antitrust breaches.

New consumer protection laws

The DMCCB also introduces significant new consumer protection laws in the UK. The driving motivation for these new amendments to the applicable consumer protection rights is similar to the rationale for a new digital markets regime. Given that so much of the consumer marketplace has shifted online and away from traditional bricks-and-mortar retailers in recent years, this has raised new difficulties and types of unfair trading practices which the existing consumers' rights laws are not fully equipped to deal with. The DMCCB, therefore, seeks to bring the applicable regime up-to-speed for a new, increasingly digitised age of consumer purchasing habits.

The DMCCB's primary purpose here is to overhaul and replace the Consumer Protection from Unfair Trading Regulations 2008 ("**CPRs**"). The current list of unfair commercial practices set out in the CPRs has been transposed across into the DMCCB, such that consumers will still be afforded protection against such practices.¹² Importantly, however, the DMCCB will enable the UK Government to update, add to and otherwise amend the list of unfair practices with greater ease and flexibility, and to pass secondary legislation to include for instance additional types of unfair practices it identifies (or has identified already) as requiring safeguards against¹³.

¹¹ Note that the UK Government did not change the jurisdictional test for the Chapter II prohibition (abuse of dominance), such that the business carrying out the conduct must still have a dominant position within the UK or any part of it.

¹² See Schedule 18 of the DMCCB.

¹³ Section 234 of the DMCCB serves as the legislative tool for this, whereby the Secretary of State is empowered to add to the list of unfair commercial practices, or remove existing unfair commercial practices, set out in Schedule 18 of the DMCCB by passing further regulations.

The DMCCB has provisions to help protect consumers against:

- **Subscription contracts:** This has become a hot issue in recent years, where consumers have been exploited by organisations that offer free (or reduced price) trial periods for their goods and/or services which make it difficult for consumers to exit the contract. This practice has become endemic over the last decade through the rise of subscriptions for everything from TV and music streaming services to gyms, newspapers and cloud storage. Indeed, it has been estimated that UK consumers expend as much as £1.6 billion annually on subscriptions they do not (or no longer) want.¹⁴



Whilst consumers will not be charged anything during these trial periods (or, at least, anything they have not agreed to), these organisations have required consumers to provide bank and/or card details up front in order to put in place an active subscription that will commence once the trial period ends. Cynically (according to some opinions), these same organisations have failed to issue warnings to consumers when their free (or reduced price) trial period is due to expire and/or have made it overly cumbersome to arrange for the cancellation of the pending subscription. The DMCCB, whilst it allows this practice of so-called "subscription contracts" to continue by in large, proposes new measures by which organisations offering these types of trial periods must abide by. For instance, cancellation methods must be simple/comprehensible, clear pre-contract information must be conveyed before a subscription contract is executed and a cooling off period of 14 days must be included.

- **Savings schemes:** The UK Government aims to protect consumers against spurious and/or risky savings schemes which exist outside the scope of financial regulations overseen by the Financial Conduct Authority or the Prudential Regulation Authority. This is particularly important, given the present cost of living crisis being experienced in the UK. The DMCCB will require such schemes to, for instance, implement safeguards to protect consumers against the contingency of the scheme becoming subject to insolvency proceedings.
- **Package travel:** The DMCCB also updates and simplifies existing rules around package travel, following the backdrop of the CMA's open letters to the package travel sector during Covid-19 reminding them of their obligations under consumer protection laws.

It is anticipated (though the DMCCB does not explicitly provide anything on this point at the minute) that the UK Government will introduce new measures to tackle fake reviews of goods and/or services. These will include prohibiting: (i) the commissioning of someone to write a fake review; (ii) posting consumer reviews without taking reasonable steps to check they are genuine; and (iii) offering or advertising to submit, commission or facilitate fake reviews.

Significantly, the DMCCB empowers the CMA for the first time to fine infringing companies or persons *directly* for breaches of consumer rights laws. Historically, any penalties for consumer law infringements have been set primarily by the courts. Under the DMCCB's proposals, the CMA will be able to fine legal undertakings up to 10% of their annual global turnover (as under the traditional antitrust rules) and fine individuals up to £300,000. These specific enforcement powers will be supplemented by the ability to issue financial penalties for breaching undertakings given to the CMA (e.g., up to 5% of a business' annual global turnover), for any failures to comply with an RFI or formal direction, providing false or misleading information or destroying, concealing or falsifying evidence (up to 1% of an undertaking's global annual turnover and additional daily penalties for continued non-compliance).

¹⁴ The Department for Business & Trade and the Department for Science, Innovation and Technology. *Enhancing consumer rights: policy summary briefing – Digital Markets, Competition and Consumers Bill*. 25 April 2023. Page 5. Available at:

Conclusion

The DMCCB will introduce a raft of new competition and consumer policy laws in the UK. It represents one of the most significant amendments to the existing regulations in these areas in the last two decades. As such, it will be very important for all businesses and individuals to acquaint themselves with these new rules and prepare early for this new regime to take effect.

Indeed, it would be dangerous to assume that the DMCCB will apply only to the largest digital companies (i.e., those likely to be issued with an SMS designation). To the contrary, the DMCCB has been specifically designed to introduce sweeping reforms to the UK's competition and consumer landscapes, almost from head to toe. Though the DMCCB is a long way from receiving Royal Assent (where, with the best will in the world, this is not expected until early 2024 at the earliest), businesses and individuals would be well advised to plan ahead. Particularly, by making any necessary adjustments to their relevant business practices that might otherwise fall foul of the new rules.

It will be interesting to see how much (if at all) the DMCCB is substantively amended as it makes its way through the Parliamentary approval process. We also anticipate that the DMCCB will necessitate the publication of amended and new guidance documents to detail how certain mechanisms of the DMCCB will operate in practice before the legislation is implemented. Watch this space...

Contact us

Should you have any queries or wish to discuss any matter in this briefing, please do not hesitate to contact the Competition Team.



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