Challenging regulatory decisions: the growing role of judicial review

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Articles | Published on 27-Mar-2025 | United Kingdom

This feature article examines the role of judicial review in the UK for businesses that seek to hold regulatory decisions up to scrutiny, with a particular focus on the digital markets, subsidy control and national security regimes.

Speedread

Following Brexit, the UK has embarked on a distinct path in its approach to regulating important aspects of the economy. This includes its approach to reviewing decisions taken under: the Digital Markets, Competition and Consumers Act 2024 (DMCCA), which, among other things, established a new regime for large players in digital markets; the Subsidy Control Act 2022 (SCA), which regulates state aid; and the National Security and Investment Act 2021 (NSI Act), which governs investments in the UK that may have national security implications. Decisions taken under the DMCCA, the SCA and the NSI Act are, with some exceptions, all subject to the judicial review standard, which accords substantial deference to the underlying regulatory decision.

The decisions of the Competition and Markets Authority (CMA) in relation to whether a firm has strategic market status (SMS) under the DMCCA, and the imposition of conduct requirements and pro-competitive interventions, may only be challenged by way of judicial review. It is likely that the meaning of key aspects of the definition of SMS and the scope of the interventions that the CMA is permitted to make will be subject to judicial review in the Competition Appeal tribunal (CAT).

The SCA also emphasises the supervisory role of the courts through judicial review. Where a subsidy is of particular interest, public authorities are required to request a report from the Subsidy Advice Unit (SAU) of the CMA. Interested parties may apply to the CAT for judicial review of a decision of the public authority to grant a subsidy. So far, this has only resulted in one judicial review decision under the SCA. However, it seems likely that more significant subsidy decisions will result in judicial reviews in the future, particularly where advice issued by the SAU has not been followed.

The NSI Act provides for the mandatory notification of transactions where they involve the acquisition of certain levels of control of entities or assets in 17 sensitive sectors. The decisions of the Secretary of State (SoS) may be challenged only by judicial review, except for decisions to impose monetary penalties. In addition, the SoS or any party to the proceedings may apply for the judicial review to be conducted largely in private under the closed material procedure. As a result, there is limited transparency in relation to the challenge of decisions under the NSI Act.

It is clear that UK regulators are being given wide decision-making discretion and that their decisions will be accorded considerable deference, if challenged. It also seems likely that more high-profile judicial reviews will be brought that seek to challenge the decisions of the relevant public bodies and the sub-units that have been tasked with administering the UK’s new regulatory regime.

It remains to be seen whether the fact that the scope of review is limited to judicial review will lead to a correspondingly limited review of decisions taken under the DMCCA, the SCA and the NSI Act, or whether the CAT and the courts will take a relatively interventionist approach.

Following the end of the Brexit transition period on 31 December 2020, the UK has embarked on a distinct path in its approach to regulating important aspects of the economy. Most recently, the Digital Markets, Competition and Consumers Act 2024 (DMCCA), among other things, established a new regime for large players in digital markets. This follows on the heels of the Subsidy Control Act 2022 (SCA), which regulates state aid, and the National Security and Investment Act 2021 (NSI Act), which governs investments in the UK that may have national security implications.

This flurry of legislative activity is arguably a reaction to regulatory developments in the EU. Indeed, at the time of Brexit, the UK largely adopted many aspects of the EU's regulatory regime as it existed at that time and, since then, the EU's regulatory landscape has continued to develop and evolve. Alongside broadly similar legislative themes, the UK has also taken a distinct path, notably with regard to how decisions are made, that is, with the assistance of sub-units of existing regulatory bodies, and to the judicial review of decisions by the English courts as a check on this enforcement. These are necessary developments since, previously, key decisions in areas such as competition law and state aid were mostly taken at an EU level and were subject to appeal to the European Court of Justice (ECJ).

It is notable that, while key UK regulatory decisions are subject to oversight by the English courts, the prevailing standard of review has been, and continues to be, that of judicial review, which accords substantial deference to the underlying regulatory decision. This regulatory deference merits further discussion, particularly given the recent political focus on regulatory intervention as a possible limiting factor on economic growth.

This article discusses:

- How the judicial review process operates.
- The use of judicial review in the regulatory regimes established by the DMCCA, the SCA and the NSI Act.
- The implications of this wave of post-Brexit regulation for UK businesses.

WHAT IS JUDICIAL REVIEW?

Judicial review is a special form of court procedure that is used by the English courts to supervise the decisions and actions of bodies that perform a public function (*see box "Applying for judicial review"*). The court's function in a judicial review is to conduct a review of the process by which a decision was reached in order to assess whether there was an error in the decision made (*see box "Grounds for challenge"*). It will not, however, assess the merits of the decision, except to the extent necessary to assess its lawfulness, and will not seek to remake the decision.

As such, the UK's judicial review procedure is arguably similar to the approach taken by the General Court of the EU under Article 263 of the Treaty on the Functioning of the European Union (TFEU) (Article 263), which considers challenges to European Commission (the Commission) decisions on limited grounds and without seeking to remake the decision, except in relation to fines. Under Article 263, the court will consider challenges on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TFEU or the Treaty on European Union or any rule of law relating

Court orders

If the English court finds that the decision was flawed under one of the permitted grounds for challenge, it may make a number of different orders, including:

- Quashing the relevant decision.
- Prohibiting the relevant body from acting beyond its powers.
- Requiring a body to carry out its legal duties.
- Making a declaration as to the law.

However, following the making of one of these orders, the court will not make a new decision. Instead, it will be for the relevant body to make a fresh decision, taking into account any guidance provided by the court.

Use of judicial review

Given the limited scope of judicial review and the additional hurdles for applicants, judicial review is potentially attractive where the legislation aims to ensure appropriate deference to the specialist decisions of a regulator and to limit the scope and burden of appeals. For example, merger decisions by the Competition and Markets Authority (CMA) may only be challenged by way of judicial review (*section 120, Enterprise Act 2002*).

However, a challenge to regulatory decisions is not always limited to a judicial review, particularly where a significant fine is at issue. For example, the decisions of the CMA on infringements of the Chapter I prohibition of unlawful agreements and the Chapter II prohibition of the abuse of a dominant position under the Competition Act 1998 (1998 Act) are subject to a wider merits review by the Competition Appeal Tribunal (CAT). This has permitted a greater level of judicial scrutiny of CMA decisions that concern competition infringements.

Notably, however, decisions taken under recent key legislation, including the DMCCA, the SCA and the NSI Act, are, with some exceptions, all subject to the judicial review standard.

STRATEGIC MARKET STATUS

The DMCCA, which received Royal Assent on 24 May 2024, among other things, creates a new ex ante regulatory regime for firms that have strategic market status (SMS) in digital markets (*see feature article "Digital markets regulation: comparing the new EU and UK regimes" and Briefing "The CMA's expanding scope under the DMCCA: implications for deal strategy"*). The regime is being phased in and started on 1 January 2025 with the Digital Markets, Competition and Consumers Act 2024 (Commencement No 1 and Savings and Transitional Provisions) Regulations 2024 (*SI 2024/1226*), which brought into force, among other sections, Part 1 (digital markets) and Part 2 (competition) of the DMCCA.

SMS designation

The CMA, which has set up the Digital Markets Unit, a dedicated sub-unit to oversee the regulation of digital markets, has the power to designate undertakings as having SMS if they have:

- Substantial and entrenched market power.
- A position of strategic significance.
- Worldwide turnover of over £25 billion or a UK turnover of over £1 billion (*sections 2-8, DMCCA*).

CMA powers

In the EU, the concept of gatekeepers under the Digital Markets Act (*2022/1925/EU*) (DMA) is a similar concept to SMS firms under the DMCCA. However, unlike the EU's approach to gatekeepers under the DMA, the DMCCA is not prescriptive as to the requirements that apply to a firm which is designated as having SMS (*see feature article "Regulating digital services in the EU: a paradigm-shifting legislative framework"*). Instead, once a firm has been designated as having SMS, the CMA then has powers to:

- Impose conduct requirements that set out how the SMS firm must conduct itself in relation to the digital activity for which it has been designated.
- Make pro-competitive interventions to address market factors that the CMA considers are preventing, restricting or distorting competition.
- Levy fines for non-compliance with conduct requirements or pro-competitive interventions. Firms that are designated as having SMS are also subject to mandatory merger reporting requirements (*https://assets.publishing.service.gov.uk/media/6762f6074e2d5e9c0bde9b43/Guidance_on_the_mergers_reporting_requirements_for_SMS_firms.pdf*).

Challenging CMA decisions

The decisions of the CMA, including in relation to whether a firm has SMS and the imposition of conduct requirements and pro-competitive interventions, may only be challenged by way of judicial review (*section 103, DMCCA*). That approach differs from the full merits appeal that is available to firms which are subject to CMA infringement decisions under the 1998 Act, even though the consequences of being designated as a firm with SMS may be considerable for the relevant business (*see "What is judicial review?" above*). The one exception is an appeal in relation to a penalty, which the CAT may consider on the merits and substitute with a penalty of a different nature or a lesser amount as it considers appropriate (*section 89, DMCCA; section 114, Enterprise Act 2002*).

Given the importance of being designated as a firm having SMS and the resources of large digital businesses, it is likely that the meaning of key aspects of the definition of SMS and the scope of the interventions that the CMA is permitted to make will be subject to judicial review in the CAT. This is particularly so because there remains significant uncertainty as to how key concepts will be interpreted, even following the publication of the CMA's guidance on the digital markets competition regime on 19 December 2024 (the guidance) (*https://assets.publishing.service.gov.uk/media/6762f4f6cdb5e64b69e307de/Digital_Markets_Competition_Regime_Guidance.pdf*).

For example, the guidance states that the concept of "substantial and entrenched market power" is a distinct legal concept from that of "dominance" as used in competition law enforcement cases, reflecting the fact that the digital markets competition regime is a new framework with a different purpose. As a result, the CMA states that it will not typically seek to draw on case law relating to the assessment of dominance when undertaking an SMS assessment. It is therefore likely that judicial guidance will be needed and sought on this, and other new concepts.

Indeed, in the EU, the designation of ByteDance Ltd as a gatekeeper has already resulted in an appeal to the ECJ. ByteDance is challenging the General Court's judgment that upheld the Commission's decision to designate ByteDance as a gatekeeper in relation to its TikTok service (*Bytedance v Commission T-1077/23*). In dismissing the appeal from the Commission's decision, the General Court showed considerable deference towards the Commission's interpretation of the DMA's legal standards. It remains to be seen whether the CAT will adopt a similar approach and whether it will seek to provide guidance in relation to key definitions in the DMCCA and the scope of the CMA's powers.

SUBSIDY CONTROL

The SCA is a further piece of post-Brexit legislation that emphasises the supervisory role of the courts through judicial review. The SCA takes a markedly different approach to the regulation of state aid to that taken by the EU and in the UK before Brexit (*see News brief "The Subsidy Control Bill: plus ça change?" and feature article "New EU regime on foreign subsidies: plugging a regulatory gap*").

New process

Instead of public authorities needing to seek pre-approval from a regulator before granting a subsidy, they are only required to consider the subsidy control principles that are set out in Schedule 1 to the SCA and to publish details of the subsidy on a database (*sections 12 and 33, SCA*).

There is also no process for binding regulatory review. Instead, where a subsidy is of particular interest, such as where the total amount of the subsidy exceeds £10 million or concerns a sensitive sector and exceeds £5 million, public authorities are required to request a report from the Subsidy Advice Unit (SAU) of the CMA, which will publish a report assessing the proposed subsidy against the subsidy control principles (*sections 52 and 53, SCA; The Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) Regulations 2022 (SI 2022/1246)*).

On 11 November 2022, the government published guidance that sets out in detail how the SAU will carry out its subsidy control functions under the SCA (*www.gov.uk/government/publications/guidance-on-the-operation-of-the-subsidy-control-functions-of-the-subsidy-advice-unit*). Public authorities may also make a voluntary referral to the CMA should they wish to obtain guidance from the SAU (*section 56, SCA*).

Challenging subsidy decisions

In place of binding regulatory review, interested parties may apply to the CAT for judicial review of a decision of the public authority to grant a subsidy. Interestingly, so far, this has only resulted in one judicial review decision under the SCA (*The*

Durham Company Limited v Durham County Council [2023] CAT 50). However, it seems likely that more significant subsidy decisions will result in judicial review applications going forward, particularly where advice issued by the SAU has not been followed and, as such, the views of the SAU are likely to carry significant weight.

Interested parties will need to ensure that judicial review applications are brought within the deadline of one month following the publication of the subsidy decision on the relevant database or, if such publication is not required, when they first had knowledge of the subsidy (*section 71, SCA*).

NATIONAL SECURITY

The NSI Act, which received Royal Assent on 29 April 2021, established a statutory regime for the government to scrutinise and intervene in investments, mergers and acquisitions that may pose a threat to national security (*see feature articles "National Security and Investment Act 2021: taming the M&A dragon" and "Foreign direct investment: national screening regimes proliferate"*).

The NSI Act provides for the mandatory notification of transactions where they involve the acquisition of certain levels of control of entities or assets in 17 sensitive sectors (*National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 (SI 2021/1264); see News brief "National security and investment: rebalancing the Act"*). Parties may also make voluntary notifications (*section 18, NSI Act*).

The Investment Security Unit, which sits within the Cabinet Office, assists the Secretary of State (SoS) in the exercise of its powers under the NSI Act. Those powers include:

- The ability to call in a qualifying acquisition under the NSI Act for review.
- The power to make interim orders while a review is ongoing.
- The power to impose final orders, which include the prohibition or unwinding of transactions (*sections 1 and 26, NSI Act*).

Challenging SoS decisions

The decisions of the SoS may be challenged only by judicial review, except for decisions to impose monetary penalties, which are subject to a full right of appeal on the merits (*sections 49 and 50, NSI Act*). The NSI Act also modifies the usual time period in which a judicial review must be brought so that applications must be made within 28 days of any decision unless there are exceptional circumstances (*section 49(4), NSI Act*).

In addition, given the national security implications, the SoS or any party to the proceedings may apply for the judicial review to be conducted largely in private under the closed material procedure (*Justice and Security Act 2013*). The closed material procedure enables information that is sensitive to national security to be disclosed in legal proceedings. Sensitive material is disclosed into a closed part of the proceedings to the court and special advocates who are appointed to represent the interests of parties that are unable to view the sensitive information themselves. As a result, there is limited transparency in relation to the challenge of decisions under the NSI Act.

To date, five transactions have been blocked or unwound under the NSI Act, all involving Chinese or Russian investors (*www.gov.uk/government/collections/notice-of-final-orders-made-under-the-national-security-and-investment-act-2021*). A number of other transactions have been approved subject to conditions. Of the transactions that were blocked, it is understood that applications for judicial review were brought by:

- Nexperia BV in relation to its purchase of a semi-conductor plant in Wales. Although the timing and outcome of that application for judicial review is unclear, the plant has now been bought by another entity (*https://ir.vishay.com/news-releases/news-release-details/vishay-intertechnology-acquires-nexperias-newport-wafer-fab-177*).
- L1T FM Holdings UK Ltd, which is owned by the investment group LetterOne Core Investment Sàrl, in relation to the divestment of its stake in broadband provider Upp Corporation Ltd. The High Court dismissed the application for judicial review and handed a victory to the government in the first judicial review decision in relation to the NSI Act (*R (on the application of L1T FM Holdings UK Limited) v Chancellor of the Duchy of Lancaster in the Cabinet Office [2024] EWHC 2963 (Admin)*).

IMPLICATIONS FOR UK BUSINESSES

Judicial review is not new but, as UK regulatory bodies take over functions that were previously performed by the EU and the regulatory net widens, it is clear that the decisions of UK regulators will be accorded considerable deference, if challenged. At the same time, it seems equally likely that more high-profile judicial reviews will be brought that seek to challenge the decisions of the relevant public bodies and the sub-units that have been tasked with administering the UK's new regulatory regime.

Although businesses will naturally want to continue to focus on consensual engagement with the relevant regulators, it is inevitable that judicial reviews will be brought, and will need to be brought, particularly where the legislation is still in the early stages of being tested or where judicial review is the only route for redress. Judicial review may also be helpful in prompting a regulator to reflect on whether any aspects of its own processes and decision-making were deficient, as in a recent case where the CMA accepted that its final report was flawed in certain respects and should be quashed (*Spreadex Limited v CMA [2025] CAT 13*).

The intention of much of the recent legislation, especially the DMCCA, appears to be to give regulators wide discretion to make what they consider to be the right decisions in a fast-moving commercial environment. The use of judicial review, as opposed to permitting a full merits appeal, is designed to ensure appropriate deference to those decisions.

However, the approach of the courts and the CAT is likely to differ depending on the nature of the challenge. On the one hand, on matters of national security where elected officials are given considerable discretion and are acting as quasi-judicial decision-makers, as the court noted in *L1T FM*, the "scope for the intervention of unelected judges is limited".

On the other hand, the Court of Appeal has recently emphasised in *Cérélia Group Holdings SAS and others v Competition and Markets Authority* that the CAT, as a specialist tribunal, can be expected to examine closely the decisions of regulators and the evidential basis for them, and that the degree of deference to be accorded by the CAT to the CMA is fact and context specific, with the level of scrutiny potentially differing between the various grounds on which a claim for judicial review can be brought (*[2024] EWCA Civ 352*).

Even more recently, in *Airwave Solutions Limited and others v Competition and Markets Authority and another*, the Court of Appeal also noted that "[w]here it is argued that the decision maker erred in, for example, the interpretation of a contract or other instrument, very little, if any, deference will be accorded. However, where the decision maker has balanced and reconciled complex evidence then appropriate deference will be accorded" (*[2025] EWCA Civ 54*).

The emphasis on the CAT's specialist knowledge and the role accorded to it by the DMCCA and the SCA are likely to further enhance the CAT's importance for businesses. It is already a key venue for the growing raft of competition class actions and its expanded role in supervising the CMA's powers is evident in the high-profile judicial review brought in *Microsoft Corp v CMA*

and Activision Inc, which was stayed following a revised proposal from Microsoft and which the CMA then cleared (*[2023] CAT 48; see feature article "UK merger control: what's in store for 2024?"*).

It seems likely that other regulators, such as the Digital Markets Unit, will also be called on to make high-profile decisions that then lead to challenges to those decisions by way of judicial review. It remains to be seen, however, whether limiting the scope of review to judicial review will lead to a correspondingly limited review of the application of the novel legislative regimes discussed in this article or whether the CAT and the courts will take a relatively interventionist approach.

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Applying for judicial review

Access to judicial review is limited by the requirement that an applicant has standing to apply for judicial review; that is, they must have sufficient interest in the matter to which the application relates (*section 31(3), Senior Courts Act 1981*). This includes both a direct personal interest in the matter or a more general public interest in the legality of the decision being challenged.

In addition, applicants must firstly apply to the court for permission to bring a judicial review, at which point the court will assess on the papers whether there is an arguable case for judicial review. An application will generally need to be made promptly and, in any event, not later than three months after the grounds to make the claim first arose (*Civil Procedure Rule 54.5(1)*). However, this time period may be shortened by statute (*see "Challenging subsidy decisions" and "Challenging SoS decisions" in the main text*).

Furthermore, filing within three months does not necessarily amount to prompt filing in certain circumstances. A particularly stark example of this was seen in *R (on the application of British Gas Trading Limited) v Secretary of State for Energy Security and Net Zero* (*[2023] EWHC 737 (Admin)*). In that case, British Gas sought to challenge the sale of the electricity provider Bulb to Octopus Energy on the grounds that an illegal government subsidy had been provided to support the transaction. However, the High Court held that the application, which was filed around one month after the relevant decisions were made, was unduly delayed due to the urgency of the sale process.

This has similarities to the EU procedure under Article 263 of the Treaty on the Functioning of the European Union, in which a challenge needs to be brought within two months of the publication of the decision by a person to whom the decision is addressed or is of direct and individual concern to them.

Grounds for challenge

In an English judicial review, a decision may generally be challenged on one or more of the following grounds:

- Illegality; that is, where a decision maker misdirects itself as to the law, exercises a power wrongly or acts beyond its powers (also called acting ultra vires).
- Irrationality; that is, where a decision is outside the range of reasonable decisions that a public authority could make, or where the decision maker has taken into account irrelevant matters or failed to consider relevant matters.

- Procedural unfairness; that is, where the decision maker fails to follow the relevant statutory procedure, such as a failure to consult, or the principles of natural justice, for example, where there is bias or a failure to hear an affected party.
- Legitimate expectation; that is, where there is a legitimate expectation, created by a body's own statements or conduct, that it will act in a certain way and it has not done so.

Challenging regulatory decisions: the growing role of judicial review (PDF Version)

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