

# DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL: WIDE-RANGING CHANGES AHEAD

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On 25 April 2023, the government introduced the Digital Markets, Competition and Consumers Bill to Parliament. This highly anticipated Bill is sizeable, with 388 pages, and seeks to introduce wide-ranging changes across several areas, including the regulation of digital markets, updates to the merger control regime and the reinforcement of consumer protection rules (see box “Strengthened consumer protection”). The Bill will bring about the most significant transformation of the UK competition regime since the establishment of the Competition and Markets Authority (CMA) in 2014.

## New digital markets regime

In 2019, an expert panel led by Professor Furman recommended changes to the competition regime to help unlock the opportunities of the digital economy (the Furman report) (see feature article “Big data and competition law: with great opportunities come great risks”, [www.practicallaw.com/w-020-7091](http://www.practicallaw.com/w-020-7091)). At the heart of those recommendations was the creation of the Digital Markets Unit (DMU) in order to, among other things, introduce a code of competitive conduct for particularly powerful digital firms.

While the DMU has already been operating in shadow form since April 2021, the Bill will place it on a statutory footing. The CMA will administer and enforce the new digital markets regime through the DMU and is planning to scale up the DMU’s staffing to around 200 employees.

**Strategic Market Status designation.** The Bill gives the CMA the power to designate firms as having strategic market status (SMS). This will have far-reaching consequences for SMS firms as they will be subject to a set of conduct requirements that the CMA will tailor to each firm. For example, the CMA may impose a requirement for an SMS firm to trade on fair and reasonable terms.

The most important conditions for SMS designation are that the firm has substantial and entrenched market power as well as a position of strategic significance in respect of a digital activity. In addition, the firm’s global turnover would need to exceed £25 billion or its UK turnover would need to exceed £1 billion. It is understood that, as a result of the

## Strengthened consumer protection

The Digital Markets, Competition and Consumers Bill will introduce major reform to the consumer protection regime. At present, the Competition and Markets Authority (CMA) must apply to court for enforcement orders against businesses that breach consumer protection legislation. This will change once the legislation is in force, as the CMA will be able to make its own decision as to whether a business has infringed the rules and impose penalties of up to 10% of worldwide turnover. As a result, the consumer protection penalty power will be brought in line with the CMA’s existing powers in relation to anti-competitive conduct. An area where the CMA could use its penalty powers is in relation to potentially misleading greenwashing claims by businesses (see News brief “Greenwashing: engaging with regulators on ESG concerns”, [www.practicallaw.com/w-036-3695](http://www.practicallaw.com/w-036-3695)).

Some changes are also proposed to substantive consumer rights, such as a tightening of the rules around subscription contracts, including a requirement for businesses to send reminders to consumers before contracts roll over into a new term. In addition, digital platforms will be prohibited from commissioning fabricated reviews and must take reasonable steps to ensure that the consumer reviews they publish are genuine.

turnover threshold, the so-called “GAMMAs” (Google, Apple, Meta, Microsoft and Amazon) are potentially in scope whereas TikTok and Spotify appear to be out of scope.

It is envisaged that the SMS designation process will normally take up to nine months and any designation may be appealed only through judicial review, rather than on a merits basis. Given the wide degree of judgment afforded to the CMA in the SMS designation process, this is one of the more controversial aspects of the Bill.

**Pro-competitive interventions.** The Bill enables the CMA to carry out a pro-competition intervention (PCI) relating to an SMS firm in order to remedy competition problems. This PCI power is broadly similar to the CMA's existing powers under the market investigation regime, although PCIs will have a shorter timeframe of up to nine months, which can be extended by three months in exceptional circumstances. The Bill also imposes an obligation on SMS firms to report to the CMA their acquisitions of stakes of 15% or more, provided that the consideration for the transaction is at least £25 million. This report needs to be submitted to the CMA before completion, with a mandatory waiting period of five working days, giving the CMA an opportunity to consider whether to open an investigation under the usual merger review rules.

**Diverging requirements.** There are obvious parallels with the EU's regulation of conduct by so-called digital "gatekeepers" under the Digital Markets Act (DMA), which applies from 2 May 2023 (*see feature article "Regulating digital services in the EU: a paradigm-shifting legislative framework", www.practicallaw.com/w-030-6172*). However, an important difference is that, once firms have been designated as gatekeepers under the DMA, they will be subject to a uniform set of rules. By contrast, the CMA will be able to tailor the conduct requirements that it imposes in each individual case. This opens the door to a global business being subject to diverging requirements in the EU and the UK. Even within the UK, there may be differences between the conduct requirements to which various SMS firms are subject.

### **Bolstered competition toolkit**

In addition to establishing a new regime for digital markets, the Bill also seeks to make important changes to the existing competition framework. A key change is the expansion of the CMA's jurisdiction in merger cases due to the addition of a jurisdictional threshold that is aimed at catching so-called "killer acquisitions". The CMA will be able to investigate mergers where:

- One of the parties supplies at least 33% of goods or services in the UK or a substantial part of the UK, and its UK turnover exceeds £350 million.
- The other party is active in the UK or supplies goods or services in the UK.

This will bring vertical and conglomerate mergers firmly within the scope of the merger control regime, as this new test will not require any form of overlap between the parties, which is different from the existing share of supply test. In addition, the existing target threshold for establishing jurisdiction on a turnover basis will be raised from £70 million to £100 million in line with inflation.

Outside of merger control, the territorial scope of the Chapter I prohibition under the Competition Act 1998 will be extended so that it catches anti-competitive agreements that are implemented outside of the UK but have effects within the UK. This would make it easier for the CMA to pursue international cartel arrangements that have been implemented overseas but cover products imported into the UK.

At present, the CMA can fine businesses that fail to comply with information requests £30,000 or a daily rate of £15,000. In comparison with other jurisdictions, these penalty caps are low. Therefore, the Bill proposes to increase the caps to 1% of a firm's annual worldwide turnover or 5% of daily worldwide turnover. There will also be an ability to fine individuals for failing to comply with investigative measures, with fixed penalties of up to £30,000 as well as daily penalties of up to £15,000.

### **Timing**

It has taken the government four years since the release of the Furman report to publish the Bill. Any SMS designation is still a long way off: current expectations are that the Bill will not receive Royal Assent before spring 2024. Once the legislation is in force, the CMA will need nine months to run through an SMS designation process, and only then will it be able to impose conduct requirements. Realistically, this is not expected to occur before mid-2025. Given the pace of technological development in areas such as artificial intelligence (AI), this seems far away. In the meantime, the CMA is filling any void by continuing its enforcement actions against technology companies and monitoring new developments, such as its initial review of AI foundation models, which it announced on 4 May 2023 (*www.gov.uk/cma-cases/ai-foundation-models-initial-review*).

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*The Bill is available at <https://bills.parliament.uk/bills/3453>.*

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