DMCC Bill in focus: part six

UK competition law: the CMA gets (another) power boost

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The Digital Markets Competition and Consumers (DMCC) Bill is now in the final throws of the Parliamentary process.

At the time of writing the Bill is undergoing its third reading in the House of Lords and is expected to receive Royal Assent around late Spring 2024. The operative provisions of the Bill are likely to be implemented in stages, giving the government and the Competition and Markets Authority (**CMA**) an opportunity to publish further guidance for businesses in certain areas.

In Part 6 of our DMCC Bill in Focus series, we unpack the changes to UK competition law regime within the Bill. Click here to read our insight on the changes to UK merger control regime in the Bill.

Please note that even at this late stage there are still certain parts of the Bill that are yet to be finalised, although most of the areas highlighted below are unlikely to change substantively between now and the Bill entering the statute books.

Competition law changes in a nutshell

As far as UK competition law is concerned, while Part 1 of the Bill (which confers sweeping powers on the CMA's nascent Digital Markets Unit) has been heralded as 'game changing' in terms of the CMA's ability to regulate big tech, Part 2 of the Bill is designed to give the CMA's existing enforcement toolkit an upgrade, strengthening its enforcement powers in areas where it believes they are currently lacking.

That said, the importance of these changes should not be underestimated. While UK competition laws themselves are not changing, the CMA will now have even greater powers at its disposal when carrying out investigations and market studies.

Read on to find out more about the CMA's new competition powers under the Bill, including:

1. The CMA's powers to force companies to **provide data/ information** during investigations.

2. New and extended **dawn raid** powers for the CMA.

3. Updated powers for the CMA's **market investigation** regime.

4. Clarifying the CMA's **extra-territorial reach** outside the UK.

5. The CMA's ability to impose penalties on companies that breach **commitments** or **undertakings**.

Note that Part 2 of the Bill also includes some changes that impact on the private enforcement regime and Competition Appeal Tribunal (CAT) litigation. For more information on these changes, please see the

dropdown menu below:

Private enforcement - what's changing?

While there will be no dramatic shake-up of the private enforcement regime under the Bill; there are some notable changes:

- **PACCAR and damages-based agreements**. The Bill had previously sought to resolve, to an extent, some of the issues raised in the landmark PACCAR Supreme Court ruling. This ruling found that competition litigation funding agreements entered into by two class representative bodies were, in fact, damages-based agreements (**DBAs**), which – if such arrangements are to be legally enforceable at all - are required to meet certain statutory conditions that were not met by the class representative in the PACCAR case. (For information, a DBA is a litigation funding arrangement whereby the fee of the provider of advocacy, litigation or claims management services is calculated by reference to the financial benefit obtained i.e. the damages achieved in the claim). DBAs are not currently enforceable in the context of opt-out collective proceedings (section 47C(8) of the Competition Act 1998) and, in order to be enforceable in other proceedings, have to meet certain conditions set out in the Damages Based Agreements Regulations 2013. The agreements in the PACCAR case were typical of many others, so the implications of the ruling – which brough passive funding arrangements within the definition of 'claims management services' – for litigation funders were significant. Putting aside the commercial motivations of those involved in the supply chain, at a basic level, if class actions cannot attract funding the consequences for public access to justice are far-reaching.)
- The outcome of the case has prompted funders and the representatives in various private damages claims to revisit their litigation funding arrangements. Given the wider implications, it was suggested that the Bill should include a provision which would partially reverse the PACCAR judgment by allowing the use of DBAs for opt-out collective proceedings heard in the CAT, but only when used by litigation funders. However, this proposal has subsequently been superseded by proposals for separate legislation on litigation funding to remedy the potential chilling effect of the judgment on such arrangements.
- The Bill also gives the CAT discretion to award **exemplary damages** in particularly egregious cases. Exemplary damages are designed to be punitive in nature, to discourage wrongdoers from profiting from their infringements and to enable claimants to recover losses over and above the actual harm suffered as a result of the underlying competition law breach. Note that exemplary damages cannot be awarded in collective proceedings.
- The Bill also gives the CAT power to grant **declaratory relief** in individual or collective claims arising out of competition law infringements. This is designed to help claimants who simply require a judicial declaration of how the law applies to the facts of the case without needing to make an application for an injunction or claim for damages.

1. Requests for Information: the CMA gets a bigger stick

Any company that has been involved in a CMA investigation or market study will know that responding to statutory Requests for Information (**RFIs**) can be incredibly challenging. It is not uncommon for RFIs to run into multiple pages of complex lines of questioning, often with detailed requests for commercially

sensitive data. This can be a huge distraction for businesses that may not be able to direct internal resources to provide the data requested within the CMA's timescales.

As a result, deadlines for responding to RFIs are almost always challenging, even if the CMA is willing to offer extensions where necessary.

Nevertheless, the CMA is concerned that its statutory powers to force companies to comply with RFIs during market studies/investigations under the Enterprise Act 2002 (**EA02**) and enforcement investigations under Competition Act 1998 (**CA98**) are not strong enough. In particular, the CMA's ability to impose fixed penalties is currently capped at a maximum of £30,000 per RFI (noting that daily penalties may also be applied – see below). From the CMA's perspective, these penalties are insufficient on occasion to drive prompt compliance.

For example, the CMA recently served penalty notices on BMW for failure to comply with a s26 Notice (see further below) as part of its ongoing CA98 investigation into end-of-life vehicles, and ASDA for failure to provide information in connection with the CMA's road fuel market study. In each case the fixed penalties imposed were capped at £30,000 – but under changes outlined at Schedule 9 of the Bill, the CMA will have the power to impose **fixed penalties up to 1% of global turnover** and/or **daily penalties up to 5% of the company's global daily turnover** in the event of failure to comply (without reasonable excuse) with RFIs issued in the following circumstances:

- Section 26 notices during CA98 competition enforcement cases; and
- s174A of Enterprise Act 2002 (**EA02**) in CMA market studies and subsequent market investigations.

Further detail on the CMA's powers in relation to its market investigation activities is set out in part 4 of this article.

Case study 2: Obstructing a dawn raid (Fender)

What happened?	What was the penalty?	… and under the DMCC Bill?
A Fender employee removed potentially sensitive hard copy notebooks from the premises during an unannounced CMA inspection at Fender's offices between 17-19 April 2018. After becoming aware of the incident, Fender notified the CMA – however, applying its 'strict liability' approach, the CMA still found that Fender was responsible for the employee's actions and had therefore obstructed an inspection.	The CMA imposed a penalty of £25,000, reduced from the statutory maximum of £30,000 to reflect mitigating circumstances.	The CMA will be able to impose much larger penalties up to 1% of global turnover (or daily penalties as referenced above). This will bring the CMA's powers more closely in line with those of the European Commission, which has regularly imposed huge penalties – including a €38million penalty imposed on E.ON for breaking a seal affixed by Commission inspectors overnight during an inspection of its German premises.

3. Market investigations

The CMA will also gain much more flexible market investigation powers when conducting in-depth inquiries into markets that it believes are not working effectively and may require structural remedies (in the form of binding Orders) to address the market failures.

Over the years Market Investigation Orders have been imposed regulating market conduct in a number of sectors, including groceries, retail banking, private motor insurance and funerals. The CMA already has wide discretion in terms of the conduct requirements it can impose by Market Investigation Orders – for example the Private Motor Insurance Order banned certain price comparison websites and insurers from entering into certain types of price parity clauses, while the Groceries (Controlled Land) Order prohibited large grocers from entering into certain forms of restrictive covenants in relation to the sale of groceries.

However, the CMA's powers in relation to the enforcement of Market Investigation Orders are currently limited in the sense that it cannot impose penalties for breach of an Order; parties suffering loss etc. as a result of a breach may bring an action and/or the CMA might seek to enforce an Order by bringing civil proceedings, but the CMA cannot sanction a breach directly as things currently stand. That will change under the DMCC Bill, which gives the CMA the power to impose penalties in such cases **up to 1% of global turnover** and/or **daily penalties up to 5% of the company's global daily turnover**.

Note that while not strictly stated in the Bill, it is widely understood that the new powers are not intended to be used retrospectively in relation Orders that have already been imposed by the CMA.

Case Study 3: Breach of Market Investigation Order

What happened?	What was the penalty?	… and under the DMCC Bill?
In December 2023, the CMA found that Morrisons and M&S had both breached the Groceries Controlled Land Order on multiple occasions by entering into land agreements that breached the terms of the Order imposed by the CMA in 2010. Other supermarkets have also been found to have breached the Order in recent years.	No direct penalties can be imposed under the Controlled Land Order – as is currently the case for all Orders imposed by the CMA upon the conclusion of a market investigation. The CMA would need to take a company to court to ensure compliance with an Order when compliance cannot be secured via dialogue between the parties .	While the CMA is unlikely to use its new powers to impose penalties for subsequent breaches of the Controlled Land Order, it will be able to issue penalties for new Orders implemented by the CMA following Market Investigations after the DMCC Bill has come into force. This will significantly up the ante for any company that is subject to a Market Investigation going forward.

In addition to its new powers in relation to breach of Market Investigation Orders, the CMA will also gain more flexible powers in the following areas:

- It will be able to accept commitments at any time during a market investigation, which may include partial commitments thereby enabling the CMA to narrow the scope of the investigation.
- It will have the power to conduct trial remedies during an investigation in order to determine the most effective form of remedy – which may require the companies involved in the market themselves to carry out mandatory trials and report back to the CMA.
- It will have the ability to impose fixed penalties up to 1% of global turnover and/or daily penalties up to 5% of the company's global daily turnover in cases where a company fails to respond to an RFI served during the course of a market investigation.

4. Extra-territorial reach of the CMA

Brexit has posed a jurisdictional challenge to the CMA now that it sits outside of the European Union and European Competition Network. This can make it harder for it to obtain information from global corporates who may have information relevant to a UK competition investigation that is technically stored or hosted overseas.

The territorial scope of the CMA's information gathering powers under section 26 notices were tested by the recent high-profile BMW case (see below) which was recently resolved in the Court of Appeal. However, the CMA hopes to put to bed any lingering uncertainty by making its extra-territorial powers crystal clear via a new s44B of CA98.

This states that the CMA may (i) serve s26 notices on a company based outside the UK and/or (ii) request specified documents or information that is held outside the UK, provided that the overseas

company in question has a ‘UK connection’.

Case Study 4: Extra-territorial reach of s26 Notice (BMW)

What happened?	What was the penalty?	… and under the DMCC Bill?
The CMA served s26 notices on BMW AG (which is based in Germany) as part of its ongoing CA98 investigation into end-of-life vehicles. BMW refused to comply as it claimed the CMA was overstepping its territorial powers by requiring BMW’s German group company to provide documents.	The CMA imposed a £30,000 fine, plus a daily penalty of £15,000. BMW successfully appealed the penalty in the CAT; however, the Court of Appeal recently reversed the CAT judgment and determined that the CMA does have the power to require overseas companies to produce documents as part of an ongoing CA98 investigation.	Notwithstanding the Court of Appeal’s 17 January 2024 judgment, s44B of the DMCC Bill should help dispel any uncertainty by making the extra-territorial scope of the CMA’s powers much clearer.

5. Penalties for breach of commitments

The CMA is concerned that its current enforcement toolkit is insufficient to hold companies to account if they renege on commitments given to the CMA in order to ‘settle’ an ongoing investigation.

For example, the CMA resolved its recent CA98 investigation into Meta and Amazon and its 2021 investigation into the electric vehicle charging market via commitments. This enabled the CMA to close the investigations in question by securing the desired behavioural remedies without needing to impose penalties. Of course, this outcome also saved the public purse from the significant costs associated with the CMA serving a Statement of Objections, Infringement Notice and, potentially, an appeal in the CAT.

However, the CMA’s concern is that it currently lacks the ability to impose penalties on firms that **breach commitments** given to the CMA in circumstances such as those described above. The CMA would need to take a non-compliant company to court if it were unable to secure compliance via dialogue with the company in question.

In keeping with the changes outlined above, under the new s35B of CA98, DMCC Bill the CMA will gain the power to impose fixed penalties **up to 5% of global turnover** and/or **daily penalties up to 5% of the company’s global daily turnover** when it identifies breaches of commitments. This also applies to breach of undertakings, for example in cases where parties agree undertakings with the CMA in order to close a merger investigation (which is reflected in the new s94AA of EA02).

6. Mergers

Finally, alongside changes to the jurisdictional thresholds entitling the CMA to investigate a merger (see Part Five of our DMCC Bill in Focus series), it is proposed that the DMCC will also limit the ability of foreign states to own or control UK print media and, from a procedural perspective, will similarly enhance the CMA's fining powers for failure to respond to information requests or for the provision of false or misleading information in connection with merger enquiries.