

Bird & Bird

The Digital Markets, Competition and Consumer Bill Passes: A New Era Begins

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The UK Parliament passed the Digital Markets, Competition and Consumer (DMCC) Bill on 23 May 2024, marking a significant milestone in the evolution of competition and consumer protection laws. This comprehensive legislation, which has taken more than a year to make its way through Parliament, is expected to come into effect in autumn 2024. It brings the most substantial reforms since the introduction of the current merger control regime under the Enterprise Act over 20 years ago, impacting digital markets, merger control, antitrust rules, and consumer law.

This article focuses on the significant reforms that have been made to digital markets and competition law. You can read about the changes to consumer protection law [here](#). We've also covered DMCCB developments in previous articles, for which see [here](#) and [here](#).

The 'SMS' Regime

A key feature of the DMCC Act is the introduction of the Strategic Market Status (SMS) regime. The Competition and Markets Authority's (CMA) Digital Markets Unit (DMU) will be empowered to designate firms as having SMS if they possess "substantial and entrenched market power" and hold "a position of strategic significance" in digital activities linked to the UK. This will, in practice, only apply to a few of the largest tech firms.

Designated SMS firms will have obligations they must comply with, including:

1. **Tailored codes of conduct** will be developed by the DMU to regulate each SMS firm's behaviour, which will need to be based on principles of fair trading, open choices and trust and transparency, and will be enforceable through fines of up to 10% of global turnover for breaches.
2. SMS firms will also be subject to **mandatory merger reporting requirements** for certain transactions exceeding £25 million.
3. SMS firms may be subject to possible **pro-competition interventions** (PCIs), which are aimed at tackling "the root causes of entrenched market power", and might include data-related interventions, obligations to provide access on fair and reasonable terms, and even separation remedies, which may require different units within an SMS firm to be operated independently of each other.

The DMCC Bill navigated through an extended period of legislative deliberation between the two Houses. Discussions revolved around key issues such as the legal criterion for enforcing conduct requirements, which has now been agreed upon as a proportionality test. The debate also covered the standard to be used for DMU decision appeals, which has been settled as being based on the merits. Additionally, the period for government approval of CMA guidance was a significant talking point, with a consensus now reached on a 30-day timeframe.

The Government also made modifications to the countervailing benefits exemption. Initially, this exemption mandated that the conduct breaches must be 'indispensable' for the realisation of outweighing benefits.

However, the amendment proposed by the Government simplified this requirement, in that the benefits 'could not be realised without the conduct'. Despite initial resistance from the Lords, the amendment was ultimately accepted.

Changes to the UK competition regime

The DMCC Act will also introduce changes to the UK's existing competition regime, including merger control and antitrust investigations. These include:

Merger Control

1. **Raised thresholds:** Turnover thresholds have been raised from £70m to £100m in line with inflation.
2. **New acquirer-centric threshold:** In addition to the new thresholds, jurisdiction for the CMA to review transactions can also now be established when at least one merging business has an existing 33% share of supply in the UK and a UK turnover of at least £350m, provided the target has a UK nexus. This forms an additional basis for establishing jurisdiction in the UK's voluntary regime and is primarily aimed at capturing "killer acquisitions" and other mergers between non-competitors.
3. **Small mergers exemption:** Mergers will now be exempt from review under a new safe harbour if each party's UK turnover is less than £10 million.
4. **Changes to procedure:** changes have been introduced to the CMA's procedure which are expected to improve the merger control process, including fast-track Phase 2 reference on request from merging parties, extension of the Phase 2 timetable by consent, and the publication of merger notices on the CMA's website.

Antitrust

1. **Extra-territorial reach:** The Chapter I prohibition, which covers anti-competitive agreements and concerted practices, has been expanded to apply to extraterritorial agreements (i.e. those implemented outside of the UK), if there are likely to be direct, substantial, and foreseeable effects within the UK.
2. **Enhanced powers of investigation:** The DMCC Act empowers the CMA with enhanced evidence-collection capabilities for Competition Act investigations. This includes provisions to bolster the CMA's investigative abilities in domestic premises, which looks to reflect the increase in remote-working. Additionally, it establishes new responsibilities for third parties. For instance, if third parties are aware or suspect that the CMA is conducting an investigation, they are now required to preserve pertinent evidence.

Merger Control and Antitrust

1. **Enhanced information gathering:** The CMA will be able to serve notice on persons and require the production of documents held outside the UK, under certain conditions.
2. **Stronger penalties for obstruction:** Much higher fines have been introduced for procedural infringements, with fines for non-compliance with investigative requirements increased from a fixed cap of £30,000 to a cap of 1% of global turnover and daily penalties of £15,000 to 5% of global daily turnover. The previous penalties were perceived as too low to deter obstruction. Moreover, businesses should be mindful that breaching an undertaking, order, or commitment can result in fines of up to 5% of global turnover and 5% of global daily turnover.

Next Steps

The CMA is now [consulting](#) on its [draft guidance](#) on the Digital Markets Competition Regime. It is inviting the views of interested parties on the proposed guidance accompanying the new competition regime and the merger reporting requirement for SMS firms. The consultation closes on 12 July 2024.

We will continue to keep you posted on any new developments.

Conclusion

The passing of the DMCC Bill is a substantial shift in the UK's competition landscape, particularly in relation to digital markets. The bill introduces sweeping amendments designed to tackle the unique challenges posed by the digital economy, with an emphasis on bolstering the CMA's investigative capabilities and increasing the scope of merger control. The broadening of jurisdiction and the introduction of new evidence-gathering powers, coupled with sterner penalties for procedural infringements, suggests a more rigorous regulatory environment for businesses. Companies, particularly those with a significant UK presence or nexus, should closely monitor these changes and consider their potential impact. Moving forward, the DMCC Act could set a precedent for other jurisdictions, reshaping competition law frameworks globally and underscoring the need for businesses to adapt to an increasingly stringent regulatory landscape.

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