



The Digital Markets, Competition and Consumers Bill – What's New on the Competition Side?

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Introduction

In addition to the headline landscape reforms to digital markets (see our update [here](#)) and consumer protection (see [here](#)), the much-anticipated Digital Markets, Competition and Consumers Bill (the **Bill**), introduced into Parliament on 25 April 2023, makes wide-ranging enhancements to the competition powers of the Competition and Markets Authority (the **CMA**) and changes to the UK merger regime.

We take a look at a few key changes to competition law proposed by the Bill.

Extending the CMA's extraterritorial reach

Under the Competition Act 1998 (**CA98**), the Chapter I prohibition (on anti-competitive agreements, decisions by associations and concerted practices) currently covers those implemented, or intended to be implemented, in the UK. The Bill would extend the Chapter I prohibition to specifically cover anti-competitive conduct implemented outside the UK where it is likely to have “an immediate, substantial and foreseeable effect on trade” in the UK, providing the CMA with greater scope for investigating international cartels which impact on the UK.

The Bill also extends the CMA's power to issue requests for information to entities located outside the UK. This has been a live issue for the CMA and follows a recent judgment by the Competition Appeal Tribunal (the **CAT**) where, on an appeal, the CMA was found not to have such powers:

- In its Chapter I investigation into the end-of-life vehicle recycling sector, the CMA had sought to use its formal section 26 CA98 powers to require the production of information/documents by BMW AG and Volkswagen AG, as well as their UK subsidiaries (those subsidiaries complied with the information requests).
- Both companies successfully challenged the CMA's authority to issue them with section 26 Notices on the basis that they were incorporated and domiciled in Germany and had no branch or office in the UK.
- In the case of BMW AG, it successfully appealed against the CMA's decision to impose fines for non-compliance with the information request.

Alongside awaiting the changes in the Bill clarifying its extraterritorial powers, the CMA has been granted permission to appeal the CAT's decision.

Tools to enhance international collaboration

In relation to international co-operation regarding competition law enforcement, the Bill provides the CMA with more powers to assist overseas regulators.

The Bill seeks to alleviate, in part, some of the challenges arising from parallel casework and multi-jurisdictional co-operation, including information-sharing. In 2020, the CMA signed the Multilateral Mutual Assistance and Cooperation Framework ([MMAC](#)) with counterparts in Australia, Canada, New Zealand and the US. Few other cooperation frameworks are in place. Post-Brexit, the UK-EU Trade and Cooperation Agreement had made provision for a co-operation agreement between EU enforcers and the CMA. However, such negotiations have reportedly not been prioritised.

Co-operation by the CMA with its counterparts continues to take place in relation to both casework and policy, including through fora such as the International Competition Network (ICN), the OECD, UNCTAD and the International Consumer Protection and Enforcement Network (ICPEN). Although post-Brexit, the CMA's role in the European Competition Network (ECN) has fallen away.

Recent examples of co-operation with overseas regulators in enforcement include the CMA's competition investigation into [suppliers of fragrances](#) launched in consultation with the US Department of Justice, the European Commission and the Swiss Competition Commission.

Market inquiries

Whilst the two stages of the existing market inquiry regime are retained (ie a market study followed by an in-depth market investigation), the Bill introduces various reforms to make the regime "*more efficient, flexible and proportionate*".

In particular, the CMA would have the power to accept undertakings at any stage, whether during a market study or a subsequent market investigation, and would have greater flexibility in defining the scope of any market investigation reference (MIR). In relation to final undertakings or orders which may be accepted or imposed respectively, the CMA would have the power to require businesses to trial the proposed remedies to assess their likely effectiveness. The CMA would also have the power to vary undertakings or orders up to ten years after its adverse effect on competition finding (but not in the first two years).

Under the current regime, the CMA is required to consult on a MIR within the first six months of a market study. This requirement is set to be abolished under the Bill. Recently, Apple successfully appealed against the CMA's decision to make a MIR into mobile browsers and cloud gaming. The CAT found that the CMA had failed to comply with this statutory timeframe and thus, its decision was set aside. Ironically, the CMA had originally decided not to undertake a MIR as the Bill's adoption was anticipated in good time, but the CMA changed its position by the time of its report due to the delays to the Bill.

The CAT recently refused the CMA permission to appeal the ruling and it is reported the CMA is now seeking permission to appeal directly from the Court of Appeal.

Enhanced investigatory and enforcement powers

There are various changes set out in the draft legislation to further bolster the CMA's powers, including:

- **Interviews and evidence:** the Bill seeks to broaden the CMA's power to interview individuals as part of competition investigations, including conducting interviews remotely, and to extend the legal duty to preserve and retain relevant documents/evidence in relation to all competition investigations.

- **Dawn raids:** the more flexible powers for the CMA reflect post-pandemic changes in working practices. In relation to dawn raids conducted at domestic premises, for example, the CMA would have the same powers as it does for such investigations with a warrant at business premises, including “seize and sift” powers. The CMA would also have the power to require the production of electronic information and documents stored remotely.
- **Fines:** there are significant changes with tougher penalties being proposed. In relation to fines for (i) failing to comply with information requests, (ii) providing false/misleading information or (iii) falsifying/destroying/concealing evidence, the CMA would be empowered to impose on companies a fixed fine of up to 1% of annual global turnover and/or a daily rate of up to 5% of global daily turnover. This is a major increase from the currently applicable fixed and daily rate fines which are capped at £30,000 and £15,000 respectively. These current capped fines would instead be available to the CMA in relation to individuals involved in (ii) or (iii) above. The Bill also introduces penalties of a fixed fine of up to 5% of annual global turnover and/or a daily rate of 5% of daily global turnover for companies’ failure to comply with the CMA’s directions or orders or with undertakings or commitments which they have given to the CMA.
- **Interim measures:** the CMA can impose these to prevent significant competition harm whilst it conducts an investigation. In relation to this currently under-utilised tool, the Bill proposes a change to the appeal process: an appeal against an interim measures decision would only be on judicial review grounds, replacing the current merits-based review.

Merger control

The Bill introduces three main changes to the jurisdictional thresholds:

- Firstly, a new threshold to capture ‘killer acquisitions’ where:
 - one of the parties supplies at least 33% of all goods or services of any description in the UK (or a substantial part of it) and has UK turnover in excess of £350m, and
 - the other party is either a UK business, carries on (part of) its activities in the UK, or supplies goods or services into the UK.

The aim is to enable the CMA to review certain conglomerate and vertical mergers and is likely to capture the acquisitions by firms with Strategic Market Status and mandatory reporting obligations under the new digital markets regime. To date, the CMA has made flexible use of the share of supply test (which remains unchanged) in establishing jurisdiction over certain mergers.

- Secondly, the Bill increases the turnover threshold from the current £70m to £100m (in line with inflation) in relation to the UK turnover of the target.
- Thirdly, a safe harbour is to be introduced for “small mergers” where each party’s UK turnover is less than £10m which will provide certainty that such transactions will not be subject to review by the CMA.

The Bill also brings in various procedural changes, including a fast-track Phase II merger reference where requested by the parties and the extension to the Phase II timetable by mutual agreement. The latter may well be helpful for managing complex, multi-jurisdictional mergers which are subject to parallel review in other jurisdictions

Private enforcement changes

In addition to bolstering the CMA’s enforcement powers, there are various changes to the private enforcement landscape affecting private litigants bringing competition law-based claims in the courts.

The CAT would be given the additional power of granting declaratory relief in individual and collective claims. Thus, the CAT would be able to issue a declaration that either the Chapter I or Chapter II (abuse of a dominant position)

prohibitions had been infringed without claimants having to formulate their competition claims as damages claims or an injunction.

In addition, exemplary damages are to make a return (they were no longer available following the UK's implementation in 2017 of the EU Damages Directive). The CAT and the High Court would again have the discretion to award exemplary damages¹ in relation to private damages claims, but not collective proceedings. To avoid this development having a negative impact on leniency applications, the Bill excludes immunity recipients from being liable for exemplary damages.

Duty of expedition

The Bill also places an express "*duty of expedition*" on the CMA (and sectoral regulators), requiring the CMA to consider the need to make a decision or to take action "*as soon as reasonably practicable*". It remains to be seen what impact this would have in practice, given the imperative for the CMA to balance expediency with the legal rights of those involved and ensuring robust due process.

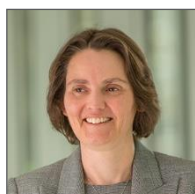
Watch this space

Given that the Bill's parliamentary journey has only just commenced, it will inevitably be some time before the draft legislation makes its way onto the statute books and there may well be amendments along the way to its almost 400 pages. Many aspects will require further guidance from the CMA in due course.

The suite of new powers proposed for the CMA across both its consumer and competition enforcement tools are significant. Combined with the far-reaching and extensive powers proposed for the CMA's Digital Markets Unit, the impact of the new Bill on the enforcement landscape cannot be underestimated.

The CMA seems to have received almost everything on its previous wish-list in the Bill, including powers negating recent CAT rulings which had curtailed its ambit and clipped its enforcement wings.

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¹ The CAT awarded exemplary damages in its 2012 decision regarding the claim by 2 Travel Group PLC (in liquidation) against Cardiff City Transport Services. The damages claim followed the OFT's infringement decision. The exemplary damages award was in the sum of £60,000.