



Legislation empowering the CMA's Digital Markets Unit introduced into Parliament

5 May 2023

Introduction

The long-anticipated Digital Markets, Competition and Consumers Bill (the **Bill**) has now begun its parliamentary journey following its introduction on 25 April 2023. Described as a “*flagship bill*” by the CEO of the Competition and Markets Authority (the **CMA**), the Bill not only introduces major landscape reforms to the UK's consumer protection regime (see our update [here](#)) and significant enhancements to the CMA's competition law powers (see [here](#)), it also ushers in a new regime for digital markets. The Bill has the potential to be a “*watershed moment*” in how UK digital markets are regulated.

As we [highlighted](#) previously, the CMA established the Digital Markets Unit (the **DMU**) in shadow form in 2021, so the Bill marks a crucial next step towards it gaining formal statutory powers to police digital markets. The main aspects of the new regime and the DMU's extensive enforcement powers are summarised below.

SMS Designation

The Government's stated purpose of the new regime is to regulate “the largest and most powerful digital firms to ensure effective competition that benefits everyone” and “to address the far reaching market power of a small number of tech firms”. To this end, the CMA, and therefore the DMU (an administrative unit within the CMA), would have the power to designate a firm as having Strategic Market Status (**SMS**) in relation to one or more **digital activities** which are **linked to the UK** and where the firm has **substantial and entrenched market power** and a **position of strategic significance** in respect of a digital activity, subject to certain **turnover thresholds**:

- **Digital activities:** their scope is set out in the form of three broadly defined categories of activities rather than a specific list (in contrast, the EU's Digital Markets Act (**DMA**) lists ten “core platform services”). The proposed categories are:
 - the provision of a service via the internet
 - the provision of digital content, or
 - any other activity carried out for the purpose of either of the above.
- **Linked to the UK:** a jurisdictional nexus with the UK is required. A digital activity would be considered to be linked to the UK if:
 - it has a significant number of users
 - it is likely to have an immediate, substantial and foreseeable effect on trade in the UK, or

- the undertaking which carries out the digital activity carries on business in the UK in relation to the digital activity.
- **Substantial and entrenched market power:** when assessing this, the DMU would be required to carry out a forward-looking assessment for a period of at least five years, taking into account developments which would be expected or foreseeable if the firm were not to have SMS designation (ie the assessment would be carried out by reference to a counterfactual assuming the firm were not designated) and which may affect the firm's conduct in carrying out the digital activity.
- **Position of strategic significance:** the Bill sets out that a firm would be in such a position if one or more of the following conditions were met:
 - the undertaking has achieved a position of significant size or scale in respect of the digital activity
 - the digital activity carried out by the undertaking is used by a significant number of other undertakings in carrying on their business
 - the undertaking's position in respect of the digital activity would allow it to extend its market power to a range of other activities, or
 - the undertaking is in a position to be able to determine or substantially influence the ways in which other undertakings conduct themselves in respect of the digital activity (or otherwise).
- **Turnover thresholds:** only if a firm (and its group) is estimated by the DMU to have turnover, arising in connection with any of its activities, in excess of £25bn globally or in excess of £1bn in the UK (from UK users or customers) over usually the last twelve-month period could it be designated as having SMS. With such high turnover thresholds envisaged, the scope of the new regime would be limited to only the largest digital firms.

In terms of process, prior to making an SMS designation, the DMU would be required to conduct an SMS investigation. It must first give notice to the firm in question setting out the reasonable grounds it has for considering that it may be able to designate the firm as having SMS and the purpose and scope of the SMS investigation, amongst other requirements. The DMU has up to nine months to conclude this investigation and decide on SMS designation (subject to possible extension) and is required to carry out a public consultation on its proposed decision. An SMS designation is then in place for a period of five years.

Consequences of SMS designation

There would be three main consequences of SMS designation for firms. It is envisaged that the DMU would have two new tools, one to prevent harm by setting out tailored conduct requirements and the other to impose targeted pro-competition interventions to address the root causes of competition issues in digital markets. Thirdly, there will also be a mandatory merger reporting requirement for SMS-designated firms where certain thresholds are met.

- **Conduct requirements:** To seek to mitigate the effects of market power, the DMU would be able to impose an enforceable Code of Conduct, tailored to the SMS-designated firm, to regulate its conduct in relation to a relevant digital activity. As with SMS designation, the DMU must give notice and consult on the proposed conduct requirements. The conduct rules would set out how the firm should treat consumers and other businesses based on three overriding principles: fair dealing (eg on reasonable terms); open choices (eg ease of ability to switch providers); and trust and transparency (eg sufficient information to make informed decisions).

The Bill sets out an extensive list of the permitted types of conduct requirements. Conduct requirements would need to be kept under review and could be varied, revoked and added to by the DMU.

In contrast with the obligations under the DMA which apply equally to all designated “gatekeepers”, the Bill empowers the DMU to prescribe bespoke conduct requirements targeted at the SMS-designated firm in

question. While the UK's novel approach enables more flexibility in regulating dynamic digital markets, the breadth of the DMU's discretion to impose conduct requirements across wide-ranging conduct categories provides much less legal certainty for SMS-designated firms.

If the DMU has reasonable grounds for suspecting that a SMS-designated firm has breached a conduct requirement, it would be able to carry out a conduct investigation and would have six months within which to notify the firm of any infringement finding. The DMU would be able to impose enforcement orders (including on an interim basis) and would also have the power to accept commitments instead. An SMS-designated firm would be able to put forward evidence that its conduct benefited from a countervailing benefits exemption (broadly equivalent to the section 9 criteria for an exemption from the Chapter I prohibition on anti-competitive agreements under the Competition Act 1998 where the benefits outweigh the potential harm).

In addition, under the proposed a **final offer mechanism**, the DMU would have the discretionary power to act, where a SMS-designated firm has failed to agree "fair and reasonable terms as to payment" in its dealings with a third party, by choosing between the respective final offers of the parties. It has been designed as "a tool of last resort" available in only certain circumstances.

- **Pro-Competitive Interventions (PCIs):** The Bill enables the DMU to investigate where it has reasonable grounds to consider that a factor (or combination of them) relating to a relevant digital activity may be having an adverse effect on competition (an AEC Finding). In the event of an AEC Finding, the DMU would have the power to make a PCI. The DMU must provide the SMS-designated firm with notice of the investigation and then would have nine months within which to notify the firm of its final decision (as opposed to the usual eighteen-month timeframe for Market Investigation References (MIRs) following a market study). There is also an obligation to consult publicly. The DMU would then have four months from giving notice within which to make a pro-competition order and would have broadly equivalent powers as under MIRs, ranging from imposing behavioural remedies through to structural remedies and divestments. The DMU would also have the power to accept commitments in place of pro-competition orders.
- **Mandatory merger reporting:** In a departure from the UK's voluntary merger regime, the Bill proposes a mandatory advance reporting obligation on a SMS-designated firm in relation to transactions where:
 - it (or its group) has "qualifying status", ie it is to increase its shares or voting rights in a "UK-connected body corporate" target:
 - from less than 15% to 15% or more
 - from 25% or less to more than 25%, or
 - from 50% or less to more than 50%
 - the target carries on activities in the UK or supplies goods or service to a person in the UK so as to be a "UK-connected body corporate", and
 - the consideration is at least £25m.

This obligation also captures joint ventures. Details of the form and content of the report to be submitted are to be published in due course. The purpose of the report is to provide sufficient information so that a decision can be made as to whether a merger investigation should be launched.

In addition to this prior reporting mechanism before a deal can complete, a new jurisdictional threshold will be introduced (amongst other changes to the merger regime proposed by the Bill). The new threshold will be met where one of the parties supplies at least 33% of the goods or services of a particular description in the UK (or substantial part of it) and has UK turnover in excess of £350m and the other party has a UK-nexus. This is likely to impact on acquisitions by SMS-designated firms.

Enforcement, Appeals and Damages Claims

Whilst it is the Government's stated intention that the "*DMU will seek to resolve concerns through informal and cooperative engagement with firms*", the Bill proposes that the DMU would have significant and far-reaching fining powers.

Corporate fines

The DMU would have the power to fine an SMS-designated firm up to 10% of global (group) turnover for breaches and/or to impose daily fines of up to 5% of daily global (group) turnover for certain ongoing infringements. Fines could be imposed for failure to comply with a conduct requirement or an enforcement order, pro-competition order, final offer order or commitments or merger-related obligations.

The DMU's proposed investigatory powers under the new digital markets regime would be similar to the CMA's powers under the Competition Act 1998. The Bill sets out that failure to comply with investigative requirements "*without reasonable excuse*" could lead to significant penalties (a fixed fine of up to 1% of annual worldwide turnover and a daily fine of up to 5% of daily worldwide turnover).

Implications for individuals

The Bill also places obligations on individuals with potential consequences for non-compliance.

The CMA already has the power to seek director disqualifications of up to 15 years in connection with competition law infringements. However, the Bill proposes this power would be extended to cover involvement in breaches of conduct requirements and PCIs.

An SMS-designated firm is required to nominate an appropriate senior manager to have responsibility for monitoring compliance with conduct requirements and any orders and/or commitments; co-operating with the DMU regarding compliance; and reporting on compliance. The DMU could impose a penalty on the nominated officer for failure "*without reasonable excuse*" to ensure that the compliance reporting obligation is duly met.

In addition, the DMU could require a SMS-designated firm to nominate a senior manager as having responsibility for ensuring compliance with an information request notice and the individual could also be fined in the event of non-compliance "*without reasonable excuse*".

Appeals

The SMS-designated firm (or another person with sufficient interest) may challenge a decision by the DMU by means of an appeal before the Competition Appeal Tribunal (CAT), but only on judicial review grounds (with a limited exception for certain penalty decisions). Therefore, the review on appeal is not on the merits of the decision itself, but on the legality of the decision-making processes.

Damages Claims

The new regime also sets out the basis on which third parties affected by certain breaches by a SMS-designated firm would be able to bring a damages claim, seek an injunction or any other appropriate remedy or relief. The Bill proposes that third parties would be entitled to bring civil proceedings where they suffer loss or damage as a result of an infringement of a conduct requirement, pro-competition order or a commitment. To this end, it is envisaged that the High Court and the CAT would be bound by a DMU infringement decision once it has become final.

Gearing up for the New Regime

It will take some time for the final legislation and requisite guidance to be in place. As part of the wider preparations for the new regime, on 4 May 2023, the Department for Business and Trade (DBT) and Department for Science, Innovation and Technology (**DSIT**) issued a proposed framework to assist in the monitoring and evaluation of the proposed regime.

Those anticipating SMS-designation will also be preparing for the new regime and carefully scrutinising further developments, including the extent to which the UK regime may differ from other jurisdictions, such as under the EU's new DMA.

The DMA is now already in force and the European Commission's "gatekeeper" designation process has just begun. Last month, the Commission issued implementing rules covering guidance on many practical aspects including time limits, format and length of documents, access to file and information for the purposes of the DMA's quantitative thresholds. The DMA provisions apply with effect from 2 May 2023, including the gatekeeper designation procedure. By 3 July 2023, providers of "core platform services" must self-assess whether they qualify as gatekeepers and notify the Commission. Our previous article [here](#) focuses on DMA obligations for gatekeepers.

With the Bill only having been introduced into Parliament last week for debate, the UK's proposed solution to regulating digital markets is playing catch up with the DMA. It remains to be seen whether the heavy-hitting and extensive enforcement powers proposed under the Bill will remain unchanged from their current form and, ultimately, how quickly the legislation will reach the statute books. The CMA's DMU will still have to wait some time for its formal powers to then take effect. Digital firms firmly in its sights will no doubt speed up their preparations in the meantime.

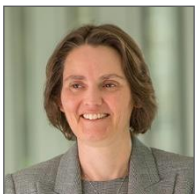
Contacts



David Cran
Partner
+44 20 3060 6149
david.cran@rpc.co.uk



Chris Ross
Partner
+44 20 3060 6258
chris.ross@rpc.co.uk



Melanie Musgrave
Of Counsel
+44 20 3060 6296
melanie.musgrave@rpc.co.uk



Leonia Chesterfield
Senior Associate
+44 20 3060 6246
leonia.chesterfield@rpc.co.uk