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Entering the final straight:
UK Digital Markets, Competition and Consumers Bill scrutinised in Parliament

The **Digital Markets, Competition and Consumers Bill** is expected to come into force in Autumn 2024. Debate on the Bill in Parliament has been significant and recent amendments have changed the shape of the Bill from its original form. Our updated guide is set out below.

The Bill introduces significant reforms to the UK's consumer, digital markets, and competition regimes in five main ways:

01 **Significantly expands the CMA's enforcement of UK consumer protection laws:** the Bill introduces an administrative enforcement model for consumer law enforcement, which allows the Consumer and Markets Authority (the **CMA**) (rather than the courts) to determine directly whether consumer laws have been breached and impose penalties of up to 10% of global turnover (mirroring, for the first time, the CMA's competition-law based enforcement approach and statutory penalties).

02 **Establishes an ex ante regulatory framework for digital markets**: the CMA's Digital Markets Unit (**DMU**) will be granted powers to enforce a new ex ante regulatory regime for firms in digital markets that have "*strategic market status*" (**SMS**), with three key pillars: (i) enforceable conduct requirements based on the objectives of fair trading, open choices and trust and transparency; (ii) targeted pro-competitive interventions to get to the heart of (SMS firms' perceived) market power; and (iii) a mandatory and suspensory merger reporting requirement applying to SMS firms for all deals meeting certain (lower) thresholds.

03 **Introduces a new merger threshold, bringing more deals in scope of the CMA's review**: transactions involving any party with a share of supply >33% and turnover >£350m in the UK will be subject to CMA review, further widening its already expansive jurisdictional reach.

04 **Enhances the CMA's investigative and enforcement powers:** the CMA's enforcement powers across the entirety of its competition and consumer law toolkit will be bolstered, with additional powers to gather evidence, impose higher penalties for failure to comply with investigative measures (e.g. failing to comply with information requests or providing false or misleading information), as well as new turnover-based penalties for non-compliance with CMA orders or undertakings and commitments accepted by the CMA.

05 **Provides faster and more flexible market inquiry powers:** the CMA will be given greater flexibility to define the scope of market investigations, accept undertakings from businesses at any stage in market studies and market investigations and tailor such undertakings for up to 10 years post-implementation if deemed ineffective, and make market investigation references even if it has previously decided not to.

These are the most significant reforms to UK competition and consumer laws since the CMA was established in 2014, and they will come into force soon.

Businesses should start planning now.

Below, we set out five key themes firms should be thinking about when navigating their way through the Bill and the proposed reforms.

1. Greater government steer on CMA competition policy and enforcement strategy

The Bill focuses on establishing a more "proactive" approach to competition policy, which is an important aspect of the Government's economic strategy to deliver growth and innovation set out in its March 2021 policy paper Build Back Better: our plan for growth.

As part of that strategy, the CMA will publish regular State of Competition reports which examine and report on how well competition is working across the UK economy. In its most recent State of Competition report published in April 2022, the CMA found that markets were becoming more concentrated and firms were maintaining leading positions for longer. The CMA will also receive clearer and more frequent strategic steers from Government on its economic priorities. The reforms are expected to enhance the CMA's role as an economic adviser to Government (as John Penrose MP envisaged in the Penrose Report, the Bank of England's "*micro-economic sibling*") and ensure that the CMA's policy and enforcement priorities and resources reach markets that are perceived to be problematic faster.

Coupled with these broader reforms, the Bill aims to make the CMA's market inquiry-based remedy powers faster and more flexible. While the use of such powers are often intended to address so-called structural concerns in a market and therefore can involve firms being required to make substantial changes to their business models and practices, the Bill proposes to give the CMA greater flexibility to define the scope of its market investigations, more opportunities to accept binding commitments at earlier stages of the process and make market investigation references even if it has previously made a decision not to (though only if two years have passed since publication of the market study report, or if there has been a material change in circumstances since the initial report was prepared).

What this means for businesses

As an already globally unique enforcement tool, businesses should expect a ramp up in CMA market inquiries as the CMA assumes its new, expanded economic advisory role to Government. Businesses should not only be thinking about their compliance with competition and consumer laws, but also, for example, about whether competition is working well in the industry, whether their business activities are relevant to the Government's economic priorities, whether there are any potential, systemic consumer complaints that might prompt a CMA market inquiry, and whether business practices and models are resilient to regulatory change.

2. Significantly strengthened consumer law powers taking centre stage

When the CMA was formed in 2014 to take on the functions of the Office of Fair Trading and the Competition Commission, its primary statutory duty was to "*seek to promote competition… for the benefit of consumers*" and its mission was to "*make markets work well in the interests of consumers, business and the economy*". Since then, there has been criticism that interventions based on competition law alone may be insufficient to protect consumer interests, particularly in fast moving digital markets. There have also been calls to strengthen consumer law enforcement powers and amend the CMA's statutory duty to make consumer interests paramount (for example, former CMA Chair Lord Tyrie's reform proposals and the Penrose Report). The CMA under a new Chair and CEO has already taken steps to bring consumer law to the forefront of its policy and enforcement agenda, including by making clear that its purpose is not only to promote competitive markets but also "*tackling unfair behaviour*".

The Bill proposes to revoke the Consumer Protection from Unfair Trading Regulations 2008 (**CPUT**) and instead include within the Bill CPUT's unfair commercial practices (including prohibiting misleading actions, omissions and aggressive practices). The expansion of these provisions has also been proposed to cover, for example, inertia selling, subscription contracts, and consumer savings schemes.

Most significantly, the Bill gives the CMA the direct power to establish consumer law breaches and to impose significant fines of up to 10% of global turnover without having to go to court (i.e. mirroring, for the first time, the

CMA's existing competition enforcement powers). While the CMA may have favoured its ability to directly enforce competition law in the past, the passage of the Bill is likely to give rise to a significant uptick in CMA consumer law enforcement as part of which the CMA will not, for example, be required to prove a competition law based 'abuse of dominance'.

The Bill provides for appeal of the CMA's direct enforcement decisions to the courts 'on the merits' but with a caveat that the legislative intent (taking into account recent case law) is that the review court should only interfere if the CMA's decision is wrong "*in a material respect*". A key issue relevant to the Bill's progression through Parliament will be whether these appeal mechanisms and wider checks and balances are sufficiently robust to meaningfully protect businesses' rights of defence, given the CMA's greater enforcement discretion and new ability to impose significant fines directly.

What this means for businesses

All businesses (and not just digital 'SMS' firms) will need to review the way in which they interact with UK consumers in light of the significantly expanded proposed enforcement regime. We expect the CMA will approach consumer protection issues more holistically going forward, rather than in discrete 'consumer' and 'competition' spheres. We have already started to see this trend in the last 12 or so months – for example, the CMA's focus on online choice architecture was framed both as a potential competition concern and a feature which could distort consumer behaviour.

3. New ex ante regulatory regime for digital "SMS" platforms

The Bill empowers the CMA's DMU with a new regulatory framework that will enable the CMA to impose ex ante regulation on certain 'SMS' firms. The CMA will be able to designate businesses as having "*strategic market status*" where it considers the firm to have both "*substantial and entrenched market power*" and a "*position of strategic significance*" in respect of a digital activity or activities.

For "SMS" firms, the CMA will have the power to impose "*conduct requirements*" relating to how those companies interact with consumers and other businesses in relation to the activities for which they have been designated. The CMA must consider whether use of such power is proportionate and whether any countervailing benefits outweigh intervention.

The Bill will also afford the CMA the power to address perceived competition problems in digital markets by making so-called "*pro-competition interventions*" where it considers doing so would be proportionate and "*remedy an adverse effect on competition*".

The CMA will be able to enforce conduct requirements and pro-competition interventions by imposing penalties on such businesses for non-compliance, including fines of up to 10% of a company's global turnover.

There is a wide requirement for designated firms to report a merger prior to it taking place, where it:

i. results in the designated firm having "*qualifying status*" in respect of shares or voting rights in a target that carries on activities in the UK or supplies goods or services to a person or persons in the UK; and

ii. the value of all consideration provided by the designated firm for shares or voting rights in the UK-connected body corporate is at least £25m.

The "*qualifying status*" condition is met where the transaction results in the percentage of shares or voting rights that the designated firm holds passing through any one of the statutory thresholds: less than 15% to 15% or more; 25% or less to more than 25%; or 50% or less to more than 50%.

A similar notification requirement also applies to the formation of joint ventures that carry on business in the UK or supply goods and services to persons in the UK, where the total value of capital and assets and all other consideration provided by designated firms is at least £25m.

What this means for businesses

The CMA is likely to begin by designating those firms with SMS that have recently been the subject of the CMA's competition market inquiries and investigations. However, the list of SMS firms is not static. The reforms will also be relevant to business relationships between SMS and non-SMS firms. Businesses that interact with SMS firms and those with the potential to be designated in the future will be paying close attention to how the new regulatory regime unfolds in practice.

4. Casting an even wider net for CMA intervention in M&A

Despite many respondents to the Government consultation raising significant concerns about the UK's existing jurisdictional share of supply test and the unpredictability of its application, the Bill introduces a new "*acquirer-focused*" threshold for merger review which would allow the CMA to intervene in deals where:

i. one party has a significant market presence in the UK, i.e. a share of supply of goods or services of at least 33% and UK turnover of over £350m); and

ii. the other party has a UK nexus, i.e. it is a UK business or body, at least part of its activities are carried on in the UK or it supplies goods or services in the UK.

The CMA's decisional practice shows that it already utilises the share of supply test very flexibly. By removing the need to establish any overlap between the parties' activities as is required by the existing share of supply test, this new threshold is intended to give the CMA a significantly expanded jurisdictional basis to intervene in acquisitions involving targets with little to no UK turnover and to review certain 'vertical' and 'conglomerate' mergers.

Regarding the UK's existing target turnover-based jurisdictional thresholds, the Bill proposes an increase in the threshold from £70m to £100m. It also introduces a safe harbour for "*small mergers*" where **each party's** UK turnover is less than £10m.

What this means for businesses

The expansion of the CMA's jurisdictional merger review thresholds further strengthens the CMA's ability to review and intervene in global deals, particularly transactions involving parties with no horizontal overlap and cases potentially giving rise to innovation competition concerns based on flywheel or ecosystem theories of harm.

5. Stronger investigative tools and tougher penalties

The Bill provides the CMA with enhanced information gathering and enforcement powers which are intended to enable investigations and remedies to be conducted more swiftly.

The Bill enables the CMA to impose significant fixed penalties of up to 1% of a business' annual turnover for: failing to comply with an information request or other investigative notice; for concealing, destroying, or falsifying evidence; or for providing false or misleading information to the CMA, as well as the power to impose a daily penalty of up to 5% of daily turnover (instead of, or in addition to, the fixed penalties) while any such non-compliance continues. Such fixed penalties are currently capped at £30,000 and daily penalties at £15,000.

The Bill also introduces higher civil penalties for companies that fail to comply with CMA orders or remedies/commitments accepted by the CMA of up to 5% of annual turnover, again with a daily penalty of 5% of daily turnover (instead of, or in addition, to, the fixed penalties) whilst non-compliance persists.

In addition to higher penalties, the reforms also include broadening the power to interview individuals as part of competition investigations, extending the legal duty to preserve evidence to all competition investigations (i.e. an explicit duty not to destroy evidence that is relevant to an investigation even if such evidence has not been explicitly requested by the CMA) and the granting of power to the CMA to "seize-and-sift" evidence when inspecting domestic premises under a warrant.

The Bill also introduces more powers to support international cooperation with other authorities, including permitting the use of compulsory information gathering powers in the UK to obtain information on behalf of an overseas authority, with reciprocity being a default requirement.

What this means for businesses

The CMA has issued numerous administrative penalties in the past for failures to comply with its investigatory requirements, which it sees as incentivising compliance with its investigatory powers and a deterrence against future failures to comply. The threat of much higher, turnover-based, sanctions for failures to comply means that businesses should revisit their internal processes for responding to information requests and ensuring ongoing compliance with CMA orders/commitments.

Concluding thoughts

The CMA's 2023/24 Annual Plan and the UK Government's Strategic Steer to the CMA 2023 indicate that an "*outcomes*" approach will guide the CMA's future policy and enforcement work, and that the CMA will use all of the tools available to it – market-wide competition inquiries and investigations; competition and consumer law enforcement; and where relevant, digital markets regulation. The DMCC sits at the heart of this strategy.

Businesses can no longer think of competition laws, consumer protection laws and digital markets regulation in isolation. Instead, businesses need to develop a holistic regulatory risk strategy that considers all these elements in tandem.