

Research Briefing

12 May 2023

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Digital Markets, Competition and Consumers Bill: digital markets and competition provisions



Summary

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Summary

The Digital Markets, Competition and Consumers Bill (Bill 294 of 2022-23) is a government Bill introduced in the House of Commons on 25 April 2023. Second reading is scheduled for 17 May 2023. The Bill's provisions would extend to the whole of the UK.

The May 2022 Queen's Speech noted that a Digital Markets, Competition and Consumers Bill would be [published in draft only](#) in the upcoming session, focusing on reform of digital markets, competition and consumer protection. However, the November 2022 Autumn Statement confirmed that the Bill would be [brought forward in the 2022-23](#) (current) session of Parliament.

Alongside the Bill, the Government has published Explanatory Notes, a Delegated Powers Memorandum and Impact Assessments on the [Bill's web page](#).

This briefing focuses on Parts 1 and 2 (and Schedules 1 to 12) of the Bill, on reform of competition law. A separate briefing focuses on the Bill's consumer protection and other measures (Parts 3 to 6 and Schedules 13 to 26 of the Bill).

Part 1: Digital markets

[Digital markets](#) (PDF) are defined in the Bill's Explanatory Notes as:

markets where businesses develop and apply new technologies for the benefit of other businesses and consumers, or create brand new products and services using digital capabilities, connecting groups of users in new and innovative ways.

Examples of businesses operating in digital markets are social media platforms like Meta (Facebook) and Twitter, online marketplaces like eBay and Amazon, and other tech-driven firms like Alphabet (Google) and Apple. According to a Government [impact assessment](#) (PDF), the UK's digital sector The UK's digital sector accounted for 1.8 million jobs in 2021, and contributed over £150 billion to the UK economy in 2019.

Path to the Bill

In March 2019, the [Government-commissioned Furman Report](#) concluded that competition in digital markets required a "new approach". It made six strategic recommendations including for a specialist Digital Markets Unit to regulate digital markets. In 2020, the Government asked the Competition and Markets Authority (the UK's main competition regulator) to lead a taskforce

advising on protecting and promoting competition and innovation in digital markets.

The taskforce reported in December 2020 and [advised focusing on the establishment of a new Digital Markets Unit within the CMA](#) (PDF). The unit would be responsible for a new regime for regulating digital firms with ‘strategic market status’.

In April 2021, the Government established the [Digital Markets Unit](#) within the CMA, on a non-statutory basis, with a focus on preparing for a new regulatory regime for digital firms.

On 20 July 2021, the Government launched a consultation on its proposals for [a new pro-competition regime for digital markets](#), seeking views on the scope and design of the regime and the role and objectives of the Digital Markets Unit. [The Government published its response in May 2022](#), in which it confirmed its intention to proceed with its proposals.

The Bill

The proposals in Part 1 of the Bill would seek to:

- empower the CMA to “designate” businesses (known as “designated undertakings”) that are very powerful in particular digital activities, giving them strategic market status in relation to those activities;
- ensure that designated undertakings comply with rules (called conduct requirements) on how they treat consumers and other businesses in relation to the activities for which they have “strategic market status”;
- give the CMA powers to address the root causes of competition issues in digital markets. It could intervene to require designated undertakings to share information that might help new competitors enter the market, for example;
- require designated undertakings to be more transparent about mergers which pose risks to competition;
- allow the CMA to enforce obligations on designated undertakings and impose penalties including fines of up to 10% of a firm’s global turnover for breaches; and
- empower the CMA to resolve payment-related breaches of conduct requirements to deal on fair and reasonable terms with third parties, through a ‘Final Offer Mechanism’ as a “backstop” enforcement tool.

[The Government says that the Digital Markets Regime would enable “all innovating businesses to compete fairly”](#) and ensure “the UK remains a highly attractive place to invest and do business for all.” Its impact assessment estimates that [the net benefits of the regime would be £5.167 billion over 10 years](#) (PDF), while total costs would be £1.022 billion.

Reaction to the Digital Markets Regime proposals

Trade association [techUK](#) said it welcomed the regime, with law firms [Travers Smith](#) and [Pinsent Masons](#) noting it could provide greater certainty for the sector.

The news website [Politico](#) described the Bill as Britain saying “no to Big Tech” and online newspaper CapX, owned by the Centre for Policy Studies said the Bill was “[innocent-sounding legislation](#)” but it “could do significant damage to the British economy”.

This legislation complements action being taken by several jurisdictions around the world to regulate digital markets. The European Union’s [Digital Markets Act](#) imposed new requirements on powerful digital firms (designated as “gatekeepers”) from May 2023.

Part 2: Competition

In the UK the independent Competition and Markets Authority is primarily responsible for enforcing competition law. The legislative framework is established by the [Competition Act 1998](#) and the [Enterprise Act 2002](#), as amended by the [Enterprise and Regulatory Reform Act 2013](#).

The [Competition and Markets Authority](#) has a duty to promote competition for the benefit of consumers. Its functions include:

- investigating markets and mergers between organisations;
- taking action against businesses and individuals involved in cartels or anti-competitive behaviour; and
- protecting consumers from unfair trading practices.

Part 2 of the Bill would reform aspects of competition law by amending existing UK law on merger control, market inquiries and the cartel offence.

The Bill would also make amendments to enhance the investigative and enforcement powers for the UK’s competition regime.

1

Overview

The Digital Markets, Competition and Consumers Bill (Bill 294 of 2022-23) is a government Bill introduced in the House of Commons on 25 April 2023. Second reading is scheduled for 17 May 2023. The Bill's provisions would extend to the whole of the UK.

The Government has published explanatory notes, a Delegated Powers Memorandum and impact assessments on the [Bill's web page](#):

This large Bill, consisting of 317 clauses and 26 Schedules, reflects proposals outlined in two separate Government consultation papers both published in July 2021: [A new pro-competition regime for digital markets](#) and [Reforming Competition and Consumer Policy](#).

Two Library briefings have been published on the Bill, one focusing on reform of competition law and the other on reform of consumer protection law. This briefing focuses solely on the Bill's proposed reform of the UK's competition regime (Parts 1 and 2 and Schedules 1 to 12). If enacted, these provisions would:

- Implement the Government's [Digital Markets Strategy](#), creating a new pro-competition regime for digital markets, with bespoke codes of conduct and a merger control regime for firms designated by the new Digital Markets Unit (DMU) as having strategic market status .
- Provide statutory powers to the DMU. The DMU was established within the Competition and Markets Authority (CMA) in April 2021 to deal with anti-competitive practices in digital markets.
- Strengthen the enforcement powers of the CMA to tackle consumer harm, including its ability to fine businesses that abuse their market position.
- Introduce wide-ranging changes to the [Competition Act 1998](#) and the CMA's market studies and investigation powers, including imposing significant penalties for non-compliance with market investigation orders. It would also make changes to the competition framework, including streamlined decision making and updating merger and fine thresholds.

A separate Library briefing focuses on the Bill's proposed reform of the UK's consumer protection regime and other measures (Parts 3 to 6 and Schedules 13 to 26).

2 Part 1: Digital Markets

2.1 Background

What are digital markets?

The Bill's Explanatory Notes define digital markets as:

markets where businesses develop and apply new technologies for the benefit of other businesses and consumers, or create brand new products and services using digital capabilities, connecting groups of users in new and innovative ways.¹

Famous examples of businesses operating in digital markets are social media platforms like Meta (Facebook) and Twitter, online marketplaces like eBay and Amazon, and other innovation-driven firms like Alphabet (Google) and Apple. The digital sector accounted for 1.8 million jobs in 2021, and contributed over £150 billion to the UK economy in 2019.²

Digital markets matter because many of the digital giants (such as those mentioned above) have significant operations in the UK even if they are headquartered abroad. The UK also has a huge digital sector of its own, home to companies like Skyscanner and Deliveroo.³ President of the Confederation of British Industry (CBI), Brian McBride, recently highlighted that the UK is the only country outside the U.S. and China to have a tech sector with companies valued at \$1 trillion or more in total.⁴

What is the issue?

Digital markets have a few unique characteristics that can make them prone to “tipping”. This means when the market “tips” towards one, or a very small number, of very large players. Some of the characteristics of tipping are:

- **Network effects**, where the value a customer or users gets from a service increases as the total number of users grow. For example, a user whose entire social network uses a particular social media platform would find the platforms even more valuable as more of their friends sign

¹ [Explanatory Notes to the Digital Markets, Competition and Consumers Bill](#), para 3

² [Impact Assessment - A new pro-competition regime for digital markets](#), 21 April 2023, para 1

³ Financial Times, [UK proves to be 'unicorn' haven despite Brexit fears](#), 8 November 2019

⁴ Confederation of British Industry, [CBI President kickstarts new campaign to scale British unicorns into companies valued over ten billion dollars](#), May 2023

up. This reduces the incentive to switch to rival platforms, making it hard for new players to enter;

- **A reliance on data.** For example, e-commerce websites can accumulate huge amounts of data about its users' purchase habits, which they can use to sell even more products. This is a huge advantage over someone new entering the market without access to such data;
- **Economies of scale and scope.** Firms' average costs tend to go down as they get bigger and provide a wider variety of goods and services. This is because digital markets tend to have high setup costs but lower operating costs once they are set up, which benefits firms that are already established;
- **Vertical integration and global reach.** Operating digitally (including online) means firms can access global markets more easily, and find it more easy to leverage this to sell other products. For example, an e-commerce firm might choose to launch its own brand of products on its already-established platform; and
- **Consumer decision-making and defaults.** Once customers become used to using (for example) a particular search engine or e-commerce platform, it can be harder to them to switch to another rival – even if that rival offers better value.⁵

In 2021 the Government identified that:

- the digital market is dominated by a small number of tech giants;
- there has been an increase in online transactions, particularly those mediated by online platforms, with the internet overtaking all other forms of advertising media (such as print and television) in 2017; and
- there is a growing trend towards digital shopping, accelerated by the outbreak of the pandemic. The Office for National Statistics reported a 47% increase in online sales from 2019 to 2020.⁶

The Government's impact assessment points out that a small number of businesses having a large amount of market power is not necessarily bad, and can sometimes be a fair reward for exceptional innovation or investment in research.⁷ But where it is the result of factors that are naturally present in the market, it can lead to bad outcomes for consumers (such as higher prices or a worse service than if there was greater competition).

⁵ [Impact Assessment - A new pro-competition regime for digital markets](#), 21 April 2023, Table 1

⁶ Department for Business, Energy & Industrial Strategy, [Reforming Competition and Consumer Policy](#), (PDF) (online), CP 488, July 2021, p83

⁷ [Impact Assessment - A new pro-competition regime for digital markets](#), 21 April 2023, para 15

The Government's view is that the high concentration of market power in a small number of digital markets businesses is holding back innovation and growth.⁸

The path to the Bill

Digital Competition Expert Panel – the Furman Report

In 2018, the then Chancellor of the Exchequer Philip Hammond and then Secretary of State for Business, Energy and Industrial Strategy Greg Clark established a Digital Competition Expert Panel to examine the opportunities and challenges the emerging digital economy may pose for competition, and to make recommendations on changes. The Panel was chaired by Professor Jason Furman, a former Chief Economist to President Obama.⁹

Reporting in March 2019, the Furman Report concluded that competition in digital markets required a new approach alongside the core conventional competition tools of merger control and antitrust enforcement (on which, see our briefing below on Part 2 of the Bill). The report contained the following strategic recommendations:

- creating a new pro-competition digital markets unit (DMU);
- adapting the merger control rules so that the CMA could more effectively challenge mergers that could be detrimental to consumer welfare;
- strengthening the CMA's enforcement powers against anti-competitive conduct;
- monitoring developments in relation to machine learning algorithms and artificial intelligence by the Government;
- launching a formal CMA market study into the digital advertising market; and
- promoting international engagement on the measures the Government chooses to adopt from the review to increase cross-border cooperation.¹⁰

In the Spring Budget on 11 March 2020, the Government said it would implement in full the Furman Report's strategic recommendations.¹¹

⁸ [Explanatory Notes to the Digital Markets, Competition and Consumers Bill](#), para 3

⁹ [Unlocking digital competition](#) (PDF) (online), Report of the Digital Competition Expert Panel, March 2019 (accessed May 2023), Foreword letter and Introduction from the Expert Panel

¹⁰ [Unlocking digital competition](#) (PDF) (online), Report of the Digital Competition Expert Panel, March 2019 (accessed May 2023), Summary and rationale for recommendations

¹¹ HM Treasury, [Policy paper: Budget 2020](#), Updated 12 March 2020 (online), Para 1.58

Digital Markets Strategy

In June 2019 the CMA published its first Digital Markets Strategy.¹² It highlighted the “profound changes taking place across the economy, and society more widely, as a result of the growth of digital markets” and set out its priorities to address these changes and ensure consumers continue to get good outcomes in those markets through competition and innovation”.¹³

In February 2021 the CMA published a refreshed version of its strategy.¹⁴

CMA Market Study

On 3 July 2019, the CMA launched a market study into the UK online platforms and the digital advertising market.¹⁵ The CMA considered three potential sources of harm to consumers:

- the extent online platforms have market power in user-facing markets, and the impact this has on consumers;
- whether consumers can control how data about them is collected and used by online platforms; and
- whether competition in the digital advertising market is distorted by the market power held by platforms.¹⁶

On 18 December 2019, the CMA published an [interim report](#) setting out its initial findings.¹⁷ Its [final report](#) was published on 1 July 2020. The CMA found UK expenditure on digital advertising was around £14bn in 2019, and about 80% of this was earned by Google and Facebook:

Google enjoys a more than 90% share of the £7.3 billion search advertising market in the UK, while Facebook has a share of over 50% of the £5.5 billion display advertising market. Google’s revenue per search has more than doubled since 2011, while Facebook’s average revenue per user has increased from less than £5 in 2011 to over £50 in 2019.¹⁸

The CMA concluded that competition was not working well in these markets and raised concerns that Google and Facebook had “developed such

¹² Competition and Markets Authority, [Policy paper – The CMA’s Digital Markets Strategy](#) (online), June 2019

¹³ Competition and Markets Authority, [Policy paper – The CMA’s Digital Markets Strategy](#) (online), June 2019

¹⁴ Competition and Markets Authority, [Policy paper – The CMA’s Digital Markets Strategy – February 2021 refresh](#) (online), 9 February 2021

¹⁵ Competition and Markets Authority, [Market Study Notice – Online platforms and digital advertising](#), 3 July 2019, see also Competition and Markets Authority, [Online platforms and digital advertising market study – Statement of Scope](#), 3 July 2019

¹⁶ Competition and Markets Authority, [Online platforms and digital advertising market study – Statement of Scope](#), 3 July 2019, para 8

¹⁷ Competition and Markets Authority, [Online platforms and digital advertising – Market study interim report](#), (PDF) (online), 18 December 2019 (accessed May 2023)

¹⁸ [New regime needed to take on tech giants](#) (online), Competition and Markets Authority press release, 1 July 2020, (accessed May 2023)

unassailable market positions that rivals can no longer compete on equal terms”.¹⁹ The CMA identified potential barriers to new competition, including:

The platforms large user base is a source of market power – it means that Facebook is a “must-have” network for users to remain in contact with each other and enables Google to train its search algorithms in ways that other search engines cannot.

Each has unmatched access to user data, allowing them to target advertisements to individual consumers and tailor the services they provide.

Both use default settings to nudge people into using their services and giving up their data – for example Google paid around £1.2bn in 2019 to be the default search provider on mobile devices and browsers in the UK, while Facebook requires people to accept personalised advertising as a condition for using their service.

Their presence across many different markets, partially acquired through many acquisitions over the years, also makes it harder for rivals to compete.²⁰

The CMA concluded that reduced competition had negative consequences, leading to harm because:

- Consumers and businesses face higher prices when shopping or advertising online;
- Innovation is held back as app developers and cloud gaming services are restricted; and
- Large platforms can impose unfavourable terms on customers and businesses, with customers receiving inadequate compensation for their engagement and use of their personal data.²¹

Given the dynamic nature of digital markets and the types of concerns identified in its market study, the CMA argued that existing laws were not suitable for effective regulation.²² To govern the behaviour of major platforms funded by digital advertising, the CMA recommended that the Government pass legislation to establish a new pro-competition regulatory regime.²³

The scale and nature of these issues mean that a new pro-competition regulatory regime is needed so that users can continue to benefit from

¹⁹ [New regime needed to take on tech giants](#) (online), Competition and Markets Authority press release, 1 July 2020, (accessed May 2023)

²⁰ [New regime needed to take on tech giants](#) (online), Competition and Markets Authority press release, 1 July 2020, (accessed May 2023)

²¹ Competition and Markets Authority, [Online platforms and digital advertising – Market study interim report](#), (PDF) (online), 18 December 2019, Introduction (accessed 5 May 2023)

²² [New regime needed to take on tech giants](#) (online), Competition and Markets Authority press release, 1 July 2020, (accessed May 2023)

²³ [New regime needed to take on tech giants](#) (online), Competition and Markets Authority press release, 1 July 2020, (accessed May 2023)

innovative new services; rival businesses can compete on a level playing field and publishers do not find their revenues unduly squeezed.²⁴

In making this recommendation the CMA highlighted how large online platforms operate and how they use digital advertising to fuel their business models:

What we have found is concerning – if the market power of these firms goes unchecked, people and businesses will lose out. People will carry on handing over more of their personal data than necessary, a lack of competition could mean higher prices for goods and services bought online and we could all miss out on the benefits of the next innovative digital platform.

Our clear recommendation to government is that a new pro-competitive regulatory regime be established to address the concerns we have identified and regulate a sector which is central to all our lives.²⁵

The CMA’s recommendations, including recommending that the Government pass legislation to establish a new pro-competition regulatory regime, were consistent with those made in the Furman Report.

In November 2020, the Government published its response (PDF) to the CMA’s online platforms and digital advertising market study and confirmed that it would set up a new Digital Markets Unit (DMU) to oversee a new pro-competition regime for digital platforms.²⁶

CMA State of Competition Reports

In February 2020, the Treasury and the then-Department for BEIS commissioned the CMA to prepare and publish regular general “state of competition reports” to raise the collective understanding of the level of, and the trends in, competition across the UK economy.²⁷ The first State of UK competition report 2020 was published on 30 November 2020.²⁸ The CMA published its second report on 29 April 2022.²⁹

In its March 2020 Budget, the Government accepted the strategic recommendations of the Furman Report and commissioned the Digital Markets Taskforce.³⁰

²⁴ [New regime needed to take on tech giants](#) (online), Competition and Markets Authority press release, 1 July 2020, (accessed May 2023)

²⁵ [New regime needed to take on tech giants](#) (online), Competition and Markets Authority press release, 1 July 2020, (accessed May 2023)

²⁶ Department for Business, Energy & Industrial Strategy and the Department for Digital, Culture, Media & Sport, [Response to the CMA’s market study into online platforms and digital advertising](#) (PDF), November 2020

²⁷ See [State of competition: letter from the Chancellor of the Exchequer and the Secretary of State for Business, Energy and Industrial Strategy \(BEIS\) to Andrea Coscelli, CMA](#), (PDF) (online), 5 February 2020 (accessed May 2023)

²⁸ Competition and Markets Authority, [The State of UK competition 2020](#) (PDF) (online), CMA 133, 30 November 2020

²⁹ Competition and Markets Authority, [The State of UK Competition Report 2022 \(CMA\)](#), 29 April 2022

³⁰ HM Treasury, [Policy paper: Budget 2020](#), Updated 12 March 2020 (online), Para 2.43

Digital Markets Taskforce

In March 2020, the Government asked the CMA to lead a Digital Markets Taskforce (the Taskforce), incorporating expertise from Ofcom and the Information Commissioner's Office (ICO).³¹ The Taskforce's aim was to provide the Government with practical advice to inform its decisions on what intervention, if any, would be necessary to protect and promote competition and innovation in digital markets and to address the anti-competitive effects that can arise from the exercise of market power in those markets. To inform this work, the Taskforce published a call for information on 1 July 2020.³² It also launched questionnaires for businesses who sell or distribute their products and services (including apps) using UK online marketplaces or app stores.³³

On 8 December 2020, the CMA published the Taskforce's advice on the design and implementation of a new pro-competition regime for digital markets.³⁴ This advice primarily focused on setting up a new Digital Markets Unit within the CMA with responsibility for a new regime for regulating digital firms with 'Strategic Market Status' (SMS). The advice built on the findings and recommendations of the CMA's market study into online platforms and digital advertising (see above).

The Government made a commitment to consult in early 2021 on proposals for a new pro-competition regime. In April 2021, a Digital Markets Unit (DMU) (or 'Platforms Regulator') was established within the CMA, on a non-statutory basis, to focus on preparing for a new regulatory regime for digital firms.³⁵ On the basis that powers for the DMU and for the new regulatory regime required legislation, the Government made a commitment to consult on proposals for the new pro-competition regime in 2021 and to legislate when Parliamentary time allowed.³⁶

Mobile ecosystems market study (MEMS) report

On 15 June 2021, the CMA launched a market study into mobile ecosystems, with the aim of gaining a better understanding of a major component of the digital economy, and to gather evidence to inform an assessment of whether

³¹ Competition and Markets Authority, Department for Business, Energy & Industrial Strategy and Department for Culture, Media and Sport, [Digital Markets Taskforce: terms of reference](#), (online), 11 March 2020

³² Competition and Markets Authority, [Call for Information – Digital Markets Taskforce](#), (PDF) (online), 1 July 2020, (accessed May 2023)

³³ Competition and Markets Authority, [Call for Information – Digital Markets Taskforce](#), (PDF) (online), 1 July 2020, (accessed May 2023)

³⁴ Competition and Markets Authority, [A new pro-competition regime for digital markets – Advice of the Digital Markets Taskforce](#), (PDF) (online), CMA 135, December 2020, (accessed May 2023)

³⁵ Competition and Markets Authority, [Digital Markets Unit](#), 7 April 2021 (last updated 20 July 2021)

³⁶ Competition and Markets Authority, [Digital Markets Unit](#), 7 April 2021 (last updated 20 July 2021)

competition is working well for consumers in the UK. An interim report was published on 26 January 2022³⁷ and a final report on 10 June 2022.³⁸

The conclusions reached in this final report were consistent with the Government's [Digital Markets Strategy \(refreshed in February 2021\)](#). In particular, the CMA said the creation of a new DMU within the CMA would “deliver a step-change in the regulation and oversight of competition in digital markets and in turn drive dynamic innovation”.³⁹

BEIS Committee Report

In September 2021, the BEIS Committee launched an inquiry into state aid and post-Brexit competition policy,⁴⁰ the third strand in its super-inquiry on Post-Pandemic Economic Growth' inquiry.⁴¹ In announcing this inquiry, the Committee said it believed an effective competition, state aid and consumer regime was an important component of Government efforts to stimulate economic growth.

On 25 October 2022, the BEIS Committee published its report.⁴² The Committee urged the Government to publish its draft digital markets, competition and consumer bill “without delay” to help deter predatory practices by big tech firms. It warned that consumers and others remained at risk until the bill is enacted:

The Competition, Consumer and Digital Markets Bill has wide support and should be prioritised, [...] There are many areas in the economy where stronger competition is required in the interests of consumers, small business and economic growth and this Bill is an essential stepping-stone driving this issue forward.⁴³

Consultation: a new pro-competition regime for digital markets

On 20 July 2021, the Government launched a consultation on its proposals for A new pro-competition regime for digital markets (PDF).⁴⁴ The Government

³⁷ Competition and Markets Authority, [Mobile ecosystems market study interim report](#) (online), 26 January 2022 (accessed May 2023)

³⁸ Competition and Markets Authority, [Mobile ecosystems market study](#) (online), was published on 10 June 2022 (accessed May 2023)

³⁹ Competition and Markets Authority, [Mobile ecosystems market study](#) (online), was published on 10 June 2022 (accessed May 2023)

⁴⁰ House of Commons Business Energy and Industrial Strategy Committee, [State aid and competition policy – Business Committee launch inquiry](#) (online), 23 September 2021, (accessed May 2023)

⁴¹ [Post-Pandemic Economic Growth super inquiry launched by BEIS Committee](#) (online), news article Business, Energy and Industrial Strategy (BEIS) Committee, 3 June 2020, (accessed May 2023)

⁴² House of Commons Business, Energy and Industrial Strategy Committee, [Post-pandemic economic growth: state aid and post-Brexit competition policy](#), HC 759, Fourth Report of Session 2022-23, 25 October 2022

⁴³ House of Commons Business, Energy and Industrial Strategy Committee, [Post-pandemic economic growth: state aid and post-Brexit competition policy](#), HC 759, Fourth Report of Session 2022-23, 25 October 2022

⁴⁴ Department for Digital, Culture, Media and Sport (DCMS) and Department for Business, Energy & Industrial Strategy (BEIS), [A new pro-competition regime for digital markets](#) (PDF) (online), CP 489, July 2021

said it would “use the opportunity presented by Brexit” to introduce a new regime for digital markets that would “actively boost competition and innovation by tackling the harmful effects and sources of substantial and entrenched market power”.⁴⁵

Views were sought on the scope and design of this new regime and on the role and objectives of the DMU. Government proposals built on the recommendations of the 2019 Furman Report⁴⁶ and the findings and recommendations of the CMA’s market study into online platforms and digital advertising⁴⁷ and the advice of the Digital Markets Taskforce⁴⁸ (all discussed above).

The new regulatory regime proposed in the consultation forms a key part of the Government’s wider pro-innovation approach to governing digital technologies, as set out in its Plan for Digital Regulation.⁴⁹ It also complements proposals included in the consultation paper on Reforming Competition and Consumer Policy (see above).⁵⁰

The Government published its response in May 2022, in which it confirmed its intention to proceed with its reforms.⁵¹ Specifically, it would establish a new pro-competition regime for digital markets, with the DMU provided with “a bespoke regulatory toolkit required to address the unique issues arising from digital markets”.⁵²

2.2

The Bill: Part 1

The Government’s policy objectives through **Part 1 (Digital Markets) of the Bill** are to:

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- ⁴⁵ For example, see [Unlocking digital competition](#) (PDF) (online), Digital Competition Expert Panel (Furman Review), March 2019, and [Online platforms and digital advertising: Market study final report](#) (PDF) (online), Competition and Markets Authority, 1 July 2020
- ⁴⁶ [Unlocking digital competition](#) (PDF) (online), Report of the Digital Competition Expert Panel, March 2019 (accessed 23 March 2022)
- ⁴⁷ Competition and Markets Authority, [Online platforms and digital advertising: Market study final report](#) (PDF) (online), 1 July 2020
- ⁴⁸ Competition and Markets Authority, [A new pro-competition regime for digital markets – Advice of the Digital Markets Taskforce](#), (PDF) (online), CMA 135, December 2020, (accessed May 2023)
- ⁴⁹ Department for Digital Culture Media and Sport, [Policy paper: Digital Regulation: Driving growth and unlocking innovation](#), 6 July 2021 (last updated 13 June 2022)
- ⁵⁰ Department for Business, Energy & Industrial Strategy, [Reforming Competition and Consumer Policy](#) (PDF) (online), CP 488, July 2021
- ⁵¹ Department for Digital, Culture, Media and Sport (DCMS) and Department for Business, Energy & Industrial Strategy (BEIS), [A new pro-competition regime for digital markets – government response to consultation](#), CP 657, 6 May 2022
- ⁵² Department for Digital, Culture, Media and Sport (DCMS) and Department for Business, Energy & Industrial Strategy (BEIS), [A new pro-competition regime for digital markets – government response to consultation](#), CP 657, 6 May 2022

- empower the CMA to “designate” businesses (known as “designated undertakings”) that are very powerful in particular digital activities, giving them “Strategic Market Status” in relation to specific digital activities;
- ensure that designated undertakings comply with rules (called conduct requirements) on how they treat consumers and other businesses in relation to the activities for which they have been designated. For example, these conduct requirements could prevent a firm ranking its own products more highly in a search result where that harms consumers;
- give the CMA powers to address proactively the root causes of competition issues in digital markets. For example, it could intervene to require designated undertakings to share information that might help new competitors enter the market;
- require designated undertakings to be more transparent about mergers which pose risks to competition;
- allow the CMA to enforce obligations on designated undertakings and impose penalties including fines of up to 10 per cent of a firm’s global turnover for breaches; and
- empower the CMA to resolve payment-related breaches of conduct requirements to deal on fair and reasonable terms through a 'Final Offer Mechanism', as a “backstop” enforcement tool.⁵³

Part 1 of the Bill comprises clauses 1 to 115 and Schedules 1 and 2. Some of the key clauses that shape this policy objective are explained below.

Strategic Market Status (clauses 2 to 8)

Clause 2 would empower the CMA to “designate” undertaking (firms) that have “Strategic Market Status” (SMS) with respect to a particular digital activity.

The criteria for designation would be that the digital activity must be linked to the UK (for example because it has a significant number of UK users)⁵⁴ and that the undertaking has “substantial and entrenched market power”, a “position of strategic significance” and meets a minimum annual turnover threshold of £1 billion in the UK or £25 billion globally. The Secretary of State would have a Henry VIII power (using the affirmative procedure) to change the threshold figures.

Clauses 3 to 8 go into more detail on each of the criteria.

⁵³ [Explanatory Notes to the Digital Markets, Competition and Consumers Bill](#), para 3

⁵⁴ See clause 4 for the full definition of “Link to the United Kingdom”

Designation procedure (clauses 9 to 18)

Clause 9 says that the CMA may conduct an investigation into whether to designate an undertaking if it has reasonable grounds to consider that it may be able to designate the undertaking as having SMS for a particular digital activity.

The investigation can take up to 9 months⁵⁵ and the CMA would have to publicly consult before any decision to designate an undertaking following an investigation.⁵⁶

Conduct requirements (clauses 19 to 25)

Clause 19 would give the CMA power to impose conduct requirements on designated undertakings, in the form of obligations or restrictions.⁵⁷ Requirements must be imposed for the purpose of meeting one of three objectives: fair dealing, open choices, or trust and transparency. A list of requirements the CMA can impose is set out in **clause 20**, which the Secretary of State would have a Henry VIII power to amend under the affirmative procedure.

The CMA would have to publicly consult before imposing or varying conduct requirements (**clause 24**).

Enforcement of conduct requirements and commitments (clauses 26 to 37)

Where it has reasonable grounds to do so, the CMA may conduct investigations into suspected breaches of conduct requirements (**clause 24**). Investigations should be no longer than six months (**clause 30**) and can result in the imposition of penalties or enforcement orders, which impose obligations on undertakings to stop or remedy breaches, or address damage caused by them (**clause 31**).

“Interim” enforcement orders can also be imposed by the CMA whilst an investigatory is ongoing if the CMA considers it necessary to do so to prevent significant damage, to prevent conduct which would reduce the effectiveness of future steps, or to protect the public interest (**clause 32**). While investigations are ongoing the CMA may also accept binding voluntary commitment from undertakings, after which the CMA would end its investigation (**clause 36**).

Final offer mechanism (clauses 38 to 43)

Clause 38 would grant the CMA powers to use a “final offer mechanism” (FOM) tool to enforce conduct requirements relating to payment terms. It

⁵⁵ Clause 14(2)

⁵⁶ Clause 13

⁵⁷ Clause 20

applies where the CMA has found that the designated undertaking has breached a conduct requirement relating to fair and reasonable payment terms, the designated undertaking has not complied with an enforcement order relating to that breach, and the CMA considers that its other powers would not resolve the breach within a reasonable time period.

It is a “last resort” measure because it can result in the CMA effectively forcing a designated undertaking to accept particular terms.

The FOM is essentially an arbitration process that allows the CMA to step in to resolve disputes between the designated undertaking and a third party relating to payment terms. The CMA would invite both parties to submit what they consider to be fair payment terms, then decide which one should be included for the transaction and any others which are “substantially the same” – it would not be able to suggest its own terms. The FOM process can take up to six months but the Secretary of State would have a Henry VIII power to amend this period using the affirmative procedure (**clause 40**).

Pro-competition interventions (clauses 44 to 54)

Clause 44 would empower the CMA to make “pro-competition interventions” (PCI) to remedy adverse effects on competition by designated undertakings. It could include orders imposing a requirement on a designated undertaking (for example, requiring a social media service to integrate its platform with other providers) or making non-binding recommendations to other public bodies to act (for example, if that other body has more expertise in a particular sector).⁵⁸

Before making a PCI the CMA would have 9 months (**clause 48**) to undertake an investigation (**clause 45**) and publicly consult on its proposed decision (**clause 47**), after which it would have a further 4 months (**clause 48**) to publicly consult on, and issue, any order it wishes to impose (**clauses 47 and 52**).

Orders to designated undertakings can include a range of possible remedies, including prohibitions from doing something, obligations to do something, supplying information, or the divestment (selling off) of part of a business.⁵⁹ Alternatively the CMA may accept a legally binding commitment from a designated undertaking in place of making a PCI (**clause 54**).

Mergers (clauses 55 to 66)

Clause 55 would require designated undertakings to report possible mergers involving them to the CMA before they take place. Two categories of mergers would need to be reported: the first is when a designated undertakings would reach a certain percentage shareholding in certain companies. The second category relates to the formation of certain joint ventures. In each case, to be

⁵⁸ [Explanatory Notes to the Digital Markets, Competition and Consumers Bill](#), para 241

⁵⁹ [Explanatory Notes to the Digital Markets, Competition and Consumers Bill](#), para 253

reportable the proposed merger would need to relate to a UK-connected company and have a value of at least £25m.

Designated undertakings must not allow a possible merger to take place until the report has been accepted as sufficient by the CMA (**clause 60**) and then a period of five working days has passed (**clause 61**). The purpose of these requirements is to give the CMA information and time to decide, before a merger takes place, whether to open a formal investigation into the merger under the general merger control regime set out in the Enterprise Act 2002.⁶⁰

Investigatory powers and compliance reports (clauses 67 to 82)

To be able to manage the new digital markets regime, the CMA would be given various new powers, including powers to require:

- the provision of information from designated undertakings and any other person believed to hold material needed for it to operate the regime (**clause 67**);
- a designated undertaking to obtain, generate, collect or retain information (which includes information in any form) or to conduct a demonstration or test of a business system or process (**clause 69**);
- an individual to attend an interview and answer questions for the purposes of a digital markets investigation (**clause 70**);
- access to a business premises without a warrant, or access to business and domestic premises with a warrant, for the purposes of an investigation into whether a designated undertaking has breached a conduct requirement, PCI or enforcement order (**clause 72 and 73**);

The CMA would also have the power to publish a notice of any decision it makes to use its investigatory powers under the digital markets regime to assist an investigation by a regulator in another jurisdiction (**clause 80**).

Designated undertakings would be required to assign an appropriate senior manager to the role of “nominated officer” when the CMA imposes a digital markets requirement, for the purpose of monitoring the undertaking’s compliance with that requirement (**clause 81**). Designated undertakings would also need to provide the CMA with reports setting out how they are complying with the requirements imposed upon them (**clause 82**).

Civil penalties (clauses 83 to 90)

Clause 83 would give the CMA powers to impose monetary penalties (fines) on a designated undertaking for breaching requirements under the digital markets regime without a reasonable excuse. The penalty would be up to 10%

⁶⁰ [Explanatory Notes to the Digital Markets, Competition and Consumers Bill](#), para 277

of worldwide turnover, or in the case of breaches of orders or commitments up to 5% of daily worldwide turnover for each day a breach continues. In most cases the CMA would be able to choose whether to impose a fixed or daily penalty (**clause 84**).

Penalties can also be imposed on designated undertakings or individuals within them for failing to comply with certain investigative requirements (**clause 85**). For individuals the penalty is up to £30,000, or a daily penalty of up to £15,000, or both. The Secretary of State would have a Henry VIII power to amend these amounts under the affirmative procedure (**clause 86**).

Criminal offences (clauses 91 to 96)

Clauses 91 to 93 would create three new criminal offences of:

- destroying or falsifying information required to be given to the CMA;
- giving false or misleading information to the CMA; and
- intentionally obstructing an officer of the CMA exercising their powers.

These offences would be punishable by fines or imprisonment for up to two years (**clause 96**).

Further enforcement provisions and review (clauses 97 to 101)

Clause 97 would allow for a court to disqualify a person from being a company director for up to 15 years if they have been involved in breaching conduct requirements or pro-competition interventions.

Any person would have the right to sue a designated undertaking to compensate their losses resulting from breaches of requirements under the digital markets regime (**clause 99**).

Administration and regulatory coordination (clauses 102 to 108)

Clause 102 would allow for the CMA to extend various deadlines in Part 1 of the Bill by up to three months where there are “special reasons” to do so (which might include illness within the CMA investigation team).⁶¹

Clause 108 would expand information-sharing powers to cover the new functions introduced in Part 1 of the Bill, and extend existing information-sharing to enable sharing between the CMA and the Information Commissioner’s Office.⁶²

⁶¹ [Explanatory Notes to the Digital Markets, Competition and Consumers Bill](#), para 436

⁶² [Explanatory Notes to the Digital Markets, Competition and Consumers Bill](#), para 464

Miscellaneous and interpretation (clauses 109 to 115)

Clause 109 would allow the CMA to collect a levy from designated undertakings to recoup the costs of delivering the digital markets regime.

Except where stated otherwise, the digital markets regime would apply extraterritorially to persons outside the UK (**clause 110**).

The CMA would be required to publish guidance on how it will exercise its powers under the digital markets regime in Part 1 of the Bill (**clause 113**).

2.3

Commentary on Part 1 of the Bill

The Government says that the Digital Markets regime would enable “all innovating businesses to compete fairly” and ensure “the UK remains a highly attractive place to invest and do business for all.”⁶³ CMA Chief Executive Sarah Cardell said the Bill has the “potential to be a watershed moment in the way we protect consumers in the UK and the way we ensure digital markets work for the UK economy, supporting economic growth, investment and innovation”.⁶⁴

The Government’s Impact Assessment on Part 1, which accompanied the Bill, estimates that the net benefit of the regime would be £5.167 billion over 10 years, while the total cost would be £1.022 billion.⁶⁵ There would be significant one-off setup costs for the DMU, and compliance costs by designated undertakings. Ongoing funding for the DMU would come from the Government but would be at least partly recovered through the levy. These are only estimates, however, and the “true costs and benefits associated with the implementation” of the regime “will depend on the types of interventions taken by the DMU following SMS designation”.⁶⁶

Opposition and other reaction

Labour’s “Industrial Strategy” document, published September 2022, notes that the Labour Party would “ensure our competition regime remains robust and fit for the modern economy. This includes developing a pro-competition regulatory regime that addresses the novel challenges posed in digital markets”.⁶⁷ In an op-ed for Journalism Matters, Labour leader Sir Keir Starmer expressed broad support for proposals for greater regulation of Big Tech, noting that Labour “support[s] moves to make platforms pay for news

⁶³ CMA press release, [New bill to stamp out unfair practices and promote competition in digital markets](#), 25 April 2023

⁶⁴ CMA press release, [New bill to stamp out unfair practices and promote competition in digital markets](#), 25 April 2023

⁶⁵ Impact Assessment – [A new pro-competition regime for digital markets](#) (PDF), 21 April 2023, p9

⁶⁶ Impact Assessment – [A new pro-competition regime for digital markets](#) (PDF), 21 April 2023, p9

⁶⁷ Labour Party, [Prosperity through Partnership: Labour’s Industrial Strategy](#) (PDF) [accessed 11 May 2022], p21

content and to give newspapers and publishers greater control of their data and content”.⁶⁸

In a March 2022 Westminster Hall debate on UK competition law, Labour Shadow Minister Seema Malhotra noted that the existing competition regime was “not fit for purpose in a digital age”, arguing that “we need legislation” and that “the Government have been a little too slow”.⁶⁹ Patricia Gibson, then-SNP spokesperson for Consumer Affairs, said a “consumer and competition Bill” was “long-promised, long-awaited and much-anticipated”.

The March 2022 debate was secured by Conservative MP John Penrose, a former government Anti-Corruption Champion who authored a Government-commissioned report into UK competition policy in February 2021. That report (titled “Power to the People”) argued that the creation of a DMU would be “exactly the right thing to do, because the entire economy is digitising, and therefore any sector could potentially see entrepreneurial firms emerging to create new digital network monopolies at any time”.⁷⁰ But it also noted that the DMU’s “extra-strong upfront powers must be ring-fenced tightly, to prevent regulatory creep”.⁷¹

Stakeholder commentary

Trade association techUK said it welcomed the regime, describing it as “a more effective approach to addressing competition concerns in digital markets than comparable regimes, such as in the EU or the USA.”⁷²

In 2020, Google’s vice president for the U.K. and Ireland Ronan Harris said that Google supported “regulation that benefits people, businesses and society and we’ll continue to work constructively with regulatory authorities and Government on these important areas so that everyone can make the most of the web” and a Facebook spokesperson noted that “Giving people meaningful controls over how their data is collected and used is important”.⁷³

Press comment

Politico reported the Bill had been “subject to frantic behind-the-scenes lobbying by major tech players” who “appear to have lost the opening battle”, noting in particular that “industry lobbyists have already hit a wall in

⁶⁸ The Northern Echo, [Journalism Matters: Sir Keir Starmer addresses Labour's take on news content](#), 1 November 2022

⁶⁹ [HC Deb 8 March 2022, vol 710](#)

⁷⁰ Various Government Departments, [Power to the people: independent report on competition policy](#), 16 February 2021, p29

⁷¹ Various Government Departments, [Power to the people: independent report on competition policy](#), 16 February 2021, p29

⁷² techUK, [The UK's pro-competition regime for digital markets: how do we make it a success for UK tech?](#) 14 April 2023

⁷³ CNBC, [Google and Facebook to be scrutinized by new U.K. antitrust unit from next year](#), 26 November 2020

their bid to tweak the planned system for appealing decisions they don't like".⁷⁴

A Financial Times editorial noted that something along the lines of the Digital Markets Unit "is surely needed", but that that DMU would be "sprawling and powerful", raising questions over whether the direction of regulation runs "counter to ambitions to make the UK a technology hub".⁷⁵

Online newspaper CapX, owned by the Centre for Policy Studies (which describes itself as Britain's leading centre-right think tank)⁷⁶ said the Digital Markets Unit "poses a fundamental threat to British innovation", saying the CMA "already has extensive powers to regulate tech companies" and that the DMU is "built on an extraordinarily arrogant premise – that a regulator sitting in the CMA's office in Canary Wharf can not only comprehend complex and fast-moving global digital markets, but also predict how they will evolve under various scenarios and intervene to deliver better outcomes".⁷⁷

Legal commentary

Law firm Travers Smith commented that while the new regime "will almost certainly entail additional competition regulation for certain tech players, it may (depending on how it is implemented) also over time result in a more predictable regulatory experience for those companies in the tech space".⁷⁸

Law firm Sidley Austin cautioned that distinctions between the UK and EU regimes "risk creating a complex web of parallel and overlapping obligations and may lead to conflicting outcomes".⁷⁹

Lawyer at Pinsent Masons Alan Davis said the regime would "help bring legal clarity for tech companies" but "may also increase the compliance burden and risks faced by businesses active in the UK".⁸⁰

2.4

International comparisons

European union

Like the UK, the EU is taking action to address the challenges posed by digital markets. Specifically, the European Commission recently consulted on the

⁷⁴ Politico, [Britain says no to Big Tech as competition bill lobbying falls flat](#), 25 April 2023

⁷⁵ Financial Times, [Britain should beware mixed messages on tech](#), 3 May 2023

⁷⁶ Centre for Policy Studies website, "[About](#)" section [accessed 11 May 2023]

⁷⁷ CapX, [Why the Digital Markets Unit poses a fundamental threat to British innovation](#), 14 April 2023

⁷⁸ Travers Smith, [The UK's new competition regime for digital markets: to remedy a gap in the CMA's toolkit](#), 16 March 2023

⁷⁹ Sidley Austin, [New UK Digital Markets Regime: Key Differences With the EU Digital Markets Act](#), 27 April 2023

⁸⁰ Pinsent Masons, [UK government publishes Digital Markets, Competition and Consumers Bill](#), 25 April 2023

performance of [Regulation 1/2003](#),⁸¹ which lays out the procedures for the application of EU competition rules. Its findings are scheduled to be published in 2024.⁸²

In addition, the European Union's [Digital Markets Act](#),⁸³ ("DMA"), which came into force on 1 November 2022, imposed new requirements on powerful digital firms (designated as "gatekeepers") from May 2023. The DMA is applicable to companies that are identified as "gatekeepers" in the digital sector. These are companies (platforms) that have a significant impact on the internal market,⁸⁴ serve as an important gateway for business users to reach their end users, and which enjoy, or will foreseeably enjoy, an entrenched and durable position - all of which is presumed if the company exceeds certain monetary and user-base thresholds. The EU Commission notes that the concern with such companies is that their market dominance "can grant them the power to act as private rule-makers and to function as bottlenecks between businesses and end users".⁸⁵

The primary aim of the DMA is to ensure the openness of important digital services, preventing gatekeepers from imposing unfair conditions on businesses and end users (consumers). For example, under the DMA, gatekeepers must:

- Ensure end users can easily unsubscribe from core platform services or uninstall pre-installed core platform services.
- Stop the installation of software by default.
- Provide advertising performance data and ad pricing information.
- Allow developers to use alternative in-app payment systems or allow end users to download alternative app stores.⁸⁶

According to the European Commission, "common rules across the single market will foster innovation, growth and competitiveness, and facilitate the

⁸¹ [EU Council Regulation \(EC\) No 1/2003 of 16 December 2002](#)

⁸² European Commission, [Antitrust: Commission seeks feedback on performance of EU antitrust enforcement framework](#), 30 June 2022

⁸³ See European Commission, [The Digital Markets Act: ensuring fair and open digital markets](#) [accessed 11 May 2023]

⁸⁴ As a precondition, these companies need to be identified as gatekeeper for at least one of the so-called "core platform services" outlined in the DMA (such as online search engines, social networking services, app stores, certain messaging services, virtual assistants, web browsers, operating systems, and online intermediation services). The same company can be identified as gatekeeper for several core platform services.

⁸⁵ European Commission, [Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets](#), 2 May 2023

⁸⁶ European Commission, [Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets](#), 2 May 2023

scaling up of smaller platforms, small and medium-sized enterprises and start-ups who will have a single, clear framework at EU level”.⁸⁷

The DMA is a landmark piece of legislation designed to work in conjunction with the EU’s [Digital Services Act](#) (DSA) to form a modern legal framework to determine how large online platforms operate in the EU. Taken together, they form a common set of rules with two main aims:

- To create a safer digital space in which the fundamental rights of all users of digital services are protected.
- To establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single market and globally.⁸⁸

“Digital services” are defined broadly, to include simple websites to internet infrastructure services and online platforms. The rules specified in the DSA mainly concern online intermediaries and platforms. For example, online marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms.⁸⁹

Germany

Germany has also amended its competition regime to enable the Federal Cartel Office (FCO) to better address the conduct of large digital companies.⁹⁰ An amendment to its “[Act against Restraints of Competition](#)” (the “ARC Digitalization Act”), took effect on 19 January 2021. The amendment represents a substantial overhaul of the German competition regime, especially concerning abuse of dominance and merger control rules.⁹¹

Rest of world

Internationally, there have also been other attempts to regulate “Big Tech”, notably in Australia⁹² and Japan.⁹³ In the US, market intelligence firm S&P Global noted that further legislation was unlikely to be imminent:

...the technology industry in 2022 successfully fought off major U.S. legislation that threatened to quash the power of major online platforms including Amazon, Apple Inc., Google LLC and Meta. The American Innovation and Choice Online Act, or AICOA, would have prohibited large tech companies like Amazon from giving preferential treatment to their own products and offerings

⁸⁷ European Commission, [Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets](#), 2 May 2023

⁸⁸ European Commission, [Shaping Europe’s digital future](#) [accessed 11 May 2023]

⁸⁹ European Commission, [Shaping Europe’s digital future](#) [accessed 11 May 2023]

⁹⁰ Bundeskartellamt, [Amendment of the German Act against Restraints of Competition](#) (online), 19 January 2021

⁹¹ Bundeskartellamt, [Amendment of the German Act against Restraints of Competition](#) (online), 19 January 2021

⁹² Financial Times, [Australia’s media thrives after forcing Big Tech to pay for content](#), 10 March 2022

⁹³ See Financial Times, [Japanese court ruling poised to make Big Tech open up on algorithms](#), 4 July 2022

over third-party competitors. The Open App Markets Act was designed to prevent app stores run by Google and Apple from requiring developers to directly use their in-app payment systems.⁹⁴

⁹⁴ S&P Global Market Intelligence, [Big Tech unlikely to face major US legislation in 2023, but EU threats loom](#), 12 January 2023

3 Part 2: Competition

3.1 Current competition regime

Competition law aims to prevent practices that undermine or restrict competition to the detriment of consumers. This includes the abuse of a dominant market position by a firm, anti-competitive agreements between firms, and mergers or takeovers which, if allowed, would substantially reduce competition.

In the UK the independent Competition and Markets Authority (CMA) is primarily responsible for enforcing competition law.⁹⁵ The legislative framework is established by the [Competition Act 1998](#) and the [Enterprise Act 2002](#), as amended by the [Enterprise and Regulatory Reform Act 2013](#), which created the CMA from two predecessor organisations: the Office of Fair Trading and the Competition Commission.⁹⁶

The Competition and Markets Authority has a duty to promote competition for the benefit of consumers. Its functions include:

- investigating markets and mergers between organisations;
- taking action against businesses and individuals involved in cartels or anti-competitive behaviour; and
- protecting consumers from unfair trading practices.⁹⁷

Sector specific regulators – such as Ofcom (communications), Ofgem (gas and electricity) and the Financial Conduct Authority (financial services) – have similar powers to investigate competition in their own fields.⁹⁸

The Competition Appeals Tribunal (CAT) was established by the Enterprise Act 2002.⁹⁹ It is an independent judicial body that hears appeals on decisions of the CMA and the sectoral regulators, as well as claims for damages resulting from breaches of competition law.

The prohibitions in UK law on abusing dominant market positions and anti-competitive agreements were based on and underpinned by equivalent provisions in EU law. Under the terms of the UK-EU trade agreement, EU

⁹⁵ The National Audit Office, [The UK competition regime](#), 5 February 2016

⁹⁶ [Enterprise and Regulatory Reform Act 2013](#), Part 3

⁹⁷ Competition and Markets Authority, [About Us](#) (accessed 11 May 2023)

⁹⁸ The National Audit Office, [The UK competition regime](#), Appendix 3, 5 February 2016

⁹⁹ [Enterprise Act 2002](#), Part 2

competition law is no longer enforced in the UK, and the UK and EU now operate completely separate competition regimes. The CMA is now responsible for all anti-competitive practices that affect UK markets and consumers.¹⁰⁰

Part 2 of the Bill would reform aspects of competition law by making amendments to the UK's existing legislation covering:

- **Merger control:** Consulting on the proposals, the Government noted that the CMA expected the number of mergers it is required to investigate to increase by 50% following the UK's exit from the EU.¹⁰¹
- **Market inquiries:** Consisting of market studies and investigations which allow the CMA to investigate competition, growth and innovation in markets and impose orders to restore competition or remedy consumers.
- **The cartel offence:** Cartel offences apply to the most serious types of collusion, such as price fixing and collusion.¹⁰²

The Bill would also make amendments to enhance the investigative and enforcement powers for the UK's competition regime.¹⁰³

3.2 The path to the Bill

Government's consultation on modernising consumer markets 2018

In April 2018, the Government published a green paper on Modernising Consumer Markets.¹⁰⁴ The paper announced several consultations and reviews, with three overarching principles:

- Competition and the removal of barriers to competition should be central to the Government's approach.
- Consumers should benefit from new technology and business models, with competition and regulation working together in the interest of consumers.

¹⁰⁰ Competition and Markets Authority, [Speech by Dr Michael Grenfell, A view from the CMA: Brexit and beyond](#), 16 May 2018

¹⁰¹ Department for Business, Energy and Industrial Strategy, [Reforming competition and consumer policy](#), 20 July 2021

¹⁰² [Enterprise Act 2002](#), part 6

¹⁰³ [Explanatory Notes to the Digital Markets, Competition and Consumers Bill](#), para 16

¹⁰⁴ Department for Business, Energy and Industrial Strategy, [Modernising consumer markets: green paper](#), 11 April 2018

- Consumers should have access to redress when things go wrong and their rights should be effectively enforced.¹⁰⁵

The green paper also announced a statutory review of competition powers, as required by the Enterprise and Regulatory Reform Act 2013, looking at:

- Whether the reforms had helped to deliver competition for the benefit of consumers.
- Whether the CMA and regulators had the tools they needed to tackle anti-competitive behaviour and promote competition.
- Whether the competition regime is equipped to manage emerging challenges.¹⁰⁶

Competition and Market Authority's proposals for the competition regime 2018 to 2019

In July 2018 the CMA responded to the Government's consultation arguing that the competition regime should be reformed to better protect consumers:

[We] believe that:

- the Government's reforms to the competition framework in 2014, combined with the CMA's ongoing work to make our processes more efficient and effective have helped to strengthen and streamline the regime; but that
- further reforms could help to make the end-to-end regime – from initial evidence gathering to the outcome of any appeals – better able to tackle consumer detriment, in particular against a backdrop of digitalisation and the UK's Exit from the EU.¹⁰⁷

In August 2018, the then Secretary of State for Business, Energy and Industrial Strategy (Greg Clark MP) asked the CMA to come forward with proposals to better protect consumers in the digital economy and improve public trust in markets.¹⁰⁸

In February 2019, the then CMA Chairman Lord Tyrie outlined his proposals to the Secretary of State in a letter.¹⁰⁹ He argued that the CMA should act faster and more decisively on competition issues, and for its powers to protect

¹⁰⁵ Department for Business, Energy and Industrial Strategy, [Modernising consumer markets: green paper](#), 11 April 2018, p7

¹⁰⁶ [As above](#), p60

¹⁰⁷ Competition and Markets Authority, [CMA response to government consultation: Modernising consumer markets green paper](#) (PDF), July 2018, p6

¹⁰⁸ Competition and Markets Authority, [Summary of proposals from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy](#), 25 February 2019

¹⁰⁹ [As above](#)

consumers to be upgraded to the same level as its competition powers.¹¹⁰ Lord Tyrie’s suggested reforms included:

- A more effective regime for market studies and investigations.
- Fines for firms that do not comply with the CMA’s requests for information.
- To make the notification of mergers above a certain threshold mandatory, accompanied by a “standstill obligation” to stop parties going ahead before receiving the CMA’s approval.¹¹¹

The then Minister for Business, Energy and Corporate Responsibility, Lord Callanan, told the House of Lords on 25 June 2020 that the proposals in the letter “have helped shaped public debate as well as informing government action.”¹¹²

State of competition report 2020

In February 2020, the Treasury and BEIS commissioned the CMA to prepare and publish regular “state of competition reports” to raise the collective understanding of the level of, and the trends in, competition across the UK economy.¹¹³ The first [State of UK competition report 2020](#) was published on 30 November 2020.¹¹⁴ The CMA published its [second report](#) on 29 April 2022.¹¹⁵

Penrose report 2020

In September 2020, the Treasury and BEIS asked Conservative MP and UK Anti-Corruption Champion, John Penrose, to produce a report considering the UK’s competition regime.¹¹⁶ Published in February 2021, the Penrose report concluded that swift change to the UK competition regime was needed:

... our independent competition and consumer regulation regime currently has a good reputation, but not a great one. International rankings put our major competition institutions behind USA, France, Germany, EU and Australia. ... Sector regulators intervene heavily, creating regulatory burdens ... Investors and business leaders say that officialdom moves too slowly in an increasingly fast-paced digital world. Citizen-consumers feel ripped off when they buy things like energy or car insurance, and increasingly feel that markets aren't

¹¹⁰ Competition and Markets Authority, [Summary of proposals from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy](#), 25 February 2019

¹¹¹ [As above](#)

¹¹² [HL Deb 25 June 2020, Vol 804](#)

¹¹³ See [State of competition: letter from the Chancellor of the Exchequer and the Secretary of State for Business, Energy and Industrial Strategy \(BEIS\) to Andrea Coscelli, CMA](#), (PDF) (online), 5 February 2020 (accessed 11 May 2023)

¹¹⁴ Competition and Markets Authority, [The State of UK competition 2020](#) (PDF) (online), CMA 133, 30 November 2020

¹¹⁵ Competition and Markets Authority, [The State of UK Competition Report 2022 \(CMA\)](#), 29 April 2022

¹¹⁶ John Penrose, [Power to the people: independent report on competition policy](#), 16 February 2021, p4

set up to work for them. In other words, the system needs to be updated, improved and refreshed.¹¹⁷

The then Business Secretary Kwasi Kwarteng said the Government would “consider John’s recommendations and respond in due course.”¹¹⁸

Consultation: reforming competition and consumer policy 2021 to 2022

The Government conducted a consultation from July to October 2021 to gather views on its plans to reform competition and consumer policy.¹¹⁹ The consultation covered proposals on promoting competition, updating consumer rights, and strengthening the enforcement of consumer law.

In April 2022, the Government published its response to the consultation and established key policy positions, including introducing a rebalanced merger control system, stronger enforcement against anti-competitive conduct, and enhancements to the CMA’s investigative and enforcement powers.¹²⁰

3.3

The Bill: Part 2

Part 2 of the Bill would make changes to the UK’s competition regime, including strengthening the enforcement powers of the CMA and introducing changes to the CMA’s market study and investigation powers. The Government’s policy objectives are to:

- Introduce a rebalanced merger control system, stronger enforcement against anti-competitive conduct and a series of enhancements to the CMA’s investigative and enforcement powers.
- Introduce new penalty powers for the civil courts for consumer law breaches and out-of-court (administrative) powers for the CMA to determine and sanction breaches of certain consumer laws.¹²¹

Part 2 covers clauses 116-138 and schedules 3 to 12. Some of the key clauses that shape this policy objective are explained below.

¹¹⁷ John Penrose, [Power to the people: independent report on competition policy](#), 16 February 2021, p8

¹¹⁸ Department for Business, Energy and Industrial Strategy, [Independent report: John Penrose MP publishes proposals to strengthen UK’s competition regime](#), 16 February 2021

¹¹⁹ Department for Business, Energy and Industrial Strategy, [Reforming competition and consumer policy](#), 20 July 2021

¹²⁰ Department for Business, Energy and Industrial Strategy, [Consultation outcome: Reforming competition and consumer policy](#), 20 April 2022

¹²¹ [Explanatory Notes to the Digital Markets, Competition and Consumers Bill](#), para 13

Anti-trust (clauses 116-120)

The existing prohibition on agreements that prevent, restrict or distort competition only applies to agreements within the UK. **Clause 116** would expand this to include conduct outside of the UK that impacts competition in the UK.

Clauses 117 to 119 would amend the Competition Act 1998 and the Criminal Justice and Police Act 2001 to create a new obligation to preserve evidence if someone knows or suspects that the CMA is or will be undertaking an investigation. These would also allow the CMA to obtain a warrant to search premises if there are reasonable grounds to suspect that relevant documents are accessible from there. It would also allow a named officer to demand production of any relevant electronically stored information accessible from those premises.

When an investigation has been commenced but not completed, the CMA has the power under section 35 of the Competition Act 1998 to issue directions known as “interim measures” to prevent significant damage to a person or category of people or to protect the public interest. **Clause 120** would change the standard of review applied by the Competition Appeal Tribunal (CAT) in appeals against interim measures directions from a determination on the merits to a review that applies the same principles as a court on an application for judicial review.

Enforcement (clauses 121-123 and Schedule 3)

Clause 121 would introduce **Schedule 3** and give the CAT the power to make legally binding statements on the application of the law to a particular set of facts (declaratory relief).

Clause 122 would enable the CAT, the High Court of England and Wales, the Court of Session and Sheriff Court in Scotland, or the High Court in Northern Ireland to award exemplary damages in competition cases (except in collective claims).

Clause 123 would allow the CMA to make formal agreements about the use of evidence against an assisting offender by adding it to a list of prosecutors specified in the Serious Organised Crime and Police Act 2005. The CMA would however be prohibited from giving a notice providing immunity from prosecution.

Mergers (clauses 124-128 and Schedules 4 and 5)

Mergers are subject to a potential investigation by the CMA in cases where the transaction meets at least one of two “tests” detailed below:

- the “turnover test” where the target company’s UK turnover exceeds £70m.

- the “share of supply test” where the merger results in a share of supply of at least 25% in the UK or a substantial part of the UK.

Clause 124 would introduce **Schedule 4** which would change the thresholds in three ways:

- it increases the level for the turnover test from £70m to £100m
- it introduces a safe harbour for mergers where both parties have low levels of UK turnover (below £10m), and
- it introduces a new acquirer-focused threshold for merger review.

The Secretary of State would have delegated powers to make certain amendments to these thresholds through both the negative and affirmative procedures. The Government said that these changes would “better target the mergers most likely to cause harm and ensure the regime remains proportionate”.¹²²

Clause 125 would put the CMA’s existing fast track procedures for mergers on a statutory footing. It would introduce **Schedule 5**, which would amend the Enterprise Act 2002 to enable the CMA to fast track a merger, moving straight to an in-depth “Phase 2” investigation if requested by the parties involved rather than an initial “Phase 1” investigation.

Clauses 126 and 127 would amend the Enterprise Act to enable the CMA and parties involved in mergers and public interest mergers to mutually agree to extend the statutory timetable for Phase 2 investigations.

Clause 128 would replace the obligation on the CMA to publish the latest form of merger notice in the London, Edinburgh and Belfast Gazettes with an obligation to publish online.

Markets (clauses 129 to 133 and Schedules 6 and 7)

Clause 129 would remove the time limit for the CMA to either begin a consultation on a proposal to make a reference or publish a notice of its decision not to after beginning a market study.

Clause 130 would allow the CMA or appropriate Minister to specify the feature or features of a market requiring investigation. It would amend the Enterprise Act 2002 to allow for references to cover the whole market or specific features.

Clause 131 would introduce **Schedule 6** which would allow the CMA to accept voluntary commitments (undertakings) at any stage during a market study or

¹²² Department for Business, Energy and Industrial Strategy, [Consultation outcome: Reforming competition and consumer policy](#), 20 April 2022

intervention. It would also allow the CMA to accept partial undertakings to narrow the issues which require investigation.

Clause 132 would introduce **Schedule 7** which would enable the CMA and the Secretary of State to conduct trials of remedies before setting a final remedy package.

Clause 133 would impose a duty on the CMA to monitor the effectiveness of undertakings and orders accepted or imposed under Part 4 of the Enterprise Act 2002. The clause would also create new powers for the CMA or Secretary of State to vary remedies which have subsequently been found to have been ineffective.

Cartels (clause 134)

Where the Serious Fraud Office is investigating a suspected cartel offence, **clause 134** would enable a named CMA officer to require the production of information which is held electronically and accessible from a premises during an inspection under a warrant. It would also expand the powers of the High Court and CAT in England and Wales and Northern Ireland, and the sheriff in Scotland to grant a warrant to the CMA on the basis that there are reasonable grounds to suspect relevant documents are accessible from any premises.

Miscellaneous (clauses 135-138 and Schedules 8 to 12)

Clause 135 would amend existing CMA powers to require people to answer questions relevant to an investigation by clarifying that someone may be required to answer question remotely. It would also widen the scope of people who can be required to attend interview by no longer limiting it to those who have a connection to a relevant undertaking.

Clause 136 would introduce **schedules 8, 9 and 10**. These schedules would allow the CMA to issue civil penalties where previously only criminal offences existed for failure to comply with investigative measures and information requirements. The Secretary of State would have delegated powers to amend the maximum penalties by the affirmative procedure and the basis on which they are calculated by the negative procedure.

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