

THE DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL

KEY CHANGES TO THE CURRENT REGIME

MAY 2023

**ADDLESHAW
GODDARD**

MORE IMAGINATION MORE IMPACT



DMCC BILL - SCOPE



**NEW DIGITAL
MARKETS
REGULATORY
REGIME**



**EXPANDED
CONSUMER
PROTECTION
REGIME**



**BOLSTERED
INVESTIGATORY
AND ENFORCEMENT
POWERS**

**SHINY NEW
POWERS**

**MOT-STYLE
REPAIRS**



**ANTITRUST
INVESTIGATIONS**



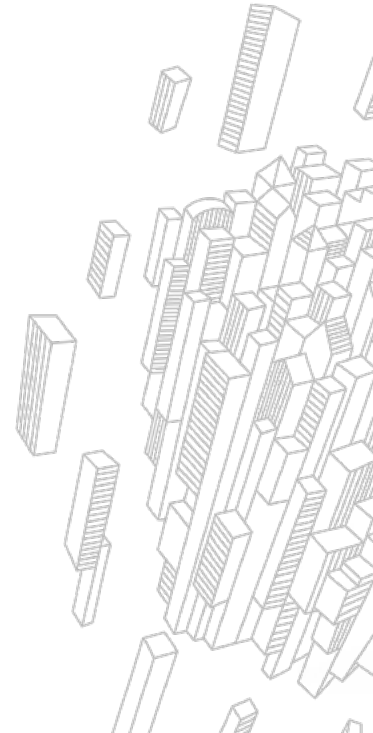
**MARKET STUDIES
AND
INVESTIGATIONS**



**MERGER
CONTROL**

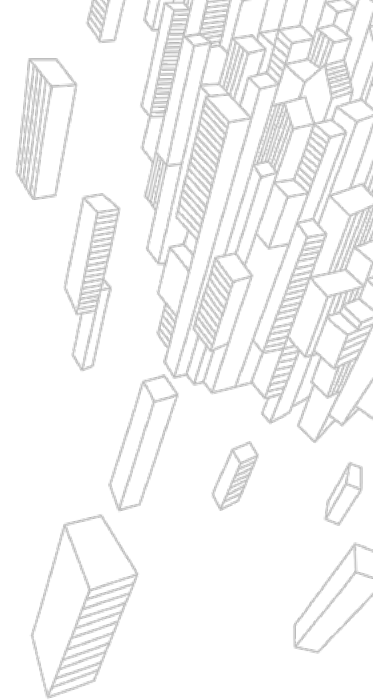
DIGITAL MARKETS (1) – DESIGNATION POWER AND SCOPE

	DMCC Bill
Designation power	<ul style="list-style-type: none"> • CMA power to designate undertakings with “strategic market status” (SMS) in relation to a digital activity linked to the UK, where turnover threshold is met • Designation process to be completed within 9 months (can be extended by up to 3 months) • CMA duty to publish guidance
Turnover threshold	<ul style="list-style-type: none"> • Global undertaking or group turnover > £25bn; or • UK undertaking or group turnover > £1bn
Strategic Market Status (SMS)	<ul style="list-style-type: none"> • Substantial and entrenched market power (forward-looking assessment in the absence of designation) + • Position of strategic significance + • In respect of the digital activity
Digital activity – very broad	<ul style="list-style-type: none"> • Provision of a service by means of the internet (whether for consideration or otherwise) • Provision of one or more pieces of digital content (whether for consideration or otherwise) • Any other activity carried out for the purposes of an activity within one of the above paragraphs
Linked to the UK – low bar	<ul style="list-style-type: none"> • Digital activity has a significant number of UK users • Undertaking that carries out the digital activity carries on business in the UK in relation to the digital activity, or • The digital activity or the way in which the undertaking carries on the digital activity is likely to have an immediate, substantial and foreseeable effect on trade in the UK



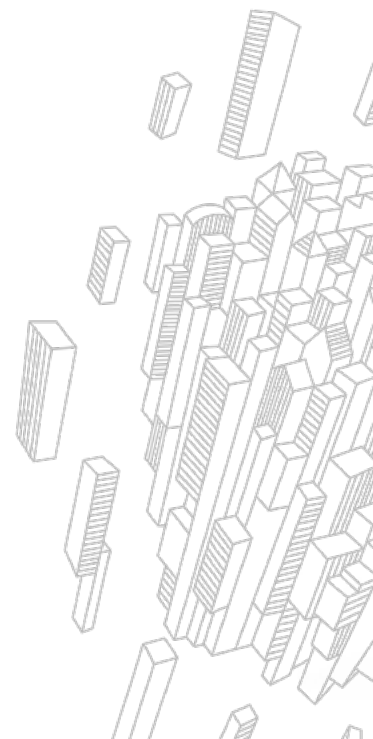
DIGITAL MARKETS (2) – POWERS OVER DESIGNATED COMPANIES

	DMCC Bill
Conduct requirements / Tailored Code of Conduct	<ul style="list-style-type: none"> CMA may impose and enforce firm-specific code of conduct on designated undertakings – permitted types of requirements set out in the Bill (section 20, can be amended by the Secretary of State in future) – including e.g.: <ul style="list-style-type: none"> - applying fair and reasonable terms of business - having effective complaints and disputes handling processes - giving explanations and reasonable notice before making material changes for users Subject to public consultation
Final offer arbitration	<ul style="list-style-type: none"> Re T&Cs in specific agreements with third parties ahead of proposed transactions Power for CMA to impose fair and reasonable payment terms on the designated undertaking where certain conditions are met
Pro-competition interventions (PCI)	<ul style="list-style-type: none"> “Mini-market investigations” over a 9-month timescale in relation to designated undertakings To launch a PCI investigation, CMA must have reasonable grounds to consider that a factor or factors relating to a relevant digital activity may be having an adverse effect on competition If adverse effect found + CMA considers a PCI would contribute/ be of use to tackle the adverse effect, CMA can impose behavioural and structural remedies on designated undertakings, including on a trial basis
Duty for designated undertakings to report mergers	<ul style="list-style-type: none"> Designated undertakings must report transactions resulting in the SMS group having: <ul style="list-style-type: none"> - Qualifying status - i.e. any of the following shares/voting rights thresholds passed: 15%, 25%, 50% + - In a “UK-connected body corporate” + - Where the consideration is at least £25m Transaction must not be closed until at least 5 working days after CMA confirmation that reporting information provided was sufficient (CMA can give consent to proceed sooner) CMA template notice to follow in due course (lighter than full merger notice)
Duty for designated undertaking to name senior manager responsible re information notices	<ul style="list-style-type: none"> CMA power to require, in an information notice, that a designated undertaking names a relevant senior manager to be responsible for ensuring the undertaking complies with the notice A penalty may be imposed on the named senior manager of a designated undertaking that fails to comply with an information notice



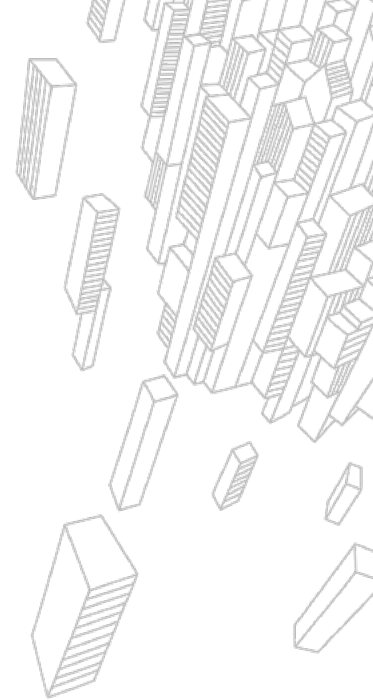
DIGITAL MARKETS (3) – SANCTIONS AND APPEALS

DMCC Bill	
Sanctions for failure to comply with conduct requirements	<ul style="list-style-type: none"> • Companies: <ul style="list-style-type: none"> - Fines up to 10% of global annual turnover and/ or - Daily fines of up to 5% of group daily turnover • No fining power against individuals • Can also resolve breaches via commitments • Director disqualification up to 15 years for breaches of conduct requirements and PCI requirements • CMA to prepare statement of policy on penalties
Sanctions for failure to comply with investigative requirements	<ul style="list-style-type: none"> • Companies: <ul style="list-style-type: none"> - Fines up to 1% of group annual turnover and/ or - Daily fines of up to 5% of group daily turnover • Individuals (e.g. named senior manager responsible for response to information request, or nominated officer responsible for compliance reports): • Civil fines on named senior manager of up to £30,000 and/or £15,000 per day or criminal fines and/or up to 2 years' imprisonment
Appeals	<ul style="list-style-type: none"> • To the Competition Appeal Tribunal (CAT) • Judicial review basis (not full merits) • Except for certain types of financial penalties which are subject to the section 114 Enterprise Act 2002 standard – CAT can quash, reduce amount and change payable date of penalty • Financial penalties are suspensory so that firms do not have to pay until the determination of an appeal



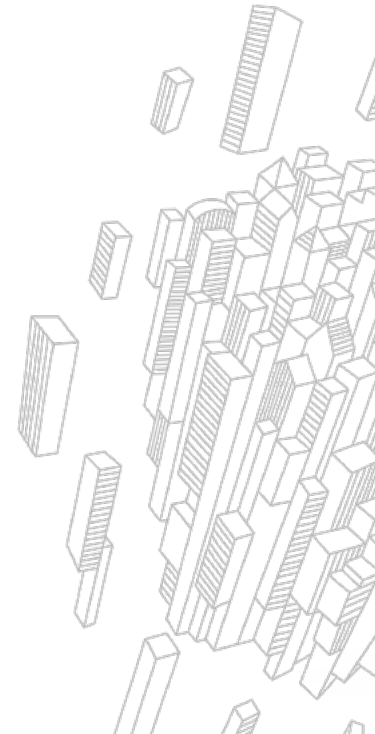
CONSUMER LAW (1) - ENFORCEMENT

	Current rules	DMCC Bill
Enforcement routes	Court-based regime only - The CMA has to take individual businesses to Court	Now administrative proceedings (similar to competition law enforcement) in addition to court-based regime - CMA can issue infringement notices, impose sanctions and award consumer compensation
Sanctions for breaches of consumer law	None - CMA can only seek Court orders to cease infringing conduct	Companies: fine up to 10% of global annual turnover Individuals: up to £300,000
Sanctions for non-compliance with information request	None - CMA can only seek Court orders to compel the business to provide information	Companies: fine up to 1% of turnover and/or 5% daily turnover Individuals: up to £30,000 and/or £15,000 daily penalty
Sanctions for non-compliance with direction	None	Companies: fine up to 5% of global annual turnover and/or 5% daily turnover Individuals: up to £150,000 and/or £15,000 daily penalty
Appeals of CMA consumer law breach decisions	N/A	On the merits to the High Court



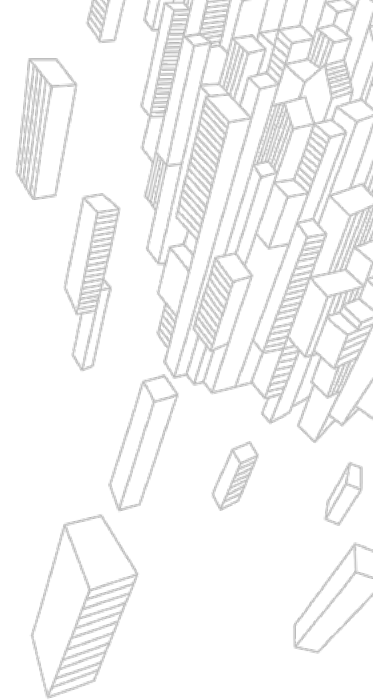
CONSUMER LAW (2) - SUBSTANTIVE RULES

	Current rules	DMCC Bill
Unfair commercial practices	Consumer Protection from Unfair Trading Regulations 2008 (CPUTRs)	<ul style="list-style-type: none"> • Repeal of CPUTRs and restatement in the Bill • Government power to add more practices to the list in future
Subscription contract “traps”	No specific rules to ensure these practices are fair	Specific regulation introduced - pre-contractual information requirements to ensure informed consent and ease of termination
Saving schemes	None - not covered by existing FCA regulation and financial protections	Specific regulation introduced - requirement to safeguard customer money
Alternative Dispute Resolution (ADR)	Outside regulated markets, no obligation on businesses to participate in ADR schemes	Provisions facilitating the use of ADR services to resolve more disputes without court action, including regarding ADR provider accreditation, notification of ADR availability and fees charged to consumers
Fake reviews - to be introduced via Government use of delegated powers	No specific prohibition against this practice	Not in the Bill itself - secondary legislation to follow, providing specific prohibitions against commissioning fake reviews or hosting reviews without prior checks



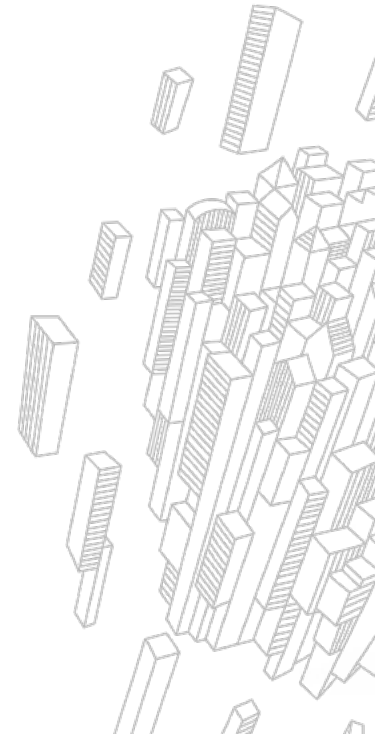
COMPETITION INVESTIGATIONS (1)

	Current rules	DMCC Bill
Extra-territoriality	<ul style="list-style-type: none"> The Chapter I prohibition applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK No explicit extra-territorial reach for CMA information notices – recent CAT judgment in <i>BMW v CMA (2023)</i> ruled extra-territorial notices as ultra vires 	<ul style="list-style-type: none"> Sufficient to have (likelihood of) direct, substantial and foreseeable effects within the UK CMA information notices can be sent to persons outside the UK and can relate to documents or information held outside the UK in some circumstances
Evidence gathering	<ul style="list-style-type: none"> CMA can interview any individual who has a “connection with a relevant undertaking” Seize and sift powers at business premises only 	<ul style="list-style-type: none"> CMA can interview any relevant person (not just employees or those “with a connection”) Seize and sift powers at domestic premises Can obtain information remotely (with warrant)
New duties on individuals	Limited duty not to intentionally or recklessly destroy/ falsify/ conceal documents once individuals have received a CMA notice to produce a document	New duty to preserve evidence



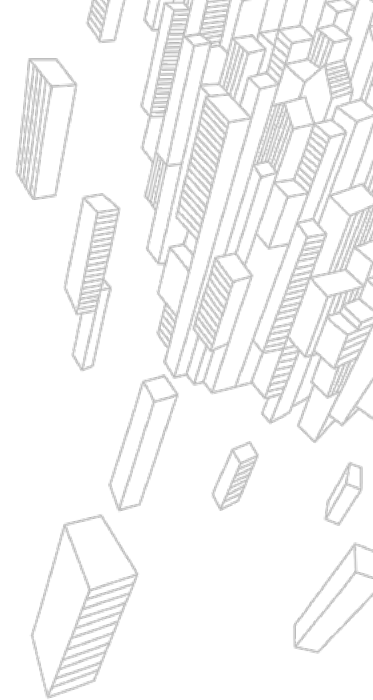
COMPETITION INVESTIGATIONS (2)

	Current rules	DMCC Bill
Sanctions for failure to co-operate in investigations	Fines up to £30,000 and/or daily penalty of up to £15,000 (both for undertakings and individuals)	<ul style="list-style-type: none"> • Companies: fines up to 1% of annual turnover and/or 5% of daily turnover • Individuals: fines up to £30,000 and/or £15,000 daily penalty
Sanctions for failure to comply with remedies (incl. commitments/ undertakings/ orders)	CMA needs to apply for a Court order compelling the undertaking to comply	<ul style="list-style-type: none"> • Companies: fines up to 5% of annual turnover and/or 5% daily turnover • Individuals: up to £150,000 and/or £15,000 daily penalty
Prosecution of criminal cartels	Limited powers of negotiation with assisting offenders (other than cartellists who qualify for a 'no action' letter)	CMA designation as a "specified prosecutor" – CMA can make a broader range of formal agreements with assisting offenders in relation to the use of evidence against them and sentence reductions



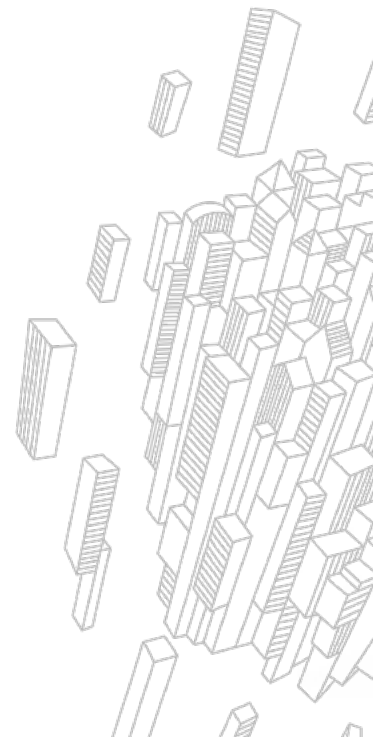
MERGER CONTROL

	Current rules	DMCC Bill
Target turnover threshold	£70m	£100m
New acquirer-focused threshold to catch potential “killer acquisitions” in the context of vertical/ conglomerate mergers	No such threshold (only target turnover threshold above and general share of supply test)	One party has a share of supply of 33%+ and UK turnover >£350m
New de minimis “safe harbour” threshold	Provided existing share of supply test is met, no minimum threshold required for the CMA to review the deal	Where each party’s UK turnover is <£10m (except for public interest mergers)
Fast-track Phase 2 reference	Not allowed – need parties to accept Phase 1 finding of substantial lessening of competition + consultation on reference proposal + reasoned decision	Allowed on request by the merging parties (except for public interest mergers)
Phase 2 timetable extension	2nd phase report due within 24 weeks of reference (can only be extended by up to 8 weeks)	<ul style="list-style-type: none"> • CMA can unilaterally extend up to 11 weeks • Further extensions allowed with merging parties’ consent
Publication of merger notices	Must be in the Official Gazettes	On CMA’s website



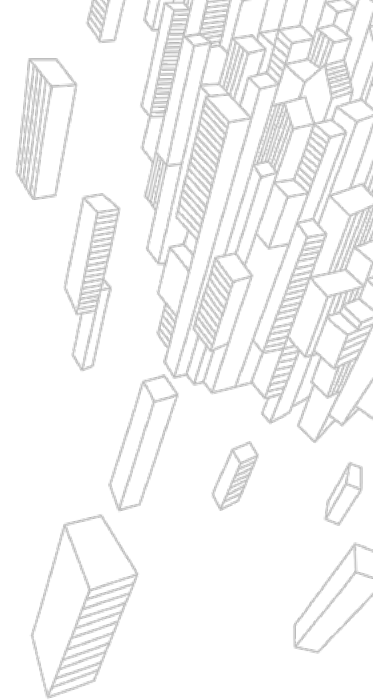
MARKET STUDIES AND INVESTIGATIONS

	Current rules	DMCC Bill
Scoping	CMA can only narrow the scope of a market investigation reference (MIR) by reference to the effects of features of such of those markets as exist in connection with a supply or an acquisition of the goods or services concerned	CMA has more flexibility to narrow the scope of market investigations – supply and acquisition connections as now provided as mere examples
Process	Requirement to consult on MIR within 6 months	No more requirement to consult on MIR within 6 months
Undertakings in lieu	Undertakings can only be accepted after the CMA has published its findings and indicated it is minded to refer or impose remedies	CMA can accept undertakings at any stage
Remedies	<ul style="list-style-type: none"> • No trial option • Remedies can only be reviewed for their removal • New investigation required for any amendment/supplement to remedies 	<ul style="list-style-type: none"> • Certain remedies can be trialled first to determine their final format – remedial action in respect of a matter concerning consumer information • Power to amend/ supplement remedies without re-opening investigation for up to 10 years • Two-year cooling off before further review
Sanctions	CMA needs to apply for a Court order compelling the undertaking to comply	Up to 5% for companies for breach of orders/ directions



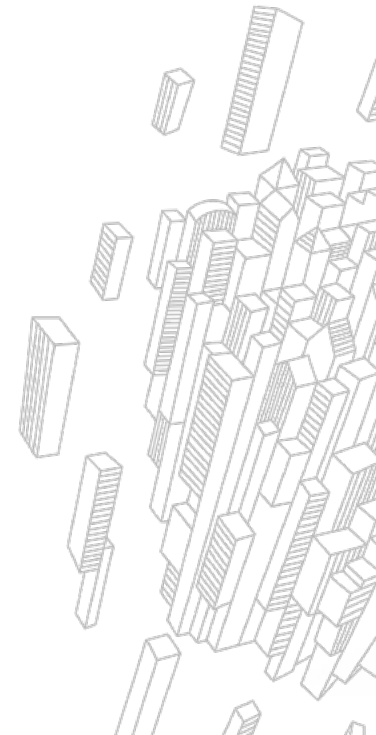
MISCELLANEOUS (1) - CAT CHANGES

	Current rules	DMCC Bill
Jurisdiction - declaratory relief	Tribunal cannot issue a judgment stating what the law means - claimants must either present a damages claims or an apply for an injunction	Can grant declaratory relief in individual and collective Chapter I and Chapter II claims
Jurisdiction for review of decisions under the new Digital Markets regime	N/A	Judicial review basis
Exemplary damages	Not allowed (following EU Damages Directive 2014/104/EU)	Allowed re private competition law claims only (for CAT + courts in general)
Appeals against interim measures - change to basis of appeal	Full merits review	Judicial review basis



MISCELLANEOUS (2) – NEW CMA DUTIES AND INFORMATION SHARING CLARIFICATIONS

	Current rules	DMCC Bill
New duty of expedition	<p>No explicit statutory duty, though note that some procedures require certain actions to take place within a specified time limit</p> <p>Some judicial review principles may come into play – e.g. breach of legitimate expectations in taking an unreasonable amount of time to conclude an investigation</p>	<p>In making a decision/ taking action, the CMA must “have regard to” the need for making a decision/ taking action “as soon as reasonably practicable”</p> <p>Applies across the CMA and concurrent regulators’ competition, consumer and digital markets functions</p>
Coordination with UK sectoral regulators re Digital Markets functions	<p>N/A – some information sharing takes place between UK regulators pursuant to statutory gateways and bilateral, non-binding Memoranda of Understanding – usually to facilitate the performance of their respective functions</p>	<p>New explicit statutory duty for the CMA in exercising its digital markets functions to consult one or more of the following regulators in certain circumstances (broadly where proportionate and relevant): FCA, Ofcom, ICO, Bank of England, Prudential Regulatory Authority</p>
Overseas regulators	<p>To legally share information relating to a business with another authority, in the absence of the business’ consent, regulators need to identify a statutory gateway enabling them to share the information – usually rely on the gateway to facilitate the performance of their respective functions. Current statutory gateways for the CMA and UK concurrent regulators do not specifically cover the overseas scenario, so this is a grey area</p>	<p>Clarifies the circumstances where the CMA and UK regulators (UKRs) with the power to enforce provisions of the Consumer Rights Act 2015 may share specified information relating to an individual or business with overseas regulators (ORs), or even use their compulsory information gathering powers to obtain information on behalf of overseas authorities</p>



REFERENCES

[Digital Markets, Competition & Consumers Bill](#) (as introduced in Parliament on 25 April 2023)

[Government Reform Proposals - Consultation Outcome \(1\)](#) (Competition & Consumer Policy)

[Government Reform Proposals - Consultation Outcome \(2\)](#) (Digital Markets)

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