

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

[Main Article](#)

[Other Developments](#)

[Merger control](#)

[Antitrust](#)

Digital Markets, Competition and Consumers Bill introduced to UK Parliament

On 25 April 2023, the [Digital Markets, Competition and Consumers Bill](#) (the Bill) was introduced into the UK Parliament. The Bill creates a new targeted regime aimed at increasing competition in digital markets and updates investigative and enforcement powers related to competition and consumer law.

Digital markets

Part 1 of the Bill provides for a new digital markets regime overseen by the Digital Markets Unit within the Competition and Markets Authority (CMA). The regime will only apply to undertakings designated as having strategic market status (SMS) in respect of a digital activity. The Bill will empower the CMA to designate an undertaking as having SMS where, following an investigation, it establishes that the following criteria are met:

- the digital activity carried out by the undertaking is linked to the UK;
- the undertaking has, in respect of that digital activity, both substantial and entrenched market power and a position of strategic influence; and
- the undertaking's global turnover in the relevant period exceeds £25 billion, or its UK turnover exceeds £1 billion within this period.

Pro-competition interventions and conduct requirements

The Bill will enable the CMA to make pro-competition interventions where it considers that this would help remedy an adverse effect on competition. The CMA will be able to impose a conduct requirement on a designated undertaking for the purposes of one or more of the following objectives: fair dealing, open choices, and trust and transparency. These requirements may be framed as either obligations or restrictions (for example, preventing undertakings from using data in a certain way, or mandating that they keep types of data separate). The CMA will be under an ongoing duty to consider the effectiveness of and compliance with these conduct requirements and may impose enforcement orders on undertakings for the purpose of remedying breaches. Designated undertakings will be required to provide the CMA with reports detailing their compliance with the requirements imposed on them.

The CMA will have the power to impose monetary penalties of up to 10% of worldwide turnover on designated undertakings where they have breached a regulatory requirement without reasonable excuses.

For further information on any EU or UK Competition related matter, please contact the [Competition Group](#) or your usual Slaughter and May contact.

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

Merger transparency requirement

The Bill also introduces a new obligation to report certain possible mergers involving designated undertakings to the CMA before completion. The relevant criteria include a minimum value of consideration (£25 million), the acquisition of certain percentage thresholds of shares or voting rights, and a specific link to the UK. This will enable the CMA to determine whether to open a Phase 1 investigation under the Enterprise Act 2002 (EA) merger control regime.

Competition

Enhanced powers of the CMA

Part 2 of the Bill introduces various changes aimed at bolstering the CMA's investigative and enforcement powers to address (suspected) infringements of Chapter 1 and 2 of the Competition Act 1998. These amended powers relate to, among other things, document preservation, production of information and seizure of documents from domestic premises. The changes are intended to enable the CMA to take faster and more effective action against anti-competitive conduct.

Changes to the competition framework

The Bill also amends various aspects of the UK's competition law framework:

- **Antitrust:** the Bill expands the territorial reach of the Chapter 1 prohibition to go beyond agreements, decisions and practices which are (or are intended to be) implemented in the UK (insofar as they may affect trade within the UK) to cover those which are likely to have an immediate, substantial and foreseeable effect on trade within the UK, even where such agreements etc. are implemented outside the UK.
- **Merger control:** the Bill will: (i) increase the target UK turnover threshold from £70m to £100m; (ii) introduce a new threshold which will be satisfied where at least one party has a share of supply of goods or services of 33% and UK turnover of £350m; and (iii) introduce a safe harbour aimed at reducing the regulatory burden for small and macro businesses. The Bill also amends the EA to enable the CMA to fast-track mergers for an in-depth Phase 2 investigation upon receipt of a request from the merging parties (thus putting the existing fast track procedures on a statutory footing).
- **Market studies / investigations:** The Bill makes various changes to the procedures for market studies and investigations under the EA, including a power to require parties to conduct trials of certain remedies before settling a final remedy package, the ability to accept undertakings at any stage of a market study or investigation, and the removal of the time limit faced by the CMA after commencement of a market study to make a reference or publish its decision not to make a reference.

Consumer law enforcement

Part 3 of the Bill provides for two civil enforcement regimes for consumer protection law: a new direct enforcement regime to be administered by the CMA and a simplified version of the existing court-based regime. The enforcement regimes cover acts or omissions amounting to commercial practices which harm the collective interests of consumers - such practices include fake reviews, subscription traps and pressure selling.

The Bill will empower the CMA to investigate suspected infringements of consumer protection law if it reasonably suspects that an infringing practice has occurred, is occurring, or is likely to occur. Following an investigation, the CMA may issue a final infringement notice to the undertaking including directions to achieve compliance via enhanced consumer measures which the CMA considers to be just, reasonable and proportionate. Where the CMA establishes an infringement, it will have the discretion to fine undertakings up to 10% of their global turnover. We plan to publish a more detailed briefing on the consumer protection elements of the Bill in due course.

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

Conclusion

In the CMA's [press release](#), the Chief Executive identified implementation of the Bill as a “watershed moment” in the protection of UK consumers and the operation of digital markets. The wide-ranging changes introduced by the Bill are intended to boost competition in digital markets and strengthen the CMA's ability to take effective action against competition and consumer law infringements. In particular, the new digital markets regime and existing merger control regime are intended to serve as complementary ways of ensuring effective competition, with merger control acting as a one-off mechanism to ensure that certain acquisitions do not restrict competition and the digital markets regime offering intervention on an on-going basis. The second reading of the Bill in Parliament is currently pending.

OTHER DEVELOPMENTS

MERGER CONTROL

EUROPEAN COMMISSION ADOPTS MERGER REVIEW SIMPLIFICATION PACKAGE

On 20 April 2023, the European Commission adopted a package of measures aimed at simplifying its merger control review. It consists of: a revised [Implementing Regulation](#) a revised [Notice on simplified procedure](#) and a [Communication on the transmission of documents](#). The measures are intended to contribute to the Commission's objective to reduce reporting requirements by 25%. Also, the package is aimed at making the process for transactions that do not raise competition concerns easier and faster, and to enable the Commission to focus its resources on those transactions that may raise competition concerns. The new package will be applicable as of 1 September 2023.

The changes will significantly affect both the simplified and normal merger review procedures. One of the key changes is that the revised simplified procedure notice expands and/or clarifies which cases can be treated under the simplified procedure. This is achieved by introducing two new categories of transactions that can fall within the simplified procedure: (i) some vertical transactions benefit from simplified treatment by default provided that certain conditions are met; and (ii) the Commission can use its discretion to treat additional cases under this procedure by using newly introduced “flexibility clauses”. Finally, the package also clarifies when the Commission can review under the normal procedure a case which technically qualifies for the simplified procedure.

The new rules also affect the notification templates. With respect to simplified procedure cases, the Implementing Regulation provides for a tick-the-box Short Form CO which includes multiple choice questions and tables for the jurisdictional and competitive assessment. The new notice distinguishes cases eligible for a “super-simplified” treatment whereby the parties are encouraged to immediately notify the Commission without pre-notification contacts. The Implementing Regulation also amends the normal review by reducing and clarifying the information required by the Form CO. This includes limiting the information requirements for markets that benefit from the flexibility clauses; introducing overview tables facilitating the submission of the required information on potential horizontal overlaps; and identifying certain sections suitable for waivers requests.

CMA BLOCKS MICROSOFT/ACTIVISION

The CMA has issued its [final report](#) on Microsoft's proposed acquisition of Activision Blizzard, blocking the proposed transaction over concerns that it “*would alter the future of the fast-growing cloud gaming market, leading to reduced innovation and less choice*”. In January 2022, Microsoft announced that it had agreed to acquire game developer and publisher Activision for a value of \$68.7 billion. The CMA launched an in-depth investigation in September 2022, and in February 2023 it provisionally found that the deal raised competition concerns in relation to both console gaming and cloud gaming services in the UK. On 24 March 2023, the CMA updated its provisional findings and reached the provisional conclusion that, overall, the transaction will not result in a substantial lessening of competition (SLC) in relation to console gaming in the UK.

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

In its final report, the CMA concluded that the merger may be expected to result in a SLC in the supply of cloud gaming services in the UK due to vertical effects resulting from input foreclosure. According to the CMA, Microsoft already has a strong position in this market as it owns gaming platform Xbox and leading PC operating systems, and the transaction would make it even stronger. In addition, the CMA considered that Microsoft would find it beneficial to make Activision titles - including Call of Duty and World of Warcraft - exclusive to its own cloud services.

The CMA concluded that the remedies proposed by Microsoft for a ten-year period were behavioural in nature, and that they required Microsoft to behave in a way which (the CMA found) may be contrary to its commercial incentives. They would also require ongoing regulatory oversight. The CMA also found that the proposed remedies package had significant shortcomings in the context of what the CMA sees as the growing and fast-moving nature of cloud gaming services.

Microsoft had also entered into agreements with Nintendo and three cloud gaming service providers to allow certain Activision content to be made available on their platforms. The CMA however found that the impact of these agreements was uncertain, and it could not be confident that they would lead to material benefits for customers. The CMA also considered other factors such as the broader international context and the extra-territorial impact of a prohibition, but found no effective remedy that would address the SLC in the UK without having an impact outside of the UK.

The proposed transaction is still subject to review in other jurisdictions, including in the EU, where a phase 2 decision is expected by the end of May. The CMA's final decision shows that it continues to be reluctant to accept behavioural remedies other than in very specific circumstances, and that it will not hesitate to block deals even where that has an extra-territorial impact.

ANTITRUST

EUROPEAN COURT OF JUSTICE REJECTS AMAZON APPEAL AGAINST EUROPEAN COMMISSION'S DECISION TO LIMIT TERRITORIAL SCOPE OF ITS "BUY BOX" INVESTIGATION

On 20 April 2023, the Court of Justice of the European Union (CJ) issued a [judgment](#) in an appeal brought by Amazon against an order of the General Court which dismissed as inadmissible an action for annulment against the Commission's decision to exclude Italy from the scope of its investigation in the Amazon - Buy Box case.

The CJ's judgment relates to the Commission's Amazon - Buy Box investigation, which was opened by the Commission in 2020 (see a [previous edition](#) of this newsletter for more details). The investigation covered the EEA except for Italy, where the national competition authority had already started a similar investigation the year before. The Commission's investigation ended on 20 December 2022 when it accepted Amazon's commitments offer, due to be implemented by June 2023. The Italian authority concluded its investigation in relation to the Italian market on 30 November 2021 by issuing a fine amounting to €1.1 billion, which has been appealed by Amazon and suspended in anticipation of the CJ's judgment.

Amazon's objection to having to defend itself in two separate proceedings was based on Article 11(6) of Regulation No 1/2003 which protects undertakings from parallel proceedings by national competition authorities and the Commission. In Amazon's view, by excluding Italy from the scope of the investigation, the Commission circumvented Article 11(6).

The judgment clarified that the protection afforded by Article 11(6) applies only in the event of parallel proceedings brought by the competition authorities of the Member States and the Commission against the same undertakings in respect of the same allegedly anti-competitive conduct occurring in the same product or geographical markets and over the same period or periods. The CJ ruled that as a consequence, undertakings cannot avail themselves of that protection if the Commission has not initiated proceedings or has not initiated proceedings in respect of a given territory.

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

As regards this case, the territorial scope of the proceedings did not include Italy, so the protection against parallel proceedings provided for in Article 11(6) of Regulation No 1/2003 could not apply. Moreover, the CJ also confirmed the General Court's order in that the protection "*does not imply any right for an undertaking to have a case dealt with in its entirety by the Commission*".

London

T +44 (0)20 7600 1200

F +44 (0)20 7090 5000

Brussels

T +32 (0)2 737 94 00

F +32 (0)2 737 94 01

Hong Kong

T +852 2521 0551

F +852 2845 2125

Beijing

T +86 10 5965 0600

F +86 10 5965 0650

Published to provide general information and not as legal advice. © Slaughter and May, 2023.
For further information, please speak to your usual Slaughter and May contact.

www.slaughterandmay.com