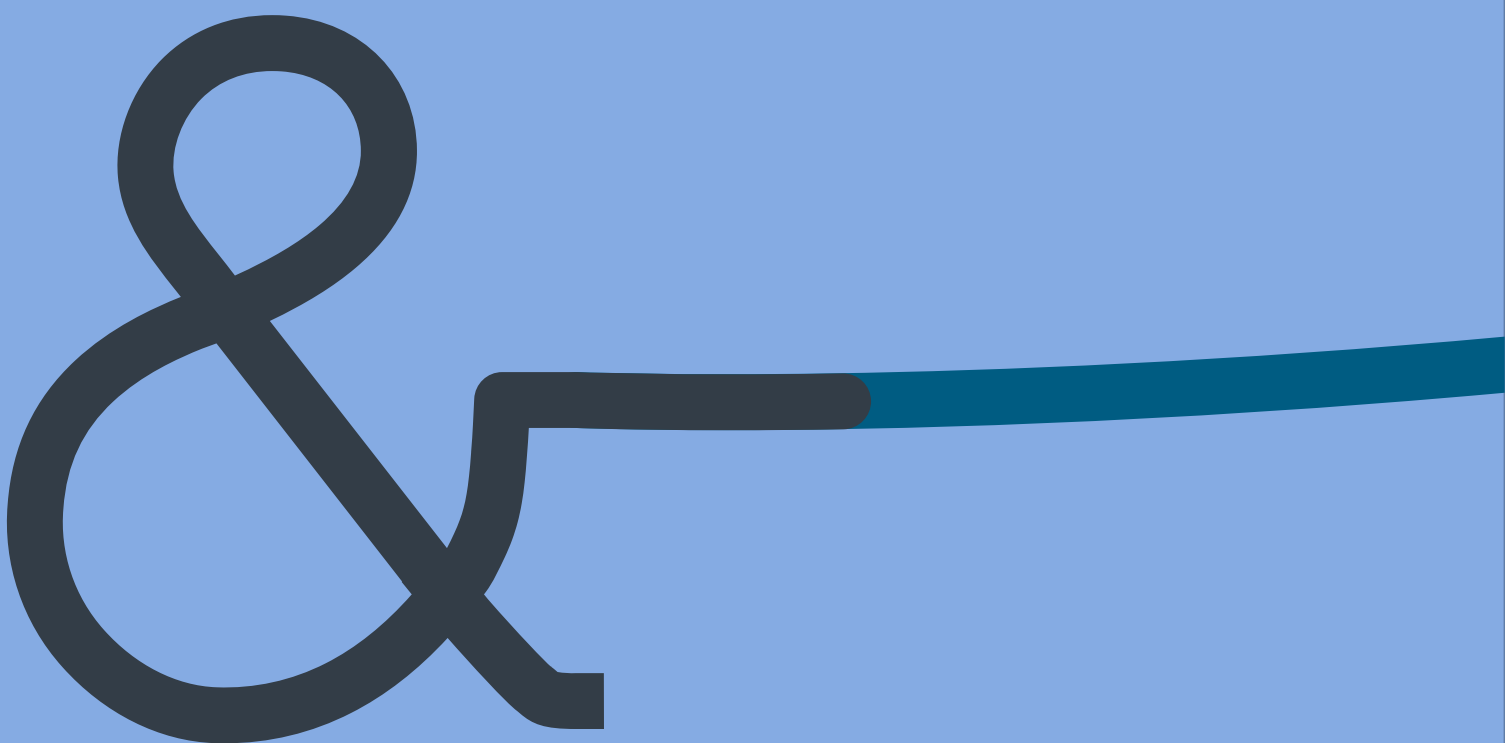


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UK competition law  
powers: sharper teeth,  
larger fines – New Bill  
bolsters investigative  
and enforcement  
powers of the CMA

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# UK competition law powers: sharper teeth, larger fines – New Bill bolsters investigative and enforcement powers of the CMA

On 25 April 2023, the Digital Markets, Competition and Consumer Bill (“Bill”) was finally put before Parliament. The Bill follows two 2021 consultations and policy decisions made in 2022 and is set to provide the CMA with stronger tools to investigate competition issues and take faster, more effective action.

The Bill aims to increase the level of competition among businesses “*both online and on the high street*”.

## Highlights

The Bill brings together a series of reforms across the CMA’s competition tools and, notably, where relevant, these **tools apply to sector regulators when exercising concurrent competition powers**. The four focus areas include (i) merger control, (ii) market inquiries, (iii) investigation powers, and (iv) investigation and enforcement.

## Rebalanced merger control thresholds: significant adjustments to current thresholds

- CMA merger assessments will be focused on transactions with the greatest potential to weaken competition. Mergers involving small companies will no longer be reviewed as they are less likely to damage competition.
- The UK merger control turnover thresholds of the enterprise being acquired (i.e., the target company) have been increased from GBP 70 million UK turnover to **GBP 100 million UK turnover**.
- A 'safe harbour' has been introduced by adding a condition into the existing share of supply test that requires **at least one of the merging enterprises to have UK turnover of more than GBP 10 million**, meaning that mergers with enterprises which have a turnover of GBP 10 million or less are **exempt** from UK merger review.
- Additionally, an **acquirer-focused threshold** has been introduced targeting certain vertical and conglomerate mergers. This addresses concerns about "killer acquisitions" in the digital sector but will likely be of general application. For this threshold to apply, an acquirer of the merging enterprises must have at least a **33% share of supply of goods or services in the UK**, or in a substantial part of the UK, and a **UK turnover of over GBP 350 million**. Crucially, the test does not require any increment in the share of supply.
- The Bill will introduce an enhanced **fast-track process** allowing some merging businesses to be fast-tracked to an in-depth Phase 2 investigation. Under this process, the CMA can fast-track a merger if it receives a request from any of the parties involved in the merger to do so, any time before the end of the ‘initial period’ during which the CMA is required to complete the Phase 1 merger investigation. This replaces the normal duty under section 22(1) and 33 (1) to refer a merger for a Phase 2 merger investigation. The Bill also enables the CMA and the parties

involved in the merger to mutually agree to extend the statutory timetable for Phase 2 investigations (by no more than 11 weeks).

- To note, firms designated with SMS status under the digital market proposals will now be subject to a **mandatory merger reporting requirement** prior to closing, especially where:
  - The SMS firm acquires at least 15% of the shares or voting rights in a company carrying on activities in the UK or supplying goods or services in the UK, with further reports required if its stake passes 25% or 50%.
  - The value of the SMS firm's total holding is at least £25 million.

## More efficient, flexible, and proportionate market inquiries

- In relation to market investigations, the Bill proposes narrowing the CMA's investigations to focus only on the **particular features of a market where the competitive concerns arise**. The focus will be on the effects of particular features of the market as set out in the reference.
- The Bill **removes the restriction on the time** in which the CMA (after commencing a market study) is required to (i) begin a consultation regarding a proposal to make a reference to a market investigation, or (ii) must publish notice of its decision not to make a reference. However, the CMA is still required to complete the process and reach a decision on the market investigation reference within 12 months of the publication of the market study notice.
- The Bill introduces a power to the CMA to **accept voluntary commitments to competition problems from businesses at any stage in a market study and a market investigation**. It also allows the CMA to accept undertakings partially to narrow the issues which require further investigation.
- In addition, the Bill will introduce a new power of the CMA to **trial certain remedies** to competition concerns to ensure they work as well as possible before settling a final remedy package.
- There will also be a new power for the CMA to **vary remedies that are found to not effectively tackle the problems they were designed to address**. A new duty has been imposed on the CMA to monitor the effectiveness of undertakings and orders accepted or imposed.

## Stronger powers to investigate illegal anticompetitive conduct

- The Bill will ensure anticompetitive agreements that harm UK markets and consumers are prohibited, regardless of where the anticompetitive conduct takes place. Currently, the CMA can only examine agreements 'implemented' in the UK, which is deemed too restrictive in this digital age. Under the Bill, Chapter I of the CA98 will be amended so that the prohibition can apply to agreements, concerted practices and decisions which are implemented outside of the UK, where these are likely to have an immediate, substantial, and foreseeable effect on trade within the UK.
- The Bill will strengthen the CMA's evidence gathering powers to interview a broader range of individuals and obtain information stored remotely when executing a warrant. This potentially plugs a previous enforcement gap.

## Faster and more effective investigation and enforcement

- The Bill will place a **new duty of expedition on the CMA**, emphasising the need for swift decision-making while protecting the importance of robust decisions and procedural rights.
- The CMA will have **greater powers to sanction companies that refuse to comply with investigations and remedies**, serving to deter egregious behaviour. The Bill introduces a new liability for a financial penalty in circumstances where a person knows or suspects that an investigation by the CMA is being or is likely to be carried out, and that person falsifies, conceals, destroys, or otherwise disposes of a document which the person knows, or suspects would be relevant to the investigation. The CMA has also been added to the list of prosecutors specified in the Organised Crime and Police Act 2005, enabling the CMA to make a formal agreement on the use of evidence against an offender that assists in investigations and prosecutions.
- To facilitate greater cooperation between competition regulators in globalised markets, the Bill will make **overseas disclosures of information more efficient** and enable the CMA to use its powers to **provide investigative assistance to overseas authorities**. It also provides for the **extra-territorial service of notices to produce a specified document or specified information held outside the UK**, by a person who is outside the UK.
- The CMA may, by notice, **require any individual to attend an interview at a time and place specified**, and answer questions for the purpose of an investigation, rather than only those who have a connection to a relevant undertaking.
- In terms of failure to comply with investigative measures and information requirements, the CMA may now issue civil penalties where previously only criminal offences existed.
- Provision is made under the Bill for **civil penalties for a failure to comply (without reasonable excuse) with orders, commitments, undertakings, or enforcement notices**.
- **Individuals could also face hefty fixed and daily penalties of up to GBP 30,000 and GBP 15,000 respectively for failures to comply** with undertakings or orders, or for the provision of false information.

## Analysis and next steps

- While most of what was proposed in the government's [April 2022 response](#) to its consultation on the proposed reforms to competition and consumer law has been pulled through to the Bill (you can find our previous insights [here](#)), it appears as though the following items did not feature in the Bill put forward to Parliament:
  - reducing the turnover threshold for immunity from financial penalties under the Competition Act for breaches of the Chapter II prohibition from GBP 50 million to GBP 20 million, meaning that it would be easier for the CMA to investigate abuses of dominance by smaller businesses; and
  - “Confidentiality rings” are not explicitly referred to in the Bill. Rather, under s.203(3)(d), provision is made for the CMA to make rules in relation to “*arrangements to ensure the protection of confidential information*”.
- The Enterprise and Regulatory Reform Act 2013 was the last significant reform to the UK competition regime (it introduced various reforms to the competition rules in the Enterprise Act 2002 and to the Competition Act 1998). The draft Bill has been

the most significant proposal for reform since 2013, despite there having been various consultations and proposals for reform since then.

- Businesses will now be required to think more holistically than ever about competition, consumer, and digital market regulation. The CMA's new toolkit, informed by the Bill, will provide it with far reaching powers that it will be most eager to exercise.
- The Bill is only at the start of the legislative process and both Houses of Parliament are required to approve it before it passes into law. We anticipate that the Bill will enter into force next spring. As part of the approval process, both members of the Houses of Parliament will debate the Bill and the proposed amendments, and there will be a specially convened committee that will scrutinise the Bill. There is, therefore, a chance that the Bill is amended before it is enacted. However, the core principals of the proposed amendments are unlikely to substantively change.

## Summary of key points:

### Concurrency

- New tools apply to sector regulators when exercising concurrent competition powers

### Rebalanced merger control

- UK merger control turnover thresholds of the enterprise being acquired (i.e. the target company) increased to GBP 100 million UK turnover
- Exemption from UK merger review where at least one of the merging enterprises has UK turnover of less than GBP 10 million
- Acquirer-focused threshold introduced where the acquirer must have at least a 33% share of supply of goods or services in the UK, or in a substantial part of the UK, and a UK turnover of over GBP 350 million
- The Bill introduces an enhanced fast track process

### Efficient, flexible and proportionate market inquiries

- Certain restrictions on time removed in relation to market studies
- CMA may accept voluntary commitments to competition problems from businesses at any stage in a market study and a market investigation
- CMA may trial certain remedies and may vary remedies that are found to not effectively tackle the problems they were designed to address

**Stronger powers to investigate illegal anticompetitive conduct**

- Anticompetitive agreements that harm UK markets and consumers are prohibited, regardless of where the anticompetitive conduct takes place
- CMA may obtain information stored remotely when executing a warrant

**Faster and more effective investigation and enforcement**

- New duty of expedition on the CMA
- Overseas disclosures of information to enable the CMA to provide investigative assistance to overseas authorities. It also provides for the extra territorial service of notices to produce a specified document or specified information held outside the UK
- CMA may, by notice, require any individual to attend an interview at a time and place specified
- Civil penalties for a failure to comply (without reasonable excuse) with orders, commitments, undertakings, or enforcement notices
- Hefty individual remedy and daily penalties of up to GBP 30,000 and GBP 15,000 respectively for failure to comply

You can find the Bill [here](#), and the CMA's supporting documentation for the Bill [here](#). Additionally, you can find our digital markets insights [here](#).

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