

COMPETITION AND CONSUMER LAW

The purpose of the Digital Markets, Competition, and Consumers Bill: what do the experts think?

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Introduction

The study of the Digital Markets, Competition, and Consumer Bill (DMCC) – now an Act of Parliament - involves applying the definition of digital markets to real-life examples, such as Meta (Facebook), and the harm such platforms can cause to service users. This includes limiting competition, which can result in a smaller range of innovative goods for consumers at an unfair price.¹ This involves reviewing the Competition and Markets Authority (CMA), and the role it plays in the proposals from the DMCC.

It is important to mention that the DMCC has now passed its final stages and became an Act of Parliament on May 24, 2024.² Thus, throughout this piece, the DMCC will be referred to as the Act. This piece will examine how the DMCC was a response to recent economic changes, focusing on the role of the DMCC in relation to consumer protection, digital markets, and competition. In particular, it will comment on Part 1 of the Act, covering strategic market status.

What is the purpose of the DMCC?

DMCC was proposed as a response to the 47 per cent increase in online sales from 2019 to 2020.³ This caused digital markets to become prone to ‘tipping’ by relying on user data.⁴ This is when e-commerce websites gather information about the buying patterns of their customers, which helps them sell more goods.⁵ Facebook is famous for doing this through personalised advertisements, giving them an advantage over new businesses entering the market that do not have access to such data. This was reflected when Facebook’s revenue rose from £5 to £50 per user in eight years as they created a monopolistic environment.⁶ The CMA would not have been able to accurately regulate how Facebook functioned then, and this shows why the DMCC was put forward to ensure that designated undertakings would comply with rules to treat consumers and smaller businesses fairly.⁷

There are three main aims of the Act: consumer protection, regulation of digital markets, and the encouragement of competition.⁸ The CMA wants to protect consumers by maintaining their rights, and this is how they will identify and penalise businesses that engage in unfair practices. CMA has established a Digital Market Unit (DMU) within itself, whose job it is to foster a competitive environment for innovations by holding digital firms accountable for their actions.⁹ The investigation and enforcement powers of the CMA would be strengthened in order to take speedy action against anti-competitive behaviour.¹⁰ An example of this is Clause 19, which allows the CMA to impose conduct

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¹ Competition and Markets Authority, 'About Us' < <https://www.gov.uk/government/organisations/competition-and-markets-authority/about> > accessed 3 April 2024.

² Digital Markets, Competition and Consumers Act 2024 c.13.

³ Department for Business, Energy & Industrial Strategy, 'Reforming Competition and Consumer Policy' (PDF) (online), CP 488, July 2021, 83.

⁴ Shalchi, A., & Mirza Davies, J., 'Digital Markets, Competition and Consumers Bill: digital markets and competition provisions' (2023) House of Commons Research Briefing Number CBP 9794, 8.

⁵ Ibid, 9.

⁶ Competition and Markets Authority, 'New regime needed to take on tech giants' (1 July 2020) < <https://www.gov.uk/government/news/new-regime-needed-to-take-on-tech-giants> > accessed 3 April 2024.

⁷ Shalchi, A., & Mirza Davies, J., 'Digital Markets, Competition and Consumers Bill: digital markets and competition provisions' (2023) House of Commons Research Briefing Number CBP 9794, 8.

⁸ Competition and Markets Authority, 'New bill to stamp out unfair practices and promote competition in digital markets' (25 April 2023) < <https://www.gov.uk/government/news/new-bill-to-stamp-out-unfair-practices-and-promote-competition-in-digital-markets> > accessed 3 April 2024.

⁹ Ibid.

¹⁰ Ibid.

requirements such as fair dealings or transparency on designated companies.¹¹ This shows that the DMCC's goal is to prevent monopolistic behaviour while promoting a beneficial competitive environment for customers.

Exploring Part 1 of the DMCC

This section identifies which designated businesses have enough power to be given a 'Strategic Market Status' (SMS).¹² It empowers the CMA, as they can take proactive measures to resolve competition-related issues, such as mandating information sharing and upholding merger disclosure laws.¹³ This is because they can impose penalties such as fines of 10 per cent of a company's worldwide revenue for non-compliance.¹⁴ An issue of subjectivity could arise in this situation, as businesses must have "substantial and entrenched market power" to be classified as having SMS.¹⁵ Therefore, while the criterion for designation is clear, it is open to interpretation and could lead to future disputes.

The expert opinion on Part 1 of the DMCC

Sarah Cardell, the CMA chief executive, believes the Act has "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."¹⁶ Ensuring that digital markets are efficient could lead to economic growth as business activity and job creation accelerate. This suggests that markets would be considered commercially important as better services would be offered to consumers. While Cardell is not an academic expert, the decisions she makes rely on academic research and in-depth knowledge of the DMCC. Still, it is essential to consider potential biases that could occur, making her judgements partial. This shows the importance of maintaining objectivity and considering diverse viewpoints.

Similarly, the government conducted an impact assessment on Part 1 of the Act,¹⁷ where, it was estimated that the total cost of the regime would be £1.022 billion, while the net benefit would be £5.167 billion over 10 years.¹⁸ Conducting an assessment demonstrates that the potential effects of the DMCC have been considered in order to assess whether implementing the regime would be useful or not. However, the true costs of the regime will depend on the "types of interventions taken by the DMU following SMS designation."¹⁹ This creates a sense of uncertainty as the actual impacts cannot be accurately predicted and could lead to unintended consequences from overly restrictive regulation. Hence, there would be a negative economic impact; markets could become distorted, deterring investments.

In contrast, law firm Sidley Austin states that the disparities between the UK and EU regimes could "risk creating a complex web of parallel and overlapping obligations and may lead to conflicting outcomes."²⁰ This situation could cause businesses in the UK and EU to become inefficient due to confusion in regimes. This is problematic because digital markets would have to comply with multiple sets of regulations that have different requirements and standards, and which may overlap. This would present challenges for businesses, as they would have to determine which jurisdictions to prioritise. In

¹¹ Shalchi, A., & Mirza Davies, J., 'Digital Markets, Competition and Consumers Bill: digital markets and competition provisions' (2023) House of Commons Research Briefing Number CBP 9794, 18.

¹² Digital Markets, Competition and Consumers Act 2024 c.13, s.2 (1b).

¹³ Shalchi, A., & Mirza Davies, J., 'Digital Markets, Competition and Consumers Bill: digital markets and competition provisions' (2023) House of Commons Research Briefing Number CBP 9794, p 17.

¹⁴ Digital Markets, Competition and Consumers Act 2024 c. 13, s.2 (2a).

¹⁵ Ibid, s, 85 (4a).

¹⁶ Competition and Markets Authority, 'New bill to stamp out unfair practices and promote competition in digital markets' (25 April 2023) < <https://www.gov.uk/government/news/new-bill-to-stamp-out-unfair-practices-and-promote-competition-in-digital-markets> > accessed 3 April 2024.

¹⁷ Impact Assessment – 'A new pro-competition regime for digital markets' (PDF), 21 April 2023, 9.

¹⁸ Impact Assessment – 'A new pro-competition regime for digital markets' (PDF), 21 April 2023, 9.

¹⁹ Ibid.

²⁰ Sidley Austin, 'New UK Digital Markets Regime: Key Differences with the EU Digital Markets Act' (27 April 2023) < <https://www.sidley.com/en/insights/newsupdates/2023/04/new-uk-digital-markets-regime-key-differences-with-the-eu-digital-markets-act> > accessed 3 April 2024.

addition, inefficiency could impede innovation and growth. This raises issues of commercial importance because of the implications for business activities, including compliance costs and legal certainty. Sidley Austin has expertise in various areas such as privacy and data security, as well as international trade and regulatory affairs. This illustrates that they have a solid understanding of potential challenges arising from the differences between UK and EU regulatory regimes, especially the DMCC.

Likewise, Alan Davis, a lawyer at Pinsent Masons, acknowledges issues that may occur from the Act's passing and enforcement. As he states, this is because the DMCC could "increase the compliance burden and risks faced by businesses active in the UK."²¹ This indicates that businesses would require additional time and resources to meet the legal requirements that the DMCC would introduce. Markets that face difficulties meeting the requirements would be at risk of facing legal consequences such as fines for non-compliance. A potential social issue would be businesses' inability to fulfil their social responsibilities when serving their customers. This could lead to diplomatic issues; for instance, cooperation with international trade partners would be hindered. This shows that more complex complications are not considered by the Act.

Conclusion

The DMCC is extremely valuable as it is an example of how the law adapts to external factors other than legal issues, such as economic advancements. This highlights how the government responded to unpredictable situations, such as the impacts of the pandemic on services like digital markets. In accordance with experts' views, the DMCC does well to tackle designated businesses that misuse their big platforms to harm service users. It also takes small businesses into account, as it takes measures to provide them an equal chance to flourish and excel. Further, the government has tried its best to use the sources available to predict the long-term impact of the Act. This shows the commitment of policymakers in assessing whether the benefits outweigh the costs when designing the DMCC.

However, it appears the DMCC has not considered the effects it could have on those other than businesses and consumers. This is because law firms are already anticipating the difficulties they might face when advising clients. This includes the regulatory divergence between the UK and EU regimes, which creates misunderstandings for businesses operating across borders, as they would need to comply with two different sets of rules and standards. This is an issue that hopefully will be dealt with appropriately when applying the Act in real-life situations.

²¹ Pinsent Masons, 'UK government publishes Digital Markets, Competition and Consumers Bill' (25 April 2023) < <https://www.pinsentmasons.com/out-law/news/uk-digital-markets-competition-consumers-bill> > accessed 3 April 2024.