



CCIA Comments on the United Kingdom’s “Digital Markets, Competition, and Consumer Bill”

The Computer and Communications Industry Association (CCIA) welcomes the opportunity to provide these comments on the “Digital Markets, Competition, and Consumer Bill”¹ (DMCC or the Bill), which amends the Competition Act 1998 and the Enterprise Act 2002 and provides further regulation regarding competition in digital markets.

CCIA is an international, not-for-profit association representing a broad cross-section of technology and communications firms, with offices in Washington, DC and Brussels. For over fifty years, CCIA has promoted open markets, open systems, and open networks, advocating for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.²

Technology and digital service companies offer innovative and popular services to consumers. They play an important role and significantly contribute to a competitive and robust UK economy. CCIA wishes to emphasise the benefits digital services provide for UK consumers and discuss important considerations that UK policymakers should take into account before designing any proposed regulation. Therefore, our comments provide (i) general observations to be considered before implementing any new regulation (Part I), and (ii) specific recommendations regarding the DMCC (Part II).

I. Regulatory Changes Should Provide Proportionality, Predictability, and Due Process

CCIA is committed to fostering digital policy most conducive to a healthy digital economy.³ This is especially important at this time, when multiple jurisdictions are considering new digital competition rules. Overly complex, intrusive, or broad regulatory regimes are likely to deter entry and investment from innovative companies and could significantly hinder consumer choice and harm economic growth. This is a risk of the DMCC.

¹ Digital Markets, Competition and Consumers Bill (DMCC). <https://publications.parliament.uk/pa/bills/cbill/58-03/0294/220294.pdf>.

² For more information about CCIA, visit www.ccianet.org.

³ See, e.g., CCIA Comments to the Australian Treasury Consultation on ACCC’s Regulatory Reform Recommendations (Feb. 17, 2023). <https://ccianet.org/library/ccia-comments-to-the-australian-treasury-consultation-on-accs-regulatory-reform-recommendations/>. CCIA Comments in Response to the Consultation on “The Future of Competition Policy in Canada” (Apr. 3, 2023). <https://ccianet.org/library/ccia-comments-in-response-to-the-consultation-on-the-future-of-competition-policy-in-canada/>.



It is important to consider that any new regulation should be proportionate and provide sufficient legal certainty and predictability. One of the main differences between the DMCC and other proposed regulations around the world is the absence of prescriptive rules. Any new rules should be principles-based rather than targeting and scoping particular companies and imposing specific obligations and prohibitions on them. However, the DMCC seems to open the door for the Competition and Markets Authority (CMA) to have an unprecedented level of regulatory discretion. Although the DMCC provides some high-level provisions and sets out some overall objectives, it gives unlimited discretion for the CMA to not just enforce the rules but decide which firms to regulate and the specific terms of such regulation, essentially across the entire UK economy.

In this regard, it is important to consider that *ex-ante* regulation needs a workable and future-proof mechanism for balancing the interests of consumers, suppliers, and other ecosystem participants in an open market economy with free competition. To provide legal certainty, this centralized oversight of the digital economy should be based on a coherent, objective, and administrable governance and enforcement framework instead of implementing presumptions, burden shifting, and different standards that would apply only to certain market participants based on the CMA's discretion.

Another important element of predictability is the ability to provide market participants and companies with reasonable certainty that rules will remain unchanged for some time. Since the DMCC also gives the CMA the power to change the rules or the targeted undertakings with "strategic market status" (SMS) at any moment, under the proposed Bill, businesses operating in the UK will have little certainty about how long the regulations would apply or whether there would be any immediate changes imposed by the CMA. This is a major concern for industry as compliance with these new rules entails high costs and requires business reengineering. For the DMCC regime to be proportionate and just, businesses need to have some understanding and certainty of the rules they should follow, and that those rules will stay constant for some reasonable amount of time.

Additionally, it is fundamental for UK policymakers to put in place procedural safeguards to guarantee checks and balances regarding the CMA's use of powers. Considering the extremely high level of discretion and flexibility the DMCC would provide to the CMA's Digital Markets Unit (DMU), the Bill needs to provide corresponding safeguards to ensure that the discretion is applied in a reasonable and proportionate way. It is crucial to implement procedural guardrails to ensure that companies have robust rights of appeal, which are proportionate to the breadth of powers available to the DMU.



Finally, it is also important for UK policymakers to think more broadly and consider what an *ex-ante* regulation's impact would be on UK consumers and small businesses that have, for long, benefitted from the targeted products and services. Before implementing new regulation, it is crucially important to analyse its impact considering all the possible consequences that regulation could bring for UK consumers, innovation, and the economy and ensuring that the regulation is both necessary and proportionate. As written, the DMCC gives the regulator the power to impose radical remedies on specific companies with no obligation to show that those remedies and interventions are addressing a demonstrable harm to competition or consumers.

II. Specific Recommendations

1. UK Policymakers Should Apply a Principles-Based Regulatory Approach and Clarify the Concept of SMS

The DMCC includes specific provisions about the designation of undertakings as having “strategic market status” (SMS) in respect of their digital activity. SMS is associated with the “substantial and entrenched market power” and a “position of strategic significance” in respect of their activities.⁴ However, according to Section 7 of Chapter 2, Part I of the Bill, only undertakings with a global turnover of over £25 billion, or UK turnover of over £1 billion, will fall within the scope of the DMCC. The CMA “may not designate an undertaking as having SMS in respect of a digital activity unless the turnover condition is met in relation to the undertaking.”⁵

Additionally, Section 9 of Chapter 2, Part I of the Bill establishes that the CMA can begin an “initial SMS investigation” where it has reasonable grounds to consider that it may be able to designate an undertaking as having SMS in respect of digital activity in accordance with the elements mentioned before. In this regard, CCIA encourages UK policymakers to avoid arbitrary scoping of new rules to specific digital services platforms. Proposed new regulations should be rules of general applicability and not be designed and enforced only against particular companies.

CCIA urges Parliament to clarify the concept of SMS. A detailed analysis of each one of the markets, products, and services is needed to determine, based on evidence, which undertakings would be designated as SMS and why these undertakings should be subject to more regulation than others also participating in the same markets. Additionally, regarding the procedure for “initial SMS investigations” and “further SMS investigations,” it is crucial for the Bill to include procedural opportunities for undertakings to defend themselves and be able to provide evidence

⁴ *Supra* note 1 at 19.

⁵ *Id.* at 21.



to be considered in the investigation. As written, a simple “SMS investigation notice” is simply not enough to protect the undertaking’s rights to defense, which goes against basic principles of due process and procedural fairness.

2. UK Policymakers Should Consider Adequate Procedural Safeguards

The DMCC will give the CMA the power to impose conduct requirements on a designated undertaking by giving the SMS undertaking a notice.⁶ It is crucial to analyse what criteria would be used to define “anticompetitive” conduct and what the proposed prohibitions – targeted at specific SMS companies – would mean for UK consumers regarding many of the services they enjoy and find beneficial. It is important to distinguish between types of conduct that may be legitimate and pro-competitive and those that may be prohibited upfront by a “digital code.”

For example, the CMA would be able to prevent SMS undertakings from “restricting interoperability between the relevant service or digital content and products offered by other undertakings.”⁷ CCIA encourages interoperability as a way to increase market contestability and reduce barriers to entry – practices such as multi-homing and switching can help keep markets open to entry and expansion. However, mandating that one company interoperate with another may put users at risk. Forced data sharing poses risks to user privacy. Furthermore, this obligation can affect integrity and security, since tools and technologies to fight spam, scams, and other harmful activities may be compromised if third-party apps are not obligated to meet security standards required for interoperation. Without requiring these sorts of assessments, conduct requirements risk being presumptive or not evidence-based. These should be on the face of the bill.

It is also important for the designed mechanisms to be applicable to the proposed *ex-ante* approach. For example, the DMCC includes a “countervailing benefits exemption” that applies to an undertaking’s conduct – if they demonstrate that it gives rise to benefits to users of the digital activity that outweigh any competitive harms, the conduct is indispensable and proportionate to the realization of those benefits, and the conduct does not eliminate or prevent effective competition.⁸ Although CCIA generally supports this type of objective justification defense, the exception seems to be challenging to apply in practice. As an *ex-ante* regime, the regulator should be required to make balancing assessments of the value to consumers before/upon drafting conduct requirements and not merely as an exemption. An exemption is important for protecting consumers from overregulation but alone lacks coherence as a straight import from traditional *ex-post* regimes.

⁶ *Id.* at 28.

⁷ *Id.*

⁸ *Id.* at 32.



The point of concern here is, in fact, that the SMS designation process and the implementation of the codes do not seem to take into account the consumer’s benefits or harm. In practice, under the proposed Bill, the code would be imposed, and if the undertakings want to challenge it, the only option is to go to court where the appeal would be based on a judicial review. It is important to consider that the undertakings are in the best position to provide relevant evidence and useful explanations about their products and services and the benefits they provide to consumers. Therefore, CCIA strongly recommends that UK policymakers take into account the impact on consumers by including mechanisms in which undertakings can also participate. Additionally, it is also important to implement mechanisms that can be applied in practice and that are coherent with the proposed approach rather than exceptions that are difficult or impossible to apply and are incompatible with the *ex-ante* approach.

Similar observations could be made regarding the proposed “final offer mechanism” that is designed to resolve breaches of conduct relating to unfair payment terms.⁹ This mechanism is untested and provides a powerful price-setting tool available for almost any possible complaint, which essentially gives the CMA price-setting powers over the entire economy.

These examples reflect the importance of analyzing each one of the mechanisms that have been included in the Bill to make sure that the UK regulation is proportionate, coherent, and effective. As such, it is crucial for the UK Parliament “to get it right” because an overly complex and confusing legislation can lead to significant unintended consequences that would harm consumers, innovation, and the entire UK economy.

3. A More Robust Appeal Process

The DMU will have the power to make SMS designations, impose conduct requirements, and have PCI investigations against specific companies. Therefore, it is critical to implement proportionate procedural protections for affected parties in such proceedings. CCIA encourages Parliament to consider that any investigation should give affected undertakings the opportunity to defend themselves in all stages of the process and be secured by suitable protections. This includes procedural safeguards and clear procedures to protect due process and defense rights as well as access to appeals on the merits. Most decisions under the DMCC will be subject to a

⁹ UK Department for Science, Innovation and Technology, “Final offer mechanism: policy summary briefing” (2023).

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1152471/final_offer_mechanism-policy_summary_briefing.pdf. [“The Final Offer Mechanism will require the DMU to choose between two final offers made by the parties, without any ability to put forward alternative payment terms. This will incentivise parties to put forward a sincere ‘final offer,’ as the decision-maker will choose the offer which it considers to be more reasonable; a party that favours itself too much risks the other party’s bid being chosen.]



judicial review standard, limited to assessing whether the DMU has acted rationally and followed procedural requirements. However, it is particularly important that the DMCC's new and untested regulatory regime apply the appeal on merits standard for review. Understanding the concern that full merits appeals may delay regulatory decisions, strict time limits, such as those in other CMA appeals regimes, including electricity, railways, financial services, and postal services, could be set to speed up the process. This is crucial considering that the lack of strong safeguards significantly affects business certainty and predictability, investment, and innovation. Therefore, the appeal on the merits mechanism should be included in the Bill.

Although there is already in place a CMA market investigation regime, the PCI seems to be expected to go beyond that regime by providing additional flexibility for the regulator. CCIA strongly believes that, before proposing any new regulation, UK policymakers should carefully evaluate whether existing competition provisions and tools are in fact appropriate and sufficient to combat potentially anticompetitive conduct involving SMS, and avoid discriminating between the process applied against companies under the scope of the PCI and those that are covered by the traditional regime. As such, coherent, proportionate, and strong procedural safeguards and appeal mechanisms are essential to preserve a robust and competitive UK economy.

CCIA welcomes any questions from Parliament.