Civil Society Submission on the Digital Markets, Competition and Consumers Bill

The **Open Markets Institute** uses research and journalism to expose the dangers of monopolisation, identifies changes in policy and law to address them, and educates policymakers, academics, movement groups, and other influential stakeholders to establish open, competitive markets that support a strong, just, and inclusive democracy.

Foxglove Legal works to make tech fair. We brought the UK's first successful challenges to decision algorithms in government and are involved in cases seeking to hold tech platforms accountable in areas from misinformation to labour relations to data protection. We seek stronger, more inclusive enforcement of competition law in the digital realm.

The **Balanced Economy Project** is dedicated to protecting democracy and tackling excessive concentrations of economic and financial power. Our goal is to hold powerful corporations to account and to reclaim the ability of present and future generations to continually restructure our economies, by collectively constraining corporate power.

Submission summary

The UK's Digital Markets, Competition and Consumers Bill (DMCCB) is an impressive and ambitious piece of legislation. While competition authorities in the UK, including the CMA, already have tools to tackle monopolistic practices by dominant firms, a failure to use these effectively in the past – combined with the fast-moving nature of digital markets – means new powers are needed to empower enforcers and society as a whole. Similar measures are being introduced elsewhere, including the European Union's Digital Markets Act (DMA), Section 19a of the German Competition Act, and proposed legislation in Australia and the United States. By imposing stringent requirements on digital monopolies – known in the legislation as firms with "Strategic Market Status" or "SMS" – the DMCCB will keep the UK at the forefront of international efforts to rein in dominant tech giants and inject fair competition into digital markets.

Below we outline some targeted improvements that we believe would make the DMCCB more effective, including reversing amendments that significantly weaken the legislation. But we also believe the main priority should be to move fast. Despite being one of the first countries to not only identify the threat posed by platform monopolies, but also investigate that threat, and to publish recommendations for new legislation and enforcement practices, the UK has since fallen behind the EU, Germany, and other governments in introducing digital markets legislation. Meanwhile, a handful of Big Tech firms continue to exploit their dominance to undermine

democracy and the free press in the UK, harm independent businesses and consumers, and block the emergence of genuine rivals, all while seeking to extend their power into new industries and technologies. In short, time is of the essence.

Proposed improvements

Reversing changes that weaken the legislation

Several late amendments made by the government to the DMCCB in the House of Commons (in response to heavy pressure from industry players) risk significantly undermining the CMA's ability to enforce the legislation, in particular by increasing the ability of dominant tech firms to delay and stifle its application.

One set of amendments (to Clauses 19, 21 and 45) impose new requirements on the CMA to demonstrate "proportionality" before it imposes Conduct Requirements or Pro-Competitive Interventions (PCIs) on SMS firms. Not only will this slow down the CMA's ability to stamp out monopolistic conduct and promote fair competition in highly concentrated digital markets, but the failure to define what is "proportionate" will create legal uncertainty while giving SMS firms another legal basis on which to challenge CMA decisions.

Another amendment to Clause 19 requires the CMA to "consider the likely benefits for consumers" before imposing Conduct Requirements on SMS firms. This is unnecessary, given the CMA already has a statutory duty to promote competition for the benefit of consumers. It also adds a procedural obstacle to effective enforcement while restricting the CMA's ability to tackle monopolistic abuse and exploitation of other groups, including small businesses, workers and citizens.

A change to Clause 29 removes the requirement for SMS firms to prove "indispensability" when claiming the already problematic "countervailing benefits exemption" (more on this below), making it even easier for them to evade the DMCCB's requirements.

Finally, changes to Clause 88 enable SMS firms to challenge penalty decisions on the merits rather than on judicial review principles, expanding the grounds on which these decisions can be appealed and impeding the CMA's ability to quickly impose fines for abusive conduct.

Taken as a whole, these problematic changes seriously weaken the DMCCB and should be reversed. The recent history of competition enforcement has highlighted the shortcomings of traditional antitrust law in tackling digital monopolies, while demonstrating how dominant corporations make aggressive use of legal exemptions, ambiguities and loopholes to stifle enforcement and overwhelm under-resourced regulators. It is crucial that the DMCCB – which is itself a response to these historic failures – does not make the same mistakes.

Removing the countervailing benefits exemption

One of the most problematic features of the Bill is the countervailing benefits exemption (Clause 29). This is a significant loophole that would require the CMA to close a conduct investigation (into a breach of a Conduct Requirement) when an SMS firm is able to 'prove' that the anti-competitive conduct in question produces benefits which supposedly outweigh the harms, and that the conduct is "proportionate" to the realisation of those benefits. We believe the exemption provides SMS firms with too much room to evade Conduct Requirements by positing questionable benefits which can be measured only through questionable and sometimes arbitrary methods.

SMS firms will exploit this loophole by channelling their considerable resources into bogging down the CMA with posited benefits, which – even if ultimately rejected – will require lengthy and expensive work by the regulator to define, measure and consider, slowing down its overall work in enforcing the new regime. Moreover, there are very few genuine instances of anti-competitive conduct that create more benefits than harms. The exemption should therefore be struck from the Bill.

Replacing the forward-looking assessment with a backward-looking test

Another potential loophole is the Bill's methodology (Clause 5) for determining whether an undertaking has "substantial and entrenched" market power. This is based on a forward-looking assessment by the CMA of a period of at least five years, in which the regulator must consider future market developments relevant to the firm's potential SMS designation. However, the inevitably speculative nature of a forward-looking assessment makes the process vulnerable to being gamed by dominant platforms.

For example, such firms may use the emergence – and even hypothetical emergence - of potential challengers to rebut the enforcer's claim that they enjoy substantial and entrenched market power, even where their dominance has yet to be meaningfully threatened by those challengers. An illustrative example of this is the rise of TikTok, which Meta has instrumentalised to push back against antitrust scrutiny. Yet while experiencing rapid growth in terms of user numbers, TikTok has so far failed to seriously challenge the economic dominance of Meta in online advertising (the basis of Meta's market power), generating less a tenth of the latter's global revenues. Dominant platforms may also use emerging technologies – such as generative AI – to claim that their dominance is transitory, claims that will be difficult for the CMA to rebut given future uncertainty.

While it is sensible to base designation on more than just a firm's market power in any given year, a more verifiable way of establishing a platform's substantial and entrenched market power would be to look backwards, not forwards. While a platform's future dominance is always subject to a small degree of uncertainty, its dominance in the past is a matter of empirical fact. We therefore recommend amending Clause 5 of the DMCCB so that substantial and entrenched

market power is based on past data, rather than a forward-looking assessment. A simple way of doing this would be to require an SMS firm to have met the Bill's turnover condition and held a position of strategic significance over a period of at least three years, an approach broadly in line with that of the EU's DMA.

Placing Pro-Competitive Interventions on an equal footing with Conduct Requirements

Pro-Competitive Interventions are one of the DMCCB's most powerful features, giving the CMA the tools to tackle serious competition problems in digital markets through a range of structural measures, including interoperability requirements, divestiture and forced separation. However, we are concerned that as drafted, the DMCCB does not place PCIs on an equal footing with Conduct Requirements.

Whereas the Bill allows the CMA to develop Conduct Requirements parallel to the designation process and impose them on SMS firms immediately or shortly after designation, there is no similar provision for PCIs. This means that if the CMA identifies competition problems that would be best addressed by a PCI, it will have to wait almost two years to impose one (based on a 9-month SMS designation investigation followed by a 9-month PCI investigation, plus up to another four months to issue a pro-competition order), compared to just 9 months for Conduct Requirements. Not only will this delay action to promote competition in digital markets, but it also risks incentivising the CMA to use Conduct Requirements to tackle urgent problems better suited to PCIs, with potentially unsatisfactory results. And it will hinder the CMA from moving quickly and aggressively to tackle monopolisation of nascent technologies, including AI.

The solution to this problem is straightforward. The DMCCB should be amended to clarify that the CMA can initiate PCI investigations during the SMS designation process, enabling it where necessary to impose PCIs on SMS firms immediately or shortly after designation. Another helpful change would be to require the CMA to consider potential PCIs as part of its duty to monitor compliance with Conduct Requirements, set out in Clause 25 of the Bill. This would ensure that when Conduct Requirements fail to solve the competition problems the CMA has identified, the regulator can quickly shift gears and apply more powerful PCIs.

Empowering the CMA to tackle leveraging of market power in both directions

The DMCBB is designed to address the ability of dominant digital platforms to leverage their power from one activity/market to another. This is reflected in Clause six of the Bill, which in determining whether a firm has a position of strategic significance, considers its ability to "extend its market power [from one digital activity] to a range of other activities". It also features in Clause 20 (3) of the Bill, in which one of the permitted types of conduct requirement is preventing SMS firms from "carrying on activities other than the relevant digital activity in a way that is likely to increase the undertaking's market power materially, or bolster the strategic significance of its position, in relation to the relevant digital activity".

While we agree with the Bill's intent to prevent dominant firms from leveraging their power across activities and markets, we believe it is incomplete. As currently drafted, the Bill only allows the CMA to prevent SMS firms from using non-designated activities to increase their market power in designated activities, but not when firms use their dominance in designated activities to increase their power in non-designated activities. This could, to give just one example, involve an SMS firm using its designated cloud computing arm or designated search engine to give preferential treatment to its undesignated proprietary AI foundation model.

Such conduct should be of great concern to the CMA, as it enables SMS firms to establish and increase their market power in activities in which they are not already dominant, as opposed to merely reinforcing their hold on markets they already control. If the Bill's objective is to boost competition in the UK's digital economy, then keeping relatively less concentrated markets open is at least as important as attempting to unpick dominance in markets that are already highly concentrated. This important gap could be addressed by amending Clause 20 (3), so that the CMA can also impose Conduct Requirements preventing SMS firms from leveraging their market power from a designated into a non-designated activity, as well as vice versa.

Tougher merger control rules for SMS acquisitions

The DMCCB introduces a requirement for SMS firms to report mergers which meet criteria relating to share ownership/voting rights, relevance to the UK, and transaction value. While this will help ensure that problematic acquisitions by dominant tech firms do not fly under the CMA's radar, the Bill does not give the regulator additional powers to intervene in such deals. But strategic acquisitions by Big Tech firms created the extreme dominance the DMCCB is designed to tackle, from Google's acquisitions of DoubleClick, YouTube, and UK-based DeepMind to Facebook's takeovers of WhatsApp and Instagram.

Existing merger control practice in the UK and elsewhere have struggled to grapple with tech acquisitions, which can appear relatively harmless in the present while resulting in serious competition issues later. In the UK, the CMA can only intervene in a merger if it proves that the deal is 'more likely than not' to result in a 'substantial lessening of competition' (SLC). This standard can be difficult to meet in unpredictable digital markets, increasing the chance of harmful deals slipping through the net, as noted by both the CMA and the Furman Review.

To address this, the DMCCB should be amended to give the CMA greater scope to block or impose remedies on SMS acquisitions. While the new acquirer-focused threshold introduced by the Bill (see above) will give the CMA the ability to investigate takeovers of innovative startups that do not meet the UK's current merger control thresholds, it does not increase the authority's ability to intervene where it identifies harms to competition. The Bill should therefore introduce a tougher merger control regime for acquisitions by SMS firms, based on a different standard of proof.

One way of doing this would be to adopt the proposal from the Digital Markets Taskforce (consisting of the CMA, Ofcom and the ICO), whereby the CMA could intervene in mergers following an in-depth phase 2 investigation if the deal poses a 'realistic prospect' of giving rise to a SLC, as opposed to being 'more likely than not' to do so. Another option, also considered by the CMA and recommended by numerous experts, would be to reverse the burden of proof in SMS acquisitions, so that merging parties are required to prove that a merger is not anti-competitive, as opposed to the CMA having to prove that it is. This would not only reduce the risks of harmful takeovers being approved, but also shift the administrative burden away from the CMA towards large corporations with far greater resources. We believe either of these alternatives would be an improvement on the current merger control provisions in the DMCCB.

Increasing transparency to ensure flexibility is not exploited

The DMCCB's flexibility is a major strength, giving the CMA the discretion to design bespoke rules and remedies tailored to each platform's business model and technology, including emerging technologies such as generative AI. However, it is also important to acknowledge the potential risks posed by this flexibility. The most significant risk is that designated SMS firms take advantage of this flexibility to propose remedies that have a minimal impact on their business models and do little to promote competition. While the CMA is ultimately responsible for imposing Conduct Requirements, PCIs and other interventions on SMS firms, the latter may exploit information, technical, and resource asymmetries to push their preferred solutions onto the regulator.

In this case, we do not believe addressing this risk requires removing the flexibility afforded by the DMCCB. Instead we believe it is essential that third parties – including the public, civil society groups, independent businesses, and consumers – be given a high degree of transparency and input on deliberations between the CMA and SMS firms. Otherwise, enforcement of the DMCCB risks becoming a closed-door dialogue between the regulator and Big Tech firms, which would ultimately be in the latter's interests.