

## **Open Markets Institute Submission on the Digital Markets, Competition and Consumers Bill**

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### **About the Open Markets Institute**

The Open Markets Institute (OMI) 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. We focus especially closely on the new and growing threats that online “platform monopolies” pose to the free exchange of news, information, and ideas. Our team possesses deep expertise in how monopoly power distorts outcomes in major markets, ranging from the technology sector and agriculture to pharmaceuticals and transportation.

### **Overview of comments on the UK Digital Markets, Competition and Consumers Bill**

The Open Markets Institute views the UK’s Digital Markets, Competition and Consumers Bill (DMCCB) as an impressive and ambitious piece of legislation. While competition authorities in the UK, including the CMA, already possess powerful tools to tackle monopolistic practices by dominant firms, a failure to enforce these effectively in the past – combined with the fast-moving nature of digital markets – means new powers would be of enormous value to enforcers and society as a whole. Similar ‘ex-ante’ measures are being introduced in other jurisdictions, including the European Union’s Digital Markets Act (DMA), Section 19a of the German Competition Act, and plans for pro-competition regulation in Australia and the United States. Passing the DMCCB will ensure the UK remains at the forefront of international efforts to rein in dominant tech giants and inject much-needed competition into digital markets.

Below we outline a number of targeted improvements that we believe would make the legislation stronger and more effective. But we also believe the main priority should be to move fast. Despite being one of the first countries to become aware of the threat posed by platform monopolies, to 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 prevent the emergence of genuine rivals, all while seeking to extend their power further into new industries and technologies. In short, time is of the essence.

## Areas of strength

### *Flexible approach*

One of the main strengths of the DMCCB, according to our analysis, is its flexible approach, whereby once a platform is designated as having Strategic Market Status (SMS), the CMA is able to tailor regulatory measures to its individual business model in the form of conduct requirements and pro-competition interventions, including through remedies not exhaustively defined in the Bill. This is in contrast to the approach taken by the EU's DMA, which sets out an exhaustive and universal set of obligations for all platforms designated as 'gatekeepers' under that legislation. Similarly, the DMCCB's expansive definition of digital activities will enable the CMA to use its new powers to tackle anti-competitive practices in emerging as well as mainstream technologies, helping ensure these markets remain open and contestable.

### *Pro-competition interventions*

Pro-competition interventions (PCIs) are one of the DMCCB's most powerful features. While the Bill's conduct requirements will play an important role in ensuring SMS firms behave in a fairer, more consistent and transparent manner, PCIs will enable the CMA to undertake more sweeping structural interventions designed to inject real competition into digital markets. These remedies, based on the powers given to the CMA by the 2002 Enterprise Act, could include everything from requirements to make an SMS firm's service interoperable with that of a rival, to mandated data portability, to forced separation of an SMS's firm's business divisions. Given the extreme levels of concentration observed in digital markets in the UK and elsewhere, and the repeated failure of behavioural remedies to promote greater competition, we believe PCIs will ultimately be the key to achieving the government and CMA's objective of creating a fairer and more competitive digital economy.

### *Acquirer-focused threshold*

One of the Bill's most important provisions (clause 124) is the introduction of an acquirer-focused threshold to the UK's merger control regime. This would allow the CMA to scrutinise mergers that fall below current turnover and share of supply tests, if the acquirer has at least a 33% share of supply of goods or services in the UK, and UK turnover of at least £350 million. This new threshold will play a critical role in enabling the CMA to investigate so-called '[killer acquisitions](#)', whereby dominant firms – in technology, pharmaceuticals and other sectors – acquire innovative small firms either to prevent them emerging as potential competitors, or to gain an early foothold in new markets. This is particularly important in relation to emerging technologies such as virtual reality, where there is [already evidence](#) of Big Tech firms using strategic investments and acquisitions to bolster their market power.

## Proposed improvements

### *Introducing safeguards to ensure flexibility is not exploited*

As argued above, the flexibility the DMCCB gives the CMA to design bespoke rules and remedies tailored to each platform’s business model is a major strength of the legislation. 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 put forward 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 be able to take advantage of information, technical, and resource asymmetries to push their preferred solutions onto the regulator.

This is why the Open Markets Institute, as a general practice, promotes the adoption of “bright line” rules for structuring markets and corporations, and for strictly delimiting the potential behaviors of any business that provides an essential service or produces an essential good. As we have detailed in some depth, perhaps the most important such bright line rule is the requirement that every essential communications and commercial platform provide the same service on the same terms to all users, without any favoritism or other forms of discrimination. The DMCCB’s “fair dealing objective” is very much in the spirit of this approach.

In this case, we do not believe addressing this risk requires removing the flexibility afforded by the DMCCB. But to fully eliminate any concerns, we believe it is essential that third parties – including the public, civil society groups, independent businesses, and consumers – be provided with a high degree of transparency and input on deliberations taking place 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. To address this, we suggest extending CMA’s duty to consult on initial conduct requirements to subsequent related measures, including conduct investigations (into breaches of conduct requirements), enforcement orders, and any commitments offered by SMS firms in response to conduct investigations. The same principle should apply across the entire process of designing and enforcing PCIs. The Bill should also provide more specificity on what information the CMA will provide when consulting stakeholders, how it will respond to points and concerns raised by those stakeholders, and how long consultation periods will last.

### *Limiting the countervailing benefits exemption*

One of the most concerning features of the Bill is the so-called “countervailing benefits exemption” (clause 29). This 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 outweigh the harms, and that the conduct is

“indispensable” and “proportionate” to the realisation of those benefits. As currently drafted, we believe the exemption provides SMS firms with far too much room to evade conduct requirements by positing questionable benefits which in turn can be measured only through questionable and sometimes arbitrary methods. While this exemption may appear reasonable at first glance, SMS firms are likely to channel their considerable resources into bogging down the CMA with claimed 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.

It is worth considering whether the exemption is needed at all. There are very few genuine instances of anti-competitive conduct that create more benefits than harms. Short of this, we recommend that the scope of the exemption in the Bill be significantly curtailed to prevent its abuse. This could be done in a number of ways, including:

- Providing an exhaustive list of the types of countervailing benefits SMS firms are able to claim, keeping this as narrow as possible;
- Limiting the number of countervailing benefits SMS firms can claim, both in relation to individual conduct and overall;
- Introducing a time limit on the duration of investigations into countervailing benefits claims, to prevent these from dragging on indefinitely;
- Placing the burden of proof on SMS firms, not the CMA, to demonstrate the existence of any countervailing benefits;
- Requiring countervailing benefit claims to be subject to public consultation.

#### *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 will consider future market developments relevant to the firm’s potential SMS designation. While it is sensible to base designation on more than just a firm’s market power in any given year, 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 will 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.

A more concrete and verifiable way of establishing a platform’s substantial and entrenched market power would be to look backwards, not forwards. While whether a platform will maintain its market power in the future is always characterized by a small degree of uncertainty, a corporation’s dominance in the past can be proven with objective data. This is the approach taken by the EU’s DMA, in which a gatekeeper needs to have met the criteria for designation in each of the past three financial years. 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. If the test is to remain forward-looking, then at the very least we recommend shortening the period for evaluation from five to three years.

#### *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. This is despite the fact that strategic acquisitions by Big Tech firms have played a major role in establishing and entrenching the 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 regimes in the UK and elsewhere have struggled to grapple with the implications of 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 when it comes to unpredictable digital markets and technologies, 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 would be able to 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 firm 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.

### *Placing PCIs on equal footing with conduct requirements*

PCIs are one of the DMCCB’s most powerful features, giving the CMA wide discretion to address serious competition problems in digital markets through a wide range of structural measures, including interoperability requirements and divestiture. However, we are concerned that as currently drafted, the DMCCB does not place PCIs on an equal footing with the weaker conduct requirements.

This is because 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 nonetheless 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 unnecessarily 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.

The solution to this problem is straightforward. The DMCCB should be amended to clarify that the CMA can instigate PCI investigations during the SMS designation process, enabling it where necessary to impose PCIs on SMS firms immediately or shortly after designation. In a similar vein, 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 where conduct requirements are insufficient in solving the competition problems the CMA has identified, the regulator is able to quickly shift gears and apply more powerful PCIs.

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

The DMCCB is clearly intended 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, whereby 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.

Yet the latter practice should be of equal and arguably even greater concern to the CMA, as it can enable 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 impose conduct requirements preventing SMS firms from projecting their market power from a designated into a non-designated activity, as well as vice versa.