



British Prosperity Unit

Special briefing: how to amend the Digital Markets, Competition and Consumers Bill

Fred de Fossard



The Digital Markets, Competition and Consumers Bill is one of the most significant pieces of economic policy introduced by the British Government since the UK's departure from the EU. It overturns decades of competition policy orthodoxy, and would give the Competition and Markets Authority unprecedented powers and authority to regulate the digital economy. So far, this Bill has received little attention during its passage through Parliament, and many implications of its policies are relatively unknown. Legatum Institute has prepared this briefing, and full legal analysis, including suggested amendments, to improve the Bill by embedding greater due process, predictability, and evidence standards to the regime. This would allow the regulator to address specific problems in the digital economy while putting clear guardrails in place to limit regulatory drift and minimise unintended consequences.

About the author

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About the British Prosperity Unit

The British Prosperity Unit (BPU) was established by Legatum Institute in 2023 to lead the Institute's work on economic policy and government reform in the United Kingdom. The United Kingdom is wrestling with the demands and opportunities presented by Brexit, restored sovereignty, and the changing currents of globalisation. The BPU will develop policies, based on rigorous economic and legal analysis, to enhance British economic competitiveness, reduce the burdens of the state, and foster economic growth.

Summary of recommendations

The Digital Markets, Competition and Consumers Bill should be amended to limit regulatory drift; to protect British competitiveness; and to ensure proper standards of evidence and due process are followed by the regulator. Following in-depth legal and political analysis by Legatum Institute, this briefing recommends five overarching policy changes to the Bill:

- **Increase regulatory accountability and ensure the Competition and Markets Authority (CMA) is governed by clear rules set in law, instead of with such wide discretion;**
- **Limit mission creep, stopping the CMA from conducting fishing expeditions into almost any aspect of a business designated as having 'Strategic Market Status';**
- **Restore predictability to the system and maintain the strong advantages of the post-1998 competition law framework, so businesses investing in the British digital economy have greater confidence in the behaviour of such a powerful regulator;**
- **Remove the sweeping and unaccountable powers included in the Bill which allow ministers to rewrite the entire enforcement regime regarding mergers; and**
- **Provide proper recourse to justice, so that businesses that may be fined up to 10 percent of their global turnover are able to challenge the merits of the CMA's underlying decision in the courts, instead of only being able to challenge the crucial underlying evidence base on process grounds.**

Each of these thematic recommendations is in a forthcoming paper accompanied by precise, effective, and carefully written amendments which will curtail the unintended consequences which could flow from the Bill as written, which would be damaging to the digital economy, and British prosperity overall.

A goose that lays the golden egg

The digital sector has been one of the great successes of the twenty-first century British economy. Thanks to a welcoming regulatory environment, generally attractive taxes, and deep pools of talent, London, Cambridge and the south-east of England have developed one of the world's leading clusters of technological innovation. The UK has, for years, boasted the strongest digital economy in Europe, and attracts more venture capital investment than France, Germany, and Spain combined.¹

This is an achievement which benefits the entire country. The digital economy is a source of economic output, innovation, employment, foreign investment, and tax revenue.² It sits at the heart of many of the Government's stated ambitions for the economy, to increase innovation, to

1 'Venture Capital (VC) investment into UK continues to slump in opening months of 2023' (KPMG, 26 April 2023) www.kpmg.com/uk/en/home/media/press-releases/2023/04/venture-capital-investment-into-uk-continues-to-slump-in-opening-months-of-2023.html accessed 23 October 2023.

2 'Digital Sector Economic Estimates 2020: annual GVA' (National Statistics, updated 17 May 2023) www.gov.uk/government/statistics/economic-estimates-gva-for-dcms-sectors-and-the-digital-sector-2020/digital-sector-economic-estimates-2020-annual-gva accessed 23 October 2023.

establish the UK as a global leader in artificial intelligence (AI), and to foster economic growth with what the Prime Minister calls “one of the most pro-investment tax regimes” in the world.³ Meanwhile, the Chancellor of the Exchequer, Jeremy Hunt, claims that his reforms to financial regulation will turn the UK into the “next Silicon Valley” in the next two decades.⁴

Considering the UK’s ageing population, decades-long slump in productivity, and struggles with administrative efficiency, the Prime Minister would be right to consider technological innovation the primary problem-solver and route to sustained economic growth. The Prime Minister has put AI at the heart of his strategy with the United States; he spent years courting the tech sector while Chancellor of the Exchequer,⁵ and even tried to bring venture capital-style investing within the staid walls of the Treasury.⁶

Threats to the golden egg

Despite this, the Government’s actual policy to the tech sector is more hostile than many would imagine. In 2020, it introduced the digital services tax, a tax on revenues, rather than profits, aimed at the largest tech firms operating in the UK,⁷ and this year the government tabled the Digital Markets, Competition and Consumers Bill, which intends to reduce the dominance of big tech in the British tech industry. The UK’s economic regulator, the Competition and Markets Authority (CMA), has also increased the number of investigations and prosecutions it conducts in the tech sector.⁸

It is not new for governments to appear Janus-faced; there are always contradictions and tensions between policies fronted by different departments, despite the cover of collective agreement. But the British state’s approach to tech regulation threatens to undo the Prime Minister’s ambitions for the sector and the economy as a whole.

Since the UK’s departure from the EU, the CMA has made high-profile interventions such as the attempt to stop Amazon investing in Deliveroo,⁹ and blocking Microsoft’s purchase of Activision.¹⁰ These two interventions were subsequently overturned, but they mark an

3 ‘PM urges tech leaders to grasp generational opportunities and challenges of AI’ (Prime Minister’s Office, 12 June 2023) www.gov.uk/government/news/pm-urges-tech-leaders-to-grasp-generational-opportunities-and-challenges-of-ai accessed 23 October 2023.

4 Karen Gilchrist, ‘UK’s new finance reforms part of a 20-year plan to be ‘world’s next Silicon Valley,’ minister says’ CNBC (London, 9 December 2022) www.cnbc.com/2022/12/09/uk-finance-reforms-part-of-20-year-plan-to-be-the-next-silicon-valley.html accessed 23 October 2023.

5 ‘UK tech firms and investors brought together for landmark Treasury Conference’ (HM Treasury, 14 September 2021) www.gov.uk/government/news/uk-tech-firms-and-investors-brought-together-for-landmark-treasury-conference accessed 23 October 2023.

6 ‘New £375 million scheme to drive investment in innovative firms of the future opens for applications’ (HM Treasury, 20 July 2021) www.gov.uk/government/news/new-375-million-scheme-to-drive-investment-in-innovative-firms-of-the-future-opens-for-applications accessed 23 October 2023.

7 HM Revenue and Customs, ‘Digital Services Tax’ (11 March 2020) www.gov.uk/government/publications/introduction-of-the-digital-services-tax/digital-services-tax accessed 23 October 2023.

8 Norton Rose Fulbright, ‘Digitalization, Big Tech and copycat antitrust investigations’ (March 2023) www.nortonrosefulbright.com/en/knowledge/publications/74c278e8/digitalization-big-tech-and-copycat-antitrust-investigations accessed 23 October 2023.

9 UK Competition and Markets Authority, ‘Amazon / Deliveroo merger inquiry’ (7 September 2020) www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry accessed 23 October 2023.

10 UK Competition and Markets Authority, ‘Microsoft / Activision Blizzard merger inquiry’ (13 October 2023) www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry accessed 23 October 2023.

attitudinal shift in the CMA; it has announced another “in-depth” inquiry into the proposed purchase of Figma by Adobe, suggesting its interest in being a British regulator with global reach in competition policy is showing no sign of changing.¹¹

It is worth exploring how and why this has happened.

One of the landmark pieces of work which precipitated this hardening against global tech firms by the British Government was the review into digital competition by American economist and former adviser to President Barack Obama, Jason Furman.¹² The Furman Review, published in March 2019, was commissioned by HM Treasury to examine whether new competition laws were required to address the dynamics of the emerging digital economy. The Review blamed increasing market concentration in the tech sector for creating a “winner takes most” model, which reduced competition and consumer choice, to the benefit of a small number of American tech giants.

This was followed by the CMA’s own long-term study into the digital advertising market, which was published in July 2019, and affirmed the government’s view that the tech sector was in need of regulatory intervention.¹³ The CMA found that Facebook and Google, the two biggest tech giants at the time, enjoyed an “unassailable” duopoly in the online advertising market.¹⁴ Set in the context of the aforementioned Digital Services Tax, which was originally announced in 2018 by the then-Chancellor, Philip Hammond, the British Government appeared to be going out of its way to criticise, regulate, and tax global tech giants.

This set the tone for the Government’s approach to digital competition policy. Despite multiple changes of Prime Minister since then, as well as a change in CEO and Chairman at the CMA, this has remained the Government’s preferred approach.

11 UK Competition and Markets Authority, ‘Microsoft / Activision Blizzard merger inquiry’ (28 September 2023) www.gov.uk/cma-cases/adobe-slash-figma-merger-inquiry accessed 23 October 2023.

12 Digital Competition Expert Panel, ‘Unlocking digital competition’ (HM Treasury, 13 March 2019) www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel accessed 23 October 2023.

13 UK Competition and Markets Authority, ‘Online platforms and digital advertising market study’ (1 July 2020) www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study accessed 23 October 2023.

14 Andrea Coscelli, ‘Digital Markets: using our existing tools and emerging thoughts on a new regime’ (Fordham Competition Law Institute conference, 9 October 2020) www.gov.uk/government/speeches/digital-markets-using-our-existing-tools-and-emerging-thoughts-on-a-new-regime accessed 23 October 2023.

The Digital Markets, Competition and Consumers Bill

The Bill that is before Parliament went through various iterations in its development. The mergers regime that is included, for example, is less far-reaching than originally planned, as a chorus of criticism from investors and representatives of start-ups encouraged ministers to limit its powers (though the subsequent compromise is still much more expansive than many realise).¹⁵

The primary measures in this Bill which affect the digital economy are as follows¹⁶:

- Giving statutory powers to the Digital Markets Unit (DMU), which sits within the CMA;
- Allowing the DMU to designate a company as having so-called “Strategic Market Status” in the digital economy, which is a term based on market size, market power, and an ability to entrench and exploit this position. This status will apply to specific ‘designated activities’ within the company – ie, search, e-commerce, social media – but has implications far beyond this area of activity;
- Enabling the DMU to conduct deep investigations into designated companies, and to mandate so-called “pro-competitive interventions” which could reduce the market power of the company. This could amount to changing the way companies integrate their products, or even preventing them from introducing new products or software updates without pre-approval from the regulator;
- Mandating greater transparency requirements on designated firms for potential mergers and acquisitions, which poses risks to competition;
- Allowing the CMA to levy fines up to 10 percent of a designated firm’s global turnover for breaches of the new regime; and
- Streamlining the legal processes so that any decisions by the CMA can only be appealed via Judicial Review, instead of a full right to appeal on the merits of the case.

These mark a serious shift away from the status quo in British competition policy, and would be more radical than the Digital Markets Act recently passed by the European Union, far more invasive than the powers used by the Federal Trade Commission (FTC) in the United States. Despite this, the Bill has progressed through multiple stages in the House of Commons with little attention, overshadowed perhaps by the political turmoil of the last two years.

The Bill was originally meant to be published in draft for pre-legislative scrutiny, but was instead introduced for immediate legislation. Unfortunately, there are a range of problems with the way in which it has been written, which would have benefited from rigorous external scrutiny and stress-testing before being turned into legislation. If now turned into law as written, this Bill would usher in a host of unintended consequences, which would be damaging to the prosperity of the United Kingdom. These will be addressed in a coming Legatum Institute paper, with replacement amendments recommended.

¹⁵ Coalition for a Digital Economy, ‘The Digital Markets Unit: On the Side of Startups?’ (September 2021) www.coadec.com/news/the-digital-markets-unit-on-the-side-of-startups/ accessed 23 October 2023.

¹⁶ UK Parliament, ‘Digital Markets, Competition and Consumers Bill: call for written evidence’ (18 May 2023) www.parliament.uk/business/news/2023/may-2023/digital-markets-competition-and-consumers-bill-call-for-written-evidence/ accessed 23 October 2023.

The majority of the political debate over the digital markets measures has been about the legal rights for companies affected by the regime to appeal decisions. It has been boiled down to whether or not a company prosecuted by the CMA under this regime can take the regulator to court for a full appeal, or a more limited one. This is an important issue, and is worth exploring, but it has obscured many more problems with the Bill.

There are five main areas of concern where we make recommendations for improvement and reform. These are:

1. **The risk of mission creep:** the powers in the Bill are far-reaching and allow for deep penetration into businesses captured by the regulations. They are also loosely defined and, as written, could be applicable to businesses far beyond the tech sector, and beyond activities one would reasonably associate with the digital economy.
 - The definitions used for the designation of a business as one with 'strategic market status' in the digital economy are too broad. To achieve 'strategic market status' and be under this regime, a business must sell its products and services to customers in the United Kingdom "by means of the internet," "the provision of... digital content" or a combination thereof (cl.3(1)).
 - There is even wider jurisdiction covering partially non-internet based services: using the internet and an electronic communications service as defined by the s.32(2) of the Communications Act 2003 qualifies. This means that even the use of a fax at a designated company would be regulated.
 - Whether a company has entrenched market power and a position of strategic significance is to be decided by the CMA and its own analysis. The Secretary of State also has the power to amend the conditions (cl.6(2)).
 - The most precisely defined aspect of what makes a business qualify for regulation under the proposed regime is turnover thresholds:
 - a global turnover of £25 billion,
 - or a UK turnover of £1 billion.
 - Again, the Secretary of State can amend the thresholds (cl.7(3)). In any event, they will easily be met by any relatively large business. Spotify, the music streaming giant, is a strong supporter of the Bill.¹⁷ Their UK revenues in 2022 amounted to £225 million, with global turnover of €11.7 billion.¹⁸ They may not qualify for the regime today, but they may well do so soon, as such a significant force in the streaming market.
 - Without properly defined activities, this regime is vulnerable to serious expansion, which could bring other businesses into scope and turn the CMA into an even more powerful and unpredictable regulator, with even less accountability.

¹⁷ Daniel Thomas, 'Spotify boss urges UK to enact tougher regulation of tech gatekeepers' *Financial Times* (London, 2 October 2023) www.ft.com/content/f0138fee-5375-47b2-a717-a1eaf8038512 accessed 23 October 2023.

¹⁸ William Turvill, 'Spotify UK sales soar as it ramps up presence' *The Times* (London, 30 July 2023) <https://www.thetimes.co.uk/article/spotify-uk-sales-soar-as-it-ramps-up-presence-zb8f5mmjl> accessed 23 October 2023.

- It is entirely possible, under current definitions, that a retail giant like Tesco would qualify as an SMS digital company under this regime, considering the size of its online retail operation, and total revenue in the UK.¹⁹ It would be unwise to rely on the CMA's judgement alone, without more precise definitions.
 - Furthermore, the Bill allows the regulator to undertake investigations beyond the subject matter of the original inquiry, and to require information to be generated. It is a licence to go on fishing expeditions within businesses. To hand these sorts of powers to a regulator which is not democratically accountable is an extraordinary step.
2. **Extensive and opaque discretions to the regulator:** the Bill proposes significant reductions in accountability to the CMA. These opaque powers make the regime even more unpredictable, which will be of great concern to the businesses affected, considering the huge sums they may be fined by the CMA.
- Mergers uncertainty: The merger regime sits behind a Henry VIII clause which allows the Government to rewrite it at any moment. The uncertainty in this policy will be of concern to entrepreneurs and investors, who will not want to see a new raft of restrictions on mergers policy;
 - The CMA will take powers to force a reporting duty on all designated firms, demanding they disclose significant information about any transactions or potential mergers, but without any reference to a firm's designated activity. So a firm which has been designated as having Strategic Market Status in search or e-commerce, for example, may have to provide the CMA information about any and all activities the CMA pleases, on which it can then choose to conduct an investigation. These are extraordinary provisions which would allow a government regulator unprecedented access into private enterprise.
 - The CMA will also demand the appointment of compliance officers within these companies, to provide information to the regulator, paid for by the companies themselves. This ultimately amounts to the CMA demanding that designated companies fund the regulator's investigations into their own activities.
3. **An out-of-date evidence base:** the Furman Review and the CMA's study were published over four years ago, and the tech economy has seen extraordinary changes since then. Post-Covid 19 pandemic shifts in consumer behaviour have fundamentally altered the digital economy, and evidence is growing that the supposedly "unassailable" duopoly enjoyed by Google and Facebook is actually a thing of the past.²⁰
- The duopoly was already past its peak when the Furman Review was published.²¹ Since then, Amazon has gained significant market share in online advertising, along with e-commerce in general. This reflects changing consumer habits in the Covid-19 pandemic,

19 Jane Denton, 'Boss of Tesco refutes Which? claims the supermarket giant has been 'doing very well' in the cost of living crisis as profits halve on sales of £56.7bn' *This is Money* (13 April 2023) www.thisismoney.co.uk/money/markets/article-11967841/Tesco-sees-sales-rise-56-7bn-profits-halve.html accessed 23 October 2023.

20 Tamar Terell, 'The Google-Meta Ad Duopoly is Ending: What Now?' *Invest is Digital* (26 January 2023) www.investisdigital.com/blog/paid-media/google-meta-ad-duopoly-ending-what-now accessed 23 October 2023.

21 Ibid.

many of which have remained, such as the expansion of online retail, which now accounts for nearly 30 percent of British retail sales.²²

- The social media market is also fundamentally different today to that of 2019. The rise of TikTok and Snapchat has transformed the market in ways not predicted in 2019.
- The advent of more advanced AI chatbots in 2022 and 2023, just as this Bill was being introduced, also shows how technology has moved on. The chatbot developed by Microsoft-funded OpenAI, ChatGPT, is already changing the way people discover information online, and challenging online search in a way nobody predicted.²³ This Bill is an attempt to legislate for a digital economy which essentially no longer exists.

4. **The Bill isn't even faithful to the evidence it cites:** instead of acknowledging that the evidence is out of date, the Bill instead proposes to far exceed the recommendations of the Furman Review, which did not propose upending the evidence-based consensus that British competition policy has enjoyed since 1998.

- The most controversial aspect of this Bill is forbidding designated companies from a full right to appeal on any decision by the CMA based on the merits of a case except for limited aspects such as fines. This goes beyond the recommendations of the Furman Review, which stopped short of recommending a Judicial Review (JR) standard, but instead advocated a middle-ground where decisions could be appealed on the 'reasonableness' of the CMA's actions and their factual basis. While this is certainly not a full merits-based appeal, it is not the same as the JR standard that the Bill advocates, especially as it leaves no clear avenue to challenge factual evidence used against the particular company singled out for designation.²⁴

5. **Poor due-process protections:** similarly to the above concerns, the Bill proposes taking market-wide powers and applying them to individual, designated companies, in order to levy potentially huge fines, and change their products. It is of particular concern, therefore, that the Bill proposes to reduce the companies' ability to appeal these decisions in court. Even if the fine can be appealed, the evidence used in the investigation and the underlying decision to regulate will sit behind a judicial review standard which only allows irrational decisions to be challenged and does not allow any intervention as to the weight of evidence even though the matter relates to facts pertaining to a company that has, effectively, been singled out. This is alien to British legal tradition; those singled out should have their day in court. This means that no company can meaningfully challenge the regulator if it believes it has made an incorrect decision; it will only be allowed to appeal its punishment. The house always wins.

- The Bill allows for the CMA to re-open investigations against designated companies, and even provides powers of entry to company premises, with and without warrants. The Bill applies enforcement measures more commonly used against cartels and organised crime to the tech sector for what may be innocent breaches or administrative compliance failures. There is even a power to single out an employee in the company for punishment, even though the policy question is essentially whether new technology

22 Office for National Statistics, 'Internet sales as a percentage of total retail sales (ratio) (%)' (20 October 2023) www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/j4mc/drsj accessed 20 October 2023.

23 Liam Tung, 'Google is feeling the ChatGPT threat, and here's its response' *ZDNet* (3 February 2023) www.zdnet.com/article/google-is-feeling-the-chatgpt-threat-and-heres-its-response/ accessed 23 October 2023.

24 Digital Competition Expert Panel, 'Unlocking digital competition', op cit.

products should be marketed, owned, and operated in one way or another. Combining these powers, and the ability to levy fines worth ten percent of a company's global turnover, with a limited right to appeal a decision in court is an extraordinary step for the government to take.

The wider context, Microsoft-Activision, and the contentious subject of cloud gaming

This Bill comes at a time when the CMA has taken a much more interventionist stance when it comes to regulating big tech. As mentioned above, it has embarked on a number of high-profile investigations and attempts to block mergers and investments in the sector.

The CMA and the FTC, in the United States, have even had to fend off accusations of collusion when it comes to mergers, following the unexpected attempt by the CMA to block the Microsoft-Activision merger, as the CMA has far more domestic power than the FTC, which is constrained by the American legal system.²⁵

Specific issues with the CMA's initial attempt to block the Microsoft-Activision deal further emphasise the potential dangers of the Bill at hand, and why it is important to amend it.

The CMA is acting as an extra-territorial regulator. Yes, British customers play games produced by Activision, such as the wildly famous Call of Duty, but its attempt to block a merger between two US firms sends a hostile signal about doing business in Britain to the rest of the world. If a regulator is overstepping the mark in sensitive and innovative sectors like the digital economy, companies may reconsider whether Britain will be an early market to launch its products.

Furthermore, the CMA's decision to block the deal in the interests of preserving competition in the cloud gaming market is contentious, because the very concept of a cloud gaming market is contested.²⁶ Prominent industry experts have argued that cloud gaming is not a distinct market, but a feature of a much broader consumer-facing platform, or part of the gaming market more widely, where it will compete with console-based games. The way in which the CMA homed in so aggressively on perceived dominance in cloud gaming suggests that the regulator was motivated to find any possible reason to stop the merger, and chose a specific niche to justify its actions.

When the United States District Court, Northern District of California, ruled on the FTC's attempt to block the deal, the judge, Jacqueline Scott Corley, found that the merger would have no negative effects on competition, and would in fact increase consumer access to Activision's games.²⁷

In light of this, ministers and MPs should be wary about handing more powers, with reduced accountability, to a regulator which is making poor use of the powers it already has.

²⁵ Reuters, 'FTC chair met UK antitrust officials last week but did not talk deals' *Reuters* (28 April 2023) www.reuters.com/markets/deals/ftc-chair-met-uk-antitrust-officials-last-week-did-not-talk-deals-2023-04-27/ accessed 23 October 2023.

²⁶ Joost Rietveld, 'Cloud Gaming Is Not A Distinct Market' *Submission prepared for the UK's Competition and Markets Authority concerning its Microsoft / Activision Blizzard merger inquiry* (31 March 2023) https://assets.publishing.service.gov.uk/media/642e9e29f6e620000c17dde1/Cloud_gaming_Opinion_.pdf accessed 23 October 2023.

²⁷ Federal Trade Commission v Microsoft Corporation 3:23-cv-02880 (ND Cal).

What needs to be done

The necessary changes would make significant improvements to the digital markets regulatory regime. They would:

- **Increase regulatory accountability and ensure the CMA is governed by clear rules set in law, instead of with such wide discretion;**
- **Limit mission creep, stopping the CMA from conducting fishing expeditions into almost any aspect of a business designated as having 'Strategic Market Status';**
- **Restore predictability to the system and maintain the strong advantages of the post-1998 competition law framework, so businesses investing in the British digital economy have greater confidence in the behaviour of such a powerful regulator;**
- **Remove the sweeping and unaccountable powers included in the Bill which allow ministers to rewrite the entire enforcement regime regarding mergers; and**
- **Provide proper recourse to justice, so that businesses that may be fined up to 10 percent of their global turnover, are able to challenge the merits of the CMA's underlying decision in the courts, instead of only being able to challenge the crucial underlying evidence base on process grounds.**

The specific amendments which achieve the above are as follows:

1. **Turning designation criteria into binding Terms of Reference for the DMU's investigations.** The current proposal does not track intervention back to the underlying concern giving rise to designation. The designation criteria should instead track the *relevant issues*, and not the company boundary, in transparent Terms of Reference.
2. **Introducing a requirement for a transparent evidence basis for Codes of Conduct and Pro-Competitive Interventions (PCIs).** The Bill proposes a wide range of Conduct regulation and PCIs on a loose objectives-based approach. The powers should instead be restricted to the relevant issues from the Terms of Reference to prevent mission creep. A consistently framed evidence base is important as it can be used to define things like changes to orders and compliance with them, by tracking back to the underlying Terms of Reference.
3. **Cutting the costly reporting requirements in the mergers regime.** Regarding mergers, there is a serious risk of the system being overwhelmed by thousands of notifications. There are also serious due process concerns and a need to trim notifications to the power that can be used to address them. If a government wishes to see growth via investment in small companies, there is a critical role for larger ones buying up smaller ones, considering existing competition concerns. Many technology companies lack intellectual property protections and merger activity is critical to both investment and to scaling up. The proposed reporting requirement will discourage investment precisely by those most able to make it. This damages the growth of a Silicon Valley Sand Hill Road startup culture to the UK, which would be a major loss to the British economy.

4. **Rowing back on the proposed enforcement overreaches.** There are serious overreach issues in the current proposals. These include powers of entry without a warrant and to fine individuals. There are new powers to order trials even outside investigations. The DMU would be able to require the creation of evidence even without an open investigation. Combined with the conceptual expansion of the regime, these process concerns will remove any meaningful checks and balances unless altered. The Bill expands regulatory power on a market-wide regulation model and increases the regulator's punitive abilities, while reducing due process. This cherry-picks between regulatory rulemaking and adjudication, and should be removed.
5. **Due process.** There are concerns with the overreliance on Judicial Review, which is well in excess of the established, expert opinion. We recommend the inclusion of safeguards to limit the regulator from reopening investigations into companies without proper evidence. To ensure proper access to justice for companies investigated, the paper recommends using a hybrid appeal standard, rather than judicial review, as is currently written. This will allow for the proper scrutiny of the regulator's decisions, and respects the recommendations of experts like Jason Furman. The CMA has nothing to fear from appeal if its work is of a high standard, especially as it would still retain significant discretion with this hybrid approach.

Outside the European Union, the United Kingdom has an opportunity to reshape its regulatory regime to create the most welcoming and competitive economy in the world, regardless of market size.

The Digital Markets, Competition and Consumers Bill is the most significant piece of competition law since the Enterprise Act 2002. Instead of making the British economy more open and more competitive, it adds a huge new layer of regulatory complexity to the digital economy, and hands swathes of political powers to unelected officials in the CMA. This is a failure to realise the promise of Brexit.

The debate on the matter of judicial review versus full merits-based appeals thus far has obscured far the wider implications of this Bill and the unintended consequences that may stem from it. There are many areas which would have grave consequences for the British tech sector: they would reduce competition and investment at a time when it is most needed; they would hurt entrepreneurs and startups thanks to the uncertain requirements being made of the mergers regime; and they may enable serious regulatory mission creep into other parts of the economy.

The tech sector is one of the jewels of the modern British economy and is expected to much of our economic recovery. The world's largest tech firms play a vital role in this sector, supporting a thriving tech ecosystem in which large and small firms are interdependent. As written, this Bill would represent a dangerous increase in regulatory power over the digital economy, suggesting that the UK is increasingly "closed for business", as Activision declared, following the CMA's attempt to block its merger with Microsoft.

If the Government insists on completing this Bill's passage through Parliament, it should amend it in the ways suggested in this paper. These amendments would ensure important checks and balances are embedded into the Bill, and allow for the more effective regulation of the digital economy without hindering British economic competitiveness.

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