

## GOVERNMENT TO AMEND DMU LEGISLATION STRENGTHENING RIGHTS OF APPEAL FOR PLATFORMS

Following the opening of a new session of Parliament this month, the UK Government has re-introduced the Digital Markets, Competition and Consumers Bill (the “**Bill**”) with a number of significant amendments. The Bill will seek to impose new obligations on firms judged by the CMA’s Digital Markets Unit (“**DMU**”) to have Strategic Market Status (“**SMS**”). When enacted, the Bill will also allow the CMA to impose penalties on SMS firms for failures to adhere to new codes of conduct as well as other obligations the CMA will be empowered to impose through so-called ‘Pro-Competition Interventions’ (“**PCIs**”).

There had been widespread concern that the Bill had sought to subject CMA decisions to a judicial review standard in any appeal of decisions made under these broad new powers. In a concession to those pushing for rigorous scrutiny of CMA decisions, the Government has tabled amendments to the Bill, such that penalties imposed by the CMA under the new legislation will be subject to a full merits review.

In a ministerial statement accompanying the new amendments, the Government also confirmed that other decisions taken by the CMA in the course of administering the new regime – such as decisions designating a platform as an SMS platform, or imposing PCIs, will be subject to an assessment of proportionality – a test which goes further than the traditional judicial review standard.

Whilst retaining the JR procedure, the requirement that decisions to designate firms as SMS, or decisions to impose PCIs must be “proportionate”, will require the CAT to more closely examine these decisions and their underlying policy rationale, beyond asking whether they are merely ‘reasonable’.

This goes beyond the current grounds of judicial review, and will enable platforms seeking to challenge DMU decisions to invite the Competition Appeal Tribunal to scrutinise decisions in greater detail, subjecting the CMA to more scrutiny than initially envisaged under previous drafts of the Bill.

- Government has amended the standard of review for DMU decisions.
- Penalties (i.e. fines) will be reviewable ‘on the merits’.
- Other decisions made such as designation as a Strategic Market Status firm, or the imposition of Pro-Competition Interventions will be subject to the requirement that they must be ‘proportionate’.

## **STANDARD OF REVIEW: JUDICIAL REVIEW vs FULL MERITS REVIEW**

### **Judicial Review**

The CAT will ask whether the decision was taken within (or outside) the CMA's statutory powers; whether the decision is 'rational' or 'reasonable'; whether the CMA has taken into account all relevant considerations.

- JRs are often front loaded and more expeditious
- Hearings are short (days versus weeks/months)
- Limited (if any) expert evidence, or witness evidence
- Little (if any) documentary disclosure
- May be determined largely 'on the papers'. But expedition not guaranteed.
- Decision may be quashed, though common for decision to be remitted to the decision-maker for re-consideration.

### **Full Merits Review**

The CAT will reopen the decision, with full re-examination of evidence underpinning it.

- Same standard as appeals against Competition Act decisions made by the CMA - key question is whether the court would have reached the same decision as the CMA -
- Review is not restricted to points of law - an appeal to the CAT is a full merits appeal involving (often multiple) witnesses of fact, expert evidence, and with trials typically lasting between 4 and 6 weeks.
- The CAT has the power to confirm or set aside the CMA's decision (in whole or part), revoke or vary any penalty, or remit the matter to the CMA to reconsider.

Clifford Chance has acted in more full-merits appeals in the Competition Appeal Tribunal of CMA decisions than any other firm in the last 5 years, and has a leading judicial review practice. To learn more about our capabilities, please contact any of the individuals listed overleaf.

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