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Digital Markets, Competition and Consumers Bill

A new sheriff in town – Getting ready for a shake-up in consumer protection law

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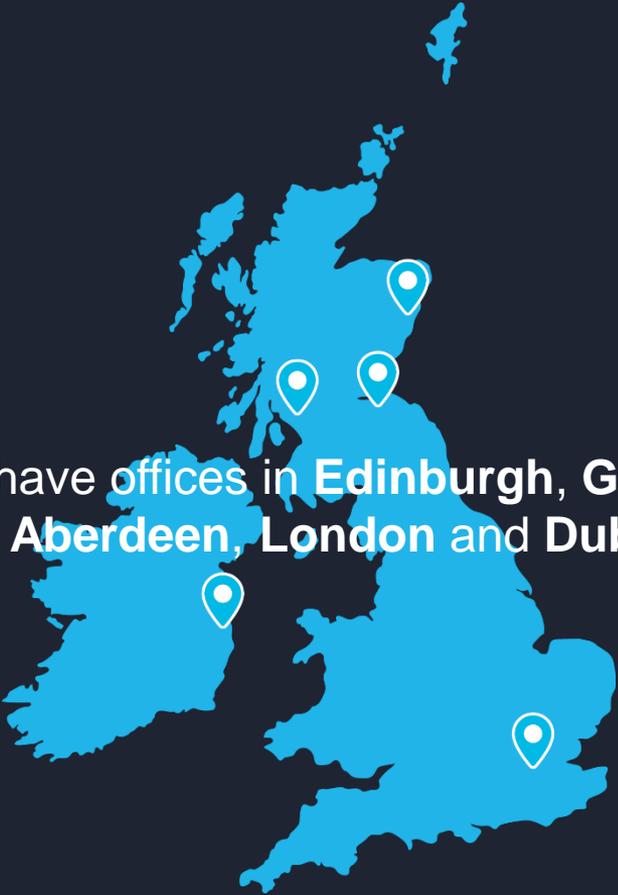
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A light blue silhouette map of the United Kingdom and Ireland is centered on a dark blue background. Five white location pins are placed on the map to indicate office locations: one in the north of Scotland, one in the west of Scotland, one in the central-western part of England, one in the south of England, and one in the west of Ireland. The text 'We have offices in Edinburgh, Glasgow, Aberdeen, London and Dublin' is overlaid on the map in white, bold font.

We have offices in **Edinburgh, Glasgow, Aberdeen, London and Dublin**

Agenda

1. The DMCC Bill – What it does.
2. Status of the Bill.
3. Why the CMA.
4. Existing consumer protection law.
5. What enforcement looks like.
6. Interactions with existing enforcement – Trading Standards etc.
7. What will change.
8. Final comments.



DMCC Bill – What it does



Introduces a new regulatory regime for digital markets, particularly large platforms with significant market power.



Reforms aspects of UK competition law regime, including merger control and the CMA's investigatory powers.



Gives the CMA significant new powers to enforce consumer protection law.



Introduces new legal requirements for doing business with consumers.



Status of the Bill

- Introduced April 2023.
- Final stages of the Parliamentary process. 30 April – Consideration of final amendments.
- Amendments in the Lords.
- Serious question as to whether this can get through prior to election.
- No guarantee that the Bill will make it through intact but seems likely – Cross party support.



Competition and Markets Authority

- UK's competition regulator.
- Investigates and enforces competition law (anti-competitive agreements and abuse of dominance), mergers and market investigations.
- Strong direct enforcement powers under competition law. 10% global turnover fines. Well resourced. Evidence-led. Over 1000 staff.
- CMA has 'second tier' enforcement powers for consumer protection law. Plays a pivotal role as a general enforcer.
- Desire to enhance the CMA's consumer protection role: 2018 Consumer Green Paper; 2019 Tyrie Report; 2021 Penrose Report; 2021 BEIS/Kwarteng Consultation/2022 Decision.
- Covid: Cost of living crisis.



Weaknesses in existing powers

(Lord Tyrie, 25 Feb 2019)

“The CMA’s consumer law powers are unfit for its current purpose, and far short of what would be required to enable the CMA effectively to fulfil a consumer interest duty. Three major weaknesses stand out.

First, where the CMA concludes that consumer law has been breached, it has no powers to order the cessation of illegal practices. Instead, it must pursue businesses through the courts in order to obtain a binding remedy. This differs from the enforcement of competition law, where the CMA decides itself whether the law has been broken and gives directions and imposes fines on offending firms.

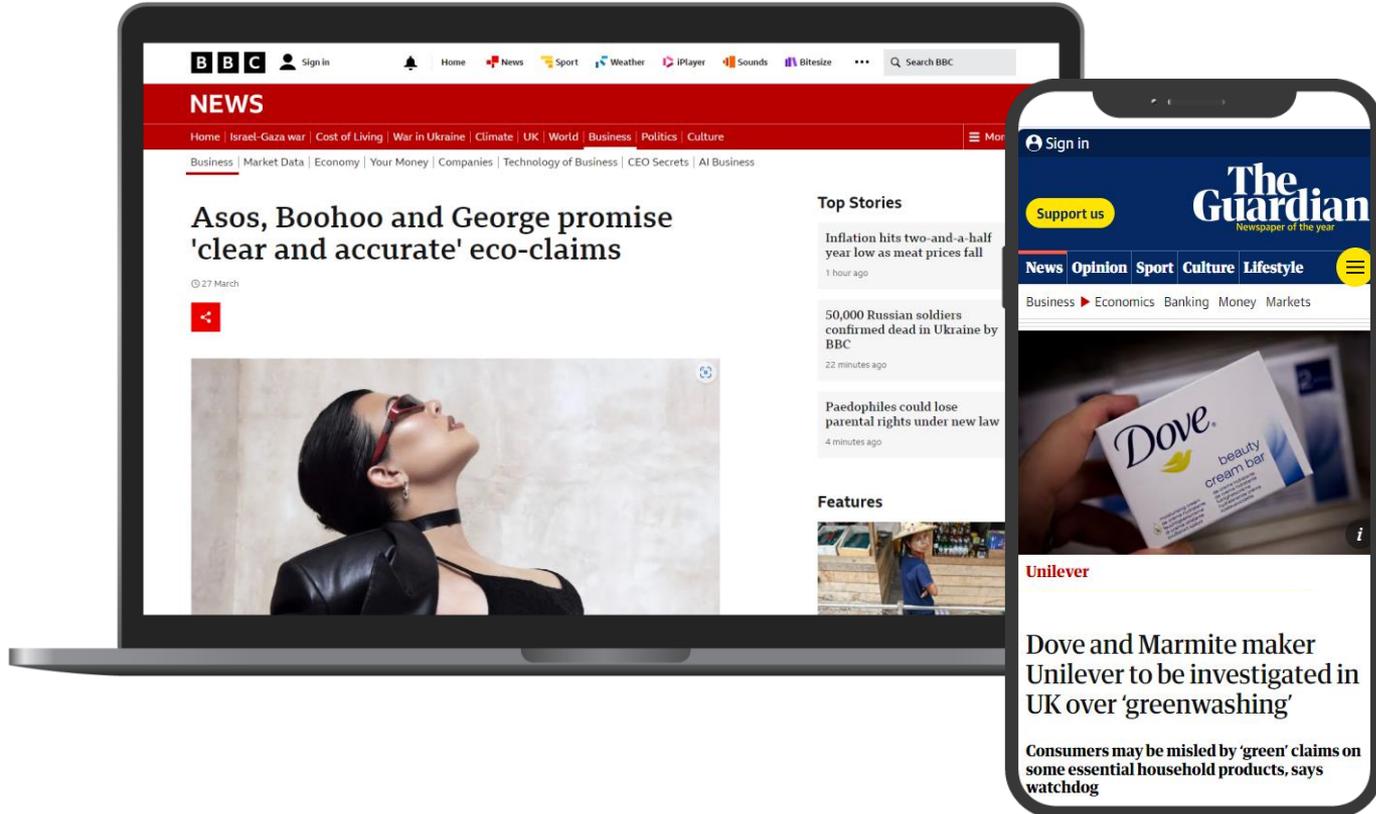
Second, even when the CMA wins in court, no civil fines are available (again by contrast with competition law enforcement).

Third, the CMA can secure undertakings from a firm, as an alternative to taking it to court. But the CMA cannot fine the firm if it fails to comply with the undertaking. From a commercial perspective, for the minority of firms that are prepared to risk breaking the law, there may often be no business case for compliance. Deterrence, in short, is very limited.”

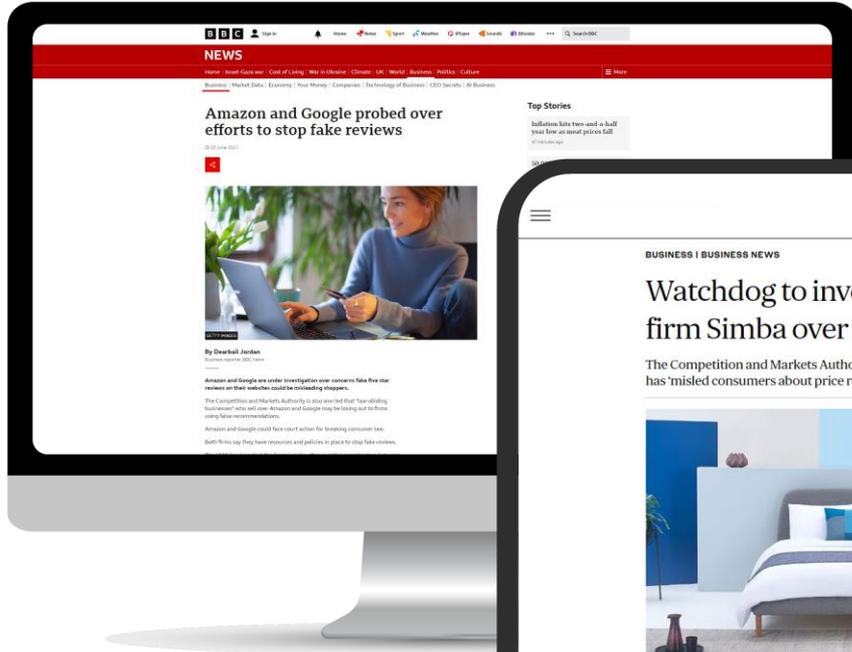
CMA’s existing enforcement powers do not match its role as a consumer law ‘regulator’.



Recent activity...



And more...



CMA – Current activities



Greenwashing



Marketing tactics (including manufactured scarcity)



Loyalty pricing



Fake reviews



Utilising existing powers

(Example: Securing of undertakings from BooHoo/Asda/Asos)



CMA – Future focus

- Act in areas of essential spending where people are “under financial pressure”.
- Online choice architecture and misleading pricing.
- Preparing to use new consumer enforcement powers under DMCC Bill.
- Broadening green claims work.
- Project to consider unit pricing in the groceries sector. Preparing to review loyalty scheme pricing by supermarkets.



Existing consumer protection law

- There is a lot of (interrelated) law in this area including:
 - **Consumer Protection from Unfair Trading Regulations 2008 (CPR)** – prohibits misleading/aggressive sales practices; lists practices that are always unfair; breach can be criminal, applicable to directors/officers of corporate bodies:-
 - **General prohibition** - Regulation 3 - unfair practices are prohibited.
 - **Regulations 5-7** – misleading/aggressive practices are prohibited.
 - **Schedule 1 blacklist** – including, displaying a trust/quality mark with no authorisation; falsely stating a product is available only for a very limited time to elicit an immediate decision from the consumer (e.g. falsely stating prices will increase in 7 days); establishing/operating a pyramid promotional scheme; claiming the trader was about to cease trading/move premises when it is not (“closing down sale”).

Enforcement today

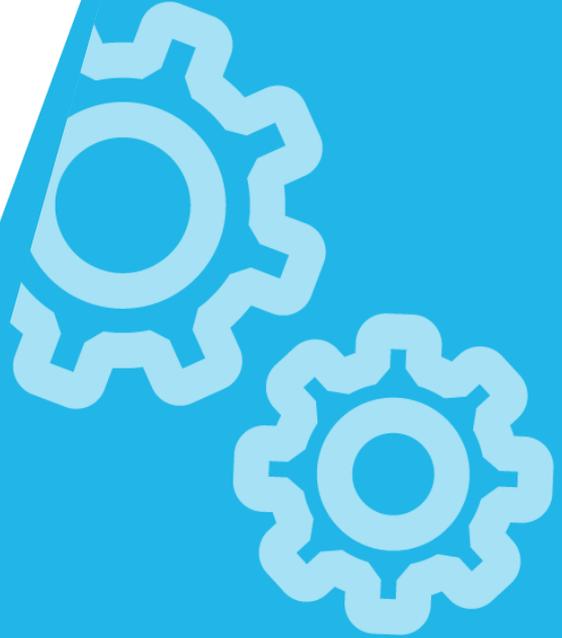
- General enforcers (GB):-
 - The CMA – key ‘hub’ role with all enforcement action being notified to it - its focus is on markets.
 - Trading Standards Services (“TSS”) – consumer detriment more generally (e.g. rogue traders, single large businesses).
- Concurrent consumer (designated) enforcers, including:-
 - ASA, Ofcom, Ofgem, ICO.
- Enforcement/ penalties - education, advice, codes of conduct and guidance – under CPR.
 - Civil – Enforcement Order (breach of Order is a contempt of court – 2 years imprisonment/fine).
 - Criminal – on indictment a fine or imprisonment up to 2 years.
- Food Standards Scotland/ the Scottish Food Crime and Incidents Unit - (the Food (Scotland) Act 2015).
 - Focus on food crime and consumer protection – fraudulent conduct/serious regulatory non-compliance w/dishonesty.
 - Enforcers and authorised officers – local Environmental Health and Food Safety Officers.



The CMA's enforcement principles

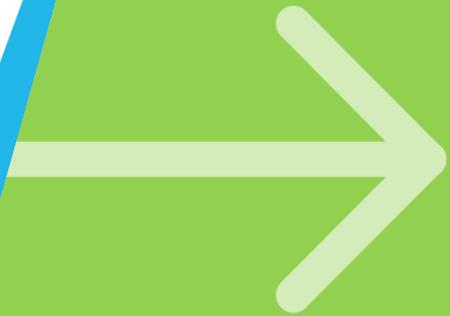
“Good consumer outcomes rely on competitive markets to provide choice and value, while vibrant competition relies on consumers confidently shopping around. Effective compliance and enforcement of consumer law ensures that consumers are treated fairly and are able to drive effective competition through the exercise of informed choice.”

(CMA58, para 2.2)



Enforcement in practice

- TSS - responsibility for most day-to-day consumer law enforcement. Enforces a wide range of consumer related legislation on its own (animal welfare, food safety, alcohol, knives and fireworks).
- CMA and TSS:-
 - Partnership working to ensure enforcement is complementary, and in assessing consumer detriment to decide which cases are suitable for the CMA.
 - TSS has a duty to notify the CMA on proposed enforcement action.
- We acted in the CMA consumer protection leasehold investigation – multiple undertakings provided by multiple housebuilders/freeholders.
- Cost of living in an emerging/ongoing theme.
- CMA is conducting a compliance review of environmental claims in the fast-moving consumer goods sector (including food and drink); interested in unit pricing and supermarket loyalty schemes.
- Scottish Trading Standards are concerned with pricing in convenience stores and unacceptable levels of short-weight prepackaged goods. Ongoing area for improvement/possible enforcement. Priority areas are counterfeit goods (seizure), doorstep/energy marketing scams, and illicit trade in puppies.



What will change: CMA enforcement

Overarching structure – CMA as the hub with the other enforcers remains broadly the same. Main change is the likelihood of more consumer enforcement and focused use of powers.

Direct enforcement powers by the CMA. Becomes a powerful regulator of consumer protection law:

- Allowing the CMA to act more quickly and take on more consumer cases (estimated to lead to hundreds of millions of pounds in benefits to consumers).
- Ensuring that any breaches of unfair trading provisions can be enforced (no loopholes).
- Allowing for information sharing between public authority enforcers have the information they need to take enforcement action.

Powers similar to Competition Act 1998 investigations (cartels and abuse of dominance):

- Conduct investigations.
- Issue infringement enforcement notices (imposing monetary penalties).
- Require the provision of information.
- Issue and enforce undertakings.

Monetary penalties:

- **Infringements:** Up to £300,000, or if higher, 10% of global turnover.
- **Information notices non-compliance or provision of false information:** Up to £30,000, or if higher, 1% of global turnover. **Continued non-compliance:** Up to £15,000 per day, or if higher, 5% of daily turnover.



What will change: Restatement of current law and new requirements

- Consumer Protection from Unfair Trading Regulations (CPRs): All the key ongoing requirements of the CPR remain in place. The CPR is repealed and restated in the DMCC with limited changes.
- The Secretary of State has the power, by regulation to amend Schedule 19 (i.e. add or remove a commercial practice considered unfair).
- During the development of the Bill, Government amended Schedule 19 to include provisions on fake online reviews (new Schedule 19(13)) reflecting how the law can respond to new/developing issues and emerging consumer harms.
- New requirements:
 - Subscription contracts.
 - Consumer Savings Schemes.
 - Regulation of Alternative Dispute Resolution.



Final comments

- Increased level and focus on consumer enforcement – CMA preparing to exercise these powers and functions (increased recruitment). Potentially large penalties in the future as enforcement steps up.
- Cross party support and potential for continued political focus on the sector.
- Commencement provisions.
- Private damages actions – increased risk due to increased regulatory activity and focus.
- Investigations – the CMA is already interested in the food and drink sector. An investigation is onerous and time consuming.



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