Post-Brexit rules for big tech give almost boundless power to the competition watchdog

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Digital Markets, Competition and Consumers Bill

So when the Digital Markets, Competition and Consumers Bill was designed, it was done so with the aim of overhauling its competition regime. Its aim is to cultivate fairer competition in digital markets by facilitating greater choice and transparency for consumers.

Curbing the powers of Big Tech firms is seen as a priority, with a host of them now given a newly designed "strategic market status" to improve competition in digital markets post-Brexit. Largely, these platforms have accepted that they will be subject to tighter regulation, providing this regulation is itself subject to the requisite checks and balances.

Yet, as it stands, the new laws will usher in a new regulatory framework which hands the CMA immense powers, but without the necessary checks and balances. A key example is the lack of scrutiny over the decisions it takes. The legislation will only allow firms to appeal on the basis of judicial review - a standard that assesses whether proper process has been followed. Whether the correct decision was reached is not a factor that can be considered.

The rationale for this is speed. Unfortunately, this is only partly true - whilst the process of a judicial review appeal can be a few months faster than a merits appeal, the only options available to the Competition Appeal Tribunal are to approve the decision or ask the CMA to correct its procedural mistake. The court cannot replace the CMA's decision with its own judgment. If the CMA has to revisit and correct its decision, the whole affair can take double the time. Hardly the Rolls-Royce standard for efficiency.

This is not to mention the vast accountability deficit within the regime. The judicial review appeal standard means there are few consequences for the CMA making the wrong decision. The worst that can happen is the Appeal Tribunal returns its homework with a label "please try again". While the CMA is an excellent competition law enforcer, it is now assuming the role of a regulator of firms with strategic market status - in essence, a new regime. No matter how good the CMA is, they are bound to make mistakes.

This is a glaring regulatory oversight which directly undermines the overarching aspiration of greater accountability and transparency for newly emancipated UK institutions. The simple fact is that the new laws entrust the CMA with immense powers which are not subject to the countervailing mechanisms or checks and balances that are appropriate to the regime's vast remit.

In the event that a big tech firm has reason to believe it has lost out on a decision that has not been properly scrutinised, they may feel they are left with no choice but to refer to the European Human Rights Convention (EHRC). The convention, which the UK is party to and has to adhere to, exists primarily to protect individual human rights, but businesses can indirectly benefit from certain rights it protects; namely, the right to a fair trial.

So where are we left? The UK has successfully escaped the clutches of what it viewed as the bureaucratic Brussels blob, but is it really better for businesses and the competitiveness of the UK?

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