

The UK's New Digital Markets, Competition and Consumers Act

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Overview and Background

The flagship UK Digital Markets, Competition and Consumers Bill received Royal Assent (DMCC Act) on 24 May 2024 and is set to introduce sweeping once-in-a-generation reforms to the existing competition and consumer protection landscape in the UK, including a new *ex ante* regulatory regime for digital markets, significantly expanded investigative and enforcement powers for the Competition and Markets Authority (CMA), and material refinements to the UK merger control regime, as well as a new enforcement regime for the UK consumer protection rules.

We highlight below the key changes introduced by the DMCC Act and what businesses should keep in mind when preparing for the provisions to come into force later this year.

New Regulatory Regime for Digital Markets

Strategic Market Status designation for Big Tech – The CMA's Digital Markets Unit (DMU), which is the enforcer of the new *ex ante* regulatory regime for large digital firms, will be granted the power to designate "Strategic Market Status" (SMS) to any digital firm with:

- Substantial and entrenched market power in respect of a digital activity that is linked to the UK
- A position of strategic significance
- Global turnover of more than £25 billion or UK turnover of more than £1 billion

Tailored conduct requirements – The DMU will have the authority to impose on SMS firms conduct requirements that it considers appropriate in each case, based on the objectives of fair dealing, open choices and trust and transparency, and will be able to enforce them against the threat of fines of up to 10% of global turnover for infringements:

- “Fair dealing” requires that users or potential users of a

relevant digital activity are treated fairly and able to interact with the SMS firm on reasonable terms.

- “Open choice” requires that users should be able to choose freely between digital services and content provided by the SMS firm and those of other firms.
- The “trust and transparency” objective aims to ensure that users have the requisite information to enable them to understand the digital services and content provided by the SMS firm, and the relevant terms on which they are delivered, as well as to make properly informed decisions on how to interact with the SMS firm.

The tailored nature of the conduct requirements for SMS firms is a key distinguishing feature from the EU Digital Markets Act, which prohibits certain practices for all digital platforms designated as gatekeepers.

Pro-competition interventions (PCIs) – The DMU will be granted the power to impose pro-competition orders where it considers that an SMS firm’s designated digital activity is adversely affecting competition in a relevant market. These may take the form of behavioural or structural remedies (S. 46-50) and will be aimed at addressing “the root causes of entrenched market power”.

Mandatory suspensory merger control regime for SMS firms – SMS firms will be required to report mergers for pre-completion clearance where the transaction consideration is £25 million or more, and there is a UK connection (i.e. the target carries out activities in the UK, or supplies goods/ services in the UK). Being mandatory, the notification will carry a standstill obligation (unlike common merger notifications in the UK, which are voluntary).

Updates to Competition Law Enforcement

Extraterritorial effect – The Chapter I prohibition, which prohibits anticompetitive agreements, has been given extraterritorial reach to apply to agreements implemented outside of the UK if there are likely to be direct, substantial and foreseeable effects within the UK – marking a paradigm shift in line with the effects doctrine under EU competition law.

In tandem, the DMCC Act expressly grants extraterritorial reach to the CMA’s investigative powers, empowering it to issue information notices and compel foreign-domiciled companies to produce documents held outside of the UK if they are being investigated under section 25 of the Competition Act 1998.

Enhanced evidence-gathering powers – The DMCC Act also extends the CMA’s information-gathering powers in domestic investigations, strengthening its ability to gather digital evidence, such as in remote-working situations, while in turn introducing more rigorous requirements on third parties to preserve evidence if they know or suspect that a CMA investigation is likely.

Heavier fines for procedural infringements – Fines for noncompliance are increased from a fixed cap of £30,000 to a cap of 1% of global turnover, while daily penalties are increased from £15,000 to

5% of global daily turnover.

Changes to the UK Merger Control Regime

Updated jurisdictional merger control thresholds – Current thresholds under the Enterprise Act set out that the CMA can assert jurisdiction where the target's most recent annual revenue exceeds £70 million (turnover test), or parties have a combined share of supply of 25% or more in relation to any product or service in the UK (share of supply test). The DMCC Act updates these thresholds as follows:

- **Turnover test** – The existing £70 million threshold has been raised in line with inflation to £100 million.
- **Share of supply test** – A *de minimis* threshold has been introduced whereby a merger shall be exempt if each party generates a turnover of less than £10 million in the UK.

The DMCC Act also introduces an additional threshold to capture so called “killer acquisitions”, which will be triggered if one party has an existing share of supply of 33% in the UK and a UK turnover of at least £350 million – i.e. the threshold can be met by the buyer only and does not require increment.

Procedural changes to merger control – Aimed at improving the merger control process, the changes include fast-track Phase 2 reference upon request from the merging parties, extension of the Phase 2 timetable by consent, and the publication of merger notices on the CMA's website.

Transformative Reforms to Consumer Protection

Step change in enforcement – The DMCC Act introduces a new enforcement regime for consumer protection, which will, for the first time, enable the CMA to investigate suspected infringements of consumer law, with wide-ranging evidencegathering and sanctioning powers, similar to the ones it exercises for competition law infringements, which notably include the power to impose significant fines of up to 10% of the infringing party's global turnover. The CMA will also have the power to impose “enhanced consumer measures”, which could involve payments to consumers or early termination of contracts. Given the CMA's continued pledge to help contain the cost-of-living crisis, it will likely be keen to make use of its new powers in this space.

Increased litigation risk – The CMA's enforcement action will no doubt increase the risk of civil damages claims (which are now the norm for competition law infringements). Although the mechanism for bringing opt-out collective action regime (which is currently limited to antitrust claims) will not be expressly available for infringements of consumer protection law (as the proposed amendment was ultimately rejected), we have already seen claims for consumer law infringements making an appearance in UK courts recently (albeit necessarily pursued as antitrust claims) and claimant law firms are expected to continue to be creative in this space.

Targeted practices – New rules dealing with subscription contracts (including mandatory precontract information, cooling-off rights, reminder notices and termination) and “drip pricing” (whereby additional costs are added to the originally displayed price) are being introduced, while fake reviews are added to the list of automatically prohibited practices. Furthermore, the Secretary of State will have the power to designate certain practices as “unfair” by way of secondary legislation.

Consumer-facing businesses should brace for increased regulatory scrutiny and assess the

compliance and corresponding litigation risk of their practices early on.

Conclusion

The game-changing reforms introduced by the DMCC Act are expected to come into effect in autumn 2024. Whilst large technology firms and consumer-facing businesses are certainly the focus, all businesses across the UK will need to understand what the new rules mean for them. The CMA is bound to publish draft guidance on how it will exercise its extensive new powers under the DMCC Act, which will provide further guidance as to how businesses should prepare for the new regime.

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