The Digital Markets, Competition and Consumers Act – the Competition Perspective

This article considers the key changes to general competition law under the Digital Markets, Competition and Consumers Act which received Royal Assent on 24 May 2024 and is expected to enter into force in the Autumn.

DMCCA becomes law

After much anticipation and having benefitted from inclusion in the "wash-up" process prior to Parliament being dissolved in advance of July's General Election, the Digital Markets, Competition and Consumers Act (**DMCCA**) received Royal Assent on 24 May 2024 and is expected to enter into force in the Autumn.

Whilst its introduction of the new digital markets regulatory regime and significant developments to the consumer protection regime have made the headlines, the DMCCA also provides for wide-ranging enhancements to the competition powers of the Competition and Markets Authority (**CMA**) and also changes to the UK merger regime. Whilst updated CMA procedural guidance on its enhanced competition powers is awaited (it published consultations on the new digital markets regime guidance the day of the DMCCA's enactment), this article considers the key changes to general competition law.

Extending the CMA's extraterritorial reach

Under the Competition Act 1998 (**CA98**), the Chapter I prohibition on anti-competitive agreements had only applied to those arrangements implemented, or intended to be implemented, in the UK. The DMCCA broadens the scope of the Chapter I prohibition to specifically cover an anti-competitive arrangement implemented outside the UK where it is likely to have "*an immediate, substantial and foreseeable effect on trade*" in the UK, providing the CMA with greater scope for investigating potentially anti-competitive activity which impacts on the UK, but takes place overseas.

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Complementing this, the DMCCA also sets out the CMA's extraterritorial information-gathering powers. Thus, the CMA has the power to serve requests for information and documents on persons (both individuals and entities) located outside the UK where the person is subject to a competition investigation (or party to a merger) or has a "UK connection" which is broadly defined. As set out below, the DMCCA also ensures that the CMA has the power to obtain information held on servers outside the UK.

This has recently been very much a live issue for the CMA where its formal section 26 CA98 powers to require the production of information/documents from overseas companies had been the subject of legal challenge in the courts. In its Chapter I investigation into the end-of-life vehicle recycling sector, the CMA had sought to use these powers in relation to BMW AG and Volkswagen AG, both incorporated and domiciled in Germany (and without any UK branch or office presence), as well as their UK subsidiaries. Whilst their UK subsidiaries complied with the information requests, the German companies successfully challenged the CMA's authority to issue them with section 26 Notices before the Competition Appeal Tribunal (**CAT**) and the High Court and, in the case of BMW AG, it also successfully challenged the financial penalty imposed by the CMA for its non-compliance. The Court of Appeal subsequently confirmed that the CMA does have the power to require overseas companies to produce documents and information as part of an investigation.

Tools to enhance international collaboration

As the CMA has acknowledged, its "*cases increasingly involve cross-border, multi-national businesses*". The CMA is not alone in dealing with this challenge and international co-operation is important for competition law enforcement. In the post-Brexit era, this has become more complex as the European Commission no longer has jurisdiction to conduct investigations in the UK and the CMA is no longer part of the European Competition Network. There have been various examples recently of the CMA's co-operation with the European Commission and other overseas regulators, including its competition investigation into suppliers of fragrances launched in consultation with the US Department of Justice and the Swiss Competition Commission, as well as the European Commission.[1]

The DMCCA not only extends the CMA's extraterritorial reach, but also sets out the basis on which the CMA can provide investigative assistance to overseas regulators and can also disclose information overseas. Following receipt of a written request for such investigative assistance, the CMA has to consider whether it would be appropriate to do so taking into account a number of factors, including whether:

- it would be able to exercise its powers in similar cases arising in the UK
- there is a co-operation agreement in place between the UK and the relevant jurisdiction
- the matter is sufficiently serious to justify its assistance, and
- the overseas regulator should contribute to its costs.

There are specific circumstances set out where it would not be appropriate for the CMA to assist. In the absence of a requisite co-operation agreement being in place, the Secretary of State's authorisation is required. Whilst there has been some progress in signing co-operation agreements, such as the Multilateral Mutual Assistance and Cooperation Framework (MMAC) with counterparts in Australia, Canada, New Zealand and the US, there are currently few other cooperation frameworks in place as yet.

[1] Suspected anti-competitive conduct in relation to fragrances and fragrance ingredients (51257): https://www.gov.uk/cma-cases/suspected-anti-competitive-conduct-in-relation-to-fragrances-and-fragrance-ingredients-51257

Market inquiries

Whilst the two stages of the existing market inquiry regime are retained (ie., a market study followed by an in-depth market investigation), the DMCCA introduces various reforms to make the regime "*more efficient, flexible and proportionate*". This is beneficial to those businesses operating in a particular market under investigation and also those impacted by the market and its features.

In particular, it enables the CMA to accept undertakings at any stage, whether during a market study or a subsequent market investigation, and provides it with greater flexibility in defining the scope of any market investigation reference (**MIR**). In relation to final undertakings or orders which may be accepted or imposed respectively, the CMA is given the power to require businesses to trial the proposed remedies to assess their "likely effectiveness". The CMA can then vary undertakings or orders up to ten years after its adverse effect on competition finding (but not in the first two years).

The requirement for the CMA to consult on an MIR within the first six months of a market study is abolished by the DMCCA. In addition, the DMCCA specifically caters for a situation which has been the subject of recent legal challenge and sets out the circumstances in which, following the publication of a market study notice and a decision being taken not to make an MIR, the CMA has the power to subsequently make an MIR in relation to the same matter without first publishing a further market study notice.

Again, this has been a practical issue for the CMA and the subject of legal challenge. Apple had successfully appealed against the CMA's decision to make a MIR into mobile browsers and cloud gaming. The CAT found that the CMA had failed to comply with its statutory timeframe and process and, thus, its decision was set aside for being ultra vires. The CMA had appealed the CAT's judgment and the Court of Appeal set aside the judgment.

Enhanced investigatory and enforcement powers

The DMCCA further bolsters the CMA's powers, including:

- **Interviews and evidence**: broadening its power to interview individuals as part of competition investigations, including conducting interviews remotely and interviewing third parties, ie those not connected with the parties under investigation, and extending the legal duty to preserve and retain relevant documents/evidence in relation to competition investigations, including to third parties where they know or suspect that the CMA is conducting, or is likely to carry out, an investigation. This is a wide-reaching obligation.
- **Dawn raids**: providing more flexible powers for the CMA reflecting the realities of post-pandemic changes in working practices and of how electronic information is increasingly stored offsite. In relation to dawn raids conducted at domestic premises, for example, the CMA will have the same powers as it does for such investigations with a warrant at business premises, including "seize and sift" powers. Thus, it will be able to remove large volumes of documents and other evidence from the homes of executives and other senior personnel. The CMA also has the power to require the production of electronic information and documents stored remotely, but which are accessible from the premises, whether business or domestic, at which it is conducting its onsite investigation. Following a recent successful legal challenge in the High Court after the CAT had refused to grant the CMA a warrant to search domestic premises as part of a cartel investigation, the CMA highlighted that:

> "*With the increase in remote-working – and electronic communication – it's essential that we are able to search domestic premises to secure evidence of potential breaches of competition law where appropriate to do so*."

- **Fines**: there are significant changes with tougher penalties being introduced. In relation to fines for (i) failing to comply with information requests, (ii) providing false/misleading information or (iii) falsifying/ destroying/ concealing evidence, the CMA will be able to impose on companies a fixed fine of up to 1% of annual global turnover and/or a daily rate of up to 5% of global daily turnover. (These are also the specified penalties in a new provision specifically empowering the CMA to issue information requests to businesses involved in, or connected with the distribution, supply or retail of motor fuel.) This is a major increase from the fixed and daily rate fines capped at £30,000 and £15,000 respectively. These capped fines would instead be available to the CMA in relation to individuals involved in (ii) or (iii) above. The DMCCA also introduces penalties of a fixed fine of up to 5% of annual global turnover and/or a daily rate of 5% of daily global turnover for companies' failure to comply with the CMA's directions or orders or with undertakings or commitments which they have given to the CMA. The CMA hopes that its increased sanctioning powers will help "*to deter egregious behaviour*".
- **Interim measures**: the CMA can impose these to prevent significant competition harm whilst it conducts an investigation. In relation to this currently under-utilised tool, the DMCCA changes the appeal process: an appeal against an interim measures decision would only be on judicial review grounds, replacing the current merits-based review.

Merger control

The DMCCA retains the voluntary nature of the UK merger regime, with the exception of certain acquisitions by the large tech companies and, the alternative turnover and share of supply jurisdictional tests. It introduces three main changes to the jurisdictional tests:

- Firstly, a new hybrid, ie a combined turnover and share of supply, test where:
  - one of the parties supplies at least 33% of all goods or services of any description in the UK (or a substantial part of it) and has UK turnover in excess of £350m, and
  - the other party is either a UK business, carries on (part of) its activities in the UK, or supplies goods or services into the UK.

The aim is to enable the CMA to intervene and review "killer acquisitions" and certain conglomerate and vertical mergers. The CMA has estimated that this new hybrid test will lead to an increase in its workload of two to five additional merger cases a year. To date, the CMA has made flexible use of the share of supply test (which remains unchanged) in establishing jurisdiction over certain mergers.

It widens the types of transactions involving large businesses operating in concentrated markets which could face CMA scrutiny beyond those in the tech sector for whom there are new mandatory reporting provisions as set out below.

- Secondly, an increase to the general turnover threshold from the current £70m to £100m in relation to the UK turnover of the target. This is to bring the threshold in line with inflation after its introduction over two decades ago. The CMA's expectation is of a reduction of two to three Phase I cases per year.
- Thirdly, a safe harbour is being introduced for "small mergers" where each party's UK turnover is less than £10m which will provide certainty to small businesses and those

overseas businesses with very limited UK activity that such transactions will not be subject to review by the CMA. Again it is anticipated that the CMA's caseload will be reduced by two to three cases per year.

There are also specific provisions for mergers in particular sectors. As noted above, the DMCCA introduces a new mandatory reporting obligation on those large tech firms with Strategic Market Status or SMS designation under the new digital markets regime. Any SMS-designated firm intending to acquire shares or voting rights above certain thresholds (the lowest of which is 15%) in a "UK-connected" business, where the deal is valued at £25 million or more, will be required to report the acquisition to the CMA and comply with a minimum ten working day standstill obligation, during which time the CMA can decide whether to launch a merger investigation. Other provisions relate to "newspaper enterprises and foreign powers" and also energy networks.

The DMCCA also brings in various procedural changes, including a fast-track Phase II merger reference where requested by the parties and the extension to the Phase II timetable by mutual agreement. The latter may well be helpful for managing complex, multi-jurisdictional mergers which are subject to parallel review in other jurisdictions.

Private enforcement changes

In addition to bolstering the CMA's enforcement powers, there are various changes to the private enforcement landscape affecting private litigants bringing competition law-based claims in the courts.

The CAT is given the additional power of granting declaratory relief in individual and collective claims. Thus, the CAT could issue a declaration that either the Chapter I or Chapter II (abuse of a dominant position) prohibitions had been infringed without claimants having to formulate their competition claims as damages claims or an injunction.

In addition, exemplary damages are making a return (they were no longer available following the UK's implementation in 2017 of the EU Damages Directive)[2]. The CAT and the High Court would again have the discretion to award exemplary damages[3] in relation to private damages claims, but not collective proceedings. To avoid this development having a negative impact on leniency applications, the DMCCA excludes immunity recipients from being liable for exemplary damages.

Duty of expedition

The DMCCA also places an express "*duty of expedition*" on the CMA (and sectoral regulators), requiring the CMA to consider the need to make a decision or to take action "*as soon as reasonably practicable*". It remains to be seen what impact this will have in practice, given the imperative for the CMA to balance expediency with the legal rights of those involved and ensuring robust due process.

What happens next

As mentioned above, many aspects will require updated guidance from the CMA.

[2] Directive 2014/104/EU on damages for competition law infringements, implemented by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.

[3] The CAT awarded exemplary damages in its 2012 decision regarding the claim by 2 Travel Group PLC (in liquidation) against Cardiff City Transport Services. The damages claim followed the OFT's infringement decision. The exemplary damages award was in the sum of £60,000.

All businesses should be mindful of the importance of complying with their legal obligations arising from CMA investigations and carefully check their specific obligations if they are contacted by the CMA, seeking legal advice where appropriate. For international businesses, it is sensible to update their procedures to include CMA investigations.

Although no business wants to be the subject of a CMA dawn raid, it is advisable to have an up-to-date dawn raid protocol in place so that, if the worst were ever to happen, everyone from Reception through to the IT team and the Board know their roles and how best to handle what is inevitably a stressful event. It is a particularly timely opportunity for businesses to review their protocols, including their training and support for individuals who might find the CMA knocking at their front door with a warrant to search their home.