The new rulebook for digital markets in the UK: what businesses need to know

DENTONS

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Dawn of a new era

The Digital Markets, Competition and Consumers (**DMCC**) Act 2024, which received Royal Assent on 24 May 2024, heralds the most significant reform to UK competition laws since 2013. The DMCC Act will also grant the Digital Markets Unit (**DMU**), under the auspices of the Competition and Markets Authority (**CMA**), legislative powers to administer a new *ex ante* regulatory regime for the largest tech companies. The DMU will administer this new regulatory framework to prospectively address future conduct in "digital markets" to protect and foster competition.

This update focuses on the digital markets reforms and compares the new UK digital market rules to those imposed by the European Union's Digital Markets Act (**DMA**), which came into force more than a year ago and with which gatekeepers have had to comply since 7 March.

We previously wrote about other changes to UK competition law proposed by the DMCC Bill, all of which have now been enacted, in our DMCC competition law update, which can be accessed **here**. Changes to UK consumer law under the DMCC Act are discussed in our article **here**.

The DMCC digital markets regime

The DMU will have the ability to make a broad range of decisions with significant consequences – first and foremost, the decision as to which firms should be designated as having Strategic Market Status **(SMS)** in respect of one or more of their digital activities.

A firm may be designated as having SMS in respect of a digital activity if the activity is linked to the UK, meets minimum turnover thresholds (global turnover of £25 billion or UK turnover of £1 billion) and has both substantial and entrenched market power and a position of strategic significance in respect of the activity.

Once a firm is designated, the DMU will design bespoke and enforceable Conduct Requirements **(CRs)** for each firm relating to how it interacts with consumers and other businesses, setting out how the SMS firm must conduct itself in relation to the digital activity. The DMU will also be able to impose targeted behavioural or structural Pro-Competition Interventions **(PCIs)**, where it considers that one or more "factors relating to a relevant digital activity" may be having an adverse effect on competition (AEC Finding).

The DMCC Act provides the DMU with a range of enforcement tools, including the issue of significant fines and civil sanctions on firms and even individuals for breaches of CRs and PCIs, as discussed below.

The door to private enforcement is also open, with the DMCC Act establishing that a person may bring a civil claim seeking damages or an injunction if they have suffered loss, including from a breach of CRs or a PCI. The DMCC Act

does not presently bring digital markets into the Competition Appeal Tribunal's collective proceedings jurisdiction. However, it is possible that a claimant may seek to bring a standalone collective claim under Chapter II of the Competition Act 1998 based on a breach of a CR or the imposition of a PCI.

SMS firms will also be subject to new mandatory and suspensory merger reporting requirements. SMS firms will need to report any deal: (i) which results in that firm or any member of its corporate group obtaining "qualifying status" in a target that carries on activities in the UK or supplies goods or services to a person or persons in the UK; and (ii) where the value of all consideration provided by the SMS firm for shares or voting rights in the UK-connected company is at least £25 million.

DMCC v DMA

The DMCC Act is expected to come into force in autumn 2024, more than one year after the commencement of the DMA. So far, seven firms have been designated as "gatekeepers" under the DMA (Alphabet, Amazon, Apple, Booking, ByteDance, Meta and Microsoft) and must now comply with its rules in respect of certain core platform services to avoid large administrative fines and other consequences.

The key differences between the DMCC Act and DMA are:

- **Designation of SMS/gatekeepers**

Under the DMA, firms must notify the European Commission (**Commission**) if they meet three criteria which create a rebuttable presumption that a firm is a gatekeeper in respect of a core platform service:

- having a significant impact on the internal market, which is presumed if a firm has EU revenues of at least €7.5 billion in each of the last three financial years, or had an average market capitalisation of at least €75 billion in the last financial year, and it provides the same core service in at least three member states;
- providing a core platform service that is an important gateway for business users to reach end users which is presumed if, in each of the last three financial years, a firm has had at least 45 million monthly active end users and at least 10,000 yearly active business users in the EU for the relevant service (e.g. online search engines, app stores and messenger services); and
- having an entrenched and durable position (or it is foreseeable that it will do so in the near future).

The onus is then on the firm to prove that it should not be assigned "gatekeeper" status in respect of a given platform service. ByteDance, Apple and Meta are each appealing their designations as gatekeepers to the EU's General Court.

Conversely, the DMCC Act does not set any "presumption" of SMS. Instead, if the DMU believes it has reasonable grounds to consider that a firm which meets the jurisdiction and turnover threshold requirements (global turnover of £25 billion or UK turnover of £1 billion) may have SMS in respect of a digital activity, it will conduct an SMS investigation to assess whether the firm has substantial and entrenched market power and a position of strategic significance.

In doing so the DMU will conduct a forward-looking assessment of a period of at least five years, taking into account developments that would be expected or foreseeable if the DMU did not designate the firm as having SMS in respect of the digital activity, and which may affect the firm's conduct in carrying out such digital activity. The CMA has released draft guidance on how it intends to conduct these investigations, though the practical application of the SMS conditions remains to be tested.

- **Conduct requirements**

The DMA sets out 22 "one-size-fits-all" rules that apply to all designated platforms and services. The DMA provides for self-execution of these rules – following its designation as a gatekeeper, a firm must take its own steps towards compliance. Gatekeepers are also required to inform the Commission of any intended concentration, where the merging entities or the target of the concentration provide core platform services or any other services in the digital sector.

By contrast, the DMCC Act adopts a "pick and mix" approach. It provides an exhaustive list of CRs that the DMU may apply to any SMS, provided that doing so would be proportionate and meet the three objectives of fair dealing, open choices and trust and transparency. CRs may be action- or outcome-orientated. For example, a CR can oblige an SMS firm to trade on fair and reasonable terms or prevent it from using data unfairly. In designing these CRs, the DMU will engage a wide variety of parties and will carry out a public consultation. The development of CRs may run parallel to the designation process.

PCIs may be imposed alongside CRs. These powers may go further than CRs by addressing competition issues at the core of the firm's business. This may include remedying or preventing conduct which may be perceived as anti-competitive. CRs may be regarded as prescriptive rules to guide the behaviour of SMS firms, whereas PCIs are wide-ranging "proactive" tools which the DMU uses to address anti-competitive behaviour.

- **Enforcement**

In line with the CMA's approach to the enforcement of competition law in digital markets, the DMU intends to adopt a participative approach in the enforcement of the DMCC Act and engage constructively both with SMS firms and other stakeholders. Nevertheless, the DMCC Act gives the DMU a wide range of monitoring and enforcement powers, including to investigate suspected infringements, to impose pro-competition orders (**PCOs**) and to accept commitments in lieu of PCOs. Following the issuance of a notice of findings of an infringement of a CR, the DMU may make an enforcement order to impose an obligation on a firm for the purpose of remedying the breach.

The DMU may also impose penalties on SMS firms that do not comply with investigative requirements, CRs or PCOs without a reasonable excuse. The maximum penalty for non-compliance with CRs or PCOs may be up to 10% of the firm's global turnover in case of a fixed penalty or up to 5% of its daily turnover for a daily penalty. Firms that do not comply with investigative requirements can be fined a maximum of 1% of their global turnover or 5% of their daily turnover. Fines can also be imposed on individuals for failing to comply with investigative requirements, up to a maximum of £30,000 fixed penalty or a £15,000 daily penalty. The CMA's existing investigation enforcement powers will also apply to investigations under the DMCC Act.

The Commission also has fining powers and may impose fines of up to 10% of a gatekeeper's total worldwide annual turnover, or up to 20% in the event of repeated infringements. Moreover, it can order periodic penalty payments of up to 5% of the average daily turnover. In addition, if a gatekeeper systematically infringes its obligations under the DMA, additional remedies may be imposed on the gatekeeper after a market investigation. If necessary and as a last resort option, non-financial remedies in the form of behavioural and structural remedies may be imposed (e.g. the divestiture of (parts of) a business). The Commission already opened non-compliance investigations against Alphabet, Apple and Meta. Like the DMCC Act, the DMA is also intended to operate in concert with private enforcement. The DMA goes further than the DMCC Act, in specifically providing for digital market collective actions under the Representative Actions Directive (EU) 2020/1828.

Unlike the DMA, the DMCC Act provides for a countervailing benefits exemption that SMS firms can use as a defence if they can prove that countervailing benefits of the conduct outweigh their (potential) anti-competitive effects. The conditions of the exemption are modelled on the existing individual exemption providing a safeguard from the

prohibition of anti-competitive agreements which has limited use in practice as it sets a very high bar.

Firms can challenge decisions of the DMU in the Competition Appeal Tribunal. However, only the imposition and size of any fines will be subject to an appeal on their merits. Only applications for review to a judicial review standard are available in respect of all other appealable decisions by the DMU, including decisions on designation and non-compliance with CRs and PCOs.

What lies ahead

The DMU has said it expects to start three to four SMS investigations within the first year of the new regime coming into force.[1] These initial investigations will be pivotal in shaping the regime and present important opportunities for stakeholder engagement with the DMU.

The DMU has been clear that it intends to be transparent about processes and adopt "a participative approach in which [they] will engage constructively with both SMS firms and other stakeholders". This is, in part, enshrined in the DMCC Act – as part of SMS and PCI investigations, the DMU will carry out a public consultation, may send requests for information as part of that investigation and will publish reasons for its final decision. Each stage represents a chance for constructive dialogue with the DMU, not only for firms under investigation, but also for firms with an interest in digital activities being regulated.

The CMA has also flagged it may consider coherence with interventions under other CMA tools, such as cases under the Competition Act 1998 (**CA98**) and requirements imposed by other UK regulators, as well as actions by other regulators or legislators internationally.[2] Subject to prioritisation decisions, it is entirely possible that the CMA could run parallel investigations into the same, or similar, conduct or markets. This brings renewed importance to evidence obtained as part of the CMA's market monitoring and intelligence gathering work and other powers, including market studies and investigations, CA98 investigations and consumer protection investigations.

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1. **gov.uk/government**
2. Paragraph 3.29 Draft CMA194con, Digital Markets Competition Regime Guidance **assets.publishing.service.gov.uk**

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