Linklaters

Winter/Spring forecast: A flurry of changes coming for UK competition and consumer rules as preparations begin for the implementation of the DMCCA

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The Competition and Markets Authority has had a busy summer, publishing a number of proposed changes to secondary legislation and guidance in preparation for the implementation of the long-awaited Digital Markets, Competition and Consumers Act (DMCCA), which received royal assent on 24 May 2024. As set out in our earlier post, the digital and competition regime changes are expected to come into force in December 2024/January 2025, with most of the consumer provisions (except those on subscription contracts) likely to follow in April 2025. In total, the CMA requested feedback on proposed changes to eight guidance documents, three regulations and one set of rules.

Most of the proposed changes come as no surprise given the incoming reforms brought in by the DMCCA (discussed in more detail in our earlier post), and many of the changes to the proposed regulations and guidance follow established CMA practice in other areas of CMA competence and/or deliver welcome additional clarity. The proposed changes/guidance are therefore largely uncontroversial. However, as ever, the devil is in the detail. Linklaters has responded to all five consultations, in some cases suggesting further modifications to better align with the intent of the DMCCA and to provide sufficient clarity for industry participants to comply with their new obligations.

In this post we explain the key changes expected under the DMCCA (aside from the SMS Regime) for businesses to be aware of – along with any potential pitfalls.

1. Competition enforcement

CMA's guidance on investigation procedures in Competition Act 1998 cases: an enhanced (and onerous) duty to preserve documents in investigations

The DMCCA gives the CMA new evidence-gathering powers, including requiring people who know or suspect that an investigation is being, or is likely to be, carried out by the CMA to preserve documents.

The CMA's proposed changes to its guidance on its investigation procedures under Competition Act 1998 cases (Draft CMA8) are broadly drafted, including an obligation to preserve documents containing "background information" – without clarifying what types of background information are relevant, whether the information should relate to product or geographic markets that are the subject-matter of the

investigation, or even how old such documents should be. Draft CMA8 also suggests that "as a matter of good practice" a broad view of relevant documents should be taken, noting that "the scope of a CMA investigation may change over time and this may include an extension of the scope of the investigation to areas which are initially adjacent to the investigation."

The problem with having such broadly drafted document preservation duties – in particular where it could essentially amount to an open-ended obligation to retain information for an indeterminate amount of time, on a vague category of documents – is that it will be difficult for industry participants to comply with. This is especially true where retaining such information may be contrary to standard document destruction practices, which generally provide that data only be kept for as long as there is an administrative need, or for as long as is required to demonstrate compliance for audit purposes or to meet specific legislative requirements.

Key takeaway: Businesses may need to carefully consider their document retention policies, and look at having "litigation hold" policies in place so that people in the business know what documents they should and shouldn't delete – especially when an investigation is underway or where there is a risk of an investigation.

2. Merger control

CMA's guidance on jurisdiction and procedure: The (extra) extraterritorial reach of UK merger control

The CMA has proposed changes across a range of guidance documents on its approach to the mergers regime. Most of these changes reflect the provisions of the DMCCA or otherwise reflect current CMA practice and are uncontroversial. However, two proposed changes to the CMA's guidance on jurisdiction and procedure (Draft CMA2) raise potential concerns.

- **The UK nexus test – when, exactly, is a business carrying out activities in the UK?**

The DMCCA introduces a new "no increment" share of supply test where at least one merging business has: (i) an existing share of supply of 33% in the UK; and (ii) a UK turnover of at least £350m – provided the target has a UK nexus (this is referred to as the "hybrid test", and is discussed in our earlier post).

There needs to be sufficient UK nexus for the hybrid test to apply, and Draft CMA2 provides welcome clarifications regarding the application of the threshold. However, the guidance on what it means for a target to carry on 'at least part of its activities' in the UK is, as currently drafted, extremely broad. In particular, one of the examples listed is the case where "consumers in the UK have access to the goods or services of the enterprise" and includes "any preparatory step" towards potentially supplying goods or services in the UK. Given the broad scope of consumers 'having access' to a good or service, it will be difficult for parties to determine whether or not their business meets this UK nexus threshold.

Key takeaway: The CMA's already broad jurisdiction is getting even broader. This means it will be more important than ever to consider whether a proposed deal is likely to draw the interest of the CMA, what the substantive risks are, whether a filing or briefing letter should be made, and how to reflect any risks in your deal documentation.

- **Extraterritorial requests for information**

Similarly, under the DMCCA, the CMA can issue formal requests for information extraterritorially to persons "carrying on business in the UK". However, one of the examples in Draft CMA2 states that the test is satisfied where "a person does not directly sell goods or services in the UK but provides a key input or component (e.g. software) for a good or service that is ultimately supplied in the UK." This is overly broad, and it would seem questionable to us that a party could be said to be carrying business in the UK where a party supplies a component to another party without any influence over where the goods or services are ultimately supplied.

3. Consumer Protection

CMA's consumer enforcement guidance: welcome insights into the operation of the DMCCA, but still some areas for clarification…

The CMA's draft direct consumer enforcement guidance CMA200CON (Draft Consumer Guidance) provides welcome insight into the future operation of the CMA's consumer enforcement powers, which will commence in April 2025. Some of the key elements to be aware of are highlighted below.

- **Application of the DMCCA to continuing conduct: risk of retroactive penalties?**

The Draft Consumer Guidance provides that the CMA's new penalty powers do not apply to conduct which takes place before the commencement date of the DMCCA. However, the CMA may have regard to pre-commencement conduct when determining any matter under the new law, such as when setting directions, enhanced consumer measures (ECMs) and in factors relevant to any monetary penalty for post-commencement conduct.

Indeed, the consideration of pre-commencement conduct could affect the seriousness of the infringement, the relevant turnover when the CMA has regard to the duration of the conduct, and the existence of any aggravating factors. In all cases, the pre-commencement conduct could therefore impact the decision by the CMA to impose a penalty and/or the amount of that penalty. If pre-commencement conduct were to result in a decision to impose a fine, or an increase to a fine that would have been imposed in relation to post-commencement conduct, this would effectively penalise that pre-commencement conduct.

Having regard to pre-commencement conduct when setting financial penalties or ECMs could operate as a *de facto* penalty for pre-commencement conduct and therefore implies that the CMA's new powers are being given retroactive effect. Linklaters' submission to the consultation argued that such a position would be contrary to long-established principles on retroactive effect and legal certainty, as well as the Draft Consumer Guidance and commencement provisions of the DMCCA itself, but it is unclear whether there will be any change.

Key takeaway: While you cannot be fined for pre-commencement conduct, there is currently a risk that your firm's pre-commencement conduct could be taken into account when setting penalties or ECMs for post-commencement breaches.

- **Online Interface Notices: when, where and how will they be used?**

Online Interface Notices (OINs) (a notice - which may include directions - that may be given where the CMA is satisfied that a person has engaged, is engaging in, or is likely to engage in a relevant infringement, which may be addressed to that person or to a third party) are being introduced as a potential enforcement tool available to the CMA where a Final Infringement Notice, by itself, may not suffice. The scope for using OINs has been narrowly defined and can only be used by the CMA where: (i) there is no other available means of bringing about the cessation of the conduct; and (ii) it is necessary to avoid the risk of serious harm to the collective interests of consumers. However, as OINs could only previously be imposed by a court and not directly by the CMA, it would be helpful for the CMA to outline the circumstances in which it considers they would be the only means of bringing about the cessation of the conduct and necessary to avoid serious harm to consumers.

- **Penalties: wider than the relevant market subject to infringement?**

The Draft Consumer Guidance also indicates that the starting point for penalties will be 30% of the party's UK turnover. Contrary to the position taken in the CMA's guidance for Competition Act 1998 infringements, this is not restricted to the party's turnover in the relevant markets (and for competition infringements, 30% is the highest starting point, reserved for the most serious infringements). Linklaters' consultation response has submitted that it would be proportionate, and in line with the CMA's current approach, to limit the starting point of the penalty calculation to activities in the UK which relate to the infringement. Assuming this is not changed, it is yet another reason for firms to focus closely on consumer law compliance.

4. Overarching proposals

DMCCA turnover and control regulations: What are free services worth (for determining turnover for penalties)?

The proposed changes to the turnover and control regulations (Draft Regulations) largely reflect changes in the DMCCA. However, notably, the accompanying consultation document seems to imply a policy intention that, when calculating turnover for penalties, turnover should include "services that are free to end-users but otherwise monetised, such as digital services that make money from third-party advertising".

Key takeaway: While free services are taken into account in SMS designations, they are not likely to be taken into account when determining turnover for penalties. We expect the CMA to clarify this following the consultation.

CMA's administrative penalties guidance: Murky, but significant, administrative penalties

Fines for procedural infringements are increasing under the DMCCA, alongside the introduction of a number of new enforcement powers when it comes to administrative penalties. The CMA sets out how it plans to apply its enforcement powers in respect of increased penalties in its draft statement of policy on its approach to administrative penalties (Draft CMA4).

Key takeaway: While most of the proposals in Draft CMA4 provide additional clarity on the approach to enforcing and imposing administrative penalties, it will be important for businesses to be aware of these

changes – and potential areas of uncertainty – especially in light of the increased fines.

- **Penalties for failing to comply with remedy requirements**

The Draft CMA4 put forward for consultation did not clarify whether the CMA's new powers to impose penalties for breaches of remedy orders would apply to historic remedies, or only to those remedies imposed after the DMCCA comes into force.

Linklaters made submissions arguing that the CMA's penalty powers should not apply to pre-existing remedies, as parties that offered commitments (or were subject to orders) prior to the DMCCA would not have contemplated that financial penalties could be imposed if they breached their commitments when responding to consultations on those measures. We also noted that imposing penalties to remedies that preceded the DMCCA would be contrary to the intent of the DMCCA, which expressly requires undertakings only be accepted where a person has information about the possible consequences of failing to comply.

We understand that the Government has subsequently decided that the penalties are not intended to apply to historic remedies. We expect this to be formally clarified in due course.

Key takeaway: While we understand that the new penalties provisions will not apply to historic remedies, they will apply to new remedy requirements, so businesses will need to consider the risk of high penalties for breaches when offering commitments or assessing the scope of potential orders that may be imposed by the CMA in future.

- **Penalty determination "in the round" – a sufficiently clear methodology?**

The Consultation Guidance that accompanied Draft CMA4 refers to the CMA making decisions on whether to impose a financial penalty – and the level of penalty – "in the round", in contrast to the traditional "stepped" process used in substantive infringements.

The issue with using an "in the round" approach, especially where the penalties can be high, is that the absence of clear reasoning for calculating penalties makes it difficult for parties to fully exercise their rights of defence and appeal.

What comes next?

Linklaters has submitted its views and concerns in response to the calls for submissions on the draft guidance, regulations and rules. The CMA will now be considering these, as well as other submissions made on its consultation documents. Adoption of the revised guidance, regulations and rules is currently planned for the end of this year, with further changes to reflect the DMCCA expected to be proposed in early 2025 and 2026.