Linklaters

The Digital Markets, Competition and Consumers Act: what you need to know about the risk of private litigation

03 October 2024

In May this year, the long-awaited Digital Markets, Competition and Consumers Act (DMCC Act) became law, introducing the most significant reforms to competition and consumer protection legislation the UK has seen in the past two decades. We previously outlined key changes regarding the Competition and Markets Authority's (CMA) new enforcement powers.

However, in addition to the increased public enforcement risk, the DMCC Act also increases the private litigation risk in a number of different ways. While some changes affect the competition litigation regime more broadly (see our previous blog post here), others give rise to specific and emerging litigation risks for companies most impacted by the DMCC Act (in particular, large tech companies and consumer-facing businesses of all sizes). We explore below the forms these risks might take, and what companies can do to mitigate them.

Risks for large tech businesses: the SMS regime

The DMCC Act introduces a new "Strategic Market Status" (SMS) regime, whereby the CMA's Digital Markets Unit will have the power to designate companies active in the UK's digital markets as having SMS, and impose specific "requirements" on them (such as requiring them to abide by Codes of Conduct), including via "pro-competition interventions" (which are likely to be similar in nature to the CMA's existing market investigation tool).

While the criteria for designation are potentially very broad and could capture any number of businesses operating in the UK, the Government and CMA have been clear that this regime is aimed at the largest tech firms, and it is likely that businesses similar to those which have been designated as "gatekeepers" under the EU's Digital Markets Act (DMA) will be targeted. However, unlike under the DMA (under which six "gatekeepers" were designated from the outset, and more since), the CMA will need to run a nine-month designation investigation process for each firm. The CMA has already indicated that it expects to run two designation investigations at any given time (commencing in December 2023 / January 2024) and conduct 3-4 SMS investigations within the first year. How the CMA will prioritise firms remains to be seen, but there are some hints in its enforcement activity – for example, the CMA recently closed an investigation into Google on the explicit basis that the SMS regime would be a more effective tool (see our update on this). Firms that are designated will be subject to a bespoke Code of Conduct which will be enforced by the CMA (with breaches punishable by fines of up to 10% of global turnover), but beyond the increased public regulation, the SMS regime also creates fertile ground for private litigants to pursue designated firms, potentially via multiple avenues.

Risk of litigation following an alleged breach of conduct requirements for SMS firms

The DMCC Act provides that SMS firms will owe a duty to any person who may be affected by a breach of a requirement by an SMS firm. Critically, these rights can be enforced directly and individuals and businesses do not need to wait for a CMA investigation / decision to have justiciable rights, which may include claims for interim relief as well as damages.

Where the CMA does find a breach of a conduct requirement, that decision will be binding on UK courts, meaning that claimants will not have to prove liability (i.e. their claim will be follow-on in nature) and will only need to evidence causation and loss in order to obtain damages. Although such claims will fall outside the remit of the current collective actions regime (which is limited to breaches of competition law), the absence of a liability hurdle to overcome is likely to make the bringing of individual claims more attractive.

For SMS firms, the first line of defence may appear simple – comply with any requirements that are imposed on them. However, early experience under the DMA has shown that whether firms have complied with requirements is often hotly contested. To put themselves in the best position to fend off any ensuing litigation (as well as mitigate the risk of reach) SMS firms should ensure they track and evidence compliance with their obligations in a clear and consistent manner and on an ongoing basis.

Broader litigation risk for SMS firms

The CMA's enhanced intervention powers under the SMS regime will likely result in more information about SMS firms and their practices being in the public domain, no doubt drawing the watchful gaze of claimant firms and funders on the lookout for potential further standalone (or hybrid, i.e. a mixture of follow-on and standalone) litigation. Given the potential crossover between the SMS regime and competition law, and the fact that collective actions are currently only available for the latter, there is a strong incentive for claimants and funders to seek to repurpose the SMS regime and its requirements as Chapter II (i.e. abuse of dominance) infringements. Even before the increased regulatory intervention that this regime promises to bring, we have already seen claimant firms building cases against companies active in markets that have been subject to regulatory intervention, despite there being no findings of infringement (such as the collective actions brought in the CAT against BT[1] and mobile network operators[2]). More broadly, even for non-SMS firms, there is also a potential risk of "contagion" – i.e. claimants seeking to use the fact that certain conduct is banned under the SMS regime to support a claim of abuse of dominance against a non-SMS firm.

As to the form such claims may take, SMS firms should take note of the CAT's and Court of Appeal's expansive approach to the certification of opt-out claims including those which are not, at least at first glance, natural competition claims.

Otherwise, such claims may take the form of conventional group opt-in claims (where the anticipated recovery per head makes such claims fundable) or, perhaps bifurcated representative actions, depending on how further appeals relating to that topic proceed before the Court of Appeal later this year.

Risks for all consumer-facing businesses: are consumer-centric claims about to become all-consuming?

The DMCC Act not only introduces new consumer protection laws (including provisions relating to subscription contracts, drip pricing and fake reviews – see more detail on this here), it also enables the CMA to take direct enforcement action finding companies in breach of consumer law, and directly impose penalties on those companies, instead of having to go through the courts. This marks a significant shift in the UK's consumer protection regime, which aligns with and is expected to enhance the CMA's increased focus on consumer law. A much more active CMA will mean easier claims for consumers against businesses found to have breached consumer law by the CMA – which could give rise to a new stream of "follow on" litigation.

Among its new tools (which are due to come into force in April 2025), the CMA will have the ability to order companies found in breach of consumer law to offer redress, including compensation, to affected consumers (including for non-financial losses such as distress or inconvenience). While the use of this mechanism could reduce private litigation risk, much will depend on how and when it is deployed.

The proposal to expand the collective actions regime to consumer law claims via the DMCC Act was ultimately not passed, and the current Government does not appear likely to resurrect that proposed expansion in the immediate term. For now, therefore, the trend of claimant firms and funders dressing consumer law claims in a competition law cloak looks likely to continue, particularly those brought against companies with significant market power.

What can businesses do to mitigate the emerging litigation risks?

The CMA is currently in the process of producing draft guidance that will set out how its new powers under the DMCC Act will be applied in practice and has published a roadmap (see our coverage here). However, much remains to be seen about how the regime will evolve. The first designation investigations and Codes of Conduct are likely to shine significant light on how the CMA intends to administer the SMS regime and will doubtless be watched closely by all potentially affected firms. As for its new consumer-law enforcement powers, the CMA has been gearing up to exercise these for some time and has already left hints as to the types of behaviour it will target, with greenwashing and urgency claims looking like they might be high on the agenda (see our thoughts on this here). Businesses should therefore actively monitor any action from the CMA and conduct a review of their consumer and competition law compliance programmes to ensure that risks are appropriately mitigated.

It is also worth bearing in mind that claimants will be free to commence private litigation on the basis of historic conduct (subject to applicable limitation periods). This will be particularly important to be aware of in the context of the increased information that is likely to become available in relation to companies' practices (both current and former) as a result of the CMA's regulatory intervention). As well as thinking about protecting themselves from falling foul of rules going forwards from both a regulatory and litigation perspective, companies should therefore also keep their eyes open to the potential to be pursued for historic breaches.

Our team is following this topic closely and would be happy to discuss.

[1] Case 1381/7/7/21

[2] Cases 1624-1627/7/7/23