Davis Polk

UK Government passes the Digital Markets, Competition and Consumers Act

May 28, 2024 | Client Update | 7-minute read

On 24 May 2024, the UK's Digital Markets, Competition and Consumers Act received royal assent, representing the most significant reform to UK competition and consumer law in over a decade.

On 24 May 2024, the UK's Digital Markets, Competition and Consumers Act received royal assent, the most significant reform to UK competition and consumer laws since the establishment of the Competition and Markets Authority (CMA) in 2014 and its first major reform since the UK left the European Union in January 2020.

The Act establishes an *ex-ante* regime for the regulation of digital markets and will make it easier for the CMA to assert jurisdiction to review cross-border mergers. In addition, the Act significantly expands the CMA's investigatory toolkit and its ability to impose substantial fines on companies for non?compliance with its decisions and procedures. Lastly, it includes several changes to the CMA's consumer protection powers, introducing a new direct enforcement regime and modernizing protected consumer rights.

Companies will need to take account of the CMA's new powers when updating regulatory compliance procedures and internal policies, as well as when assessing filing requirements and execution risk for cross-border deals. Risk assessments should consider CMA cooperation with the European Commission and the US agencies.

Major changes to the UK competition and consumer protection regime include:

– **An *ex-ante* regime to regulate digital firms whose activities have "strategic market status" (SMS).** The Act gives the CMA's Digital Markets Unit (DMU) powers to regulate SMS firms, similar to those imposed on "gatekeepers" under the EU's Digital Markets Act (DMA). The DMU will be able to designate an SMS firm if it has: (i) global turnover of £25 billion and UK turnover of £1 billion; and (ii) "substantial and entrenched market power" and a "position of strategic significance" in a digital activity with a link to the UK.

  Firms with an SMS designation will be subject to a range of obligations and restrictions similar to those under the DMA, such as requirements to notify a wider range of deals to the CMA. Further, the Act gives the DMU wide discretion to impose individual conduct requirements, e.g., trading conditions, requirements to provide information, and withholding from certain activities. The Act also gives the DMU powers to investigate whether the activities of firms with SMS designation are having an adverse effect on competition and to impose "pro?competitive intervention orders".

  The CMA has announced its intention to open three or four SMS investigations in the first year of the Act with a focus on digital sectors it has already investigated, i.e., cloud services, mobile browsers, music streaming, mobile ecosystems, display advertising, social media, and app stores.

– **Expansion of the CMA's jurisdiction to review deals.** The Act introduces a new jurisdictional threshold allowing the CMA to review mergers where one party has a "share of supply" in any UK segment above or equal to 33% and UK turnover of £350 million or more without the need for any actual or potential competitive overlap with any transacting party. This is a response to CMA concerns about "killer acquisitions" (i.e., buying potential competitors to prevent future competition), and will apply across all sectors. It will allow the CMA to review deals where firms with significant UK presence acquire targets with limited local presence. This is a significant broadening of UK merger control, which

has historically focused on deals where the target has meaningful UK activities.

The Act also increases the existing target turnover threshold from £70 million to £100 million and introduces a new safe harbor for deals where all parties each have UK turnover below £10 million. While these changes may exclude some deals with limited UK links, we expect that the CMA's broad interpretation of the "share of supply" test will lead to an overall increase in deals reviewed.

- **"Fast-track" route available for parties subject to CMA merger review**. Transacting parties are now able to request a fast-track referral to Phase 2 during pre-notification or Phase 1 engagement with the CMA without conceding that there is a substantial lessening of competition. Additional time, including "stop the clocks" agreed between the CMA and notifying parties, will also provide greater flexibility for the CMA to review complex transactions in a tailored and procedurally efficient manner. These statutory changes formalize recent revisions to the CMA's guidelines on its procedures.
- **Foreign state intervention regime for print media mergers**. Applicable with immediate effect, the Secretary of State gains the ability to issue a "foreign state intervention notice" where they have reasonable grounds to believe a transaction will give a foreign state or foreign state-linked entity control or influence over the policy of a UK newspaper or magazine. Further details on which foreign state-linked entities may be permitted to make passive investments remain to be defined in secondary legislation.
- **Enhancement of the CMA's investigative and enforcement powers.** The Act gives the CMA a range of additional enforcement powers, expanding its reach to investigate anti-competitive conduct to remote-working situations and agreements outside of the UK, where there are direct, substantial, and foreseeable effects in the UK. Under the Act, the CMA has the power to impose turnover-based fines of up to 10% of an undertaking's global turnover for non-compliance with CMA orders, as well as additional information gathering powers and greater discretion to conduct unannounced inspections (i.e., dawn raids) where it suspects anti-competitive conduct.
- **Substantial broadening of the CMA's consumer protection powers.** The Act introduces a major reform of the CMA's consumer protection powers, both in relation to enforcement process and the consumer rights protected. A new direct enforcement regime allows the CMA to investigate suspected infringements of consumer protection laws and impose penalties of up to 10% of a company's global turnover without the need to go through the court system, bringing it into line with the UK competition law regime. To assist with its investigations, the CMA can issue information notices with extra-territorial reach to gather relevant information. Non-compliance with such notices may result in fines of up to 1% of global turnover, while the breach of an undertaking given to the CMA will result in fines of up to 5% of global turnover.

  The Act also makes several changes to extend and modernize the consumer rights protected, particularly considering the trend towards online retail and advertising. Among other things, the Act enables the CMA to investigate and enforce against drip pricing (where buyers are misled by an affordable upfront price before being 'drip fed' extra charges later in the buying process), fake consumer reviews, and misleading or overly restrictive subscription contracts.

- **Limits the scope of merits-based appeals.** Despite significant back and forth on the appropriate standard of review during the legislative process, the final version of the Act restricts challenges of substantive decisions to a UK judicial review standard. In practice, this means that the Competition Appeal Tribunal can overrule the CMA only on grounds of procedural fairness, illegality, or irrationality. Challenges on the merits will only be available when determining the quantum of penalties.

Commencement of the Act expected towards the end of 2024

Now that the Act has received the royal assent, the CMA will run a consultation process on aspects of the new regime over the coming months before it comes fully into force later in 2024.

The CMA's SMS designation investigations are expected to begin in Autumn 2024 and take approximately nine months. As we have seen with the DMA implementation process in the EU, legal challenges are likely and the full range of obligations under the SMS regime are expected to be in full force for the initial set of firms with SMS until mid-late 2025.

Takeaways for companies active in the UK

The changes under the Act increase the scope of deals that may be subject to scrutiny by the CMA across all sectors. We expect that the CMA will introduce new guidance in the coming months to clarify the scope of the new no increment required jurisdictional threshold, which risks creating significant uncertainty for transacting parties.

Companies will need to be mindful of these changes when assessing deal risk and negotiating deal documents. Steps to address this risk includes proactive engagement with the CMA and including suitable protections in deal documents that suspend closing where the CMA has decided to “call in” the deal for review (i.e., springing conditions).

Digital firms, in particular, will need to conduct filing assessments early and be mindful of potential additional obligations and restrictions if they are designated as having activities with SMS. Outside of merger control, firms with activities within digital markets should be prepared to implement internal audit and reporting procedures if they are designated as having SMS status, given the increased risk of investigation by the CMA.

The CMA’s focus on consumer protection coupled with the new possibility of direct enforcement and significant fines means consumer facing businesses will also need to consider the impact of the Act and whether their internal policies are fully compliant.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Jürgen Schindler
+32 2 405 0500
juergen.schindler@davispolk.com

Frances Dethmers
+32 2 405 0501
frances.dethmers@davispolk.com

Matthew Yeowart
+44 20 7418 1049
matthew.yeowart@davispolk.com

Emma Walsh
+44 20 7418 1363
emma.walsh@davispolk.com

Andrzej O'Leary
+44 20 7418 1042
andrzej.oleary@davispolk.com

Ben Isaacs
+32 2 405 0504
ben.isaacs@davispolk.com

Dylan Jones
+44 20 7418 1028
dylan.jones@davispolk.com

Tara Shah
+44 20 7418 1038
tara.shah@davispolk.com