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Client Alert

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United Kingdom: Introducing Regulation of Digital Platforms and New Competition and Consumer Protection Powers

UK Government Passes Flagship Digital Markets, Competition and Consumers Bill

In brief

The UK Government passed the long-awaited (the "**Act**")[1] on 24 May 2024. Some provisions of the Act take effect immediately (for example, new controls over foreign ownership of newspapers), but most provisions will enter into force in Autumn this year following the conclusion of a public consultation on important legislative guidance. The Act introduces radical new digital sector regulation - akin to the European Union's Digital Markets Act ("**DMA**") - in addition to expanding the UK Competition & Markets Authority's ("**CMA**") consumer protection powers and introducing significant reform of the UK competition regime. This briefing provides an overview of the key changes affecting digital markets, the UK competition regime and UK consumer protection law.

In depth

DIGITAL MARKETS

The legislation provides a statutory footing for the CMA's Digital Markets Unit ("**DMU**"), which has existed in "shadow form" since April 2021. It confers on the DMU wide-reaching functions intended to develop and enforce digital sector regulation within the CMA. The CMA has recently signalled the ramping up of its operational readiness in preparation for taking on this new responsibility through building the capability of the DMU to a nearly 200 member team, including a panel of , economists, etc.

Similar to the DMA, the Act aims to regulate the conduct of the largest tech players - firms enjoying Strategic Market Status ("**SMS**") in respect of a digital activity. These are firms deemed to enjoy "substantial and entrenched market power" and "a position of strategic significance" -- whether by virtue of their relative size, their role in the day-to-day business or critical operations of other undertakings, their influence over how other undertakings operate or their ability to leverage into other activities. When assessing market power, the DMU will consider the "digital activities" provided by the firms that are linked to the UK. "Digital activities" are services provided by means of the internet, electronic communications services or digital content (including services that are provided free of charge). To be caught by the regime, such firms must have group UK turnover exceeding £1 bn or group worldwide turnover exceeding £25 bn in the most recent period of 12 months. This closely mirrors the EU's "gatekeeper" concept in the DMA. Following an investigation that can last up to nine months (extendable by three months), the DMU will be empowered to designate firms as having SMS.

The CMA has the power to impose one or more conduct requirements or pro-competitive interventions ("**PCIs**") on designated SMS firms to address problematic conduct or market structures.

Conduct requirements are intended to be tailored to individual firms and the CMA is granted extraordinary discretion as to their content, provided they relate to one of three objectives (fair dealing, open choices, or trust and transparency) and fall within the permitted categories of requirement. These categories are broad (see table below).

Whilst the balance of power lies with the CMA when it comes to determining the individual obligations of the designated firms, there are provisions that set out consultation requirements which must be followed before imposing conduct requirements. The legal standard for imposing such requirements will be a proportionality test.

[1] Note that the final version of the Act has not yet been published.

The CMA is empowered to remedy breaches of a conduct requirement with enforcement orders that specify the relevant breach and include the reasons for imposing the obligations in the order or by accepting binding commitments.

After much debate, the appeal standard for appeals of decisions on breaches of conduct requirements will be judicial review for all decisions other than in respect of penalty provisions (see below).

Permitted categories of conduct requirements

Requirements obliging a firm to:	Requirements preventing a firm from:
Trade on fair and reasonable terms.	Applying terms, conditions or policies differently to different users or types of users.
Have effective processes for handling complaints and disputes.	Self-preferencing.
Provide users with clear, relevant, accurate and accessible information.	Carrying out activities in non-designated areas of its business in a way that is likely to materially enhance its market power or position in relation to the relevant digital activity.
Give advance notice and explanation of changes.	Incentivising or requiring the use of its broader services alongside the designated activity.
Present to users any options or default settings in a way that allows them to make informed and effective decisions.	Restricting the ability of the relevant activity to interact with products offered by other firms.
	Restricting whether or how users can use the relevant service or digital content.
	Using data unfairly.
	Restricting the ability of users to use services or digital content provided by competitors.

Meanwhile, PCIs enable the CMA to address 'adverse effects on competition' - including detrimental effects on UK users or customers - that might stem from factors other than a firm's conduct, e.g., perceived harms flowing from its enjoyment of network effects. Orders in this context could range from general behavioural obligations - e.g., to facilitate interoperability, data mobility or consumer choice, to structural changes - whether operational or corporate. Using these PCI powers, the CMA could also recommend that a separate body, such as the FCA, take relevant action where better placed to do so.

The Act imposes an obligation on designated firms or their group members to report planned transactional activity (triggered at 15%, 25% and 50% thresholds of equity or voting rights in entities linked to the UK, or when forming a JV vehicle expected to have links to the UK). There is a value threshold before this requirement applies: consideration for the shares or voting rights (including any acquired by prior transactions) of at least £25 m or total value of all capital and assets contributed to the JV and of all other consideration provided of at least £25 m. Notifying firms are obliged to wait for the CMA to confirm that the information reported is 'sufficient', in addition to waiting an additional 5 working days, before proceeding with the transaction. Sufficiency is by reference to the information the CMA needs in order to decide whether to open a Phase 1 merger investigation.

The Act also provides for extensive powers to request information – exercisable regardless of whether information is stored in the UK; as well as personal liability for senior management responsible for ensuring compliance with information requests or substantive requirements. The duty to preserve information - including where a person suspects that an investigation may be carried out - is a difficult requirement for firms to comply with in practice.

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Fines for breach of a conduct requirement or a PCI order are potentially onerous: up to 10% of worldwide turnover, or daily fines of up to 5% of daily worldwide turnover for specified categories of breach. Individuals can also be fined and, as under general competition law, there could be criminal exposure for breaches relating to potential obstruction of an investigation, in addition to the risk of director disqualification.

COMPETITION REGIME

In addition to creating a new digital markets regime, the Act introduces the first major changes to the wider UK competition regime in over a decade. The changes are designed to give the CMA increased powers and flexibility to conduct faster and robust investigations and a greater ability to intervene in mergers. We highlight some of the key changes below:

Merger Control

- The voluntary notification regime is retained, but the Act has revised the jurisdictional thresholds.
  - **Small change to turnover thresholds.** The current UK turnover threshold is increased from £70 m to £100 m. The existing 25% share of supply threshold remains the same.
  - **New "acquirer-focused" threshold.** Significantly, the CMA now has the ability to review any merger where: (i) one party has at least a 33% share of supply of goods or services in (a substantial part of) the UK, **and** a UK turnover of over £350 m; and (ii) another party has a UK nexus. The UK nexus criterion is an extremely broad one and is met where at least part of the activities of the party are carried out in the UK, or the party supplies goods or services in the UK. The new additional threshold does not require any overlaps between the parties and is intended to capture vertical mergers and so-called "killer acquisitions" whereby a large player acquires a relatively small nascent or innovative competitor to eliminate the future competitive threat posed by the competitor. The new threshold will add an extra layer of complexity and regulatory burden on merger parties while increasing the ability of the CMA to intervene in transactions.
  - **New safe harbour**. A safe harbour is introduced for mergers involving parties with low levels of UK turnover. A condition is added into the existing share of supply test that requires at least one of the merging enterprises have UK turnover of more than £10 m. This has the effect that any merger involving only enterprises with a respective UK turnover of less than £10 m is exempt from UK merger review on competition grounds.
  - **New regime for mergers involving newspaper enterprises and foreign powers**. An important amendment to the draft Bill was introduced during its third reading in the House of Lords to prevent the acquisition of interests in news media organisations by foreign powers. Under the Act, the Secretary of State can issue a "foreign state intervention notice" to the CMA, requiring the CMA to investigate and report on whether a "foreign state newspaper merger situation" has been, or will be, created. This will be the case where: (i) two or more enterprises cease to be distinct, (ii) one of the enterprises concerned is a newspaper enterprise, and (iii) as a result of the enterprises ceasing to be distinct, a foreign power is able to control or influence the policy of the newspaper enterprise or is able to control or influence that policy to a greater extent. Where the CMA's findings are in the affirmative, the Secretary of State may issue an order to unwind or block the transaction. Notably, the thresholds for establishing jurisdiction under this regime are significantly lowered – (i) the turnover test is amended to only £2 m; and (ii) the definition of when enterprises cease to be distinct is amended to remove the concept of "material" influence (it is sufficient for there just to be influence).
- There is the introduction of a new duty on the CMA to make a reference for a Phase 2 merger investigation regarding a completed or anticipated merger if it has accepted a fast-track request from the parties involved in a merger. This puts the current fast-track procedures on a statutory footing. Where it accepts such a request, the CMA will be able to extend the Phase 2 timetable by an additional 3 weeks.

Investigation Powers in Conduct Cases

- CMA has a new power to "seize and sift" documents, including information stored electronically, obtained under a warrant during a dawn raid at domestic premises. This reform reflects changed working practices post-pandemic, with many employees continuing to work from home. This could raise concerns around privacy and personal rights.
- The interview powers of the CMA are expanded to require **any** individual to attend an interview and answer questions for **any** matter relevant to an investigation. This potentially exposes employees of third parties (e.g., customers or suppliers of the business under investigation) and interviewees may be required to answer questions remotely.
- There is now a new duty to preserve evidence in all antitrust investigations where a person knows or suspects that an investigation is, or is likely to be, carried out by the CMA. In practice, the duty would arise where a business receives a case

initiation letter from the CMA and would therefore be aware that its conduct is under investigation. The duty may further arise where, for example, an individual working for a business is aware that a customer has reported their suspicions of price fixing and that the customer has been interviewed by the CMA, or members of an anti-competitive agreement are "tipped off" that a member of the agreement has blown the whistle to the CMA. The duty would apply in this case to the individual and their employer. In practice, this duty is likely to be highly onerous. As things stand at present, companies already face very wide and onerous evidence preservation demands in investigations.

Market Studies and Investigations

- The Act removes the restriction on the time period during which the CMA, after the commencement of a market study, is required to decide whether or not to make a reference for an in-depth market investigation.
- The Act includes a provision to allow the CMA to make a reference for an in-depth market investigation even if it has previously decided not to do so following a market study in situations where: (i) two or more years have passed since the publication of the market study notice; or (ii) there has been a material change in circumstances.
- The Act introduces new provisions to allow the CMA to make a reference which refers a whole market for investigation, or specific features of a market. This gives the CMA more flexibility to define the scope of an investigation.
- The CMA will be able to accept voluntary commitments at any stage of a market study or investigation.
- New provisions will allow the CMA to conduct trials of remedies before settling a final remedy package, and to vary remedies accepted or imposed following a market investigation which are subsequently found to have been ineffective. The latter arises in relation to remedies accepted or imposed within the preceding 10 years from the CMA's finding of an adverse effect on competition. This power will not be available where the CMA market investigation took place less than 2 years ago. This provides a "cooling-off" period after undertakings are accepted or orders imposed, and a "long stop" of 10 years on the exercise of the power.

Civil Penalties

- There will be new powers for the CMA to issue civil penalties where currently only criminal penalties exist (e.g., penalties for destroying, falsifying or concealing documents; providing false or misleading information), and increased penalties for failure to comply with investigative measures and information requirements in antitrust investigations, merger investigations and market studies and investigations. The CMA will be able to impose civil penalties on companies of up to 1% of annual worldwide turnover and additional daily fines of up to 5% of daily worldwide turnover for ongoing non-compliance.
- New powers for the CMA to issue civil penalties of up to 5% of annual worldwide turnover for breaches of remedies and commitments in antitrust investigations, merger investigations and market studies and market investigations are also included in the Act.

Standard of Appeal

- The Act provides that the power to serve notices to a person outside of the UK may only be exercised if the person's activities are being investigated as part of a UK enforcement investigation or they have a "UK connection". In effect, this will allow information to be required to be produced by those persons who are the subject of a UK enforcement investigation and, also, third parties where there is a sufficient UK connection. A "UK connection" is defined as where a person is a UK national; is an individual who is habitually resident in the UK; is a body incorporated under the law of any part of the UK; or is a person (company or individual) that carries on business in the UK.

Territoriality

- The Act introduces an important substantive change by removing the requirement for anti-competitive agreements to be implemented in the UK. Going forward, agreements that have (or are likely to have) a direct, substantial and foreseeable effect on trade within the UK are also within the scope of the UK prohibition on anti-competitive agreements even when these agreements are not implemented in the UK.

Service of notices/information requests outside the UK

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CONSUMER PROTECTION

The Act fundamentally changes the UK consumer protection enforcement regime giving the CMA increased powers and flexibility to conduct faster and robust investigations. It also makes other important changes to current legislation including the introduction of new rules for consumer subscriptions. We highlight some of the key changes below:

Enforcement regime

- The Act provides for two regimes for civil enforcement of consumer protection law: a court-based regime (a simplified and enhanced version of the current Part 8 Enterprise Act 2008 procedure) and a direct enforcement regime to be administered by the CMA.

Investigation powers

- The CMA will have a new express power to investigate suspected infringements and to decide whether an information notice has been complied with, and if not, impose a fine for any non-compliance.
- Providing false or misleading information or the destruction or falsification of requested information will constitute a failure to comply with an information notice.
- A premises entry warrant will cover documents accessible from the premises as well as documents located off the premises (to reflect work from home practices).

Significant fines for breaches of consumer law

- The UK courts and the CMA will have the right to impose fines of up to 10% of global annual turnover for breaches of UK consumer law.

Replaces the Consumer Protection from Unfair Trading Regulations 2008

- The current rules regulating unfair commercial practices, currently set out in the Consumer Protection from Unfair Trading Regulations, will move into Part 4 of the Act. There are number of changes to the text but the key provisions remain unaltered.
- One key change is the addition of submitting or commissioning fake consumer reviews or publishing consumer reviews without taking reasonable and proportionate steps to verify that they are they are not false or misleading to the list of commercial practices which are in all circumstances considered unfair.

New rules for subscription contracts

- Businesses offering consumer subscriptions will be required to:
  - provide consumers with clearer pre-contractual information categorised as "key pre-contract information" and "full pre-contract information". This information includes: the length of any fixed term, costs during and after any introductory period, minimum total amount the consumer will be liable for under the contract and how the consumer can cancel the contract);
  - obtain the consumer's express acknowledgment that the contract imposes an obligation to make payments to the business if signed up on-line;
  - honour the consumer's 14 day statutory right to cancel the contract on initial sign up, first renewal following any introductory period and on renewal of an annual (or longer period) contract;
  - issue consumers with a reminder that a free trial or low-cost introductory period is coming to an end and a reminder before the contract auto-renews;
  - issue reminder notices for ongoing subscriptions that include details of renewal dates and amount payable together with the difference in cost between the renewal payment and the previous payment;
  - ensure consumers can exit the contract easily without involving any unnecessary steps; and
  - provide a consumer who has cancelled with an end of contract notice.

Restrictions on drip pricing

- The Act introduces new rules that require businesses to provide consumers with the total price the consumer will necessarily incur when purchasing the trader's product in any "invitation to purchase".

Other changes

- The Act also introduces regulation to consumer saving schemes, updates the consumer alternative dispute resolution regime and amends the secondary ticketing rules.

What does this mean?

- The Act will bring a major change to the enforcement landscape - both to the ease with which the CMA can enforce the law and the penalties it can impose.
- Currently, the CMA has no power to issue fines directly and must go through the courts to hold businesses to account. The new fines are also higher than those recently introduced in the EU. In the EU the fines are up to 4% of annual turnover in the Member State(s) where the breach took place whereas in the UK the fines are up to 10% of global annual turnover.
- The new rules on subscriptions will require businesses to review and change their subscription sign up and cancellation processes, as well as update subscription terms and ensure they can issue end of contract notices.
- Businesses will need to take steps to ensure that any reviews they publish are genuine by taking reasonable and proportionate steps to verify them.
- The new rules on drip pricing will require businesses to ensure any advertising that includes pricing, the price given is the total price the consumer will necessarily incur. This will include any additional mandatory costs that are often added at check-out such as booking fees or service charges.

Next Steps

The Act is expected to come into effect in Autumn 2024. The CMA has, in the meantime, been rigorously preparing for taking on its new powers under the Act. Indeed, on 24 May 2024, shortly after the Act was passed, the CMA launched a on its draft guidance on how it will exercise its functions under the new regime. Responses to the consultation are due on 12 July 2024.

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