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DMCC Act receives Royal Assent

On 24 May 2024, the long-awaited Digital Markets, Competition and Consumers (DMCC) Act 2024 received Royal Assent. More than a year after its first introduction into the House of Commons, the DMCC Bill completed its journey through the legislative process in the final 48 hours before the prorogation of Parliament, in the "wash-up" period ahead of the upcoming general election.

The DMCC introduces sweeping reforms to UK competition law and consumer protection. It creates a new ex-ante regulatory regime aimed at increasing competition in digital markets and modernises investigative and enforcement powers related to competition and consumer laws.

In this newsletter, we provide an overview of the key changes introduced by the DMCC. We will be covering the reforms in a series of more detailed briefings over the coming weeks and in the lead up to the main provisions of the DMCC coming into effect later this year.

Digital markets

Part 1 of the DMCC establishes a new digital markets regime overseen by the Digital Markets Unit within the UK Competition and Markets Authority (CMA). As reported in a previous edition of this newsletter, the regime will apply to large companies designated by the CMA as having strategic market status (SMS) in respect of a digital activity. The core elements of the SMS regime have not changed since the DMCC was first introduced. For an undertaking to be designated, the CMA will need to establish through an investigation that the following criteria are met:

- the digital activity carried out by the undertaking is linked to the UK;
- the undertaking has, in respect of that digital activity, both substantial and entrenched market power and a position of strategic influence; and
- the undertaking's global turnover in the relevant period exceeds £25 billion, or its UK turnover exceeds £1 billion.

Additional requirements for designated undertakings will include:

- **Merger transparency requirements:** the DMCC introduces a mandatory pre-completion notification requirement for certain mergers involving designated undertakings. Broadly, the relevant criteria for a merger to be notifiable to the CMA include a minimum value of consideration for the transaction (£25 million), the acquisition of certain percentage thresholds of shares or voting rights, and a specific link to the UK. This will enable the CMA to determine whether to open a Phase 1 investigation under the Enterprise Act 2002 (EA) merger control regime.
- **Pro-competition interventions and conduct requirements:** the DMCC will empower the CMA to intervene in digital markets to promote dynamic competition and innovation, by imposing 'pro-competitive interventions' (PCIs) on SMS firms. This tool will be similar to the CMA's market investigation powers. Similarly, the CMA will be able to impose targeted conduct requirements on SMS firms for the purposes of the

For further information on any EU or UK Competition related matter, please contact the Competition Group or your usual Slaughter and May contact.

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

following objectives: fair dealing, open choices and trust and transparency. In practice, these may be framed as obligations or restrictions (for example, preventing undertakings from using data in a certain way or mandating that undertakings keep certain types of data separate). Following disagreement between the House of Lords and the House of Commons on the appropriate standard for the CMA to set out conduct requirements, the DMCC as passed by Parliament provides that conduct requirements imposed by the CMA must be "proportionate". Designated undertakings will be required to provide the CMA with reports detailing their compliance with the requirements imposed on them.

General competition

Part 2 of the DMCC introduces various changes aimed at bolstering the CMA's investigative and enforcement powers to address (suspected) infringements of Chapter 1 and 2 of the Competition Act 1998. These amended powers relate to, among other things, document preservation, production of information and seizure of documents from domestic premises, as well as enhanced CMA fining powers and international cooperation and information-sharing powers. The changes are intended to modernise the CMA's enforcement toolkit and allow it to take faster and more effective action against anti-competitive conduct.

The DMCC amends various aspects of the UK's competition law framework, including:

- **Merger control:** the DMCC introduces a new jurisdictional threshold to capture "killer acquisitions", where the transaction has a sufficient UK nexus and at least one party has an existing share of supply of 33% in the UK and a UK turnover of at least £350m. The DMCC will also increase the target UK turnover threshold from £70m to £100m. Other changes include, among others: (i) a safe harbour aimed at reducing the regulatory burden for small and macro businesses; and (ii) the CMA's ability to fast-track mergers to Phase 2 and to extend the Phase 2 timetable with the consent of the merger parties.
- **Antitrust:** the DMCC expands the territorial reach of the Chapter 1 prohibition in the Competition Act 1998. The prohibition will apply to agreements where there are (or are likely to be) direct, substantial and foreseeable effects within the UK, even if such agreements are implemented outside the UK.
- **Market studies and investigations**: the DMCC introduces changes to the procedures for market studies and investigations under the EA, including the CMA's ability to accept undertakings at any stage of a market study or investigation, and the removal of the time limit faced by the CMA after commencement of a market study to make a reference or publish its decision not to make a reference.
- **Foreign state ownership of UK newspapers and news magazines**: new rules, which were introduced in a late amendment to the DMCC Bill in March 2024, will restrict foreign state ownership, control, or influence over UK newspapers and news magazines. A Government consultation on the draft regulations relating to this new regime is currently ongoing.

Consumer protection

Part 3 of the DMCC provides for two civil enforcement regimes for consumer protection law: for the first time, a new direct enforcement regime to be administered by the CMA, and an enhanced version of the existing court-based regime. The enforcement regimes cover acts or omissions amounting to commercial practices which harm the collective interests of consumers – among other changes, such practices will now expressly include fake reviews and subscription traps (see our previous client briefing and blog post on this topic).

The DMCC will empower the CMA to investigate suspected infringements of consumer protection law if it reasonably suspects that an infringing practice has occurred, is occurring, or is likely to occur. Following an investigation, the CMA may issue a final infringement notice to the undertaking including directions to achieve compliance via enhanced consumer measures which the CMA considers to be just, reasonable and proportionate. Where the CMA establishes an infringement, it will have the discretion to fine undertakings up to 10% of their global turnover.

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Next steps

Just hours before the start of the pre-election period (during which public bodies like the CMA must adhere to certain requirements not to make announcements which might compete with the election campaign for public attention or call into question public bodies' political impartiality), the CMA published for consultation its draft guidance on the digital markets aspects of the DMCC (see our blog post on this) and on its new overseas investigative assistance powers. Further guidance relating to, among other things, the consumer protection aspects of the DMCC is expected to be released later this year.

Commencement of the main provisions of the DMCC requires secondary legislation, with the bulk of the reforms expected to come into force in Autumn 2024. We will be covering these developments in more detailed thematic briefings and in upcoming newsletters, in the lead up to commencement.

OTHER DEVELOPMENTS

MERGER CONTROL

CMA finds that Microsoft/Mistral AI partnership does not qualify for investigation

On 17 May 2024, the UK Competition and Markets Authority (CMA) announced that it has decided that the partnership between Microsoft and French foundation models (FM) developer Mistral AI, does not qualify for investigation under the merger provisions of the Enterprise Act 2002. In April 2024 the CMA announced it was considering whether the partnership could be reviewed under the UK merger regime.

Microsoft had entered its partnership with Mistral AI in February 2024. The partnership which saw Microsoft invest €15 million, includes a multi-year agreement through which Microsoft will supply Mistral with Microsoft's Azure supercomputing infrastructure (the compute commitment), and a commitment to make Mistral AI's models available on Microsoft's Azure platform (the distribution agreement).

The CMA concluded in its decision, published on 21 May, that the partnership has not resulted in Microsoft obtaining material influence over Mistral AI.

In particular, the CMA noted that Microsoft's potential shareholding in Mistral is less than 1%, and that when Microsoft's shareholding is taken in combination with other factors, there is no indication that Microsoft will have the ability to influence policy through voting powers at shareholder meetings. The CMA also concluded Microsoft will not have the ability to influence policy via alternative methods, such as through influencing the Mistral board, given that it does not have board representation, special voting or veto rights and there are other larger investors.

Secondly, the CMA concluded that Microsoft did not acquire material influence through (i) the compute commitment, noting that the commitment accounted for a modest proportion of Mistral's contracted compute, nor (ii) the distribution agreement, which is non-exclusive and so Mistral remained free to put its models on other platforms. Thirdly, it was unlikely that future collaboration and development opportunities as set out in the agreement would enable Microsoft to materially influence Mistral's commercial policy.

Therefore, the CMA does not believe that Microsoft and Mistral have ceased to be distinct. As a result of the decision, the CMA does not have jurisdiction to review the partnership in its current form under merger control rules.

After publication of its updated foundation models report in April (for details, see a previous edition of our newsletter and this blog post), the CMA has recently stepped up its scrutiny of big tech investments in AI. For instance, the CMA is currently also looking into Microsoft's partnership with Inflection AI and the hiring of key employees, and Amazon's partnership with Anthropic. The CMA has yet to determine whether these partnerships qualify for merger investigation.

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ANTITRUST

European Commission fines Mondelèz for cross-border trade restrictions

On 23 May 2024, the European Commission announced that it has imposed a fine of €337.5 million on Mondelēz International, Inc. for its conduct hindering the cross-border trade of chocolate, biscuits and coffee products between EU Member States in breach of competition rules. The Commission had carried out unannounced inspections at Mondelēz's premises in Austria, Belgium and Germany and opened formal proceedings in January 2021.

Mondelēz, a US-based company whose portfolio consists of brands such as Oreo, Ritz, Toblerone and Milka, has been found to engage in anti-competitive agreements or concerted practices aimed at restricting cross-border trade. Mondelēz was also found to have abused its dominant position in certain national markets for the sale of chocolate tablets.

The Commission found that the company had engaged in 22 anti-competitive agreements or concerted practices in breach of Article 101 TFEU. In particular, the Commission noted that these agreements or concerted practises, which took place between 2012 and 2019 and covered all European markets, limited the territories or customers to which seven wholesale traders could resell Mondelēz products. One agreement also included a provision ordering customers of Mondelēz to apply higher prices for exports compared to domestic sales. Also, between 2006 and 2020 and covering all Member States, Mondelēz was found to have prevented ten exclusive distributors from fulfilling orders from customers located in other Member States without prior permission from Mondelēz.

In addition, the Commission found that, between 2015 and 2019, Mondelez breached Article 102 TFEU: Mondelēz had refused to supply a trader in Germany to prevent the resale of chocolate tablet products in four Member States where prices were higher; and Mondelēz had stopped the supply of chocolate tablet products in the Netherlands to prevent them from being imported into Belgium, where the company was selling these products at higher prices. The Commission concluded that Mondelēz's illegal practices prevented retailers from being able to freely source products in Member States with lower prices and artificially partitioned the internal market to the detriment of consumers.

The level of the fine was determined with reference to the gravity and duration of the infringements, as well as the value of Mondelēz's sales affected by the infringements. Due to the fact that Mondelēz cooperated with the Commission and acknowledged its liability for the infringements, the Commission granted a 15% reduction, resulting in a fine of €337.5 million.

GENERAL COMPETITION

UK Government publishes updated NSIA Market Guidance and updated guidance on the call-in power

On 21 May 2024, UK Government published updated market guidance on the operation of the National Security and Investment Act 2021 (NSIA), in addition to an updated section 3 statement. The updates arrive following a call for evidence issued by the Government in November 2023.

Section 3 of the NSIA allows the Secretary of State to make a statement setting out how the Secretary of State expects to exercise the call-in power under the NSIA. It includes details of sectors of economy in relation to which the Secretary of State considers trigger events are more likely to give rise to national security risks, details of trigger events and details of factors the Secretary of State expects to take into account when deciding whether to exercise the call-in power.

The updates to the section 3 statement include:

- Greater detail on trigger events including the circumstances in which certain acquisitions could be considered under the NSIA, such as the incorporation of new entities, formation of joint ventures overseas, and outward direct investment.

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- Information on how the Government may consider the risk involving transfers of technology when evaluating asset acquisitions.
- Greater guidance on where the Government may see risk from UK acquirers or acquirers that have previously been cleared through the NSI system.
- Information on how the Government may consider control risk in cases involving passive and non-controlling investments.
- Improved examples of how the Government assesses risk for targets, acquirers and control.

Important updates made to the market guidance include:

- Further details on how long the NSIA process will take, including the steps following notification and how the review period and assessment period are calculated.
- Clarification of what is meant by “governing the affairs of the entity”, if a party acquires voting rights that allow them to pass or block resolutions governing the affairs of an entity.
- As regards acquisitions involving parties who are suffering material financial distress, the guidance clarifies that timelines for screening can only be expedited in exceptional circumstances, and usually only at the stage when the Secretary of State is deciding whether to call in an acquisition.
- New guidance on how the NSIA can apply to cases of outward direct investment.
- New and clarified tips for parties completing the notification form.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

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For further information, please speak to your usual Slaughter and May contact.

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