ALERTER

A New Legal Dawn for Big Tech in the UK: DMCCA, Parts 1 and 2 Now in Force

Patrick Green KC
James White
Jack Castle

Thomas Mallon
William Moody
Kate Gardiner

After much anticipation, on 1 January 2025, Parts 1 and 2 of the Digital Markets, Competition and Consumers Act 2024 came into force throughout the United Kingdom, supported by the CMA's Digital Markets and Competition Regime Guidance dated 19 December 2024.

OVERVIEW

After much anticipation, on 1 January 2025, Parts 1 and 2 of the Digital Markets, Competition and Consumers Act 2024 (the "**DMCCA**" or the "**Act**") came into force throughout the United Kingdom, supported by the CMA's Digital Markets and Competition Regime Guidance dated 19 December 2024 (the "**Guidance**").

The implementation of Part 1 in particular is a milestone development in the regulatory landscape for the largest tech platforms with operations in the UK. Now, if a firm is designated by the CMA as having "*Strategic Market Status*" ("**SMS**") (essentially because it has substantial and entrenched market power and a position of strategic significance), the firm is liable to become the subject of specific conduct requirements ("**CRs**") and/or pro-competition interventions ("**PCIs**"). For those who are not already closely familiar with Part 1 of the DMCCA (as well as Part 2 on changes to existing competition laws), we have included a summary of the key provisions in the **Annex** to this Alerter.

At a high level, the UK's new digital markets regime has parallels with the regime already in force under the EU's Digital Markets Act 2022 ("**DMA**"), which has seen companies including Apple, Google, and Meta become subject to closer regulatory scrutiny. However, the high-level parallels between the UK's DMCCA and the EU's DMA do not mean that regulatory activity under the DMCCA is likely to mirror or otherwise reflect regulatory decisions taken in the EU (or indeed elsewhere). On the contrary and by way of specific example, under the DMCCA, a firm may only be designated as having SMS following a detailed investigation by the CMA of up to 9 months, and, in respect of SMS designated firms, the CMA may impose bespoke CRs. In contrast, under the DMA, "*gatekeeper*" status (which is the equivalent of SMS) may be designated by reference to presumptions, and the DMA provides a prescribed list of conduct requirements for firms with gatekeeper status. In that regard, the DMCCA is very much to be understood

A New Legal Dawn for Big Tech in the UK: DMCCA, Parts 1 and 2 Now in Force

Patrick Green KC, James White, Jack Castle, Thomas Mallon, William Moody & Kate Gardiner

as part of the UK's post-Brexit ability to regulate competition and markets in a way that differs to the approach taken in the EU.

LITIGATION

Whilst the imminent impact of the DMCCA from a competition, regulatory and compliance perspective is fairly well documented, the potential impact of the Act from a litigation perspective has, so far, been less well canvassed. In that regard, all commercial litigators, in-house lawyers and others within businesses with responsibility for managing commercial and litigation risks, as well as consumer representatives who act in litigation, must now be aware of:

- **The ability to review the CMA's digital markets decisions**. Pursuant to section 103 of the Act, a person with a sufficient interest may apply to the Competition Appeal Tribunal (the "**CAT**") for a review of the CMA's exercise of its digital markets functions (save as regards mergers and the imposition of civil penalties). Any application for review must be brought on judicial review grounds. This contrasts with the position in respect of CMA decisions in other contexts where the grounds for review are wider (e.g., a CMA finding of an abuse of dominance is appealable to the CAT on the merits). Notwithstanding the relative narrowness of the bases for review, it is anticipated that there will be a number of these review applications in the early stages of the DMCCA regime, not least due to the untested nature and scope of the regime and the anticipated importance of the CMA's decisions and interventions under the Act. Any such review decision of the CAT is itself appealable to the Court of Appeal on a point of law.
- **Entirely new private damages actions**. Pursuant to section 101 of the Act, a person who suffers loss by reason of an SMS firm's (i) breach of a CR, (ii) breach of a requirement in a pro-competition order ("**PCO**"), or (iii) breach of a specified commitment given to the CMA, may seek damages from the SMS firm in question. The right of action takes the form of a breach of duty owed by the SMS firm to the person who suffers loss, and defences in respect of a breach of statutory duty are expressly stated to apply. The Act provides that any final decisions of the CMA that a firm is in breach of a requirement under the Act is binding on the courts and on the Tribunal, but, equally, the new right of action under section 101 does *not* require a prior finding by the CMA that the SMS firm is in breach of the CR, PCO, or commitment. Therefore, both 'follow-on' and 'standalone' claims are possible, and we expect to see both types of claim being brought in the period from around the start of 2026 (taking into account the regulatory timelines in the Act, as summarised in the Annex to this Alerter). As regards practicalities: an action under section 101 may be brought in the High Court or in the CAT, but the DMCCA does *not* make provision for claims under section 101 to be advanced on a collective basis. It therefore remains to be seen *how* section 101 claims might be advanced in circumstances where multiple persons are alleged to have been harmed by a relevant breach.
- **The possibility of new collective proceedings**. It remains to be seen whether claims that arise under section 101 might instead be formulated as an alleged breach of competition law carried out by an SMS firm (i.e., on the basis that the facts and matters that give rise to an alleged breach of a CR, a PCO, or a commitment for the purpose of section 101, also constitute an abuse of dominance by the SMS firm in question). From a claimant perspective, the obvious procedural advantage of such an approach would be to engage the collective proceedings regime that applies in competition damages actions in the CAT. Nevertheless, the substantive merits of reformulating one right of action (i.e., a claim under section 101) as another form of action (i.e., a breach of competition law) would need to be carefully considered. Further, any such alleged breach of competition law would need to grapple with the time and resource- intensive constituent elements of a competition law claim (e.g., market definition) which do not feature (at least in the same way) in section 101 claims.
- **Read across to existing damages actions**. CMA interventions under the DMCCA are liable to impact existing damages actions, including in existing collective proceedings. For example, where the subject matter of an existing damages action materially overlaps with the CMA's regulatory activities under the DMCCA, there could well be material intervention by the CMA

A New Legal Dawn for Big Tech in the UK: DMCCA, Parts 1 and 2 Now in Force

Patrick Green KC, James White, Jack Castle, Thomas Mallon, William Moody & Kate Gardiner

in existing damages actions and/or the outcome of existing damages actions could be materially influenced by parallel CMA regulatory activity. By way of specific example, if Alphabet, Amazon, Apple, and/or Meta were designated as having SMS (noting that all of those firms are already designated as "*gatekeepers*" under the DMA regime), those firms may become subject to CRs, PCOs and/or commitments, which could potentially overlap with the issues raised in (for example) *Consumers' Association v Apple Inc*, *Hammond v Amazon*, *Ad Tech v Google*, and/or *Gormsen v Meta* (as applicable).

- **Exemplary damages**. Exemplary damages can again be sought in competition damages actions, which marks a departure from previous EU-derived rules which removed the ability of claimants to see exemplary damages in competition claims. However, exemplary damages (i) may only be sought in competition claims where the relevant infringement and loss arose after 1 January 2025, (ii) may *not* be sought or recovered in collective proceedings, and (iii) are only available to a limited extent as against immunity recipients.

In short, the DMCCA marks a material shift in the legal environment faced by the largest tech firms in this jurisdiction, both as regards the scope for substantive regulatory intervention but also as regards litigation risks and rights of redress.

Readers will also be aware of the separate consumer protection provisions contained in the DMCCA, which are due to come into force in April 2025 (and in 2026 in respect of subscription contracts). The team at Henderson Chambers will publish separate alerters on those provisions in due course – keep your eyes peeled!

If you require assistance on any DMCCA matters or would like to discuss the impact of the DMCCA (whether from an investigation, litigation or regulatory perspective), please get in touch with the clerks or with one of the authors.

ABOUT THE AUTHORS

Patrick Green KC ✉
Patrick Green KC won the coveted Barrister of the Year by The Lawyer in 2020 after securing victory for 555 Sub-postmasters in the landmark Post Office Group Litigation.

View Patrick's profile here.

James White ✉
James has a busy commercial practice with an emphasis on group litigation, competition law, commercial litigation, and financial services disputes. James is ranked as a Leading Junior for Group Litigation (Legal 500 2025).
View James' profile here.

Jack Castle ✉
Jack practices in commercial, financial services, employment and public law. He is ranked as a Rising Star by the Legal 500, and contributed the "Authorisation" chapter to Consumer Credit Law and Regulation.
View Jack's profile here.

Thomas Mallon ✉
Thom accepts instructions across the range of Chambers' practice areas. He focuses on commercial litigation, consumer finance and insurance, property, group litigation, and product liability.
View Thomas' profile here.

William Moody ✉
William has a busy practice spanning a number of areas. His main practice includes commercial litigation, group actions, financial regulation, consumer law, procurement and EU law.

View William's profile here.

Kate Gardiner ✉
Kate is developing a broad practice across all of Chambers' main areas, with a particular focus on commercial litigation, group actions, and environmental disputes.

View Kate's profile here.

2 Harcourt Buildings, Temple
London EC4Y 9DB
Tel: +44 (0)20 7583 9020 | DX: LDE1039 Chancery Lane
Web: www.hendersonchambers.co.uk | Email: clerks@hendersonchambers.co.uk

Annex: Overview of Parts 1 and 2 of the DMCCA

Patrick Green KC, James White, Jack Castle, Thomas Mallon, William Moody & Kate Gardiner

PART 1: DIGITAL MARKETS

Part 1 of the Act establishes a new regime for the further regulation of digital markets. The new regulatory powers may be exercised against undertakings that are designated by the CMA as having strategic market status ("**SMS**").

Chapter 2 – Designation of Strategic Market Status

In summary, under Part 1, Chapter 2, the CMA may designate an undertaking as having SMS where the undertaking has substantial and entrenched market power in relation to a "*digital activity*" which "*is linked to the United Kingdom*", and where the undertaking in question holds a position of strategic significance in respect of that digital activity. SMS designation lasts for 5 years.

Digital activity. Section 3 defines a "*digital activity*" as **(a)** the provision of a service by means of the internet, whether for consideration or otherwise, **(b)** the provision of one or more pieces of digital content, whether for consideration or otherwise, or **(c)** any other activity carried out for the purpose of an activity within (a) or (b). Examples within (a) include social media platforms and e-commerce platforms; examples within (b) include software, music, computer games or apps. Where a firm carries out more than one digital activity, the CMA can group these together where they have the same or similar purposes, or where they can be carried out in combination with each other to fulfil a specific purpose.

Link to the UK. Further to sections 2(1)(a) and 4, the digital activity in question must have a link to the UK. A link to the UK will arise where **(a)** the digital activity has a significant number of UK users, **(b)** the undertaking that carries out the digital activity does business in the UK in relation to the digital activity, or **(c)** the digital activity or the way in which the undertaking carries on the digital activity is likely to have an immediate, substantial and foreseeable effect on trade in the UK.

SMS Conditions. In relation to designation (referred to in paragraph 2 above), pursuant to section 2, in order for an undertaking to be designated as having SMS, the undertaking must:

a. Have substantial and entrenched market power in respect of a digital activity; and
b. Be in a position of strategic significance in respect of a digital activity.

Substantial and entrenched market power. This requirement is distinct from the concept of dominance under ordinary competition law see Guidance [2.64]). But, like the concept of dominance under competition law, "*substantial and entrenched market power*" does not have a substantive statutory definition; instead, the DMCCA emphasises that the CMA is required to assess, on a forward-looking basis, whether an undertaking has substantial and entrenched market power, taking into account possible future developments over at least a five year period (including as regards expected or foreseeable developments if the undertaking were not designated as having SMS). Further, the Guidance at [2.48] states that factors relevant to the assessment of substantial and entrenched market power will include the stability of shares of supply, the number and strength of competitive constrains on incumbent firms, profitability levels, and consumer switching.

Strategic significance. Section 6 sets out four conditions, at least one of which must be satisfied in order for an undertaking to have a position of strategic significance. The conditions are that: **(a)** the firm has achieved significant scale or size in respect of the digital activity; **(b)** the digital activity is used by a significant number of other undertakings in carrying out their business; **(c)** the undertaking's position in respect of the digital activity would enable it to extend its market power to a range of other activities; or **(d)** the undertaking's position in relation to the digital activity enables it to determine or substantially influence the behaviour of other undertakings.

Turnover requirement. In addition to the above, SMS will only be designated where the undertaking in question satisfies the turnover condition in section 7: the undertaking must have a global turnover of more than £25 billion, or UK turnover of more than £1 billion.

Process. The matters above will be assessed by the CMA as part of "*an SMS investigation*", which is a detailed and evidence-based investigation lasting up to 9 months, subject to a potential extension of 3 months (see Guidance [9.2]). This process differs to the process in the EU under which the equivalent of SMS ("*gatekeeper*" status) may be designated on the basis of presumptions by reference to quantitative criteria.

Annex: Overview of Parts 1 and 2 of the DMCCA

Patrick Green KC, James White, Jack Castle, Thomas Mallon, William Moody & Kate Gardiner

Under section 103, designation with SMS may be challenged by way of application to the CAT on judicial review grounds. The potential strategy(ies) in any such applications for review by the CAT should be kept squarely in mind by those with conduct of an SMS investigation on behalf of the relevant undertaking. (This comment applies equally in respect of other CMA decisions that may be reviewed on judicial review grounds – see paragraphs 20 and 26 below.)

A decision of the CAT on any such a review application may be appealed to the Court of Appeal on a point of law. Again, the possibility of an appeal on a point of law should be in contemplation during the investigatory phases under the DMCCA.

Chapter 3 – Conduct Requirements ("CRs")

Chapter 3 gives powers to the CMA to impose one or more CR on a designated undertaking, which are requirements as to how the designated undertaking must conduct itself in relation to the relevant digital activity (section 19(3)). However, the Guidance at [3.1] states that CRs serve to "*guide*" undertakings as to how they "*should*" conduct themselves, which implies that the CMA will approach CRs with a degree of flexibility (in that regard also see the Guidance [3.61]).

Threshold for CRs. A CR (or combination thereof) may only be imposed where the CMA considers that the imposition of the CR would be *"proportionate*" in pursuit of at least one of the following statutory objectives:

a. *The fair dealing objective*. The fair dealing objective seeks to ensure that users or potential users of the digital activity are (a) treated fairly, and (b) able to interact, whether directly or indirectly, with the undertaking on reasonable terms. The meaning of fairness in this context is not defined in the statute or in the Guidance. However, the Guidance *does* state that the CMA may publish "*interpretive notes*" to accompany a CR in order to explain the CR including, e.g., as regards what the CMA considers to be "*fair*" (see the Guidance [3.59] and see the example in [3.23] and fn 125). See section 19(6).
b. *The open choices objective*. The open choices objective is to ensure that users or potential users of the digital activity are able to choose freely and easily between the services or digital content provided by the undertaking and services or digital content provided by other undertakings. See section 19(7).
c. *The trust and transparency objective*. The trust and transparency objective is that users or potential users of the digital activity have "*the information they require*" (a) to understand the services or digital content provided by the undertaking through the relevant digital activity, including the terms on which they are provided, and (b) to make properly informed decisions about whether and how they interact with the undertaking in respect of the relevant digital activity. See section 19(8).

Further, in deciding whether to make a CR, the CMA must have regard to "*the benefits for consumers that […] would likely result (directly or indirectly)*" from the CR: Guidance [3.10].

Types of CR. CRs must be of a "*permitted type*", as prescribed by the Act. Permitted types of CR are:

a. *Mandatory CRs*. These are CRs that *oblige* a designated undertaking to trade on fair and reasonable terms; to have effective process for handling complaints; to provide clear and accurate information to users; to give explanations and notice before making material changes to their services; and to present options or settings in a way that enables users to make effective decisions about them. See section 20(2).
b. *Prohibitory CRs*. These are CRs that *prevent* a designated undertaking from applying discriminatory terms; using its position to treat its own products favourably when compared to the products of other undertakings; carrying on activities other than the relevant digital activity in a way that is likely to increase its market power or strategic significance; requiring or encouraging users to use other of the undertaking's services; restricting interoperability between the undertaking's services and those of other undertakings; restricting users' use of services; using data unfairly; and restricting the ability of users to use the products of other undertakings. See section 20(3).

Annex: Overview of Parts 1 and 2 of the DMCCA

Patrick Green KC, James White, Jack Castle, Thomas Mallon, William Moody & Kate Gardiner

Process. The Guidance gives a detailed overview of the approach that the CMA will take when deciding whether to impose a CR and, if a CR is imposed, what that CR will be. For example, the Guidance states that the CMA will start by considering whether its desired outcome could be achieved and measured through an *outcome-focused* CR. However, where the outcome in question could not clearly be assessed, the CMA may instead specify an *action-focused* CR. See Guidance at [3.27].

A CR will come into force on a date of the CMA's choosing, which will not always be immediately (section 19(11)). Further, CRs will be imposed by notice, which must be published as soon as reasonably practicable after being made (section 19(1), (4)), and contain certain specified matters, including the reasons for imposing the CR and why it is proportionate for the CR to be imposed (section 21). CRs must be kept under review (section 25); CRs can be revoked (section 22) but only following consultation (section 24(4)); and CRs will cease to have effect when designation of SMS comes to an end (section 19(11)(b)(ii); also see section 17).

Enforcement. The Act establishes a detailed enforcement regime, which begins with a "*conduct investigation*" that will be commenced where the CMA has "*reasonable ground to suspect that an undertaking has breached a conduct requirement*". The default period for a conduct investigation is up to 6 months (section 30(2)), though this can be extended by up to 3 months (section 104).

Following a conduct investigation, the CMA may:

a. Close the investigation without making a finding, including where the undertaking satisfies the CMA that its breach of the CR is outweighed by "*countervailing benefits*" of the undertaking's conduct (sections 28 and 29);
b. Make an enforcement order ("**EO**"), which will impose obligations on the undertaking to stop, prevent and/or address any damages caused by a breach of a CR (section 31);
c. Make an interim enforcement order ("**IEO**") in relation to a "*suspected breach of a conduct requirement*" where the CMA considers that this is necessary in order to prevent significant damage to a particular person, prevent conduct which could reduce the effectiveness of any other steps the CMA might take in relation to the CR, or protect the public interest (section 32);
d. Accept commitments from the undertaking in question in relation to the undertaking's behaviour in respect of the relevant CR (section 36); and
e. Adopt the "*final offer mechanism*". The final offer mechanism is concerned with the terms of a transaction between an SMS undertaking and a counterparty and essentially permits the CMA to compel the designated undertaking and the counterparty to submit to the CMA proposed payment terms that are "*fair and reasonable for that transaction*" (sections 38-45). The final offer mechanism is only available where **(a)** the transaction concerns the provision of goods and services, **(b)** the SMS undertaking has breached an EO in relation to a CR that concerns fair and reasonable terms, and **(c)** the breach could not satisfactorily be addressed "*within a reasonable time frame*" through the CMA exercising its other digital markets functions: see Guidance [7.122]. Following receipt of those proposed payment terms, the CMA will make a "*final offer order*" on the terms received from the designated undertaking or the third party. As part of this final offer mechanism, it is possible for groups of counterparties to make a single submission to the CMA.
f. Pursuant to section 103, the CMA's decisions as regards CRs may be challenged by way of an application to the CAT on judicial review grounds. The CAT's decision on those grounds may be appealed to the Court of Appeal on a point of law.

Chapter 4 – Pro-Competition Interventions

Chapter 4 gives the CMA power to make a Pro-Competition Intervention ("**PCI**") in relation to an undertaking with SMS, following a PCI investigation.

PCIs. The CMA's power in relation to making a PCI is set out in section 46:

a. A PCI may be made in circumstances where a factor or combination of factors relating to the relevant digital activity is having an adverse effect on competition (an "**AEC**") and it would be

Annex: Overview of Parts 1 and 2 of the DMCCA

Patrick Green KC, James White, Jack Castle, Thomas Mallon, William Moody & Kate Gardiner

proportionate to make the PCI for the purpose of "*remedying, mitigating or preventing*" the AEC.

b. Pursuant to section 46(5), an AEC arises where a factor or combination of factors "*prevents, restricts or distorts competition in connection with the relevant digital activity in the United Kingdom*." Note that the language "*prevents, restricts or distorts competition*" and the concept of an AEC are also used in the context of the CMA's powers to carry out a market investigation under the Enterprise Act 2002, a fact that is noted in the Guidance (see Guidance [4.3] (but also note that this emphasises that there will be areas of divergence as between the approach taken in respect of PCIs and the approach taken in respect of market investigations).

c. Before making a PCI, the CMA "*may*" have regard to "*any benefits to UK users or UK customers that the CMA considers have resulted, or may be expected to result from a factor or combination of factors that is having an adverse effect on competition*" (see section 46(2)). Similarly, when considering whether an AEC arises, the CMA "*will*" have regard to "*competition-enhancing efficiencies that have resulted, or may be excepted to result*" from the factors giving rise to the potential AEC (see the Guidance [4.13]).

PCI Investigation. A PCI may only be made following a PCI investigation.

a. A PCI investigation may be commenced "*where [the CMA] has reasonable grounds to consider that a factor or combination of factors relating to a relevant digital activity may be having an adverse effect on competition*." Section 48 provides that, when a PCI investigation begins, the CMA must give the designated undertaking an investigation notice, which must state, *inter alia,* the grounds on which the investigation is based, the "*purpose and scope*" of the investigation, and the period by the end of which the CMA is to give notice setting out its decision following the PCI investigation.

b. A PCI investigation may relate to more than one undertaking with SMS and in relation to multiple digital activities (see the Guidance, fn 167).

c. The relevant undertaking must be notified of the CMA's decision on whether to make a PCI within 9 months of the commencement of the investigation period, subject to a possible 3 month extension. Any PCI must itself be made within 4 months beginning with the date on which the CMA gives notice to the relevant undertaking of the outcome of the PCI decision. See section 50 and see Chapter 9 of the Guidance on extensions.

Forms of PCI. A Pro-Competition Order ("PCO"). A PCO establishes requirements as to how the undertaking "must" conduct itself "in relation to the relevant digital activity or otherwise". Such orders may include any of the provisions that can be incorporated within an enforcement order under the Enterprise Act 2002, Schedule 8. Those obligations include (but are not limited to) general restrictions on conduct (e.g., a restriction on certain uses of data), the imposition of obligations to be performed (e.g., a requirement to make a service interoperable with a competitor's service), and requirements to divest an aspect of the undertaking's business (see the Guidance [4.64-4.85]). Breach of a PCO may lead to enforcement action – see section 55(4), covered in paragraph 31 below.

a. The CMA may make PCOs on a "trial basis" for the purpose of "assis*ting*" the CMA in establishing what requirements would be effective in remedying any adverse effect on competition. In that regard, the CMA may, by making a further PCO, replace an initial PCO with another PCO. See sections 51 and 52. Pursuant to section 52, a PCO ceases to have effect upon revocation of the PCO or when the SMS to which it relates ceases to have effect (albeit subject to section 17).

b. Recommendations. The CMA may make a PCI in the form of "*recommendations*" given to "*any person exercising functions of a public nature*" in relation to the designated undertaking or the digital activity "*or otherwise*". Circumstances where this form of PCI might be appropriate include where there is a need for intervention that falls wholly or partly within a regulated sector, in which case the sectoral regulator may be better placed to intervene than the CMA (see Guidance [4.21-4.22]).

c. Commitments. The CMA may accept "*an appropriate commitment*" from a designated undertaking in relation to the conduct that concerns the AEC or a detrimental effect on UK users or UK customers that results from the AEC. A commitment "*is*" appropriate where the CMA

Annex: Overview of Parts 1 and 2 of the DMCCA

Patrick Green KC, James White, Jack Castle, Thomas Mallon, William Moody & Kate Gardiner

considers that compliance with the commitment would contribute to or otherwise "*be of use*" in "*remedying, mitigating or preventing*" the AEC or the detrimental effect on UK users or UK customers. Where a commitment is accepted by the CMA but it does not address the entity of the AEC that is the subject of the PCI investigation, the CMA may continue the PCI investigation insofar as it relates to conduct that is not covered by the commitment. See Section 56.

Process. When deciding which form of PCI to adopt, the CMA will consider the purpose of the PCI, the effectiveness of different forms of PCI for that purpose, and the proportionality of implementing any particular PCI for that purpose. See the Guidance [4.20]. The CMA is also under a statutory obligation to carry out a public consultation on any decision it considers making as a result of the PCI investigation, including as regards the terms of any PCO (section 49, Guidance [4.58]). Further, pursuant to section 46(4), the CMA may "*use a PCI*" for the purpose of "*remedying, mitigating or preventing any f or UK customers*" that has or might be expected to result from the AEC to which the PCI relates (i.e., whereas a PCI primarily empowers the CMA to address an adverse effect on competition), and the CMA will take any such customer detriment into account when deciding what PCI to implement.

Pursuant to section 103, PCIs may be challenged by way of application to the CAT on judicial review grounds. Any such decision of the CAT may be appealed to the Court of Appeal on a point of law.

Chapter 5 – Reporting of SMS Mergers

Chapter 5 of the DMCCA establishes an obligation on undertakings with SMS, and members of a group of companies which includes an undertaking with SMS status, to report certain transactions to the CMA. This creates an exception to the general voluntary notification regime for merger control in the UK. This new merger reporting regime is supported by bespoke CMA Guidance, also dated 19 December 2024 (CMA195). By way of high-level outline:

a. An undertaking with SMS or a member of a group of companies that includes an undertaking with SMS (referred to in the Act as a "*relevant person*" and "*P*") must report transactions prescribed by the Act to the CMA.
b. *A relevant transaction* for the purpose of the reporting obligation (referred to in the Act as a "*reportable event*") is:
    i. Per section 57(2), an event which results in P having "*qualifying status*" in respect of shares or voting rights in relation to a "*UK-connected body corporate*", and the value of all consideration provided for those shares or voting rights exceeds £25m.
    ii. Per section 57(3), the formation by P and at least one other body corporate of a "*joint venture vehicle*" where (i) it is intended that the joint venture vehicle will be a UK-connected body corporate, (ii) P has qualifying status in respect of the shares or voting rights of the joint venture vehicle, and (iii) the total value of all assets and consideration provided by P to the joint venture vehicle is at least £25m.
c. *Qualifying status* arises where P obtains shares or voting rights in relation to a UK-connected body corporate and those shares or voting rights result in P increasing its shares or voting rights in the UK-connected body corporate from: less than 15% to 15% or more; from 25% or less to more than 25%; or from 50% or less to more than 50%. See section 58.
d. *A UK-connected body corporate* is any body corporate which carries on activities in the UK, or supplies goods and services to a person or persons in the UK. See section 57(5), and the Guidance on SMS Mergers [3.11].
e. *Process*. Upon receipt of such a report, the CMA has 5 working days to confirm whether the report that is provided is sufficient (section 62) and the CMA then has a further 5 working days to review the transaction (referred to in the Act as the "*waiting period*" – see section 63). Until expiry of the waiting period, the transaction cannot be completed.
f. Following the expiry of the waiting period, the CMC will inform P whether the CMA **(a)** has decided to open an investigation into the transaction; **(b)** is continuing to assess whether to open an investigation into the transaction; or **(c)** has been able to determine that it has no further questions about the transaction at that stage (see Guidance on SMS Mergers [5.14]). The threshold for opening an investigation is a "*reasonable chance*" that the transaction gives rise to a substantial lessening of competition (see

Annex: Overview of Parts 1 and 2 of the DMCCA

Patrick Green KC, James White, Jack Castle, Thomas Mallon, William Moody & Kate Gardiner

Guidance on SMS Mergers [5.15]).

g. Section 66(1) of the Act incorporates the judicial review regime set out in section 120 of the Enterprise Act 2002 for most decisions made by the CMA under Chapter 5 (although there is a specific carve-out for decisions relating to the imposition of a penalty under section 85(4) or 87).

Chapter 6: Investigatory powers etc and compliance reports

Chapter 6 gives the CMA a number investigatory and compliance powers, which include (as set out in more detail in the relevant provisions in Chapter 6): **(a)** a power to give information notices, which may not require privileged information to be provided to the CMA (section 69; section 81); **(b)** a power to require the appointment of a senior manager who is to have responsibility for ensuring compliance with the requirements of an information notice (section 70); **(c)** power of access to (*inter alia*) business premises or equipment in order (*inter alia*) to supervise the obtainment of relevant information or to observe conduct (section 71); **(d)** power to interview a person who the CMA believes has information relevant to an SMS investigation, a PCI investigation, or an investigation as to whether an undertaking is in breach of a requirement under Part 1; **(e)** power to enter business premises without a warrant (i.e., conduct a 'dawn raid'); and **(f)** a power to enter business premises with a warrant.

Further, the Act establishes a duty on designated undertakings to preserve information relevant to (*inter alia* and as further specified in section 80) an actual or potential investigation of a breach of a requirement under Part 1, a PCI investigation, and an SMS investigation.

Finally, where an undertaking is subject to "*a digital markets requirement*", the undertaking must have an officer with responsibility for carrying out functions including monitoring compliance and the production of compliance reports. Compliance reports must be provided for each reporting period specified by the CMA. See sections 83 and 84.

Chapter 7 – Enforcement and Appeals

Civil penalties: competition requirements. The CMA may impose a penalty on an undertaking that has, "*without reasonable excuse*", failed to comply with: **(a)** a CR; **(b)** an EO in respect of a CR; **(c)** an IEO in respect of a CR; **(d)** a final offer order (see 19(e) above); **(e)** a requirement under a PCO; **(f)** commitments given to the CMA in respect of a CR and/or a PCI; **(g)** the requirements in Chapter 5 as regards mergers. Where the penalty is payable as a fixed sum, the maximum permissible penalty is an amount equal to 10% of the global total value of the turnover of the undertaking or of the group of companies to which the undertaking belongs. Where the penalty is payable as a daily sum, the maximum permissible penalty is an amount equal to 5% of the global total value of the daily turnover of the undertaking or the group of companies to which the undertaking belongs. See sections 85 and 86.

Civil penalties: information requirements. The CMA may impose a penalty where "*without reasonable excuse*": **(a)** an undertaking has failed to comply with a requirement under Chapter 6; **(b)** an undertaking has given information which is false or misleading "*in a material particular*" in connection with any function of the CMA under Part 1; **(c)** a senior manager named under section 70 (see 28 above) has failed to satisfy prescribed duties; **(d)** a nominated compliance officer (see [30] above) has failed to carry out prescribed duties; **(e)** an individual who obstructs an officer of the CMA from entry, with or without a warrant. Where the penalty is imposed as a fixed amount on an undertaking that is not an individual, the maximum amount of the penalty is an amount equal to 1% of the global total value of the person's turnover. Where the penalty is imposed as a daily sum, the maximum penalty is 5% of global daily turnover. Where the penalty is imposed on an individual, the maximum penalty is £30,000 when a fixed penalty, and £15,000 per day when a daily penalty. See sections 87 and 88.

Procedure and appeals. Pursuant to section 89 of the Act, sections 112-115 of the EA 2002 apply in relation to penalties imposed under sections 85 or 87 of the DMCCA. Also see the Guidance [8.56].

Offences. The Act establishes offences concerning the destruction, disposal, concealment and falsification of information relevant to the CMA's digital markets functions, and concerning the intentional obstruction of an officer of the CMA who seeks to enter a business premises with or without a warrant. See sections

Annex: Overview of Parts 1 and 2 of the DMCCA

Patrick Green KC, James White, Jack Castle, Thomas Mallon, William Moody & Kate Gardiner

93 to 96. Sentences range from a fine to a term of imprisonment not exceeding 2 years (see section 98).

Public and private enforcement in the courts.

a. *Director disqualification*. The Companies Director Disqualification Act 1986 is amended so as to apply in respect of requirements under Chapter 3 (CRs) or Chapter 4 (PCIs). See section 99.
b. *Court enforcement*. The CMA may apply to the court for an order to enforce the requirements under an EO, commitments in respect of a CR or PCI, a final offer order, a requirement under a PCO. See section 100.
c. *Damages*. Breaches of a CR, a requirement under a PCO, and a requirement under a commitment, are actionable in damages by a person who suffers loss and damage by reason of the breach. Any such action may be brought before the High Court or the Tribunal. The court and the Tribunal are bound by final decisions of the CMA as regards the breach of a CR, a PCO, and a commitment. See sections 101 and 102.
d. *Judicial review and subsequent appeals*. Decisions of the CMA under Part 2, save under Part 5 and save in respect of civil penalties, may be the subject of a review by the CAT on an application by a person with a sufficient interest in the decision. Any such review will apply the same principles that apply on judicial review. A review decision of the CAT may be appealed to the Court of Appeal on a point of law. See section 103.

PART 2 – CHAPTER 1, COMPETITION

Part 2, Chapter 1 of the DMCCA updates the antitrust provisions of the Competition Act 1998, enhancing the territorial reach of the Chapter 1 prohibition and refining the framework for appeals and remedies. Most notably, the DMCCA removes the previous requirement for certain agreements or practices to be implemented in the UK (section 119), adjusts the standard of review for appeals against interim measures directions (section 124), permits the granting of declaratory relief by the CAT (section 125), and reintroduces exemplary damages for certain competition proceedings (section 126).

In particular, section 119 broadens the scope of the Chapter 1 prohibition under the Competition Act 1998 by capturing agreements, decisions or concerted practices that, even if not implemented in the UK, are likely to have an "*immediate, substantial, and foreseeable*" effect on trade within the UK.

Section 124 of the Act modifies the standard of review applied by the CAT in respect of appeals relating to interim measures directions. Under the current section 46 of the CA 1998, a wide range of decisions by the CMA are appealable to the CAT. These include, for example, findings of infringement of the Chapter I or Chapter II prohibitions, the imposition of penalties, and decisions or directions made under sections 32, 33 or 35 of the Competition Act 1998. Interim measures directions were subject to a merits-based appeal standard under the Competition Act 1998. This meant that the CAT could scrutinise the substance of the CMA's decision. Section 124 of the DMCCA changes this: rather than engaging in a full merits review, the CAT will apply a more limited standard, akin to that used in judicial review. In other words, the CAT will focus more on whether the CMA acted within its powers, followed proper procedure, and took into account all relevant factors, rather than substituting its own view for the CMA's on the underlying merits of the decision.

Sections 125 and 126 address remedies and relief. Section 125 enables the CAT to grant declaratory relief, providing an additional route to clarify the application of competition law following individual cases. Section 126 amends the CA 1998 so that the EU-derived rule against the recovery of exemplary damages in competition proceedings is now omitted (such that exemplary damages can now be claimed). However, exemplary damages (i) may only be sought in competition claims where the relevant infringement and loss arose after 1 January 2025, (ii) may not be sought or recovered in collective proceedings, and (iii) are available as against immunity recipients only to a limited extent.

Other changes introduced by Part 2, Chapter 1 are primarily procedural. For example, sections 120–123 adjust existing exclusions and strengthen the CMA's investigatory powers. These include imposing a duty to preserve documents relevant to an investigation (section 121) and extending the CMA's powers to secure and review information (sections 122–123).

Annex: Overview of Parts 1 and 2 of the DMCCA

Patrick Green KC, James White, Jack Castle, Thomas Mallon, William Moody & Kate Gardiner

PART 2, CHAPTERS 2-5 ON MERGERS, MARKETS, CARTELS, MISC.

Chapter 2 – Mergers

A new *de minimis* threshold. A new "*safe harbour*" for small and micro businesses has been introduced in the form of a filing exemption for small mergers where each party's UK turnover is less than £10 million. See section 127 and Schedule 4.

Killer acquisitions. A new jurisdictional threshold means that the CMA can now review transactions when at least one merging business has an existing 33% share of supply in the UK and a UK turnover of at least £350m. See section 127 and Schedule 4.

Newspaper enterprises and foreign powers. Special media-related provisions have been introduced, with new rules restricting foreign state ownership, control, or influence over UK newspapers and news magazines.

There are also provisions for the introduction of fast-track references under sections 22 and 33 of the EA 2002 (see section 128) and adjustments to the law on mergers of energy network enterprises (see section 129).

Chapter 3 – Markets

Removal of time-limits on pre-reference consultation. Section 134 of the Act removes the time-limit on pre-reference consultation.

References. Section 135 of the Act gives the CMA the power to make a reference for a market investigation where there has been a material change in circumstances, or where more than two years have passed after the publication of the relevant market study. Further, Section 136 of the Act revises the scope of market investigations.

Undertakings. Section 137 of the Act allows the CMA to accept undertakings under Part 4 of the Enterprise Act 2002 at any stage of a market study or investigation. Section 138 amends the power of the CMA to conduct trials to assess the likely effectiveness of any such undertakings, and section 139 heightens the CMA's duty to monitor undertakings that it has accepted.

Chapter 4 – Cartels

Production of information authorised by warrant. Section 141 amends section 194 of the EA 2002, extending the relevant officer's powers to obtain information under warrant.

Chapter 5 – Miscellaneous

Attendance of witnesses. Section 142 broadens the power to ask questions in investigations, removing the requirement that an individual must have a connection to a relevant undertaking and enabling the CMA to require "*remote*" attendance from witnesses.

Civil penalties. Schedules 10, 11, and 12 of the Act make provision for the imposition of civil penalties in the circumstances specified.

Service, notices, orders. Schedule 13 makes provision for the services of documents in relation to investigation, enforcement, mergers, market studies and market investigations, as well as for the extra-territorial application of notices. Schedule 14 makes provision about the making of orders and regulations.

Working days. Section 146 extends various time limits in Part 3 of the Enterprise Act 2002 (mergers) by changing time limits from being counted in "days" to "working days".

This Alerter and its Annex should not be treated, or relied upon, as legal advice.

2 Harcourt Buildings, Temple
London EC4Y 9DB
Tel: +44 (0)20 7583 9020 | DX: LDE1039 Chancery Lane
Web: www.hendersonchambers.co.uk | Email: clerks@hendersonchambers.co.uk