



THE DMA AND THE DMCC: A SIDE BY SIDE ANALYSIS

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DMA

VS



DMCC

WHAT ARE THE REGULATIONS AND WHEN DO/DID THEY COME INTO FORCE?

The Digital Markets Act (“**DMA**”) forms part of the European Commission’s new regulations governing conduct in the digital space, to ensure “**fair and open digital markets**” and to “**end unfair practices**”.

The rules took effect from **2 May 2023**. Companies qualifying as **gatekeepers** (as outlined below) in respect to core platform services (“**CPS**”) were required to notify the Commission by **3 July 2023**. The DMA task force then must designate a company as a gatekeeper within **45 working days** (i.e. at the latest by **6 September 2023**).

Companies designated as gatekeepers must ensure compliance with their obligations under the DMA within **six months** after designation.



The Digital Markets, Competition and Consumers Bill (“**DMCC**”) introduces a new regime governing digital activities to “**promote competition in digital markets for the benefit of consumers**”.

The Bill was published on **25 April 2023** and is expected to enter into force in **Autumn 2024** (it is currently at report stage following its second reading and committee stage). Companies designated with strategic market status (“**SMS**”) must comply with bespoke codes of conduct imposed on them by the CMA.

There is no set deadline by which the CMA must designate companies as having SMS (and therefore by which they need to ensure compliance) under the DMCC. However, once the CMA begins a designation investigation, it must publish its decision (having also conducted a public consultation) within **nine months**. Therefore the first codes of conduct may be expected to first come into force at the **end of 2024 or during 2025**.

FOR WHICH COMPANIES?

The Commission can designate companies as gatekeepers if the following criteria are met:

- The company provides a **CPS** which (non-exhaustively) includes services such as online search engines, social networking, operating systems, web browsers and cloud computing;
- The company has a **significant impact on the**



The CMA can designate companies as having SMS in respect of a digital activity for a period of 5 years if the following criteria are met:

- The company has (i) **substantial and entrenched market power** (a forward-looking assessment over at least five years) and (ii) **a position of strategic significance** (by reference to factors such as size/scale, number of users, potential to extend market

internal market (presumed met if the company has **€7.5 billion** EEA turnover in each of the last three financial years, or a market capitalisation of **€75 billion** over the last financial year, **and** provides the same CPS in at least three Member States);

- The CPS is an **important gateway for businesses to reach end users** (presumed met if the CPS has more than **45 million** monthly active end-users and **10,000** yearly business users, within the EU in the last financial year); and
- The company has an (actual or foreseeable) **entrenched and durable position** (presumed met where a CPS has **45 million** monthly active end-users and **10,000** yearly business users within the EU in the last three financial years).

These thresholds apply irrespective of whether the company is incorporated outside of a member state, meaning a non-EU company can be designated as a gatekeeper.

Designated gatekeepers can request the Commission to reconsider, amend or repeal the designation decision.

The Commission may also designate gatekeepers which do not meet the quantitative thresholds stated above following a market investigation.

power to other activities and/or power to influence);

- In respect of a **digital activity** (i.e. digital content and/or a service provided by means of the internet);
- That is **linked to the UK** (i.e. if the activity has a significant number of UK users, if the company carries on business in the UK in relation to the digital activity, or if the digital activity is likely to have immediate, substantial and foreseeable effect on trade in the UK); and
- Where the company's UK turnover achieved exceeds **£1 billion** or its global turnover exceeds **£25 billion** in the "relevant period" (broadly, the most recent 12 month period, unless the 12 months before this period consisted of a higher level of turnover).

These thresholds apply irrespective of whether the company is incorporated outside of the UK, meaning a non-UK company can be designated with SMS.

The CMA may conduct a 'further SMS investigation' at any time up to 9 months before the end of the five-year designation period, in which it may (i) revoke or re-designate the company; or (ii) designate the company as having SMS in respect of a similar or connected digital activity.

Analysis

The tests for designation under the DMA and the DMCC both include qualitative criteria. At first glance, the DMCC arguably gives the CMA greater discretion to designate a company as captured by the regime - for instance the key concept of "substantial and entrenched market power" unlike its DMA equivalent, does not include quantitative criteria and requires the CMA to predict future market developments in every case, leaving the CMA with much greater room for subjective judgment.

However, in contrast to the DMA which applies presumptive thresholds, the DMCC sets a *de minimis* turnover threshold: any company falling below this threshold will not be captured by the DMCC. Therefore despite the appearance of broadness of the DMCC's criteria, it may be possible that companies find it simpler to identify whether they fall under the remit of the DMCC as compared to the DMA.

WHICH OBLIGATIONS AND POWERS?

The DMA imposes a number of **prescribed obligations** on gatekeepers in relation to their designated CPS'.

Once designated a gatekeeper, the **obligations** of the DMA will apply immediately and gatekeepers must be in compliance within six months of their designation.

These obligations include (non-exhaustively):

- **prohibitions** on:
 - (i) certain **uses of data** (such as combining and/or cross-using an end user's personal data without explicit consent);
 - (ii) **imposing unfair conditions** of use on businesses and consumers;
 - (iii) **restrictions on interoperability** (such as side loading other applications or uninstalling pre-installed applications (including in-app payment or web browsers)); and
 - (iv) **self-preferencing**: gatekeepers will be unable to treat services and products offered by itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform.
- **requirements in certain circumstances to ensure**:
 - (i) **ease of modification** (i.e. ability to remove any (non-essential) software applications, or changes by end users of default settings); and
 - (ii) the installation and **effective use of third-party software** that use



The CMA can impose **conduct requirements** in relation to designated **digital activities**. These conduct requirements are not prescribed in the DMCC. Rather, the DMCC describes 'permitted types of conduct requirement' that will be used as a framework for designing a bespoke code (set out further below).

In order to impose conduct requirements on a designated company, the CMA must first carry out a public consultation on its proposals. Whilst the CMA can carry out this consultation at the same time as the designation consultation, it is not required to do so, and there is no statutory deadline by which a conduct requirement must be imposed on a designated entity.

Permitted types of conduct requirement

- Have the objective(s) of (i) fair dealing; (ii) open choices, and/or (iii) trust and transparency; and
- Fall within at least one of the "**permitted types**" of conduct requirement which include:
- **Eight negative obligations prohibiting** activity such as:
 - (i) **using data unfairly**;
 - (ii) **application of discriminatory** terms;
 - (iii) **restrictions on interoperability**; tying (i.e. requiring or incentivising the use of another of its products);
 - (iv) **self-preferencing** including in relation to the use of data;
 - (v) **leveraging power** across markets to increase market power in relation to the digital activity.
- **Five positive obligations** that include:

or interoperate with its operating system.

Gatekeepers can ask the Commission to suspend, in whole or in part, a specific obligation that would endanger, due to exceptional circumstances beyond the gatekeeper's control, the economic viability of its operation in the EU.

- (i) trading on **fair and reasonable terms**;
- (ii) implementation of **effective processes for handling complaints and disputes**; and
- (iii) **notice and explanations** to users in advance of changes to a digital activity.

The CMA also has powers under the DMCC to:

- make '**pro-competition interventions**' in relation to a designated company which may take the form of either (i) an order imposing behavioural requirements; or (ii) recommendations for action to another body exercising public functions; and
- arbitrate disputes of payment terms between a designated company and a third party by way of '**final offer orders**'.

Analysis

While there are similarities in terms of the substance of the obligations within the DMA and the DMCC, there is divergence in respect of how these will be imposed (and in the case of the DMCC, designed) on designated companies.

The DMA is a prescriptive cross-platform regulatory regime, setting out the obligations that apply to all designated companies with respect to the activities of their CPS. By contrast, the DMCC provides the CMA with permitted types of conduct requirement that it can apply to a designated company, provided these requirements are consistent with one of the three overarching objectives. This arguably provides the CMA with greater flexibility in tailoring business specific conduct requirements to a designated company, and provides less certainty to designated companies.

Another potentially significant difference is the timing of application of the obligations under the DMA and DMCC. Whilst obligations apply under the DMA from date of designation (with a requirement to be compliant within six months), there is no date by which the CMA has to issue the notice of conduct requirements. The CMA has previously stated an intention to consult on conduct requirements concurrently to the designation process. Whether this will be the case in practice remains to be seen.

Finally, the DMA is limited to the imposition of conduct requirements on gatekeepers, whereas the DMCC also provides the CMA with a wider set of regulatory powers through the 'final offer' mechanism and pro-competition investigations, which apply in addition to its Enterprise Act powers to conduct market studies and to refer market(s) for detailed investigation (where the CMA has reasonable grounds for suspecting that a feature or combination of features of a market or markets in the UK prevents, restricts or distorts competition).

WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE?

Breaches of an obligation under the DMA

The Commission can:

- Adopt **interim measures** in case of urgency due to the risk of serious and irreparable damage for business users or end users of a gatekeeper.
- Impose structural or behavioural remedies in case of systemic non-compliance with their obligations.
- Adopt a **non-compliance decision** that:
 - orders the gatekeeper to cease and desist with the non-compliant activity within an appropriate deadline and to provide explanations on how it plans to comply with that decision; and
 - imposes a fine on the gatekeeper that cannot exceed **10% of its worldwide turnover**, or **20% of its worldwide turnover** in cases where a previous infringement has taken place in the 8 years preceding the decision.

The designated company can:

- Offer **binding commitments** (which the Commission can accept) for the relevant CPS to ensure compliance with the obligations.



Breaches of a conduct requirement under the DMCC

The CMA can:

- Make enforcement orders in relation to **breaches** of conduct requirements (including on an interim basis) to **stop** the breach, **prevent** a future breach, and to **address** damage caused by the breach.
- Impose civil penalties:
 - For failure of compliance with a **conduct requirement**: a fixed amount of up to **10% of the worldwide turnover**.
 - For failure of compliance with an enforcement order, a final offer order, a pro-competition order or a commitment: a fixed amount of up to **10% of the worldwide turnover**, **and/or** a daily rate amount that cannot exceed **5% of the total value of the daily turnover**.
 - The CMA may also apply to disqualify directors for failure of compliance with a conduct requirement, pro-competition intervention, final offer order, or enforcement order.

The designated company can:

- Offer **binding commitments** (which the CMA can accept) regarding its conduct in relation to a suspected breach of a conduct requirement or a pro-competition investigation.
- Propose the application of the **countervailing benefits** exemption regarding a potential breach of a conduct requirement if: (i) the breach of the conduct requirement gives rise to benefits to users or potential users; (ii) the benefits outweigh the impact on

competition of the breach; (iii) the conduct is indispensable and proportionate to realise the benefits and (iv) the conduct does not eliminate or prevent effective competition.

Analysis

A key distinction of the DMCC is the countervailing benefits exemption. Similar to section 9 of the Competition Act 1998, this provides a defence to designated companies when being investigated by the CMA for breaches of conduct requirements. In practice this is a high bar to meet, and whether it will be effective remains to be seen.

WHAT POWERS OF INVESTIGATION DO THE COMMISSION AND THE CMA HOLD?

Market Investigations

The Commission can open market investigations to determine whether:

- a company should be **designated as a gatekeeper** (on its own initiative or on the referral of 3 or more Member States);
- a gatekeeper has **systematically failed to comply** with its obligations under the DMA where it is found to have breached its obligations three times in eight years (on its own initiative or on the request of 1 or more Member States); and
- **another service within the digital sector** should be added to the list of CPS' defined in the DMA.

General Powers

The Commission can:

- **request information** and/or access to any data and algorithms of companies by decision or simple request;
- interview any natural or legal person (with consent) and take recordings;
- conduct **dawn raids** of any premises, land and means of



Investigations

The CMA can open investigations to determine whether:

- a company should be **designated as having SMS** under the DMCC on its own initiative;
- a designated company has breached a conduct requirement, a **'conduct investigation'**; and/or
- there are factors that may be having an adverse effect on competition, a **'pro-competition intervention'** investigation.

General Powers

The CMA can:

- request information **stored within or outside the UK** from companies, **including from extra-territorial companies**, that are part of the designated company or which carry on business in the United Kingdom;
- compel an individual **within the UK** to attend an interview.
- conduct **dawn raids**, to enter business and domestic premises in the UK. Information can be acquired whether stored within or outside the UK (but the CMA does not have the power to

transport of companies and professional associations; and

- **appoint independent external auditors and experts** to assist with dawn raids.

conduct a dawn raid on premises outside of the UK);

- **access with notice** business premises, equipment, services, and relevant information or persons in order to supervise the obtaining of information, or to observe the designated company, etc.; and
- **appoint** 'skilled persons' to provide the CMA with a report in relation to a company under investigation.

WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE WITH INVESTIGATION POWERS?

The Commission has the power to impose **fin**es in cases of failure to comply with investigative requirements of up to **1% of the worldwide turnover** for companies (including professional associations) which intentionally or negligently fail to comply with investigative requirements.



- The CMA has the power to impose **fin**es in cases of failure to comply with investigative requirements of up to:
 - **1% of the worldwide turnover** and/or **5% of the worldwide daily turnover** for a company;
 - **A fixed amount of £30,000** and/or **£15,000 per day** for an individual.

The DMCC also qualifies conduct such as destroying or falsifying information, providing false or misleading information, and obstructing an officer as a **criminal offence**. Penalties may include criminal sanctions such as a fine or imprisonment.

MERGER REQUIREMENTS

- A gatekeeper is **required to inform** the Commission about mergers, **prior** to their implementation and following the conclusion of the agreement, the announcement of a public bid or the acquisition of a controlling interest where the merging entities or the target of merger, provide CPS or any other services in the digital



The DMCC applies a suspensory merger notification regime to designated companies.

A designated company (including a member of its group) **has a duty to report** any transaction to the CMA, **prior** to completion where:

- in relation to **mergers** (i) post-acquisition its share percentage or voting rights in a UK-connected company incrementally increases from less than 15% to 15% or more,

sector, or enable the collection of data.

- **This notification is required irrespective of whether or not the concentration would be notifiable under the merger control regime.**

from 25% or less to more than 25%, or from 50% or less to more than 50%, **and** (ii) the total value of all consideration provided is at least £25 million; or

- in relation to **joint ventures**, where (i) it expects or intends that the JV will be a UK-connected company; (ii) it has, after the JV is formed, at least 15% of the share percentage or voting rights; and (iii) the total value of capital, assets contributed to the joint venture and other consideration provided by the relevant company is worth at least £25 million.

Designated companies are not allowed to complete an acquisition which falls under the above thresholds until: (i) a report is provided to the CMA detailing the transaction; and (ii) the waiting period has passed (a period of five working days after the CMA has confirmed the report provided is sufficient).

In addition to the DMCC, the CMA's existing merger control powers, including the potential imposition of any interim measures to block transactions, remain applicable, as do the Government's powers under the National Security and Investment Act regime.

Analysis

The DMA and DMCC require gatekeepers and designated companies to report qualifying mergers (to both the CMA and Commission where applicable). Importantly, the DMCC's obligation is far wider, and requires the reporting of all mergers, including those in which the target does not undertake digital activities. This obligation also extends to prospective qualifying mergers of any other company of the group to which the designated company belongs.

Significantly, the duty to report mergers under the DMCC is a divergence from the principle of voluntary notification under the UK's merger regime (and is similar in this respect to mandatory notifications under the National Security and Investment Act). Whilst this will increase obligations on designated companies to report their transactions the response of the CMA to the report may provide informal guidance to companies on whether to submit a separate merger filing to the CMA. The DMCC bill makes further amendments to the UK's merger control regime which we've analysed [here](#).

Unlike the DMCC, the DMA does not set a statutory deadline in which the Commission must consider a notified concentration before the gatekeeper can proceed.

BREACH OF MERGER REQUIREMENTS

Breaches of a Merger Requirement

- The Commission can impose fines of up to **1% of the worldwide turnover** for companies that (i) fail to inform the Commission of the concentration or (ii) supply incorrect, incomplete or misleading information.
- The Commission can also **prohibit** the gatekeeper, for a limited period following a finding of systematic non-compliance, from entering into mergers relating to digital activities.



Breaches of a Merger Requirement

- The CMA can impose a penalty of a fixed amount of up to **10% of the worldwide turnover**.

HOW WILL THE REGULATIONS BE ENFORCED?

Public Enforcement

The Commission will enforce the DMA. However, it will work with national competition authorities to ensure coherent, effective and complementary enforcement of their respective powers are applied to gatekeepers. The Commission and national competition authorities will also have the power to exchange confidential information.

Appeals

Commission decisions in respect of non-compliance, requests for information, and inspections resulting in fines can be appealed to the Court of Justice, which will have unlimited jurisdiction to annul, reduce, or increase fines and penalty payments.

Private Enforcement

Any person may bring actions before national courts in respect of non-compliance by a gatekeeper with its obligations.

Claims can be brought:

- on a **follow-on basis**, (i.e. where the Commission has



Public Enforcement

The CMA will enforce the DMCC under the remit of the CMA's Digital Markets Unit, created for the management and enforcement of the DMCC.

Appeals

CMA decisions under the DMCC can only be appealed to the Competition Appeal Tribunal (**CAT**) on a **judicial review** basis (i.e. on the grounds of (i) irrationality; (ii) illegality; (iii) procedural impropriety, (iv) legitimate expectation).

The CAT may dismiss the appeal, quash the whole or part of the decision (and remit the decision back to the CMA for reconsideration). In respect of merger decisions, the CAT also has the power to amend the level of penalty applied.

Private Enforcement

Any person affected by a breach of a conduct requirement, a pro-competition intervention, or a commitment, may bring civil proceedings for damages, an injunction (or interdict) or any other appropriate relief or remedy.

found a gatekeeper to be in breach of its obligations);

- on a **stand-alone basis**, (i.e. where the Commission has not adopted a non-compliance decision); and/or
- as **collective actions**.

Actions can be brought:

- on a **follow-on basis**, (i.e. where the CMA has found there to be a breach); and/or
- on a **stand-alone basis**, (i.e. where the CMA has not found there to be a breach).

The DMCC does not directly provision that breaches of a pro-competition intervention or a conduct requirement will be suitable for collective proceedings under 47B of the Competition Act 1998 (though this does not preclude a stand-alone claim under Chapter II of the Competition Act in which any breach of the DMCC would be persuasive, nor a representative claim under CPR rule 19.8).

Analysis

The DMCC outlines the remedies available for breach, whereas the DMA leaves open (via direct effect) the types of remedies available following breach by reference to the applicable laws of relevant member states. The DMA and the DMCC however have similarities in the applicability of private enforcement on a stand-alone and follow-on basis (although the DMA specifically holds open the possibility of collective actions).

Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

London

Governor's House
5 Laurence Pountney Hill
London EC4R 0BR England

Paris

36 rue La Fayette
75009 Paris France

Brussels

Rue Guimard 9
1040 Brussels, Belgium

Andrew Hockley

Tel: +44 (0) 20 3400 4630
andrew.hockley@bclplaw.com

David Anderson

Tel: +32 2 792 2421
david.anderson@bclplaw.com

Julie Catala Marty

Tel: +33 (0)1 44 17 77 95
julie.catalamarty@bclplaw.com

Victoria Newbold

Tel: +44 (0) 20 3400 4133
victoria.newbold@bclplaw.com

Nicholas Young

Tel: +44 (0) 20 3400 3692
nicholas.young@bclplaw.com

Rémi Beydon

Tel: +33 (0)1 44 17 77 21
remi.beydon@bclplaw.com

George Christodoulides

Tel: +44 (0) 20 3400 4745
george.christodoulides@bclplaw.com

Rebecca Loko

Tel: +44 (0) 20 3400 4535
rebecca.loko@bclplaw.com