A&O SHEARMAN

U.K. finalizes new consumer, antitrust and digital markets regime

MAY 2024

The Digital Markets, Competition and Consumers Act 2024 has finally been enacted. It introduces significant changes to U.K. merger control and antitrust rules, establishes a new consumer protection regime and introduces a groundbreaking new digital markets regime. Businesses with operations in the U.K. – particularly those active in digital and consumer sectors – should begin preparing now to ensure they are in full compliance when the rules start to take effect, for the most part expected in stages from autumn 2024.

IMPACT IN FOUR AREAS

1. CONSUMER PROTECTION: DRAMATIC STRENGTHENING OF CMA POWERS PLUS NEW RESTRICTIONS TARGETING ONLINE SALES PRACTICES

In a landmark development, the Competition and Markets Authority (CMA) will be able to bring enforcement action against companies infringing U.K. consumer protection rules directly, without recourse to the courts. It will be able

to impose fines of up to 10% of annual global turnover for infringements and there will be other heavy fines for procedural breaches.

The CMA has focused increasingly on online sales practices and the new rules introduce further restrictions on consumer businesses. Fake reviews will be added to the list of prohibited commercial practices. Hidden fees and unavoidable drip pricing will be prohibited. The rules safeguarding consumers from subscription traps will be tightened.

Overall, the CMA's consumer enforcement powers are being brought into line with existing antitrust and merger control powers, meaning the rules have more teeth and we expect greater impact going forward.

2. DIGITAL MARKETS: A NEW REGULATORY REGIME

A new digital markets regime will subject certain large digital firms to significant regulatory hurdles:

- Firms designated as having "strategic market status" (SMS) in relation to one or more digital activity by the CMA will be subject to tailored conduct requirements.
- The CMA will also be able to make "pro-competition interventions" (PCIs) to address factors underpinning the firms' market power.
- SMS firms will be required to report certain M&A to the CMA, giving the authority greater visibility over deals in the digital sector.

The CMA will have the power to enforce the regime with fines of up to 10% of global turnover for non-compliance.

The regime is designed to be more "bespoke" than its EU equivalent, the Digital Markets Act.

3. MERGER CONTROL: IMPORTANT THRESHOLD CHANGES

The CMA has updated its primary merger control thresholds for the first time since its creation. A new threshold will enable the CMA to take jurisdiction more easily over non-horizontal mergers. This is seen as important given the increased focus on the potential for competitive harm from non-horizontal mergers that may eliminate or weaken an important potential competitor or strengthen a dominant position through an acquisition in a neighboring market. The current turnover threshold will also increase (to GBP100 million) and there will be a new "safe harbor" for small mergers.

The Act introduces two amendments to the U.K. in-depth merger control review process:

- A new fast-track procedure is designed to speed up in-depth merger reviews.
- Merging parties will be able to agree an extension with the CMA, which could give more time for the consideration of complex remedies or help align the U.K. review timetable with parallel merger reviews in multi-jurisdictional deals.

4. ANTITRUST: TOUGHER POWERS TO INVESTIGATE AND ENFORCE

An important expansion to the prohibition on anticompetitive agreements will bring in scope agreements implemented outside the U.K. that have effects within the U.K.

The CMA will gain more robust powers to gather evidence, including electronic data and information located overseas. The CMA will also get substantial new fining powers: up to 1% of annual turnover for companies failing to comply with a CMA investigation and up to 5% for breaches of remedies.

In market inquiries, there will be a greater focus on ensuring any remedies are effective, as well as procedural changes to give the CMA more flexibility.

The four sections below give you the headline points about each of these areas of reform. Please be in touch with your usual A&O Shearman contact if you would like to discuss any of these aspects further.

U.K. consumer enforcement overhaul

KEY TAKEAWAYS

1. CMA WILL BE ABLE TO ENFORCE CONSUMER LAW DIRECTLY

- The CMA has been increasing its focus on practices which cause consumers harm for several years. In particular, it has been bolstering its enforcement action against online businesses and online choice architecture decisions that may mislead consumers. The CMA has until now however lacked the tools to enforce against unfair behavior itself.
- The Act changes that. The CMA will now itself be able to decide if certain consumer laws have been breached, investigate behaviors, require changes to trading practices and impose financial penalties—all without recourse to the courts.
- The CMA will still be able to make use of its enforcement powers via civil and, in the most serious cases, criminal courts. However, we expect the authority to make full use of its direct enforcement capability, with a likely surge in investigations once these powers take effect (expected in stages later in 2024).

2. COMPANIES FACE FINES OF UP TO 10% OF ANNUAL GLOBAL TURNOVER FOR CONSUMER PROTECTION LAW BREACHES

- These new penalties bring the CMA's enforcement powers up to speed with its equivalent in the antitrust space. It will be interesting to see whether parental liability rules for owners of consumer businesses also follow the same path as antitrust (i.e., whether shareholders will be found liable for the conduct of their subsidiaries).
- Companies will also face fines of up to 5% of global turnover for breaching undertakings or administrative directions and up to 1% of global turnover for other procedural breaches such as providing false or misleading information to the CMA during its investigation.
- CMA decisions which could lead to the imposition of a financial penalty will be subject to a full merits appeal. This is an important safeguard given that we expect the CMA to pursue many consumer protection cases that are novel and/or test the boundaries of its new powers, particularly in the digital space.

3. INDIVIDUALS CAN BE SUBJECT TO FIXED PENALTIES

- Individuals will also have liability under the regime and if found to have breached consumer protection laws could be fined up to GBP300,000.

4. FAKE REVIEWS ADDED TO THE LIST OF BANNED COMMERCIAL PRACTICES

- Submitting or commissioning a fake review, or a review that conceals the fact that it has been incentivized, will be automatically considered an unfair trading practice. As will publishing a consumer review in a misleading way.
- Publishing consumer reviews without taking "reasonable and proportionate" steps to prevent the publication of (or the removal of) fake reviews, reviews that conceal the fact that they have been incentivized or false/misleading review information will also be banned.
- Such unfair practices will be subject to civil, rather than criminal, liability.
- New guidance will be published to help businesses comply with the new rules.

5. HIDDEN FEES AND UNAVOIDABLE DRIP PRICING PROHIBITED

- Businesses must advertise all mandatory fees and charges upfront (e.g., booking fees for cinema and train tickets). They must also disclose the existence of any variable mandatory fees (e.g. delivery fees) and how these will be calculated. Any "invitation to purchase" that omits "material information" will therefore be deemed an unfair commercial practice.
- Significantly, enforcement will not depend (unlike other prohibitions) on demonstrating that such practices influenced a consumer's transactional decision.
- The government will keep the impact of optional drip fees (e.g., airline seat and luggage upgrades for flights) under review.

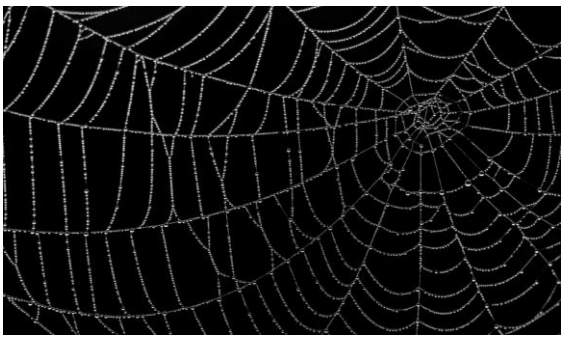
6. RULES AGAINST ONLINE SUBSCRIPTION TRAPS TIGHTENED

- Under provisions expected to come into force no earlier than spring 2026, businesses will be required to for example:
    - provide clear information to consumers before they enter a subscription contract, including notice period and steps to bring a contract to an end
    - issue a reminder to consumers when a free trial or introductory offer is coming to an end, and a reminder before a contract auto-renews onto a new term
    - ensure that consumers can exit subscriptions in a straightforward way (consumers will have the right to terminate by making a clear statement setting out their decision to bring the contract to an end)
    - reimburse consumers for any overpayments made once a subscription has been exited

7. CMA ABLE TO ENFORCE SECONDARY TICKETING RULES

- Although there was disagreement in Parliament over the rules applying to secondary ticketing facilities, with the House of Lords pushing forcefully for additional obligations, in order to get the legislation passed before Parliament was dissolved pending the U.K. general election, the House of Lords ultimately conceded its position.
- The Act therefore bolsters the enforcement of the existing secondary ticketing provisions in the Consumer Rights Act (e.g., by enabling the CMA to enforce the rules) but does not go further than that.
- The government may look again at this area in future.

New U.K. digital markets regime



KEY TAKEAWAYS

1. THE REGIME ONLY APPLIES TO FIRMS HAVING "STRATEGIC MARKET STATUS"

- The CMA, through its Digital Markets Unit, will designate firms as having SMS in relation to a digital activity. Five conditions must be met:

  i) The firm carries out one or more digital activity, e.g., providing a service via the internet or providing digital content.
  ii) The digital activity is linked to the U.K., e.g., it has a significant number of U.K. users, or the firm carries on business in the U.K. in relation to the digital activity.
  iii) The firm has "substantial and entrenched market power" (based on a forward-looking assessment).
  iv) The firm has "a position of strategic significance" in respect of the digital activity. This could be where it has achieved significant size or scale in relation to the activity, a significant number of other firms use the activity, or its position in relation to the activity would allow it to extend market power to other activities or substantially influence how other firms conduct themselves.
  v) The CMA estimates that the firm (or its group) has global turnover > GBP25 billion or U.K. turnover > GBP1bn.

- The CMA must complete an SMS designation investigation within nine months (extendable by three months). Designations will last for five years.
- We expect only a small number of the largest digital firms will be designated. The CMA has indicated three to four designation investigations in the first year. Some firms will likely be designated in relation to a number of different digital activities.
- The new digital markets competition powers are expected to commence in October 2024 and, in preparation, the CMA is consulting on draft guidance.

2. SMS FIRMS WILL BE SUBJECT TO BINDING BUT TAILORED CONDUCT REQUIREMENTS

- These will be tailored to each SMS firm. This is unlike the EU Digital Markets Act, where a blanket set of obligations apply to all "gatekeepers". Conduct requirements will be kept under review and may be amended.
- Conduct requirements can only be imposed for the purpose of certain objectives: treating users fairly, enabling user-choice, or providing information to enable users to make informed decisions. They must be proportionate.
- They must fall within permitted categories. These can take the form of obligations (such as trading on fair and reasonable terms or providing information) or restrictions (including requirements that prohibit self-preferencing, discriminatory terms or restrictions on interoperability). Their scope is potentially very broad.

- If under investigation by the CMA for suspected breach of a conduct requirement (see point 5 below), SMS firms can argue their conduct is exempt due to resulting benefits for users, such as lower prices or higher quality. Firms will likely face a high burden to show that the conditions for exemption are met.

3. CMA CAN MAKE "PRO-COMPETITION INTERVENTIONS" INCLUDING STRUCTURAL SEPARATION

- PCIs go beyond the conduct requirements and will enable the CMA to tackle the root causes of barriers to competition in digital markets. They are modelled on the existing U.K. market inquiry regime.
- PCIs are wide-reaching and can force an SMS firm to behave in a certain way, restrict its conduct or even require divestment of parts of its business. They can also take the form of recommendations to government or other regulators.
- SMS firms can offer legally binding commitments to address any potential concerns.
- The CMA has already indicated where its new powers could be used, based on experiences in recent CMA investigations and market studies, calling out platforms funded by digital advertising and mobile ecosystems.

4. SMS FIRMS MUST REPORT ALL M&A ABOVE CERTAIN THRESHOLDS TO THE CMA

- This applies where an SMS firm (or member of its group):

  i) acquires 15% or more of shares/voting rights in a company carrying on activities in the U.K. or supplying goods or services in the U.K. (or increases its shares/voting rights to more than 25% or more than 50%), and
  ii) the value of the consideration is at least GBP25 million (for this acquisition and other acquisitions of shares/voting rights in the company).

- There is a similar threshold for joint ventures.
- SMS firms cannot complete these deals until expiry of a waiting period, which will run for five to ten working days after the report is submitted.
- The rules give the CMA greater visibility over deals in the digital sector. If a reported deal raises concerns, the CMA can take forward an investigation through the standard merger control process and may impose a "hold separate" order.

5. SMS FIRMS CAN BE FINED 10% OF GLOBAL TURNOVER FOR BREACH

- This includes non-compliance with conduct requirements, PCI orders and the merger reporting obligation. Daily penalties are possible in some circumstances.
- The CMA has robust powers to investigate possible breaches, including via information requests, interviews, dawn raids, expert reports and even requiring SMS firms to demonstrate or test systems/processes.
- Failure to comply with an investigation (e.g., not responding to an information request) or giving false or misleading information will attract fines of up to 1% of global turnover, plus daily penalties.
- Individuals face fines of up to GBP30,000 and director disqualification for up to 15 years. Certain conduct may also amount to a criminal offense.

6. APPEALS AGAINST CMA DECISIONS WILL BE (MOSTLY) ON JUDICIAL REVIEW GROUNDS

- CMA decisions under the new regime can be challenged in the U.K. courts.
- Although digital firms lobbied heavily for such appeals to be on a "merits" basis rather than on more narrow judicial review grounds (which only allow appeals on the basis of errors of law or procedural fairness), the

government has ultimately settled on a hybrid approach—judicial review for all appeals under the digital regime except for challenges to the level of a fine, which will be on a merits basis.

- This goes some way to addressing concerns of digital firms that it would be difficult to successfully challenge CMA decisions, but means that key decisions (such as designation as SMS or imposing conduct requirements) can only be appealed on limited grounds.

Merger control reforms

KEY TAKEAWAYS

1. NO CHANGE TO VOLUNTARY AND NON-SUSPENSORY MERGER REVIEW PROCESS

- The CMA will continue to actively review markets and call in transactions it considers may raise antitrust concerns. It will impose strict "hold separate" obligations, particularly in completed deals.

Merger control thresholds summary

CURRENT THRESHOLDS	NEW THRESHOLDS
Target's U.K. turnover > GBP70m; or	Target's U.K. turnover > **GBP100m**; or
Parties' share of supply ≥ 25% of any goods or services in the U.K. (or a substantial part of the U.K.) in which they overlap	Parties' share of share of supply ≥ 25% of any goods or services in the U.K. (or a substantial part of the U.K.) in which they overlap **and at least one party has U.K. turnover > GBP10m**; or
	(i) One party has a share of supply ≥ 33% of any goods or services in the U.K. (or a substantial part of it) and has U.K. turnover > GBP350m; and (ii) another party is a U.K. business/body, at least part of its activities are carried on in the U.K. or it supplies goods or services in the U.K.

2. NEW "ACQUIRER-FOCUSED" THRESHOLD WILL ENABLE MORE SCRUTINY OF VERTICAL DEALS

- The CMA will have newfound jurisdiction to investigate deals where:

  i) one party has a share of supply of at least 33% of any goods or services in the U.K. (or a substantial part of it) and has a U.K. turnover of more than GBP350m; and
  ii) another party is a U.K. business or body, at least part of its activities are carried on in the U.K. or it supplies goods or services in the U.K.

- This will make it easier for the CMA to assert jurisdiction over non-horizonal mergers, including purchases by large players of start-ups or small innovative firms.
- Digital and pharma deals will most likely come under scrutiny, although the threshold is sector-agnostic.

3. INCREASE TO TARGET TURNOVER THRESHOLD FROM GBP70 MILLION TO GBP100M

- There will also be a new exemption where each party has U.K. turnover of less than GBP10m.

4. SHARE OF SUPPLY TEST UNCHANGED MEANING CONTINUED UNPREDICTABILITY

- The test (see above for details) gives the CMA huge flexibility to take jurisdiction over deals that appear to have only limited or no impact in the U.K.
- We expect the CMA to continue to use the test creatively. However, the government has previously pledged to monitor its operation and may consider reforms at a later date.

5. NEW FAST-TRACK PROCEDURE WILL STREAMLINE IN-DEPTH REVIEWS

- Parties can request an automatic reference to phase 2 at any stage of pre-notification or the phase 1 review, potentially shaving months off the overall process.
- The CMA will not have to determine whether the merger has resulted or will result in a substantial lessening of competition (SLC). Nor will parties need to accept that the merger may create an SLC.
- Other recently implemented changes to the phase 2 process (to facilitate increased engagement between the parties and CMA decision-makers, and enable earlier focus on the issues and remedies) will complement these reforms.

6. PARTIES CAN AGREE WITH THE CMA TO EXTEND AN IN-DEPTH REVIEW

- This will allow time for the consideration of remedies, which could be invaluable in complex cases.
- It could also be a useful tool to help parties align parallel reviews in multi-jurisdictional mergers.

7. FIRMS DESIGNATED UNDER THE NEW DIGITAL MARKETS REGIME MUST REPORT DEALS

- Large firms designated as having “strategic market status” will be obliged to report transactions that meet certain thresholds (lower than those under the general merger control regime—see above for more information).
- They cannot complete these deals until expiry of a waiting period, which will run for five to ten working days after the report is submitted.
- If a reported deal raises concerns, the CMA can take forward an investigation through the standard merger control regime and may impose a “hold separate” order.

8. NEW RULES PREVENT FOREIGN OWNERSHIP OF U.K. NEWSPAPERS

- With immediate effect, the Secretary of State will be able to intervene in transactions where they suspect a “foreign power” will have ownership, control or influence over U.K. newspapers or periodical news magazines.
- The CMA will be required to report on whether relevant thresholds are met. This includes a reduced turnover test of GBP2m. If they are, the Secretary of State will prohibit the transaction.

U.K. antitrust regime revamp

KEY TAKEAWAYS

1. BAN ON ANTICOMPETITIVE AGREEMENTS WILL HAVE WIDER REACH

- The prohibition will capture extra-territorial agreements that are implemented outside the U.K. as long as they have (or are likely to have) "immediate, substantial and foreseeable" effects within the U.K.

2. GREATER EVIDENCE-GATHERING POWERS FOR THE CMA

- Companies will need to be mindful of their updated duties and obligations in their compliance procedures when faced with inquiry from the CMA:
  - Individuals and businesses will be under a new duty to preserve evidence where they know or suspect that an investigation is, or is likely to be, carried out by the CMA.
  - The CMA will have broader powers to interview individuals unconnected to the company under investigation.
  - The CMA will be able to obtain any information stored electronically and accessible from the business and domestic premises (e.g., in the cloud) during dawn raids executed under a warrant.
  - When carrying out dawn raids at domestic premises the CMA will have "seize and sift" powers. This may well encourage even more inspections of private homes, which have become more common since the increase in remote-working.
  - The CMA will be able to require companies and individuals to produce documents and information held outside the U.K. where they are the subject of an enforcement investigation or are third parties with a sufficient U.K. connection. This clarifies an issue that was recently subject to appeal before the U.K. courts. It also applies to the merger control regime.

3. TOUGHER SANCTIONS FOR NON-COMPLIANCE WITH INVESTIGATIONS AND REMEDIES

- Companies failing to comply with investigations will face fines of up to 1% of annual turnover (plus 5% daily penalties) on companies. Individuals could be fined GBP30,000 (plus a GBP15,000 daily penalty).
- Breach of remedies, including interim measures, commitments and orders, could result in fines of up to 5% of annual turnover (plus 5% daily penalties) on companies. Individuals face GBP30,000 fines (plus a GBP15,000 daily penalty).
- These sanctions apply across the board to antitrust, merger control and market investigations.
- We expect the CMA to be bold in the use of its new powers.

4. EXEMPLARY DAMAGES POSSIBLE IN PRIVATE ANTITRUST LITIGATION

- The Competition Appeal Tribunal will have the power to award exemplary (i.e., punitive) damages for breaches of antitrust law, except in collective proceedings.
- It will also be able to grant declaratory relief in individual and collective claims, such as a statement on the interpretation of a contractual clause or a statutory provision, or on the validity of a patent.
- This may encourage more claims.

5. A MORE FLEXIBLE MARKETS REGIME

- There will be a greater focus on ensuring remedies following a market inquiry are effective:
    - The CMA will be able to accept binding commitments from businesses at any stage of a market study or investigation. This could bring inquiries to a close more swiftly.
    - Businesses can be required to conduct "implementation trials" of certain consumer information remedies to ensure they work as well as possible.
    - For up to ten years after finding an adverse effect on competition, the CMA will be able to vary, release, revoke or replace ineffective remedies, subject to a two-year cooling off period.
- Other amendments are designed to inject flexibility into the procedure, but could have mixed results for the companies involved:
    - Giving the CMA the option to narrow the scope of an in-depth market investigation to focus on particular features (rather than the market as a whole)—this should minimize the burden on businesses.
    - Enabling the CMA (in certain circumstances) to make a market investigation reference after previously deciding not to do so—this could result in uncertainty for market players.

6. NEW ANTITRUST POWERS IN RELATION TO MOTOR FUELS

- Bolstering the CMA's recent work to ensure effective competition in the motor fuel sector, it will have new powers to request information on the distribution, supply and retail of petrol and diesel.

Failure to comply with CMA information notices will risk fines of up to 1% of global turnover (or 5% daily penalties) and could be a criminal offense.

CONTACTS

Dominic Long
Partner, Global Deputy Head Antitrust

Tel +44 20 3088 3626
Mob +44 7825 980 441
Dominic.Long@AOShearman.com

Philip Mansfield
Partner

Tel +44 20 3088 4414
Mob +44 7795 504 011
Philip.Mansfield@AOShearman.com

Thomas Masterman
Partner

Tel +44 20 3088 3386
Mob +44 7795 887 731
Thomas.Masterman@AOShearman.com

Kristina Nordlander
Partner

Tel +44 20 3088 1280
Mob +44 7385 949 080
Kristina.Nordlander@AOShearman.com

Matthew Readings
Partner

Tel +44 20 7655 5937
Mob +44 7798 820 726
Matthew.Readings@AOShearman.com

David Weaver
Partner

Tel +44 20 3088 2099
Mob +44 7590 064 119
David.Weaver@AOShearman.com

James Webber
Partner

Tel +44 20 7655 5691
Mob +44 7793 169 336
James.Webber@AOShearman.com

Louise Tolley
Knowledge Counsel

Tel +44 20 3088 3585
Mob +44 7795 396 238
Louise.Tolley@AOShearman.com

Emily Bourne
Senior Knowledge Lawyer

Tel +44 20 3088 4562
Mob +44 7717 895 993
Emily.Bourne@AOShearman.com