ThoughtLeaders4 Competition • February 2025

TL4 Competition MAGAZINE

ISSUE 8

PIONEERING PERSPECTIVES: COMPETITION LAW, LITIGATION, AND THE NEXT GENERATION OF LEGAL THOUGHT

INTRODUCTION

"Leaders are like gardeners ... As leaders we are not only responsible for harvesting our own success but for cultivating the success of the next generation"

- Susan Collins

Welcome to Issue 8 of our Competition Magazine. In this edition, we delve into the latest developments in competition law and litigation, exploring the evolving landscape and the key challenges that shape the industry. We also spotlight our Future Thought Leaders Essay Competition, where aspiring minds have shared their innovative perspectives on the future of competition law. We are delighted to congratulate Lucy Watkiss of Linklaters who claimed victory in the essay competition.

Thank you to our corporate partners and contributors for their expert insights and fresh ideas.

ThoughtLeaders4 Competition Team

Peter Miles
Head of Event Production & Community Director
020 3481 8843
email Peter

Helen Berwick
Commercial Director Competition
0203 433 2281
email Helen

Alexander Edgal
Conference Producer Associate
020 3998 9752
email Alexander

Maddi Briggs
Strategic Partnership Senior Manager
020 3398 8545
email Maddi

Chris Leese
Founder/Chief Commercial Officer
020 7101 4151
email Chris

Danushka De Alwis
Founder/Chief Operating Officer
020 7101 4191
email Danushka

Paul Barford
Founder/ Managing Director
0203 398 8510
email Paul

CONTRIBUTORS

Eric Eckhardt, **Angeion Group**

Aastha Mantri, **Economic Insight**

Lucy Clyn, **Exton Advisors**

Simon Boschat, **Hill Dickinson**

Paul de Servigny, **IVO Capital Partners**

Alexandre Lercher, **IVO Capital Partners**

Daniel Vowden, **Mayer Brown**

Kathryn Lloyd, **Mayer Brown**

Sarah Wilks, **Mayer Brown**

Megan Stride, **Mayer Brown**

Katherine Kirrage, **Osborne Clarke**

Rob Camm, **Osborne Clarke**

Loree Kovach, **Epiq**

Tanya Lansky, **Lionfish**

Lucy Watkiss, **Economic Insight**

Maria Rosaria Raspanti, **Pavia e Ansaldo Studio Legale**

Joseph Moore, **Travers Smith**

Imogen Nolan, **Travers Smith**

Lucy Watkiss, **Linklaters**

Sara Warner, **Mills & Reeve**

Erasmia Petousi, **Linklaters**

Ilyada Akça, **CoPartners**

Markus Brösamle, **Noerr**

Ellen Huison, **Knights**

CONTENTS

| ESSAY COMPETITION |

The DMA and DMCC have Introduced Ex Ante Regulatory Frameworks for some Technology Businesses which are Intended to Complement and Supplement Competition Law. How will this Legislation Impact Private Enforcement and Interact with and Impact upon Public Enforcement of Conduct in the Digital World?

Competition

Upcoming Events

The EU Digital Markets Competition Litigation & Compliance Forum 2025
20 March 2025
Brussels

The Competition in Financial Services Summit 2025 - 2nd Annual
29 April 2025
Central London

The Global Merger Control Forum 2025
15 May 2025
Brussels

The Consumer Protection and Enforcement Summit
22 May 2025
Central London

The Competition Collective Actions Forum 2025 - 3rd Annual
5 June 2025
Central London

The UK Competition Law Summit 2025 - 2nd Annual
19 June 2025
Central London

Preview Competition events here:
https://thoughtleaders4.com/competition/competition-events

For Partnership enquiries please contact:

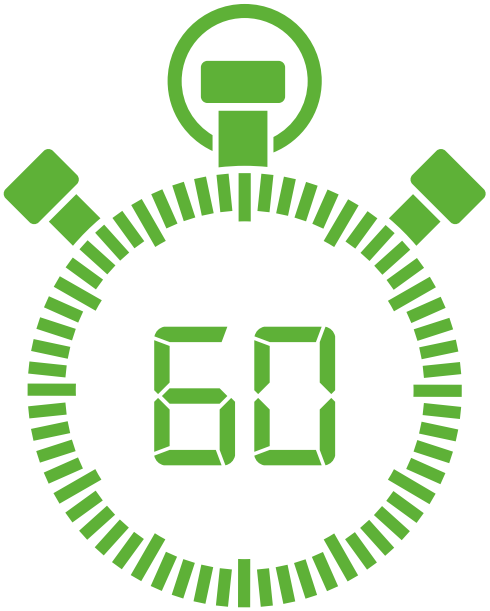
Helen Berwick

Commercial Director
Competition

T: +44 (0) 20 3433 2281
E: Helen@thoughtleaders4.com

60-SECONDS WITH:

ERIC ECKHARDT
CHIEF REVENUE OFFICER
ANGEION GROUP



Q What has been the best piece of advice you have been given in your career?

A Focus on outcomes and frame your activity around the questions, 'so what?' and 'what next?' In doing so, you will better be able to convey why your work/message/idea is important for the intended audience or goal outcome while focusing on practical next steps for action to implement or expand. So often people get caught in cycles of ideation or esoteric debate and lose the plot on what they are actually trying to accomplish.

Q What motivated you to pursue a career in law?

A I wanted to find a way to do the greatest good for the greatest number of people, and the legal system can be a mechanism to accomplish that. Working in the business of law for companies that support legal process, my motivations over the past 15 years have been shaped by neutrality and preserving balance to ensure the integrity and practicability of legal outcomes.

Q What do you see as the most rewarding thing about your job?

A I love looking at complex challenges, breaking them down, and constructing solutions. At Angeion I feel extremely lucky to work with an amazing team of similarly aligned, solution oriented, and forward-thinking people. It would all be boring if I weren't doing something I enjoy with people I like and respect, and who challenge me to be better.

Q What was the last book you read?

A On Tyranny – Twenty Lessons from the Twentieth Century by Timothy Snyder. The first line is, 'History does not repeat, but it does instruct.' I think it is important to learn from the past to safeguard the future.

Q What are you looking forward to in 2025?

A Broadly, creating memorable, and perspective expanding, experiences with my family and friends. Also, my best friend and his partner recently celebrated the arrival of their second child, and I can't wait to meet her soon!

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A As someone who values self-reflection, I don't tend to wait for the new year to seek opportunities for improvement (so no New Year's Resolution). In what feels like a rapidly changing world, I have given a lot of thought to themes for the year around which I want to anchor my perspectives, engagement with others, and behaviors. This year, I seek to focus on empowerment, balance, and growth. I think these are drivers for positive change.

Q What is the one thing you could not live without?

A A garden. I have a large organic vegetable garden at home, and in my spare time often study permaculture and regenerative agriculture. If I couldn't get my hands dirty and grow some food, sustainably, I would be a significantly less happy person. Hyperbolic to say I couldn't live without it, but it supports my mental and physical healthy meaningfully.

Q What does the perfect weekend look like?

A Good food and drink with people that I love, and more time spent outside than indoors. When practical, time spent in a forest or on top of mountain, foraging for mushrooms along the way.

Q What is something you think everyone should do at least once in their lives?

A I think that everyone should pick something that scares them, that they don't think they can do, or an area of greatest struggle, and methodically chip away at it. That looks different for everyone, but it makes us all stronger – mentally, physically, emotionally. Ideally, continue breaking down those walls and you will have a lot more perspective and space. I also think everyone should hike to the top of a mountain at least once in their life.

Q If you could give one piece of advice to aspiring practitioners in your field, what would it be?

A I would encourage people to find the path in this field that aligns with their motivations and goals. There isn't one single 'right' way to get where you want to go, and experience can shape your destination in meaningful ways, so be open and adaptable.

Q What legacy would you hope to leave behind?

A I want people's lives to be demonstrably better because of the life I lived, whether they realize it was because of me or not. I want to leave the world better than it was when I arrived.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A I would have dinner with my favorite author, Hermann Hesse. His novels, notably Siddhartha and Steppenwolf, explore the struggles of the human spirit and authenticity amidst societal expectations (especially given that they were written during a time where authoritarian influences in Europe were on the rise). I think it would be a meaningful conversation.

ANGEION GROUP
Writing the Rules

COLLECTIVE ACTION ADMINISTRATION

EXPERIENCE IS INDISPENSABLE

1631/7/7/23 - PROFESSOR CAROLYN ROBERTS V (1) ANGLIAN WATER SERVICES LIMITED AND (2) ANGLIAN WATER GROUP LIMITED

1630/7/7/23 - PROFESSOR CAROLYN ROBERTS V (1) NORTHUMBRIAN WATER LIMITED AND (2) NORTHUMBRIAN WATER GROUP LIMITED

1629/7/7/23 - PROFESSOR CAROLYN ROBERTS V (1) YORKSHIRE WATER SERVICES LIMITED AND (2) KELDA HOLDINGS LIMITED

1628/7/7/23 - PROFESSOR CAROLYN ROBERTS V (1) UNITED UTILITIES WATER LIMITED AND (2) UNITED UTILITIES GROUP PLC

1603/7/7/23 - PROFESSOR CAROLYN ROBERTS V SEVERN TRENT WATER LIMITED AND SEVERN TRENT PLC

1601/7/7/23 - DR SEAN ENNIS V APPLE INC. AND OTHERS

1599/7/7/23 - DOUG TAYLOR V BLACK HORSE LIMITED AND OTHERS

1595/7/7/23 - ROBERT HAMMOND V AMAZON.COM INC. AND OTHERS

1582/7/7/23 - CHARLES ARTHUR V ALPHABET INC. & OTHERS

1572/7/7/22 - MR CLAUDIO POLLACK V ALPHABET INC., GOOGLE LLC, AND OTHERS

1527/7/7/22 - ALEX NEILL CLASS REPRESENTATIVE LIMITED V. SONY INTERACTIVE ENTERTAINMENT EUROPE LIMITED AND OTHERS

1523/7/7/22 - BSV CLAIMS LIMITED V. BITTYLICIOUS LIMITED AND OTHERS

1468/7/7/22 - MR. JUSTIN GUTMANN V. APPLE INC., APPLE DISTRIBUTION INTERNATIONAL LIMITED, AND APPLE RETAIL UK LIMITED

1443/7/7/22 - COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED ("CICC I") V. VISA INC. AND OTHERS

1433/7/7/22 - DR LIZA LOVDAHL GORMSEN V. META PLATFORMS INC., META PLATFORMS IRELAND LIMITED AND FACEBOOK UK LIMITED

1336/7/7/19 - MR PHILLIP EVANS V BARCLAY BANK PLC AND OTHERS

CAN THE CMA TAKE A DIFFERENT APPROACH TO SUPPORT GROWTH?

Authored by: Aastha Mantri (Associate Director) - Economic Insight

2025 is a big year for the CMA. After much anticipation and the Digital Markets Unit (DMU) running in shadow form for nearly four years, on 1 January, the CMA assumed its new powers in digital markets under the Digital Markets Competition and Consumer (DMCC) Act. It has since announced the first investigation (into Google search and search advertising) and the second one (into Apple and Google's mobile ecosystems).

However, these changes have taken second place to the many headlines saying that the Government has told the CMA to reconsider its approach to delivering its functions to support growth in the UK.

The CMA initially responded to this by highlighting that it is "fully supportive of the government's focus on driving economic growth"[1] and that it considers "competition is an engine for growth." [2]

But, this did not hit the mark with the Government, and culminated last week in the CMA's chair (Marcus Bokkerink) stepping down because he apparently did not (as the Chancellor put it) "share the mission and the strategic direction"[3] of the Government.

Since then, some practitioners have expressed concern that the Government's intervention signals a loss of the CMA's independence, whereas others think that it is about time that the CMA's onerous processes were scrutinised. But there appears to be broad consensus around some core principles:

1. The UK has a productivity problem and has done ever since the financial crisis in 2008. This is not unique to UK but what is concerning is that the UK lags behind most of its peers in other G7 countries and is not showing signs of improvement.
2. While there are several reasons for this, and the CMA can hardly be held responsible for it, the decisions made by regulators (including the CMA) influence the drivers of long-term productivity and growth in the country (including investment and innovation).[4]
3. Competitive markets, where there is healthy rivalry between businesses, can drive innovation and investment, and therefore, long-term improvements in productivity and growth.
4. An independent competition authority, who makes evidence-based decisions in a predictable manner which businesses and consumers can trust, is necessary for long-term stability and growth.
5. A high regulatory burden, both in terms of processes and pace, increases costs on businesses, and therefore affects their competitiveness. Hence, a streamlined process that reduces the regulatory burden can support growth.

1 The CMA's response to the correspondence from Government available here: https://assets.publishing.service.gov.uk/media/6785237ff0528401055d233a/Response_to_correspondence_from_government.pdf.

2 Sarah Cardell's speech at the Chatham House Competition Policy 2024 available here: https://www.gov.uk/government/speeches/driving-growth-how-the-cma-is-rising-to-the-challenge.

3 Please see: https://www.bloomberg.com/news/articles/2025-01-22/reeves-says-cma-boss-replaced-by-person-who-shares-the-mission.

4 'The UK Productivity Puzzle: A Survey of the Literature and Expert Views.' Williams, S. et al. (Jul 2024) International Journal of the Economics of Business, 32(1), 31–65. Available here: https://www.tandfonline.com/doi/full/10.1080/13571516.2024.2367818.

None of these principles are terribly contentious. What is potentially more contentious is the answer to the question: How should the CMA respond to the Government's steer that it should do more to support growth in the UK, while adhering to the above principles?

One straightforward answer to this question is for the CMA to find a way to reduce the regulatory burden on businesses. This is already on the CMA's radar. Its draft Annual Plan for the next year highlights its aim to "deliver a regime that is swift yet rigorous; robust but pragmatic; agile yet predictable; collaborative yet independent."[5] It has promised, amongst other things, to accelerate its merger review timelines; show more openness to behavioural remedies; refine the thresholds and criteria for initiating investigations; and seek to be more proportionate in its engagement with businesses. It could additionally consider what this means for its implementation of its new powers under the DMCC Act. For instance, in identifying conduct requirements, it could consider alignment with similar rules in other jurisdictions; use its trialling and testing powers more selectively; etc.

But, beyond these procedural changes, could there be a more substantive change in the CMA's approach to focus on growth? Specifically, given the uncertainty inherent in its decisions,[6]

perhaps the CMA could allow itself to take more risk to maximise the opportunities for increased productivity

in sectors which are expected to drive growth in the UK. Let me explain what I mean.

It is well-established that healthy rivalry between businesses looks different in different sectors. In some sectors, healthy rivalry could predominantly involve intense price competition (e.g., the production of some basic manufactured goods). In other sectors, healthy rivalry could involve intense quality competition (e.g., in some service sectors). Given this, in sectors which are expected to be the drivers of productivity and growth, one might reasonably take the position that healthy rivalry involves businesses having the incentives to make the required investment (in physical or intellectual property) to deliver such productivity and growth.

However, making such investment requires the possibility of earning high returns on this investment. If this never happens, businesses will not bother making the investment, and competition (however fierce) would not deliver it. Equally, if it happens for too long, companies will have no incentive to invest and innovate. Therefore, competition authorities seek to balance between these opposing forces to ensure businesses have "optimal" incentives to innovate.

The trouble is that in contemporary sectors (especially ones expected to drive technological change and, therefore, productivity improvements), it is hard to determine what the right balance is. In particular, the "winner takes all" nature of these markets can mean that the risk involved with the initial investment can be higher, and as a result, the timeframes for recouping this investment can be longer. As such, working out whether companies have been earning high returns for "too long" and deciding whether the balance of incentives is right in the sector is harder for competition authorities.

This means that, to a greater or lesser degree, the CMA has to make these decisions under uncertainty. For instance, like in Vodafone/Three, it can face the decision on whether to allow a merger that reduces rivalry in the short-term to potentially deliver investment in the long-term. It hopes that, by doing so, it has correctly balanced the incentive to invest so that there is something to fight for in the future.

So, a competition authority focussed on growth might make its decision under uncertainty with a bit more openness to risk. This would mean being more patient about how long companies should earn high returns, and therefore when the balance of incentives needs to be corrected, as long as these sectors are delivering the underlying drivers of productivity and growth.

As an example, if one believed that domestic investment in Artificial Intelligence (AI) is key to productivity improvements in the UK, the CMA might allow businesses who are able and willing to make these investments a longer timeframe before considering any intervention.

(In practical terms, this might mean that these services would not be captured by the CMA under any DMCC-related investigations).

This is not unique to the CMA. Other regulators, including utility regulators in the UK, also need to make similar decisions under uncertainty. For instance, in air traffic control, one of the key objectives for the regulator is to provide the regulated company incentives to deliver critical safety infrastructure. This means that the regulator has to make the call of prioritising this investment to be delivered even if, in the short term, it risks prices being higher than may be considered efficient.

In practice, this change in approach would require the CMA to:

(a) identify which sectors could drive growth and productivity;

(b) understand what needs to happen for these sectors to deliver this growth; and

(c) (in sectors which require this) take a longer-term view of the competition horizon.

If the CMA does choose this path, the answer to whether it has got it right might only be answered much later. However, it could track leading indicators of expected changes in productivity and growth to give itself comfort in the meantime (e.g., the scale of domestic investment in the sector in the UK; the scope and scale of innovative businesses in the sector in the UK; the pace of change in other sectors who input into the sector; etc.). But, if it does not, it will need to quickly consider what else it could do to support growth because it appears that "business as usual" will not do.

5 CMA's draft annual plan 2025 to 2026. Available here: https://www.gov.uk/government/consultations/cma-draft-annual-plan-consultation-2025-to-2026/cma-draft-annual-plan-2025-to-2026#evolving-the-way-we-work.

6 For example, uncertainty about the correct counterfactual; uncertainty about how markets would evolve in the future (with or without intervention); uncertainty about the position of other companies or countries; etc.

ESG AND THE RISE OF GROUP CLAIMS IN THE CAT

AN EMERGING INTERSECTION?

Authored by: Lucy Glyn (Director) - Exton Advisors

ESG principles have rapidly moved from niche to mainstream. Increasingly, businesses are held accountable not just for their economic performance but for their impact on society, the environment, and governance practices.

This shift is paving the way for competition law to play an interesting new role in enforcing ESG principles.

As both regulatory and public expectations intensify, competition law may become a key tool in addressing harmful corporate conduct that undermines sustainable and ethical business practices. And the Competition Appeal Tribunal (CAT) might just become a hotspot for this action.

Competition law, with its focus on promoting fair market conditions and consumer welfare, has traditionally not been directly associated with ESG principles, with its focus on broader social goals, such as environmental protection, employment rights, and corporate transparency. But corporate conduct that undermines these social goals, such as collusion to limit clean energy development or to suppress transparency, could now be challenged through competition law. The ability of competition law to adapt to these concerns is a key feature of its evolving role.

The potential for competition law to be used as a vehicle for challenging unsustainable practices is further compounded by the fact that group litigation has become a key feature in the UK legal landscape, particularly in the competition law context.

The rise in the use of litigation funding also supports the increase and ease with which these cases can be brought. By providing the financial resources needed to pursue complex and high-cost group claims, funders play a pivotal role in enabling access to justice for affected parties.

This is particularly significant for ESG-related claims, where the potential claimants may be widely dispersed or lack the resources to litigate independently.

But the intersection between ESG principles and competition law is not merely conceptual; it is increasingly a practical reality. In December 2023, Professor Carolyn Roberts[1] filed a claim in the CAT against six major UK water companies, alleging that they abused their dominant positions by providing misleading information to regulators leading to customers paying higher prices for sewerage services that were allegedly underperformed. The claim's first certification hearings were held in September 2024, with further hearings scheduled for early 2025. While these may be viewed as environmental claims at their core, the allegations of monopolistic behaviour underscore their competition law basis. It remains to be seen if this claim will be certified and indeed be successful at trial.

So Why Does The CAT and the Collective Redress Mechanism Matter For ESG Breaches?

One of the key advantages of bringing ESG-related group claims in the CAT is its unique and specialised collective redress mechanism. Outside the CAT, these mechanisms are often cumbersome, less efficient, or, in some cases, not well-suited to large-scale competition-related claims.

In contrast, the ability to bring "opt-out" collective actions in the CAT, meaning that affected parties do not need to individually opt in to the claim, is crucial when the harm is widespread and diffuse, as may often be the case in ESG breaches, such as when a cartel harms both market competition as well as environmental sustainability or social fairness. By allowing groups to sue collectively without requiring individual consent, the CAT ensures that the voices of all those impacted by anti-competitive behaviour can be heard.

Moreover, the CAT has specific procedural rules and a track record in dealing with complex competition-related claims, which makes it uniquely equipped to handle the intersection of ESG issues and competition law. Without this specialised forum, ESG group claims might face significant barriers to bringing about meaningful redress in other courts, which may lack both the focus and procedural efficiency needed for such cases.

Looking ahead, the CAT will likely see an increasing number of cases where ESG issues and competition law intersect with several factors driving this trend:

Public awareness and legal pressure: As public awareness of ESG issues grows, so does the pressure on businesses to conform to sustainable practices. Competition law offers a powerful mechanism to challenge those who engage in unsustainable or unethical business conduct that also undermines fair competition.

Regulatory evolution: Governments and regulators are increasingly attuned to the need for alignment between economic and environmental goals. The UK's Competition and Markets Authority (CMA) and the European Commission have already signalled an interest in examining how anti-competitive practices could harm sustainable business practices. This regulatory evolution will likely fuel an increase in ESG-based group claims in the CAT.

Global ESG standards: As international ESG frameworks and guidelines become more established, there is growing pressure for businesses to comply with these standards. Competition law, especially in jurisdictions like the UK, which have strong consumer protection and antitrust regimes, will be increasingly used to challenge firms whose actions undermine global ESG goals.

The interplay between competition law and ESG principles is still in its nascent stages, but is perhaps set to become an important feature of corporate litigation in the years to come. This isn't just a legal trend; it's a sign of how businesses are being held to higher standards across the board.

For companies, this means ESG isn't just about good PR anymore, it's about avoiding legal risk. And for claimants, the interplay with competition law is a powerful tool for seeking justice and driving change.

1 Professor Carolyn Roberts v Severn Trent Water Limited and others

The Competition in Financial Services Summit 2025 - 2nd Annual

Delivering Fresh Insights and Perspectives on the Latest Developments and Specific Challenges Facing Financial Services Sector Competition Specialists.

29 April 2025
Central London

For partnership enquiries, please contact Helen
on +44 (0) 20 3433 2281 or email helen@thoughtleaders4.com

WHAT THE LATEST CMA GUIDANCE MEANS FOR GREENWASHING

Authored by: Simon Boschat (Senior Associate) and Oliver Hart (Trainee) - Hill Dickinson

Green Comes Out In The Wash: How The CMA Is Policing Fashion's Eco Claim

In an era of increasing consumer awareness about sustainability and environmental impact, fashion companies are under growing pressure to align with eco-friendly values. As brands rush to market with new 'green' initiatives and sustainability claims, the UK's Competition and Markets Authority (CMA) has published a practical compliance guide[1] on environmental claims for fashion brands, applying the principles set out in its Green Claims Code[2], and has also advised 17 fashion brands to review their green claims in light of the guidance. The guidance, issued to combat 'greenwashing', aims to help businesses in the fashion industry navigate the complex landscape of environmental marketing while also protecting consumers from deceptive practices.

Why The CMA Guidance Matters For Greenwashing

The fashion industry is one of the most resource-intensive sectors, notorious for its environmental and social footprint. In an era of fast and cheap fashion, it has attracted growing criticism for harmful and potentially criminal conduct in supply chains. In a previous article[3], we highlighted how Chinese cotton imports in particular had come under the microscope in a recent Court of Appeal case, amid serious allegations of forced labour and human rights abuses.

As public demand for more sustainable products grows, many companies are keen to highlight their eco-friendly credentials. However, this has led to an increase in vague, misleading, or exaggerated environmental claims that can confuse consumers and undermine trust.

To address this, the CMA's guidance provides a framework for companies to follow, ensuring that they make clear, honest, and substantiated environmental claims. The main goal is to avoid 'greenwashing' — a term used to describe companies making false or misleading statements about their environmental performance to appear more sustainable than they truly are.

Brands that make misleading or unsubstantiated environmental claims risk facing enforcement action, including investigations, fines, and negative publicity leading to reputational damage.

1 https://www.gov.uk/government/publications/complying-with-consumer-law-when-making-environmental-claims-in-the-fashion-retail-sector/complying-with-consumer-law-when-making-environmental-claims-in-the-fashion-retail-sector#put-in-place-processes-to-make-sure-your-claims-are-right

2 https://assets.publishing.service.gov.uk/media/61482fd4e90e070433f6c3ea/Guidance_for_businesses_on_making_environmental_claims_.pdf

3 https://www.hilldickinson.com/insights/articles/national-crime-agency-spotlight-unlawful-decision-not-investigate-whether-chinese

The CMA's practical compliance guidance is important for three key reasons:

1. **Consumer Protection:** To safeguard consumers from deceptive claims, ensuring they can make informed purchasing decisions.
2. **Fair Competition:** To create a level playing field where businesses are incentivised to make genuine sustainability improvements, rather than relying on empty promises.
3. **Legal Compliance:** To help businesses avoid potential legal risks, such as enforcement action for misleading claims.

Five Key Aims Of The CMA's Guidance On Environmental Claims

The CMA's guidance focuses on a few key principles to help fashion businesses make truthful and transparent environmental claims:

1. Clarity and Specificity

Claims should be clear and specific. Avoid vague terms like 'eco-friendly' and provide concrete details—such as using organic cotton or reducing water usage—so consumers understand exactly what makes the product sustainable. The need for clarity and accuracy also extends to the use of filters and other navigational tools that consumers use to find products on websites.

2. Substantiation and Evidence

Claims must be backed by verifiable evidence. This includes certifications, scientific studies, or third-party audits. Without this proof, such unsubstantiated claims risk being seen as misleading.

3. Avoiding Misleading Impressions

Businesses should avoid giving false impressions, especially through visual cues. Images logos and icons that suggest a product is more sustainable than it truly is—without evidence backing up the claim—can mislead consumers.

4. Full Lifecycle Consideration

Sustainability claims should cover the entire lifecycle of the product, from sourcing to production, transportation, and disposal. Focusing on only one aspect of sustainability can be misleading. If a claim is based on a specific part of the product's lifecycle, then this should be made clear with a prominent summary.

5. Comparative Claims

Any claims comparing products should be based on reliable evidence and made on a like-for-like basis to allow consumers to make an informed choice. Unsupported or unclear comparisons are likely to be considered misleading.

What Does The CMA's Guidance Mean For Fashion Brands And Their Supply Chains

For fashion brands, this guidance is a call to action to improve transparency and integrity when marketing sustainability efforts. The guidance comes ahead of new enforcement provisions that will soon take effect under the Digital Markets, Competition and Consumers Act 2024. Perhaps the most eye catching of the new sanctions is the potential for companies to face fines of up to 10% of their global turnover for breaches of consumer protection rules.

Companies are therefore urged to:

- Audit their claims to ensure they align with the CMA's guidelines.
- Provide consumers with clear, substantiated evidence of their environmental impact.
- Avoid exaggerated or overly broad language that could be seen as greenwashing.

To make credible and substantiated environmental claims, fashion companies will need to work closely with suppliers to ensure that sustainability practices are not just part of their marketing narrative but embedded throughout their operations. This requires a deep understanding of the entire supply chain, from raw material sourcing to production, transportation, and disposal.

CMA's Green Claims Code: Key Takeaways For Fashion Brands And Supply Chains

The CMA's guidance on environmental claims in the fashion sector sets clear standards for businesses to follow, ensuring that their sustainability claims are truthful, substantiated, and not misleading.

For companies, this means a heightened responsibility to provide verifiable evidence for any environmental claims, from sourcing materials to production processes. Failure to comply could result in legal repercussions, reputational damage, and a loss of consumer trust.

Fashion brands must embrace transparency and work closely with their supply chains to ensure their sustainability efforts are authentic and fully supported by documentation. Ultimately, the CMA's guidance provides a roadmap for companies to align their marketing with genuine environmental practices, helping them avoid greenwashing while building credibility in a market increasingly driven by ESG-conscious consumers.

FOLLOW-ON ACTIONS IN COMPETITION LAW

A POSITIVE TREND FOR EUROPEAN BUSINESSES

Authored by: Paul de Servigny (Fund Manager) and Alexandre Lercher (Litigation Analyst) - IVO Capital Partners

In recent years, the enforcement of competition law across the European Union has seen a notable rise, particularly in the number of sanctions imposed on cartels and anti-competitive agreements. The European Commission has continuously ramped up efforts against such violations, with billions of euros in fines being imposed annually. For instance, fines for cartels and anti-competitive behaviors have consistently increased over the past decade. In 2022 alone, the Commission fined car glass producers over €1.3 billion for cartel activities, highlighting the robust enforcement in this area. This trend can also be observed at the national authorities' level. Indeed, in France, the Competition Authority revealed on January 15, 2025, the total amount of fines imposed in 2024. This amount stands at €1.4 billion, which is eight times higher than in 2023. We can mention the three largest were:

1. **€611 million:** A fine in December 2024 against ten home appliance manufacturers and two distributors for price-fixing,
2. **€470 million:** A fine in October 2024 against four electrical equipment groups (Schneider Electric, Legrand, Rexel, and Sonepar) for a vertical agreement between manufacturers and distributors ; and
3. **€250 million:** A fine in March 2024 against Google for failing to comply with its commitments regarding press publishers' neighboring rights.

In the meantime, the 2014 EU Damages Directive (transposed in 2017 in France) has made it easier for victims of anti-competitive practices, especially businesses, to claim damages for the harm they suffer from such practices. This directive has removed significant barriers to follow-on actions, which are claims brought after a competition authority has found a violation. The introduction of easier access to evidence and a longer statute of limitations has enabled more companies to seek compensation, even though the practice of claiming damages is not yet a widespread reflex among businesses.

The rise of follow-on actions is a positive development for the European economy, as it promotes fair competition and holds wrongdoers accountable. By compensating victims and dissuading anti-competitive practices, follow-on actions contribute to leveling the playing field. [Enlarge] However, companies need to be made more aware of their right to compensation, as many still do not pursue claims due to a lack of understanding or fear of high litigation costs.

One of the challenges in these cases is the need for substantial economic expertise to quantify the damages, which can be costly and time-consuming. This often discourages smaller businesses from pursuing claims, limiting the full potential of the directive. But, the growing awareness of litigation funding among businesses allows an increasing number of companies, particularly in this sector, to assert their rights in court.

Despite these challenges, follow-on litigation remains a crucial tool in strengthening the integrity of the EU's competitive markets. Indeed, we have financed cases in various jurisdictions and under different regulatory frameworks. In England (before Brexit) and Portugal, we had the opportunity to fund cases with a very large number of claimants, as proceedings in these countries follow an opt-out format. We have also financed several actions in Spain, Germany, and Italy, where the procedural framework requires an opt-in system. The opt-in procedure necessitates significant efforts to gather claimants, resulting in substantial costs, which further justifies the involvement of a funder. Additionally, we have had the opportunity to finance standalone proceedings and even pre-litigation phases, enabling injured companies to come to the negotiation table with comprehensive expert reports.

Finally, we are seeing the emergence of seed funding companies that invest relatively modest amounts in cases they consider promising. In a second phase, they reach out to litigation funders to enable the formal initiation of the legal action.

Ultimately, as more companies become aware of their rights and the benefits of enforcing them, follow-on actions will play an increasingly vital role in improving corporate behavior and ensuring compliance with competition law throughout the EU.

BRG EUROPEAN COMPETITION PRACTICE

Since launching in Brussels and Paris in September 2023, BRG's European Competition practice has now grown to over 50 professionals.

Aleksandra Boutin
Managing Director
Brussels

Xavier Boutin
Managing Director
Brussels

Adina Claici
Managing Director
Brussels

Konstantin Ebinger
Managing Director
Brussels

Laurent Eymard
Managing Director
Brussels & Paris

Marcella Fantini
Managing Director
Rome

Greg Harman
Managing Director
London

Kai-Uwe Kühn
Managing Director
Brussels

Francesco Lo Passo
Managing Director
Rome

Liberty Macebo Mncube
Managing Director
Johannesburg

David Parker
Managing Director
London

Dante Quaglione
Managing Director
London & Rome

Mark Bosley
Director
London

Jean-Gabriel Despeyroux
Director
Paris

Cyril Hariton
Director
Brussels

BRG

INTELLIGENCE THAT WORKS

THE VANISHING POINT

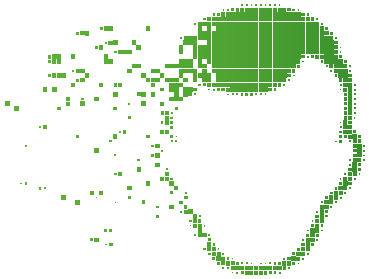
ANTITRUST RISKS RAISED BY EPHEMERAL MESSAGES

Authored by: Daniel Vowden (Partner), Kathryn Lloyd (Senior Associate), Sarah Wilks (Knowledge Counsel) & Megan Stride (Associate) - Mayer Brown

Ephemeral messaging is a form of multimedia digital communication characterised by the automatic disappearance of messages after receipt. The ubiquity of ephemeral messaging, including through popular software applications such as SnapChat, WhatsApp, Telegram and Signal, is increasingly a cause of concern among competition authorities.

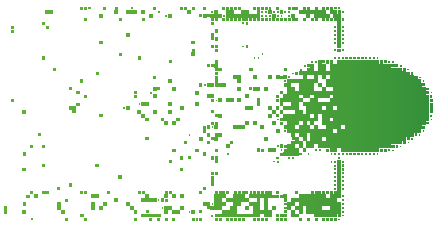
Cartels are characteristically conducted in secret. Ephemeral messaging, which in addition to automated deletion also typically offers end-to-end security encryption, provides an ideal means for secret collusion.

In 2024, the European Commission imposed a €15.9 million fine for the deletion of incriminating WhatsApp messages during an antitrust inspection.



Notwithstanding this fine, the European Commission has yet to issue guidance or otherwise significantly amend its investigatory practices to address ephemeral messaging. In January 2025, the UK Competition and Markets Authority ("CMA") gained new investigatory powers under the Digital Markets, Competition and Consumers Act ("DMCCA"). These powers, intended to be "fit for purpose" in a digital world, provide the agency with means to target ephemeral messaging in antitrust investigations. The DMCCA also places more extensive obligations on businesses to preserve evidence, including ephemeral messages.

In the United States, the Department of Justice ("DoJ") and the Federal Trade Commission ("FTC") have gone further, issuing specific guidance to businesses on the treatment of ephemeral messages, particularly around appropriate document preservation practices.



1. New CMA Powers Target Ephemeral Messages

The CMA, like competition authorities across Europe, employs sophisticated tools to collect audio files, emails, text messages and instant messages during antitrust investigations. Historically, however, a "gap" arguably existed in relation to ephemeral messaging, with technology evolving at a faster pace than agency practice.

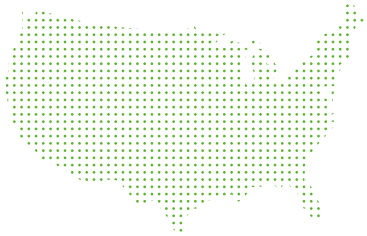
The DMCCA looks to address this gap. It confers on the CMA extensive new investigatory powers that better reflect contemporary working practices.

During an antitrust inspection, the CMA now has the power to access to data, including digital data, "accessible from the premises" under investigation (as opposed to "on" those premises). This applies to searches both of domestic and company premises. Additionally, the CMA can now require production of passwords, encryption keys and assistance from employees in identifying and accessing remotely stored digital documents. This brings ephemeral messages, including messages accessible via personal devices used for business purposes, within the scope of the CMA's search powers.

The DMCCA also imposes more extensive obligations on business to preserve potentially relevant evidence, including ephemeral messages.

A new duty to preserve documents (including electronic documents and digital communications) is triggered under the DMCCA where a person knows or suspects that an investigation is being, or is likely to be, carried out by the CMA. Ephemeral messages are, in principle, within the scope of this wide duty, raising practical challenges for business when formulating appropriate document preservation policies. The CMA's Guidance on Investigation Procedures in Competition Act 1998 Cases (CMA8) expressly notes that "[t]he CMA is unlikely to regard automatic destruction of relevant documents following a business' document retention policy as a 'reasonable excuse'...".

Reforms under the DMCCA mean that intentional or negligent obstruction of investigations - including destruction of or tampering with relevant evidence - carry significant penalties in the UK. Businesses are now at risk of fixed penalties of up to 1% of global turnover (with fixed penalties formerly limited to amounts not exceeding £30,000).



2. Learnings from the US

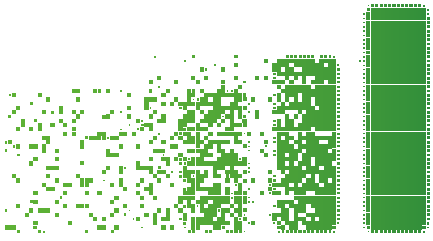
In 2023, the DOJ announced[1] a number of updates to its guidance covering its Criminal Division's Evaluation of Corporate Compliance Programs that targeted ephemeral messaging.

The DOJ explained that it would consider the extent to which a company's policies on ephemeral messaging are tailored to particular risks and needs, as well as whether those policies adequately ensure that such communications can be preserved and accessed. If a company under investigation does not produce communications from third-party messaging platforms, DOJ prosecutors will ask questions, and a lack of answers could affect how the DOJ assesses a company's cooperation efforts.

The DOJ Antitrust Division struck a similar tone in November 2024 when it updated its guidance explaining how it evaluates companies' antitrust compliance programs. In that context, the Antitrust Division will consider what "electronic communication channels" are permitted under company policies, how the company has attempted to manage and preserve ephemeral messaging and other information within those channels, and the company's rationale for any preservation or deletion settings it permits. The Antitrust Division will look at how companies communicate these policies to employees as well.

The FTC has observed that companies risk civil or criminal sanctions if they fail to preserve ephemeral messages when they were obliged to do so. In those contexts, companies should turn off any automatic deletion settings, and may even need to stop the use of certain applications altogether.

Both the DOJ and FTC have also acknowledged that using ephemeral messaging can increase the likelihood that personal devices fall in the scope of an inquiry.



3. Key takeaways

Reforms under the DMCCA, effective 1 January 2025, substantially bolster the CMA's ability to target ephemeral messages during antitrust investigations. Digital evidence, including ephemeral messages, are regarded as a key source of evidence in antitrust investigations.

Firms that are under investigation should take steps to preserve documents early on in an investigation by implementing a "litigation hold" on all relevant data. In practice, firms may need to navigate challenges on this front including in relation to technical limitations and privacy concerns. In the UK, the DMCCA requires this step to be taken once a person "knows or suspects that an investigation… is being, or is likely to be, carried out" by the CMA. Where possible, such "litigation holds" should set out as a key priority the disabling of auto-delete features of ephemeral messaging apps.

Organisations will need to be ready to explain their document preservation policies. A proportionate balance will need to be struck between a business's need to retain documents for only limited periods versus its legal obligations to cooperate during inspections.

In the absence of specific guidance from the CMA, much can be learned from the best practices advocated by the DoJ and FTC. In devising antitrust compliance policies, companies would be well-advised to consider how precisely ephemeral messaging is treated and what specific safeguards should be adopted, balancing commercial imperatives with legal risks. Effective training and the dissemination of guidance to employees is of paramount importance, as a means to avoid wrongdoing in the first instance and to ensure retention policies accord with employee practices and can therefore withstand scrutiny during an antitrust investigation.

1 https://www.mayerbrown.com/en/insights/publications/2023/03/dojs-criminal-division-announces-further-updates-to-doj-policy-on-key-topics-ephemeral-messaging-compensation-clawbacks-and-selection-of-corporate-monitors

Competition

The Global Merger Control Forum 2025

Explore the evolving practical, political, and technical challenges global merger control landscape

15 May 2025
Brussels

Complimentary attendance for In-House Counsel, Regulatory Authorities and Government Representatives

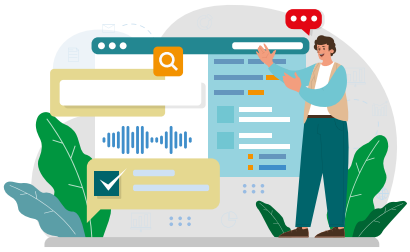
For partnership enquiries, please contact Helen
on +44 (0) 20 3433 2281 or email
helen@thoughtleaders4.com

WHAT CAN BUSINESS EXPECT FROM THE UK DIGITAL MARKETS COMPETITION REGIME IN 2025?

AND HOW DOES THE UK EXPERIENCE COMPARE TO THAT OF THE EU?

Authored by: Katherine Kirrage (Partner) and Rob Camm (Knowledge Lawyer) - Osborne Clarke

The digital markets competition regime (the "regime") under the Digital Markets, Competition and Consumers Act 2024 (DMCCA) came into force on 1 January 2025, following publication of the Competition and Markets Authority's final guidance on it on 19 December 2024. It represents a substantial change to regulation of the technology landscape in the UK, and especially large tech firms. In this article we discuss what can be expected from the regime in the coming years, as well as comparing the experience of challenger firms, big tech and the Commission under the Digital Markets Act (DMA) in the EU.



An Overview Of The Regime

Under the digital markets competition regime, the CMA has the power to designate the largest tech firms with strategic market status (SMS). This allows it to impose conduct requirements (CRs) and/or pro-competitive interventions (PCIs) to remedy the perceived anticompetitive conduct of these firms.

The CMA promotes the participative and consultative nature of the regime throughout its guidance, in many cases reflecting the statutory provisions of the DMCCA.

The regime promises several opportunities for engagement with the Digital Markets Unit (DMU) by designated firms and the third parties that interact with them, among others.

Where The Regime May Focus

On Tuesday 7 January 2025, the CMA set out its initial plans for the digital markets competition regime. It has committed to implement it in an open, transparent, proportionate and predictable way that moves at pace, while ensuring a fair process.

As part of providing that predictability, the chief executive, Sarah Cardell, announced that the CMA intends "to launch SMS investigations in relation to 3 distinct digital activities in the first 6 months".

The first of these is to determine if Google has SMS in its general search and search advertising activities. The second is to assess whether Apple and Google have SMS in their mobile ecosystems, including operating systems, app stores and mobile browsers. Now the CMA anticipates a short pause before launching the next investigation into a third area of digital activity around June. Will Hayter (head of the DMU) has indicated that this staggered approach has been adopted in consideration of the capacity of both the CMA and challenger firms.

The aim is to allow the CMA to manage its resources in a timely and efficient way, while upholding its commitment to operate the regime in a proportionate manner without undue burden for key stakeholders. Whether that happens in practice remains to be seen, especially given the complexity of the arguments and evidence it is likely to be dealing with. It may help that the CMA has stated that it will seek to build on research already done, reflected in the recent suggestion by Sarah Cardell that it is likely SMS investigations will reflect previous CMA market studies. The CMA has an ongoing market investigation into the cloud services market, with a deadline of 4 August 2025. Depending on the outcome, the CMA may consider this to be another area to aim its digital market's powers.

It is also notable that the CMA expects to consult on an initial set of CRs in parallel with the initial investigations.

The DMCCA and DMA

In its press release, the CMA also noted that the coming into force of the regime follows the implementation of the EU's Digital Markets Act (DMA). It is possible that the CMA will be able to take a number of lessons from the European Commission's enforcement of the DMA to date.

Although both laws target similar conduct – perceived distortions of competition by large tech companies – they differ in their approach.

While the DMA contains a standard set of rules that apply to all gatekeepers, the DMCCA gives the DMU the ability to create a tailored set of rules for each separate SMS firm and digital activity.

Sarah Cardell has highlighted the hope that bespoke, targeted regulation will offer confidence that intervention is opening up opportunity rather than limiting innovation. Will Hayter gave the example of some Big Tech firms being slow to roll out AI tools in Europe because of regulatory uncertainty.

Additionally, the CMA may be able to take advantage of more advanced proceedings and enforcement experience in the EU as Mr Hayter indicated. It seems likely that there would be significant learning to be done from the Commission's non-compliance investigations and subsequent proceedings, with Apple's interoperability obligations under the DMA being one such example. It is possible that these regulatory discussions may give the CMA and Apple a more advanced starting point when drafting CRs or PCIs. The CMA hopes that its collaborative and iterative approach will mean that companies won't simply avoid bringing a new product to the UK (as Apple has done with Apple Intelligence in the EU). However, this approach also risks prolonging regulatory uncertainty as SMS firms will not know exactly what is required when developing a new product: a difficult balance for the CMA to navigate.

Appropriate Flexibility Or Procedural Overload?

Business now knows much more – it has the legislation and guidance, and can take an educated guess at potential targets for SMS designation, CRs and PCIs as well as being able to anticipate issues that may be raised under the regime alongside the solutions that could be proposed. However, the exact path of the regime is still somewhat unclear.

The CMA is committed to a very intensive period of enforcement over the coming years. The level of engagement required (and asked for) from both SMS firms and third parties will be substantial, even before considering potential challenges to decisions under the regime. Comments from some American tech companies that regulation in Europe (presumably the UK is included in this) is becoming overbearing and even tariff-like places even more pressure on the CMA. Whether it can achieve its goals of UK growth and innovation while developing bespoke regulation under a global spotlight will be a key question this year.

RBB| Economics

Global leaders in competition economics

We are experts in competition economics.

We are fully committed to every case we take on and rigorous in the analysis we deliver.

We deal with the complete spectrum of competition policy assignments from mergers and litigation through to market investigations and abuse of dominance.

230+ specialist economists

16 offices worldwide

Landmark cases for the world's largest firms

rbbecon.com

Proud Competition Community Partner

Epiq holds a well-earned reputation as one of the world's preeminent providers of class and group action administration services. This has been reinforced through the successful management of some of history's largest matters.

People.
Partnership.
Performance.

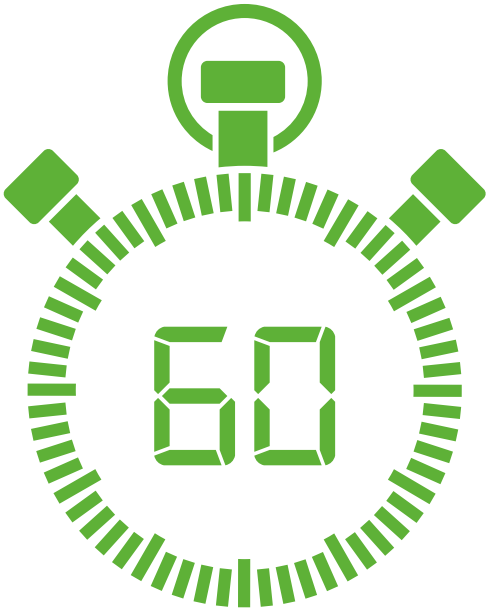
To learn more, contact
Lauren McGeever
Managing Director
lmcgeever@epiqglobal.com
+1 917 344 9460

epiq

epiqglobal.com

60-SECONDS WITH:

LOREE KOVACH
SENIOR VICE PRESIDENT OF STRATEGY AND CLIENT TECHNOLOGY
EPIQ



Q What has been the best piece of advice you have been given in your career?

A Don't be afraid to ask for what you are worth, and don't be afraid to walk away when you aren't getting it.

Q What motivated you to pursue a career in law?

A I liked the idea that there were rules and frameworks guiding arguments to achieve justice.

Q What do you see as the most rewarding thing about your job?

A The people. Getting together and solving problems with intelligent people.

Q What was the last book you read?

A "Say Nothing," by Patrick Radden Keefe.

Q What are you looking forward to in 2025?

A From a professional standpoint, I'm looking forward to seeing how collective redress expands in international markets.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it?

A Yes, to be better about staying in touch with friends who don't live near me.

Q What is the one thing you could not live without?

A Friendship.

Q What does the perfect weekend look like?

A Sunshine, outside. Drinks and dinner with friends. Down time. Bad television.

Q What is something you think everyone should do at least once in their lives?

A Travel internationally and work in a restaurant.

Q If you could give one piece of advice to aspiring practitioners in your field, what would it be?

A For aspiring lawyers, be open to non-traditional legal work that doesn't necessarily involve practicing law, as that can not only be rewarding, but it also offers the opportunity to work in a variety of areas rather than just one specialty.

Q What legacy would you hope to leave behind?

A To have been the best friend and daughter possible.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A My grandfather on my mom's side. He died before I was born. He ran a general store in the rural southern United States that was in my family for three generations. I'd want to hear about his life, both because it's so different from what I live today but also because he sounded like an interesting man.

EXEMPLARY DAMAGES

BALANCING THE COST OF JUSTICE

Authored by: Tanya Lansky (Managing Director) - Lionfish

Late last year, Portland Communications' Litigation and Disputes team published a report[1] based on a survey of UK business leaders. Amongst numerous interesting findings, the results indicated that only 50% believed that litigation drives improvements in corporate behaviour.

That same report confirmed that 67% of those surveyed believed that an increase in litigation would lead to improvements in corporate behaviour, albeit only 56% found that disputes hold large companies to account. Although the focus was on class actions, one cannot help but wonder whether these figures would be substantially higher if corporates facing litigation had more at stake than simple compensatory damages.

The UK Landscape

Amidst the ripples created by the Supreme Court's decision in PACCAR, the re-introduction of exemplary damages within the Digital Markets, Competition and Consumers Act ('DMCC') was overlooked by many given much focus was on the provisions that sought to reverse PACCAR.

Corrective justice is one thing, however punitive damages have long been considered by many as a positive deterrent against wrongdoing. Indeed, numerous eminent academics and senior Justices have actively supported and recommended the idea of extending out the UK's regime for 'punitive' damages.

To use a recent example, the Post Office scandal saw defendant behaviour so egregious on every level that it became the focus of an SRA investigation. Between the numerous complaints flagged by the postmasters prior to considering a claim, through to the Post Office's £100m+ legal spend, the defendant's abhorrent strategy to delay and minimise compensation happens to be an example that sheds light on the limited powers granted to the court insofar as righting continued wrongs. To draw an analogy with gross negligence, higher damages are awarded where professional defendants have demonstrated intentional harm, pure carelessness or a lack of appreciation of risk; so, why should poorly behaved corporates be insulated from paying anything more than pure compensation for harm caused, especially where their behaviour has caused further damage?

A punitive damages framework that accounts for degrees of bad behaviour exhibited – both before the time of the wrongdoing and thereafter (including during any litigation) – would be an outright benefit to society. Such a framework would encourage elements including free market rules and importantly, reduce the strain on the legal system.

1 https://portland-communications.com/wp-content/uploads/2024/11/Reputation-and-Accountability-Class-ActionsESG-and-Values-DrivenLitigation.pdf

Outright Deterrence

High stakes situations attract higher degrees of attention and due regard. In a world where exemplary damages could increase the financial risk on corporates, logic would dictate that greater standards would be exercised. Consider the old principle of the 'social contract' whereby rules and obligations are imposed in exchange for rights and protections afforded by the state. Affording additional protections to harmed individuals by holding corporates accountable in a way that is more proportionate to their actions would further align corporates and deter them from committing wrongdoings in the first place.

Creating an additional incentive through serious harm caused to their business would push corporates to pause before conducting themselves unethically or with little regard to solid standards. Raising the financial consequences of wrongdoing would not only serve as a powerful deterrent to corporate misconduct, but set higher standards and encourage more ethical business practices all whilst reducing the number of claims brought before the court. Particularly in the competition sphere, such disincentives – or rather incentives – would help boost a healthy business environment by maintaining fair and balanced competition.

Financial Arbitrage and Settlement

In the 1997 Law Commission Report on Aggravated, Exemplary and Resitutionary Damages, recommendations were made to expand the use of exemplary damages. This reported cited reasons including the "[…] 'gaps' in the law – areas in which other remedies or sanctions are inadequate […]". To this day, these inadequacies are the very same elements used by defendants to arbitrage the value of defending a claim – not through the lens of the law, but rather through a purely financial lens which includes considerations of cost, profit and other commercial incentives. Put another way, exploiting inefficiencies, including those of a legal system's damages regime, is just one of several ways a defendant will arbitrage the value of defending a case. And to argue otherwise would simply be naïve.

As an example, a claim for £250m in compensatory damages attracting a £30m defence budget that may take 5 years to conclude (during which time £300m in profits would be generated by the anti-competitive behaviour that is the subject matter of the case) would attract dramatically different considerations to a claim that risks doubling in damages payable to £500m through punitive damages and costs.

The latter would drive behavioural and tactical changes in corporates' approaches to litigation and urge the same to seriously consider settlement as opposed to delaying a payout – especially where liability has been established. This would only benefit and uphold the principles of justice, both in terms of access and function, and preserve the court's valuable capacity and resources.

Moreover, as and when the Damages-Based Agreements Regulations are eventually improved, punitive damages could open up a further type of compensation that law firms could benefit from. Such a shift would put traditional defendant law firms chasing sizeable fees from large corporates in an unusual economic dilemma involving choosing which side of the legal argument would they prefer to sit on.

Ultimately, many outside the legal universe believe that the sole beneficiaries to all things relating to litigation costs and damages are lawyers, funders and defendants, while the actual victims of wrongdoing – which justice is supposed to serve – are left behind. Although exemplary damages may not fix the problem, an enhanced framework beyond the limited DMCC's reintroduction would ultimately protect the victims of wrongdoing – not only by changing behavioural conduct of litigation or outcomes, but perhaps also by driving corporates not to commit wrongdoings in the first place. And of course, the irony is that with no wrongdoing, corporates would be granted their big wish and see litigation funding disappear albeit not through the work conducted by their expensive lobbyists but rather through natural market forces.

Economic Insight

WE MAKE ECONOMICS RELEVANT

Rigorous Analysis & Exceptional Consulting Skills

Economic Insight is an economics consultancy that provides an unrivalled level of service. Our unique proposition is that we combine the rigour of technical economics with exceptional consulting skills to help you make great decisions.

We are a team of expert, highly experienced and skilled economists with a focus on translating our analysis into clear, accessible and valuable advice. In our opinion, that's what makes us different and what makes economics relevant.

Visit **www.economic-insight.com**
or search Economic Insight on LinkedIn

OUR CLIENTS INCLUDE

Royal Mail Group · HM Treasury · E E · Thames Water · tobii · TESCO mobile · 3 · NATS · centrica

DEVELOPMENTS IN THE ITALIAN ADMINISTRATIVE CONSUMER PROTECTION LITIGATION

THE COUNCIL OF STATE ON THE STANDARD OF PROOF OF EVIDENT EXCESSIVENESS OF PENALTY FEES

Authored by: Maria Rosaria Raspanti (Senior Associate) - Pavia e Ansaldo Studio Legale

Recent developments in Italian administrative case law have fundamentally reshaped the enforcement landscape regarding consumer protection in the car rental sector. The Council of State's December 2024 rulings have significantly curtailed the Italian Antitrust Authority's (IAA) aggressive enforcement approach against car rental companies, particularly concerning the alleged excessiveness of fees charged by the companies to consumers face to the notification of administrative decisions ascertaining traffic violations by drivers.

The controversy concerned the investigations launched by the IAA against several prominent car rental operators, including Goldcar, Sicily by Car, Europcar, Locauto, B-Rent, and Autovia.

These companies had implemented contractual provisions requiring customers to pay fees ranging, approximately, from €20 to €50 when processing notifications by the public authorities concerning alleged infringements of road traffic rules.

The IAA's enforcement actions targeted these fees as potentially unfair contractual terms under the Italian Consumer Code.

The IAA's original position contended that these fees violated Article 33(2)(f) of the Italian Consumer Code (Legislative Decree No. 206/2005), which prohibits contractual clauses imposing manifestly excessive payments on consumers. The Authority argued that the administrative tasks involved – primarily consisting of communicating driver information to authorities and forwarding violation

notices to customers - were straightforward, not implying additional activities to the ordinary administrative tasks carried out by the professionals, and thus did not justify the imposed fees. The IAA particularly emphasized that these activities merely consisted of routine data transmission and document forwarding, which should be considered part of the standard rental service.

In first instance proceedings, the Administrative Court of Lazio (TAR) upheld the IAA's arguments, characterizing the contested provisions as penalty clauses and finding the amounts disproportionate to the actual costs incurred by the companies. The TAR's reasoning emphasized that document storage and communication activities were inherent to the rental companies' operations and did not justify additional charges.

The recent decisions issued by the Council of State, however, mark a significant departure from this approach. While confirming the legal classification of the contested provisions as penalty clauses – noting that such provisions serve a compensatory function and are not merely meant to remunerate additional administrative workload, irrespective of the naming adopted in the terms and conditions of the companies – the Council of State identified critical deficiencies in the IAA's investigative methodology and evidence gathering processes.

The decisions established several crucial principles.

- **First,** the Council of State requires the IAA to meet a substantially higher standard of proof for demonstrating "manifest excessiveness" under the Consumer Code. This finding underscores the necessity to conduct more rigorous investigations, particularly when challenging relatively modest fee amounts.
- **Second,** the Council of State explicitly rejects the IAA's comparative approach of evaluating fees against either the underlying traffic violation fines or the rental service costs; instead, it is noted that the assessment should focus on the actual administrative burden and costs incurred by operators, considering the specific operational context of each company.
- **Third,** and related to the second point, the rulings emphasize the importance of considering concrete evidence provided by operators regarding their operational costs and the volume of violations processed: in this regard, the Council attributed significant relevance to the companies' data on annual notification volumes, administrative procedures, and associated costs in assessing fee reasonableness.
- **Fourth,** given the relatively modest amounts involved (few tens of euros), the Council of State states the need of a particularly thorough assessment of alleged disproportionality. This standard highly challenges the IAA's traditional enforcement approach, which seems to heavily rely – at least in these cases - on presumptions of unfairness rather than detailed economic analysis.

The practical implications of these developments are significant for future enforcement actions. The IAA is in fact clearly called to conduct comprehensive investigations into actual administrative costs, to provide specific evidence of manifest excessiveness, to consider operators' operational data and cost structures provided during the investigation.

While these rulings do not preclude the IAA from initiating new proceedings, they establish a substantially higher evidential threshold for proving the unfairness of contractual penalties. The Authority's traditional approach in this specific context, which results characterized by a high degree of generality in its decisions, appears increasingly untenable under the new standards established by the recent case law.

Looking forward, these developments are likely to have lasting implications for consumer protection enforcement in Italy, particularly in cases involving contractual penalties. The emphasis on thorough investigation and concrete evidence should lead to more sustainable and well-founded regulatory decisions; this might also require the development of economic analysis to support findings and the demonstration

of a clear causal link between the alleged unfairness and specific market conditions. The developments will also potentially offer operators greater flexibility in setting reasonable penalty charges.

The new orientation represents a balanced approach that acknowledges both consumer protection needs and business operational realities, potentially setting a precedent for similar cases across other sectors of the Italian economy. It underscores the importance of evidence-based enforcement and the need for regulatory authorities to conduct thorough economic analysis before challenging established business practices. Overall, this evolution in administrative jurisprudence marks a significant milestone in Italian consumer protection law, establishing more stringent requirements for regulatory intervention in contractual matters while ensuring that enforcement actions are based on solid evidential grounds rather than mere presumptions of unfairness.

AlixPartners

Experience you can rely on, results you can trust.

AlixPartners' Economics Consulting team brings a rigorous, fact-based approach to high-stakes litigation, investigations and regulatory matters.

To find out more, visit: www.alixpartners.com

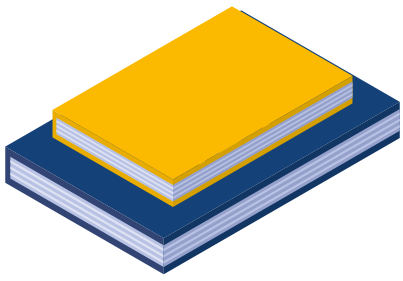
When it really matters.[sm]

BUT WE ARE NEVER, EVER, EVER GETTING BACK TOGETHER?

THE UK, THE EU AND THE LAW OF LIMITATION

Authored by: Joseph Moore (Partner) and Imogen Nolan (Senior Associate) - Travers Smith

The Damages Directive, which was implemented in the UK on 9 March 2017 via schedule 8A of the Competition Act 1998, provides that the limitation period for competition claims begins with the later of the claimant's "day of knowledge" and the day on which the infringement of competition law ceased.[1] The latter aspect of the limitation period is commonly referred to as the "Cessation Requirement".



In the recent Court of Appeal decision in the Umbrella Interchange litigation,[2] the court was required to consider whether, by reference to two "post-completion CJEU decisions", namely, Volvo and Heureka,[3] the Cessation Requirement was incorporated into the English limitation rules in respect of claims which pre-date the Damages Directive (as implemented in the UK by schedule 8A of the Competition Act 1998). The decisions are referred to as post-completion CJEU decisions because they were handed down by the Court of Justice of the European Union after the implementation period completion day (31 December 2020), being the point at which the transitional (or implementation) period of Brexit ended.

Limitation issues have been relevant to a number of legacy follow-on damages claims making their way through the English courts and can have significant implications for the scope of the claim.

In the context of the Umbrella Interchange litigation, which includes the Merricks class action, the question of whether claims in respect of five of the 18-year claim period are time barred turns on whether the Cessation Requirement forms part of the pre-Damages Directive English limitation rules.[4]

The Judgment

The Court of Appeal's answer (like that of the CAT) to the question of whether the Cessation Requirement applies to pre-Damages Directive claims was a

1 See Article 10(2) of the Damages Directive and section 19 of Schedule 8A of the Competition Act 1998.

2 Umbrella Interchange Fee Claimants and Umbrella Interchange Fee Defendants [2024] EWCA Civ 1559.

3 Volvo AB and DAF Trucks NV v RM (2022) (Case C-267/20) and Heureka Group a.s. v Google LLC (2024) (Case C-605/21).

4 The infringement period as set out in the Commission's Decision is 22 May 1992 to 21 June 2008. The impact of the Court of Appeal's decision is that claims would be time barred in respect of loss suffered before 20 June 1997.

resounding "no" for several (arguably unsurprising) reasons. First, while section 6 of The European Union (Withdrawal) Act 2018 (Withdrawal Act) permits the English courts to "have regard" to post-completion day CJEU decisions, they are not bound by them – a point which the UK Supreme Court (UKSC) made in the Lipton decision[5] handed down shortly before the hearing of the appeal in the Umbrella Interchange litigation. Unsurprisingly, the Court of Appeal said it would "take a lot of persuading" to not follow the Lipton decision. Therefore, while the Court was permitted to have regard to the post-completion decisions in Volvo and Heureka, it was not bound to follow them and considered it "inappropriate" to apply those cases to the (pre-completion) facts of the case.[6] Second, the Court of Appeal did not agree that certain pre-completion day CJEU authorities relied on by the Claimants established a Cessation Requirement under EU law. Third, a Court of Appeal decision from 2015 – Arcadia[7] –held that the English law limitation rules applicable to competition law infringements (for claims pre-dating the Damages Directive) did not infringe the principle of effectiveness notwithstanding the absence of the Cessation Requirement in English law. The Court of Appeal in the Umbrella Interchange litigation considered the decision in Arcadia, which "was decided on very similar facts", to be binding.

Perhaps most interestingly of all, the Court of Appeal was clear that Arcadia was correctly decided and that the principle of effectiveness did not necessitate the introduction of the Cessation Requirement into English law. Rather, the Court of Appeal held that the Cessation Requirement was introduced by the Damages Directive (as opposed to being an existing principle that was codified by that legislation), notwithstanding the CJEU's decision in Heureka (which adopted the contrary position in suggesting that the Cessation Requirement is an existing principle of EU law which pre-dates the Damages Directive). The Court of Appeal's (dim) view of the CJEU's decision in Heureka was made clear in paragraph 43 of its judgment, which reads:

"This court was not, even before completion day, bound by inchoate and unexpressed principles of EU law that were later enunciated in future EU law decisions".

What Next?

It will be interesting to see whether the Claimants apply for permission to appeal given the UKSC's decision in Lipton and if so, whether permission will be granted.

In any event, leaving aside the possibility of further consideration by the UKSC of how the terms of the Withdrawal Act ought to be interpreted, the impact of this decision regarding the limitation rules that apply to competition claims in the UK is likely to be limited, and as time passes, the rump of claims that would fall outside of the scope of Schedule 8A of the Competition Act (which brings into effect the Cessation Requirement provided for in the Damages Directive) will shrink even further. However, it remains to be seen whether the stark divergence between the UK and EU courts on the issue of whether the Cessation Requirement pre-dates the Damages Directive is an isolated incident, or whether it presages the beginning of a period of further divergence on matters of competition law.

5 Lipton v BA Cityflyer Ltd [2024] UKSC 24.

6 The Tribunal decided that Volvo did not establish a cessation requirement. The Heureka decision was handed down following the Tribunal's decision, but before the hearing in the Court of Appeal. As the Court of Appeal decided that Heureka clearly established a cessation requirement, the court was of the view that it would be academic to consider whether or not the Tribunal's analysis of Volvo was strictly correct: see paragraph 30.

7 Arcadia Group Brands Ltd v Visa Inc [2015] EWCA Civ 883.

When everything is at stake, rely on CRA

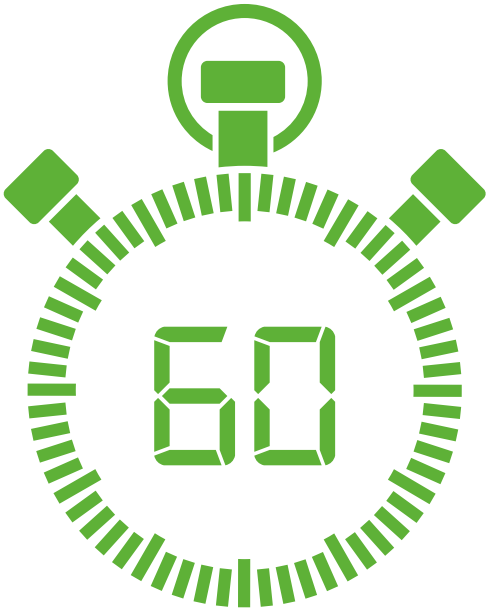
Charles River Associates (CRA) is a leading global consulting firm that offers economic, financial and strategic expertise to major law firms, corporations, accounting firms and governments around the world. Our expertise in antitrust economics, econometrics, mergers, acquisitions, divestitures and related matters has made us the firm of choice for clients and competition authorities around the globe. Our economists have the economic knowledge, jurisdiction-specific expertise and geographic presence required to efficiently support clients around the world.

ecp.crai.com

CRA Charles River Associates

60-SECONDS WITH:

LUCY WATKISS
ASSOCIATE
LINKLATERS



Q What has been the best piece of advice you have been given in your career?

A 'Be more cat and less dog.' To me, it means channel your inner confidence, keep calm, believe in your abilities and seize every opportunity that comes your way with both hands, even if it scares you.

Q What motivated you to pursue a career in law?

A I first became motivated to pursue a career in competition law after working on the Visa Interchange Fee litigation as a first-seat trainee at Linklaters. I had always been interested in business and politics when studying, and competition law is the perfect intersection of these things.

Q What do you see as the most rewarding thing about your job?

A Helping clients to understand the complexities of competition and foreign investment law and using my expertise to the benefit of others. That and working with a group of extremely talented and lovely colleagues in my team at Linklaters.

Q What was the last book you read?

A The last book I read was 'Long Island'. It is the sequel to Colm Tóibín's popular novel 'Brooklyn', a coming of age story about a young Irish woman who emigrates to New York and is set partly in America and partly in Ireland. It now seems an apt choice as I will soon be travelling to Dublin for the Thought Leaders 4 Competition Summit!

Q What are you looking forward to in 2025?

A From a work perspective, watching how the first designation investigations play out under the Digital Markets, Competition and Consumers Act. Having waited for several years for the legislation to make its way through parliament, I am excited to see how the CMA exercises its new powers and the impact of any interventions on the digital sector in the UK.
On a personal level, I am looking forward to visiting Japan and Thailand later this year.

Q Do you have a New Year's Resolution, and if so, how do you plan to keep it

A I always have the same New Year's Resolution, to read 12 books in 12 months. Some years I don't quite manage it but in 2024 I made the most of reading on my commute and am off to a strong start in 2025!

Q What is the one thing you could not live without?

A My ASICS running trainers. Running is my favourite way to relax and switch off from work. I can usually be found at Parkrun every Saturday morning and am taking on my first marathon this year.

Q What does the perfect weekend look like?

A My perfect weekend consists of parkrun, followed by a bacon sandwich at home, before going to the theatre or a nice restaurant with family and friends.

Q What is something you think everyone should do at least once in their lives?

A Travel and spend some time experiencing a different culture.

Q If you could give one piece of advice to aspiring practitioners in your field, what would it be?

A Identify a sector that excites you. Fortunately, competition law enforcement has the potential to impact businesses and consumers in every sector of the economy. There is a real pleasure to be found in becoming a subject matter expert and applying competition law in a field in which you already have an interest.

Q What legacy would you hope to leave behind?

A I have had the benefit of working with some incredible mentors and role-models in my legal career thus far. I would like to be remembered as someone who passed the benefit of that time and wisdom on and enabled others to access the profession and make the most out of the opportunities it affords.

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A William Shakespeare or Jane Austen. I would love to discuss their works with them and find out if Shakespeare really did write all his plays himself. I would be interested in their reactions to the modern world and the fact that their works are still appreciated and widely read centuries after they wrote them!

OUR STORY

ThoughtLeaders4 are serious about providing opportunities to up-and-coming practitioners specialising in Competition. We strongly believe that the next generation of practitioners should be writing, speaking at and attending events in order to build their network and further their careers.

With this in mind, we are proud to present the inaugural **Competition Next Gen Future Thought Leaders Essay Competition**. Assessed by an illustriously experienced, senior and broad-ranging panel of practitioners this is your chance to stick your head above the parapet and mark yourself as the one-to-watch. With the opportunity to attend and discuss your essay at our **The Competition Next Gen Summit 2025**, we look forward to your submissions and to welcoming you to the Competition community.

THE BRIEF

The DMA and DMCC have introduced ex ante regulatory frameworks for some technology businesses which are intended to complement and supplement competition law. How will this legislation impact private enforcement and interact with and impact upon public enforcement of conduct in the digital world?

In the run-up to The Competition Next Gen Summit 2025 conference on 12-14 February in Dublin, we invite submissions from next gen practitioners on this topical debate.

We encourage you to set out your personal views and thoughts on the current law and its potential future direction and to draw on your own or your colleagues' experiences.

We also invite you to be creative, well-researched, opinionated, and take a position on this timely issue, affecting the next generation of divorce practitioners.

JUDGING PANEL

NICOLE KAR
PARTNER
PAUL WEISS

Nicole Kar is global co-chair of the Antitrust Practice. She advises on global merger investigations from an antitrust and foreign investment standpoint and has led over 40 significant merger reviews before the UK and European authorities; as well as advising on cartel, abuse of dominance and consumer law investigations and consequential litigation, particularly in the UK's Competition Appeal Tribunal; compliance issues; and self-reporting to financial and other regulators.

ELAINE WHITEFORD
PARTNER. ANTITRUST & COMPETITION
WILLKIE FARR & GALLAGHER

Elaine Whiteford has over 20 years' experience of contentious EU, Competition and Regulatory work, specialising in follow-on damages litigation, challenges to regulatory decisions, cartel investigations and threatened disputes. Elaine also has extensive experience in relation to regulatory investigations conducted by the European Commission and other competition regulators.

JOHN MESSENT
COUNSEL
CLEARY GOTTLIEB

John Messent's practice covers all aspects of UK and EU competition law, as well as rules on national security and investment screening. He has represented clients before the European Commission, the Competition and Markets Authority, and UK sectoral regulators, as well as before the EU and UK Courts. John was seconded in 2013 to the Policy department of the Office of Fair Trading, working on guidance documents to be published by the new Competition and Markets Authority (including on mergers, Competition Act investigations, and criminal cartel prosecutions). He became counsel in 2024.

ANDREW LEITCH
PARTNER
BRYAN CAVE LEIGHTON PAISNER

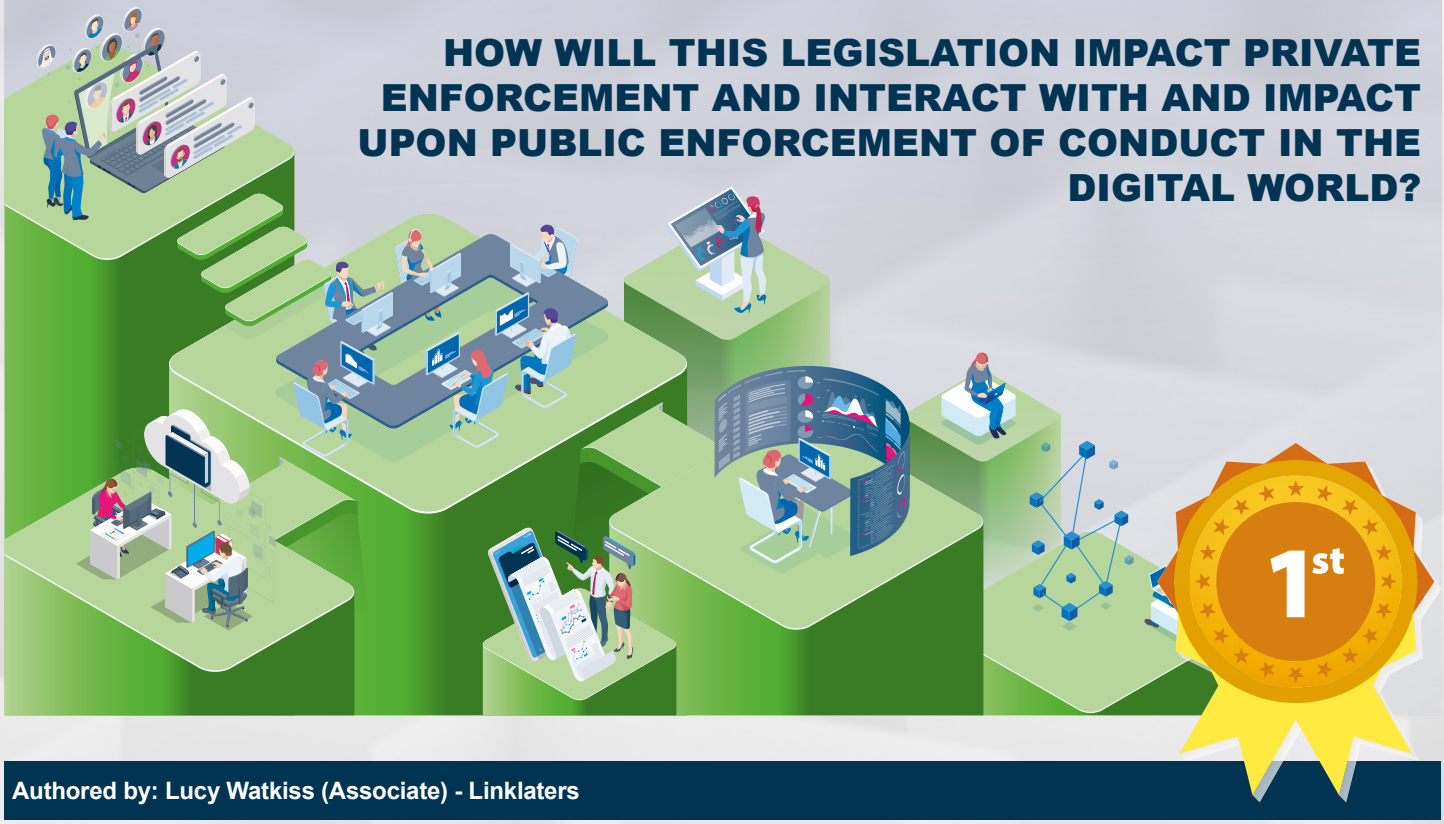
Andrew has significant experience in competition litigation, having acted for both claimants and defendants in disputes arising out of price fixing cartels, in addition to advising on litigation concerning abuse of dominant positions in marketplaces. Andrew has experience of litigating disputes in various courts in the U.K., including the High Court of Justice, the Competition Appeal Tribunal and the Court of Appeal. He has advised clients in a range of regulated and non-regulated industry sectors, including industrial manufacturers, financial institutions and technology companies.

STEPHEN WISKING
PARTNER
HERBERT SMITH FREEHILLS

Stephen has over 20 years' experience and has been involved in a significant number of landmark competition and regulatory cases at EU and UK level. He specialises in all aspects of EU and UK competition law, including merger control, cartels and abuse of dominance cases, market investigations, competition disputes and strategic advice. Stephen advises clients across a broad range of sectors including financial services, media (particularly broadcasting), telecoms, energy, pharmaceuticals and professional services.

THE DMA AND DMCC HAVE INTRODUCED EX ANTE REGULATORY FRAMEWORKS FOR SOME TECHNOLOGY BUSINESSES WHICH ARE INTENDED TO COMPLEMENT AND SUPPLEMENT COMPETITION LAW.

HOW WILL THIS LEGISLATION IMPACT PRIVATE ENFORCEMENT AND INTERACT WITH AND IMPACT UPON PUBLIC ENFORCEMENT OF CONDUCT IN THE DIGITAL WORLD?



Authored by: Lucy Watkiss (Associate) - Linklaters

The Digital Markets Act (the "DMA") came into force on 1 November 2022 and introduced an ex ante regulatory framework with the aim of making digital markets "fairer and more contestable".[1] The DMA regulates the activities of a small group of companies providing "core digital platform services" that have been designated as "gatekeepers".[2] Many of the obligations with which gatekeepers must comply are inspired by previous competition enforcement cases in the digital sector, and therefore there is a high degree of complementarity between the enforcement of the DMA and competition enforcement under Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU").[3] The Digital Markets, Competition and Consumer Act (the "DMCC") was enacted on 24 May 2024 to give the UK Competition and Markets Authority (the "CMA") (specifically its new digital markets unit (the "DMU")) similar powers to regulate firms with 'strategic market status' ("SMS").[4] It is anticipated that a similarly narrow group of firms will be designated on account of having "substantial and entrenched market power" and "a position of strategic significance" in relation to digital activities in the UK.[5] Each SMS firm will have to comply with tailored conduct requirements, notify mergers to the CMA and could be made subject to pro-competitive interventions.

Despite the overlap between the subject matter of these new regulatory frameworks and existing competition law powers, EU and CMA officials have emphasised that the DMA and DMCC are not intended to replace existing competition law. Speaking at the 'Competition Law Thinking in Times of Change' conference in November 2024, Linsey McCallum confirmed that "The DMA has not been introduced because of the failure of Article 102. Competition law is helpful for punctual intervention in markets. If we're seeing the same conduct from the same companies, then there is a need for ex ante rather than ex poste regulation."[6] At the same event, Chris Prevett described "an ongoing role for traditional competition enforcement tools", noting "the DMCC is not intended to cut across the existing toolkit."[7]

1 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265, Recital 7.

2 DMA, Article 3.

3 Cases which appear to have inspired conduct obligations set out in Articles 5 and 6 DMA include Google Search (Shopping) (case AT.39740) and Apple App Store Practices (case AT.40716).

4 Digital Markets, Competition and Consumers Act 2024, Chapter 2.

5 DMCC, s 5 and s 6.

6 Linsey McCallum, Deputy Director General, DG Competition, European Commission, 'Reforming Article 102 TFEU' (Speech at the Competition Law Thinking in Times of Change: A Conference in Honour of Valentine Korah, University College London, 5 November 2024).

7 Chris Prevett, General Counsel, UK CMA, 'The transformation of UK Competition Law: 1956 – 2024' (Speech at the Competition Law Thinking in Times of Change: A Conference in Honour of Valentine Korah, University College London, 5 November 2024).

The DMA recitals state that the regulation aims to protect a "different legal interest" from that protected by competition rules and "should apply without prejudice to their application."[8] It is envisaged that the DMA will work in parallel with existing competition tools but serve a different, more narrow regulatory purpose. It is more challenging to distinguish between the framework introduced by the DMCC and the CMA's existing competition enforcement powers under Chapters 1 and 2 of the Competition Act 1998 ("CA98"). The DMU will sit within the CMA, whereas the DMA is administered by a joint DG Comp and DG Connect taskforce.

The CMA describes the provisions of the DMCC as inherently tied to ensuring competition in digital markets, unlike the DMA, which has been pitched by EU officials as sectoral regulation transforming digital markets into a regulated sector.[9]

Both regimes are in relative infancy. To date, seven gatekeeper designation decisions have been taken under the DMA.[10] The first SMS designations under the DMCC are not anticipated until mid-to-late 2025.[11] It remains to be seen how these regulatory frameworks will interact with traditional public and private competition enforcement but it is possible to make some predictions:

1. The new frameworks will likely cannibalise some of the work previously undertaken under existing competition enforcement tools.
2. The new frameworks provide powers for enforcing against non-compliance and there is at least the prospect of parallel enforcement against the same behaviour via different regulatory tools in different jurisdictions.
3. Traditional competition enforcement tools will continue to play a role in regulating the digital sector at large, because the DMA and DMCC provisions only apply to the largest digital companies and, with respect to the DMA, a narrow set of conduct obligations.
4. Third parties can enforce their rights under the DMA and DMCC through stand-alone or follow-on private damages actions which could lead to more private enforcement against digital companies and risk causing some regulatory divergence.

From Ex Poste To Ex Ante

The DMA and DMCC mark a shift from ex poste to ex ante regulation of large firms operating in the digital sector. Both the Commission and CMA have emphasised the importance of engaging with designated firms in order to ensure these frameworks achieve their stated aims and best ensure compliance. This marks a change in tone and scope, as competition investigations focus on specific behavioural infringements and are adversarial in nature. EU official Filomena Chirico contrastingly described the DMA as "a new generation of regulation" and explained that having introduced an ex ante regulation, the Commission hopes to monitor compliance rather than investigate non-compliance.[12] The CMA has similarly emphasised the flexible nature of the DMCC encouraging compliance, noting that conduct requirements for SMS firms will be tailored, designed in collaboration with SMS firms and can be easily updated (more so than the obligations of the DMA specified in Articles 5 – 7) as digital markets evolve.[13]

Cracking Down On Non-Compliance

The aspiration for compliance as the default position, if successful, could reduce the need for ex poste competition enforcement relating to the types of conduct covered by the DMA and SMS firms' codes of conduct. However, the modifications required to comply with a DMA obligation or DMCC conduct requirement might not align with a company's commercial incentives. Under the DMA, gatekeepers must decide how to comply with conduct obligations and the Commission can investigate and fine a gatekeeper if it finds that it is not meeting the requisite standard.

There are already live DMA non-compliance cases against Alphabet, Apple and Meta.[14] Equally, there may be some cases where rather than adapting to comply, gatekeepers and SMS firms decide to switch off the offending functionality in the relevant jurisdiction, which could degrade consumer experience.

8 DMA, Recital 11.

9 'Overview of the CMA's provisional approach to implement the new Digital Markets competition regime', CMA policy paper, 11 January 2024, paragraph 1.2; Filomena Chirico, 'The Digital Markets Act: From Strategy & Vision to First Non-Compliance Cases' (3 June 2024) <https://www.youtube.com/watch?v=tZifM79e9iI> accessed 27 November 2024; Denis Sparas, 'Digital Markets Act – First Wave of Cases, First Assessment' (23 January 2024) <https://www.youtube.com/watch?v=qtPuwAXLJJc> accessed 27 November 2024.

10 Alphabet, Amazon, Apple, ByteDance, Microsoft, Meta and Booking have been designated as gatekeepers.

11 Under Digital Markets, Competition and Consumers Act 2024 (Commencement No. 1 and Savings and Transitional Provisions) Regulations 2024, Part 1 (Digital Markets) of the DMCC will have effect as of 1 January 2025.

12 Filomena Chirico, 'The Digital Markets Act: From Strategy & Vision to First Non-Compliance Cases' (3 June 2024) <https://www.youtube.com/watch?v=tZifM79e9iI> accessed 27 November 2024.

13 'Digital markets competition regime guidance', CMA guidance, draft published for consultation on 24 May 2024, paragraph 3.33; Chris Prevett, General Counsel, UK CMA, 'The transformation of UK Competition Law: 1956 – 2024' (Speech at the Competition Law Thinking in Times of Change: A Conference in Honour of Valentine Korah, University College London, 5 November 2024).

14 The European Commission, 'Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Market Act' (25 March 2024).

One criticism of traditional competition enforcement against digital companies is that the fines imposed following investigations fail to act as a deterrent and are perceived as the 'cost of doing business'. Both the EU and UK authorities have bolstered their powers. Under the DMCC, the CMA can issue penalties for infringements of pro-competition orders and conduct requirements, and for failing to comply with investigative requirements.[15] Fines of up to 20% of annual worldwide turnover can now be issued for repeat violations of the DMA and the Commission may implement proportionate behavioural or structural remedies.[16] Both authorities appear to be encouraging a culture of compliance through designing ex ante frameworks, whilst ensuring the regimes can bite in instances of non-compliance.

Possible Parallel Enforcement

Whilst pursuing "a different legal interest", the DMA's subject matter inherently overlaps with existing competition law, in particular Article 102 TFEU, and raises the prospect of parallel enforcement by the Commission (under the DMA) and national competition authorities (under traditional tools). In recognition of this risk, the DMA includes some protections. Article 40(5) established a "high-level group" of European digital regulators, to act as a forum for discussion and cooperation.[17] Under Article 38, "the Commission and the national competent authorities of the Member States [enforcing Articles 101 and 102 TFEU] shall cooperate […] through the European Competition Network". National competition authorities must inform the Commission of any competition investigations into the behaviour of gatekeepers and notify it of any obligations they intend to impose on the gatekeepers in advance of doing so.[18] As there is at least the possibility of duplicative regulatory proceedings, multiple commentators have raised an additional question concerning whether such parallel enforcement is compatible with gatekeepers' fundamental rights, as parallel enforcement may be incompatible with the principle of ne bis in idem.[19]

Traditional Tools Will Fill The Gaps

Whilst the DMCC is potentially broad in scope, both the DMA and DMCC are narrow in expected application. They apply to a small group of large companies with a high degree of market power in the digital sector. Even with the DMA and DMCC in operation, Article 102 TFEU and Chapter 2 CA98 will remain the primary ways to regulate the behaviour of companies which operate in digital markets but do not meet the gatekeeper or SMS designation criteria, in addition to companies active in non-digital markets.

Digital markets evolve rapidly and the comparatively slow process through which new legislation is enacted means that the DMA risks quickly becoming outdated. For example, the DMA does not expressly cover artificial intelligence, which has become a priority for competition regulators.[20] Articles 5 – 7 of the DMA set out a list of prescriptive rules imposed on gatekeepers, which are defined narrowly; they relate to specific behaviours connected with the core platform services for which a gatekeeper has been designated.[21] The more open-ended, flexible Article 102 TFEU can be used to enforce against new, innovative examples of abuse.

It may be needed by the Commission to fill the gaps and investigate behaviours which carefully navigate around the types of conduct specified in the DMA but still threaten competition and (to the degree they overlap) fairness and contestability in digital markets.

The DMCC has in-built flexibility as new conduct requirements can be introduced. This has important implications for how much the CMA will continue to enforce under CA98 in digital markets, as the DMCC provides very broad powers to introduce new rules for any digital activity.

Trailblazing UK Private Enforcement

In the UK, individuals can already enforce their rights under Chapters 1 and 2 CA98 at the UK Competition Appeals Tribunal (the "CAT") and many private damages actions take the form of Chapter 2 CA98 abuse of dominance claims alleging innovative forms of abuse against digital companies.[22]

If the new frameworks are successful in introducing a culture of compliance, theoretically, there should be fewer infringements and opportunities to bring private damages claims. However, third parties can enforce their rights under

15 'Digital markets competition regime guidance', CMA guidance, draft published for consultation on 24 May 2024, paragraph 8.6; DMCC, s 87.

16 DMA, Article 30(2), Recital 75.

17 DMA, Article 40(5).

18 DMA, Article 38(1) – (3).

19 Arianna Andreangeli, 'The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets', (2022) 43 E.C.L.R 2022, 496; Assimakis Komninos, 'The Digital Markets Act: How Does it Compare with Competition Law?' (2022) SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4136146> accessed 27 November 2024; Linklaters, 'DMA – What's next?' (LinkingCompetition, June 2022) <https://www.linklaters.com/insights/blogs/linkingcompetition/2022/june/the-dma-is-here-whats-next> accessed 28 November 2024. The principle ne bis in idem stops defendants from being tried or punished twice for the same offence.

20 On 23 July 2024, the competition authorities of the UK, EU and United States of Amercia published a joint statement on competition in generative AI foundation models and AI products.

21 DMA, Articles 5(1), 6(1) and 7(1).

22 Competition Act 1998, s 47A; Consumer Rights Act 2015, s 81, Schedule 8; Gormsen v Meta Platforms, Inc [2024] CAT 11, [2024] 2 WLUK 438; Kent v Apple Inc [2022] CAT 45, [2022] 10 WLUK 468; Coll v Alphabet Inc [2022] CAT 39, [2022] 8 WLUK 190.

both the DMA and DMCC via private enforcement if they have suffered as a result of non-compliance by a gatekeeper or SMS firm. Early non-compliance cases show that whether a gatekeeper has complied with a conduct requirement can be hotly contested and suggest that this could be an area ripe for private enforcement.

Private enforcement of the DMCC and DMA may take the form of a follow-on or stand-alone private action.[23] Under the DMA, this would involve third parties enforcing rights in national courts at the EU member state level.

The DMCC and DMA are litigation-friendly but there is a risk of regulatory divergence following stand-alone claims. For example, in the UK, any person affected by a breach of a conduct requirement will be able to enforce their rights under the DMCC directly in court, even if the CMA has not made an enforcement decision with respect to the conduct. Courts could be asked to rule on provisions of the DMA and DMCC before the Commission and CMA have had the opportunity to consider the relevant provision and investigate a potential breach. Under the DMA, protections have been built-in to avoid practical conflicts between ongoing or historic public enforcement and parallel private enforcement: National courts cannot give a decision which runs counter to a decision already adopted by the Commission under the DMA and must avoid giving decisions which would conflict with a decision contemplated by the Commission.[24]

Conclusion

Over time it will become clear whether the DMA and DMCC introduce a shift towards successful ex ante regulation, such that, for regulating gatekeepers and SMS firms, ex poste competition tools become somewhat redundant. There are notable overlaps between the aims and remits of the DMA, DMCC and traditional competition enforcement tools. Whilst some of the potential complications have been anticipated and legislative protections introduced, the interplay between the different regulatory styles will be tested in practice and degree of potential divergence remains to be seen. As the Commission and CMA start to navigate these tools, operating in a consistent and efficient manner should be front of mind. This should help to clarify the scope of the new frameworks and provide greater legal certainty.

23 DMCC, s 101 and s 102; Giulia Rurali, Martin Seegers 'Private Enforcement of the EU Digital Markets Act: The way ahead after going live' (Kluwer Competition Law Blog, 20 June 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/06/20/private-enforcement-of-the-eu-digital-markets-act-the-way-ahead-after-going-live/> accessed 2 December 2024; Linklaters, 'Enforcement by Private Third Parties' (The Digital Markets Act Hub) <https://www.linklaters.com/insights/publications/digital-markets-act/dma-hub/private-enforcement> accessed 2 December 2024.

24 DMA, Article 39(5).

THE DMA AND DMCC HAVE INTRODUCED EX ANTE REGULATORY FRAMEWORKS FOR SOME TECHNOLOGY BUSINESSES WHICH ARE INTENDED TO COMPLEMENT AND SUPPLEMENT COMPETITION LAW.

HOW WILL THIS LEGISLATION IMPACT PRIVATE ENFORCEMENT AND INTERACT WITH AND IMPACT UPON PUBLIC ENFORCEMENT OF CONDUCT IN THE DIGITAL WORLD?

Authored by: Sara Warner (Senior Associate) - Mills & Reeve

Introduction

Competition law exists to promote fair and competitive markets, typically through enforcement on an ex post basis. Due to the specific economic characteristics of digital markets, traditional competition law alone is generally considered insufficient to address the competition concerns associated with the largest digital platforms. Several jurisdictions have therefore introduced ex ante regulation, which includes the Digital Markets Act 2022 ("DMA")[1] in the European Union ("EU") and the Digital Markets, Competition and Consumers Act 2024 ("DMCCA")[2] in the United Kingdom ("UK").

This essay explores how the DMA and DMCCA will impact private enforcement and interact with and impact upon public enforcement of the conduct of the largest digital platforms in the EU and UK.[3] It is divided into three substantive parts. Part I discusses the enforcement powers of the European Commission ("EC") and the Competition and Markets Authority ("CMA") under the DMA and DMCCA, respectively.[4] Part II explores the opportunities and challenges that third parties face in bringing private actions to enforce the obligations of designated firms under the DMA and DMCCA. Part III considers the risks that private enforcement poses for effective public enforcement of the DMA and DMCCA.

The essay concludes that, over time, we may see an increase in private enforcement, led by large businesses and challenger firms. However, ensuring fair and competitive digital markets ultimately requires effective cooperation and coordination as between regulators and private claimants, and between courts and regulators, at a national, EU and international level. The essay proposes that informal private enforcement in the form of stakeholder engagement in implementing the regimes has the potential to fulfil a more significant role than formal private actions. Various aspects of the digital markets competition regime under the DMCCA arguably indicate that, in this regard, the UK may be better placed to set the standard.

I. Public Enforcement Under The DMA and DMCCA

The DMA and DMCCA both provide for the ex ante regulation of designated firms, and the monitoring and enforcement of compliance. As will be discussed, however, the two regimes differ in their approach, which varying effects on the scope for stakeholder engagement.

1 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 OJ L 265, 12.10.2022, 1-66.
2 References in this essay to the 'DMCCA' refer to the digital markets competition regime part of the DMCCA only.
3 For the purpose of this essay, 'digital platform' is used broadly to encompass similar expressions like 'technology business' (as used in the essay question).
4 For the purpose of this essay, 'CMA' is used interchangeably to refer to both the Digital Markets Unit of the CMA and the CMA more generally.

EC Enforcement Of The DMA

Since 1 November 2022, the DMA has provided for the designation of 'gatekeepers' of core platform services based on three main quantitative criteria.[5] All 'gatekeepers' must comply with a pre-determined set of obligations,[6] and report to the EC on their compliance.[7] The EC can investigate suspected non-compliance through market investigations lasting up to 12 months,[8] and in certain circumstances, impose interim measures.[9]

To date, the EC has designated 24 core platform services provided by seven 'gatekeepers' (Alphabet, Amazon, Apple, Booking, ByteDance, Meta and Microsoft),[10] and has already opened non-compliance investigations into Alphabet, Apple and Meta.[11] The 12-month time limit means that we can expect the outcome of these investigations much sooner than with traditional competition law investigations, which typically take a number of years.[12]

Speed is especially important in regulating digital markets, given the rapid rate of technological development. For the same reason, like other competition authorities, the EC will always be on the backfoot. Challenger firms and users of designated platform services therefore represent an invaluable source of real-time market information. The DMA provides that the EC "may" consult third parties, but such consultations are not mandatory. Together with the use of quantitative criteria and a "one size fits all" approach to gatekeepers' obligations, this indicates that the opportunities for stakeholder engagement are limited.[13]

CMA Enforcement Of The DMCCA

Once the digital markets competition regime comes into force on 1 January 2025,[14] the CMA will have the power to designate an undertaking as having Strategic Market Status ("SMS") in relation to a specific digital activity if, following an investigation, the CMA considers that the undertaking satisfies certain qualitative criteria.[15] SMS firms must comply with bespoke Conduct Requirements ("CRs") and Pro-Competition Interventions ("PCIs") will enable the CMA to address specific competition concerns.

The CMA has wide-ranging information gathering powers to assist with monitoring compliance, including the ability to require information stored outside the UK,[16] which is significant given the cross-border nature of the businesses of the largest digital platforms.

The CMA must publicly consult on proposed designations, CRs and PCIs,[17] and has announced that it intends to adopt a "participative" approach and engage constructively with stakeholders.[18] There is hope amongst challenger firms and large business users, in particular, that this will provide genuine opportunities to contribute towards the effective enforcement of the digital markets competition regime. Although this will require the CMA to make sufficient information publicly available to enable meaningful stakeholder engagement.

II. Private Enforcement Of The DMA and DMCCA

In the absence of express provision in the DMA for third party actions, there is some debate as to the likelihood that it will lead to private enforcement.[19] However, the DMA does allude to private actions in the national courts of the EU Member States within the context of cooperation between the EC and national courts.[20] The German Competition Act has been amended to

5 "An undertaking shall be designated as a gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future." DMA Article 3(1).

6 DMA Articles 5, 6, and 7.

7 DMA Article 11.

8 DMA Article 18(1).

9 DMA Article 24.

10 See, https://digital-markets-act.ec.europa.eu/gatekeepers_en.

11 Press release, 'Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act', 25 March 2024, available at https://digital-markets-act.ec.europa.eu/commission-opens-non-compliance-investigations-against-alphabet-apple-and-meta-under-digital-markets-2024-03-25_en.

12 This is exemplified by the competition law investigation into Meta, which the EC opened in June 2021 and only recently concluded. Press release, 'Commission fines Meta €797.72 million over abusive practices benefitting Facebook Marketplace', 14 November 2024, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_5801.

13 A review of the EC's practice in this area is beyond the scope of this essay.

14 Digital Markets, Competition and Consumers Act 2024 and Consumer Rights Act 2015 (Turnover and Control) Regulations 2024, para 1(2).

15 The CMA may designate an undertaking as having SMS in respect of a digital activity carried out by the undertaking where the CMA considers that: the digital activity is linked to the UK; the undertaking has a global group turnover exceeding £25bn or UK group turnover exceeding £1bn; and in respect of that digital activity, the undertaking has substantial and entrenched market power and a position of strategic significance. DMCCA section 2.

16 DMCCA sections 69(7), 71(6), 74(8) and 76(7).

17 DMCCA sections 13, 24, 49 and 54.

18 Remarks by Sarah Cardell, CEO of the CMA, delivered during the January 2024 Concurrences Tech Antitrust Conference, Palo Alto, USA, 11 January 2024, available at https://www.gov.uk/government/speeches/the-cmas-approach-to-digital-markets-regulation.

19 See, for example, Magnus Strand, 'Private Enforcement under the Digital Markets Act: Rights and Remedies Revisited' (2024) Nordic Journal of European Law 2, 120-132.

20 DMA Articles 1(7) and 37-39. This is supported by the following statement on DG-Comp's website: "This will facilitate direct actions for damages by those harmed by the conduct

strengthen private enforcement of the obligations resulting from the DMA.[21] An increase in private enforcement of the conduct of the largest digital platforms in the EU is therefore possible.

By contrast, the DMCCA explicitly provides that the obligations of an SMS firm may be enforced by any person who sustains loss or damage caused by a breach.[22] However, private enforcement is not without its challenges which, as the following discussion suggests, are likely to disproportionately impact individual consumers and small businesses (at least in the short-term).

Information Asymmetry

The absence of perfect information means that a third party may not have access to the information they need in order to substantiate their claim (or even know whether they could have a claim). The level of transparency in decision-making and monitoring of compliance by the EC and the CMA will therefore influence the extent of any increase in private enforcement. The requirement for the CMA to hold public consultations and its intention to adopt a "participative" approach should benefit potential claimants in the UK. Still, larger more sophisticated businesses will have an advantage over small businesses and individuals.

Legal Uncertainty

The introduction of new and complex legal provisions poses a challenge for third parties in determining whether they have a claim. The use of qualitative criteria in the DMCCA arguably poses a greater challenge for potential claimants in the UK, particularly in the absence of precedents. The CMA may assist, for instance, by providing interpretations of PCIs or information about enforcement decisions.[23] In the short-term, however, the general lack of clarity around the interpretation of the provisions of the DMCCA, and to a lesser extent the DMA, is likely to delay any increase in private enforcement.

Funding Litigation

Third parties will require specialist legal expertise in understanding whether they could have a claim under the DMA or the DMCCA. The cost of this can be substantial and possibly prohibitive for individual claimants and small businesses. Also, the limited availability of precedents will make it harder in the early years to predict the outcomes of cases, which will make it even more difficult for third parties to secure funding. For this reason, early private enforcement may be led by larger businesses and challenger firms with deeper pockets. Although there is also the possibility of collective actions.[24]

Strategic Considerations

Many businesses rely on the services of the largest digital platforms. As demonstrated by the various competition law investigations into Google and Amazon for example, there is a severe imbalance in bargaining power between the largest digital platforms and business users. Businesses therefore have the added consideration of the potential commercial ramifications of bringing private actions against designated firms with whom they do business. This could deter private enforcement by some businesses, but for the possibility of opt-out class actions.

III. Interaction Between Private And Public Enforcement

Proceeding on the basis that it is reasonable to expect some increase in private enforcement, even though the pace of this trend may be hindered by the various challenges faced by third parties, this poses a number of potential risks for the overall effective enforcement of the DMA / DMCCA. The interaction between private and public enforcement was relatively recently acknowledged by the CMA.[25]

A fundamental risk is the fragmentation of enforcement as a result of inconsistent approaches to the interpretation and application of the rules. The implications of this could be far-reaching in the digital market context, given the international operations of the largest digital platforms. However, effective cooperation and coordination between regulators, courts and third parties both within and between jurisdictions can help mitigate this risk.

Conclusion

In a rapidly changing sector where regulation will always be outpaced by the market, private enforcement has an especially important role to play. By presenting additional avenues by which third parties may enforce the conduct of the largest digital platforms, the DMA and DMCCA can reasonably be expected to lead to an increase in private actions. As discussed, however, the bringing of private actions is not without its challenges, particularly in the early days of new legislation. The nature of such challenges means that private actions may be a realistic option only for challenger firms and large businesses, at least in the short-term.

In addition, private actions pose risks to effective public enforcement that must be managed. Although cooperation and coordination between regulators, courts and third parties, at both a national and international level, can assist, and signs of this are positive in relation to both regimes.

In the author's view, informal private enforcement in the form of stakeholder involvement in the public enforcement of the DMA and DMCCA offers greater potential for third parties to contribute towards ensuring fair and competitive digital markets. Given the requirement for the CMA to undertake public consultations and its intention to adopt a "participative" approach, the DMCCA regime seems more amenable in this regard. Much will depend, however, on the CMA being sufficiently transparent, in practice, to enable stakeholders to engage meaningfully in the process.

of non-complying gatekeepers." Questions and Answers, 6 September 2023, available at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349.

21 Bundeskartellamt press release, 'Amendment to the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB; 11th amendment to the GWB)', 7 November 2023, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/07_11_2023_GWB_Novelle.html.

22 DMCCA section 101.

23 DMCCA section 102(6).

24 DMA recital 104 and Article 42; DMCCA Sch 3, para 9 inserting Sch 4, para 21B of the Enterprise Act 2002.

25 'Private actions and public enforcement: Panel remarks by Sarah Cardell, CEO of the Competition and Markets Authority, at the Competition Appeal Tribunal's 20th Anniversary conference on 4 May 2023', available at https://www.gov.uk/government/speeches/private-actions-and-public-enforcement.

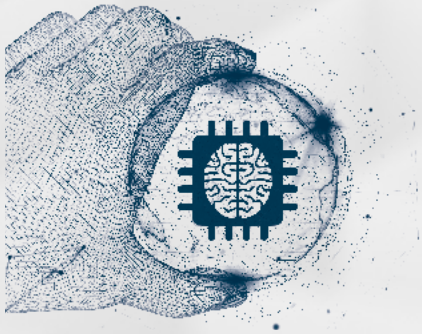
THE DMA AND DMCC HAVE INTRODUCED EX ANTE REGULATORY FRAMEWORKS FOR SOME TECHNOLOGY BUSINESSES WHICH ARE INTENDED TO COMPLEMENT AND SUPPLEMENT COMPETITION LAW.

HOW WILL THIS LEGISLATION IMPACT PRIVATE ENFORCEMENT AND INTERACT WITH AND IMPACT UPON PUBLIC ENFORCEMENT OF CONDUCT IN THE DIGITAL WORLD?

Authored by: Erasmia Petousi (Associate) - Linklaters

The Digital Markets Act ("DMA") and Digital Markets Consumer and Competition Act ("DMCC") introduce a sector-specific regime, with ex ante obligations targeted at a sub-set of digital technology undertakings. Content-wise, these obligations are largely based on existing case-law relating to breaches of ex post primary prohibitions. The novelty of digital regulation lies in promoting obligations that were previously imposed as "remedies" for specific anti-competitive conduct to a more (in the DMA case) or less (in the DMCC case) rigid set of primary per se obligations or prohibitions.[1]

This article explores how this paradigm shift impacts traditional competition law enforcement for the digital sector, adding new avenues for enforcement but also significant complexities.



More Private Enforcement Avenues

Despite the silence of the draft regulation, Articles 39 ("Cooperation with national courts") and 42 ("Representative actions") of the DMA presuppose a framework comprising private enforcement, including consumer collective claims.[2] The DMCC is more direct than its European counterpart, as Section 101 allows anyone affected by a breach of a "relevant requirement" to bring proceedings for damages, injunctions or any other appropriate relief or remedy.

From a systematic perspective, the DMA and DMCC reserve their core preliminary provisions to regulators, while a consequential set of obligations give rise to actionable individual rights. Under the DMA, the designation of a "gatekeeper" is an administrative decision exclusively made by the European Commission ("EC").[3]

1 Regarding the nature of this legislation, see a summary of the interesting academic debate in Belle Beems, 'The DMA in the broader regulatory landscape of the EU: an institutional perspective' (2023) 19 European Competition Journal 1. The present article takes the position that digital regulation is akin to a sector-specific regime, distinct from, but interplaying with, competition rules.

2 Also recitals 92 and 104. Assimakis Komninos, 'Private Enforcement of the DMA Rules before the National Courts' (2024) <https://ssrn.com/abstract=4791499> accessed 20 November 2024. The consensus is that private enforcement follows directly from the Regulation's direct effect.

3 Ibid (n 2). Tamta Margvelashvili, 'Charting the course of DMA's private enforcement: unveiling the forum shopping challenge' (2024) 20 European Competition Journal 588. Certain Member States have also been supportive of private enforcement in the context of the DMA.

It is flowing from this decision that the substantive obligations set out in Articles 5-7 DMA kick in, and these are sufficiently precise and unconditional as to give rise to direct effect.[4] In the DMCC, the actionable "relevant requirement" comprises (i) a conduct requirement (Section 19), (ii) a requirement imposed by a pro-competition order (Section 46), or (iii) a requirement to comply with a commitment given in respect of a conduct investigation or a pro-competition investigation (Sections 36 or 56).

Potential claimants, therefore, have additional litigation avenues against designated undertakings, by means of both standalone and follow-on claims. In this respect, the DMCC is layered on top of an already significant number of private damages actions in the UK related to tech companies. While follow-on actions are not expected soon, as they would rely on the binding effect of an authority decision, standalone actions appear a much more powerful avenue, notably injunctions.[5]

As to the exercise of this right, the lack of harmonisation in the DMA is contrary to the evolution of competition law enforcement under the Damages Directive.[6] This relates to both procedural and core elements of a successful claim, namely harm and causation, which are largely a matter of national law.[7] While the principles of equivalence and effectiveness provide a safety valve, the regulatory status quo is largely reminiscent of the lack of harmonisation in the post-Courage situation.[8] [9] Equally, the DMCC deliberately lacks a fundamental element of current UK competition litigation, namely collective opt-out proceedings, limiting claimants to tools such as opt-in claims or Group Litigation Orders.[10]

The interplay of digital regulation and public enforcement

Digital regulation provides an additional, sector-specific route of public and private enforcement for designated undertakings, applying in parallel to traditional competition law rules; albeit the objectives of the two strands of legislation differ.[11] This dynamic inherently creates a risk of parallel introduction and enforcement of digital regulation (EU-wide or national) and competition law by different enforcers (EC, Member States, CMA) and / or courts, in a way which could run counter to the ne bis in idem principle.[12]

While the DMA is framed as a uniform, EU-wide set of rules, Article 1(5) creates ample opportunities for Member States to introduce national rules for core platform service providers subject to limited caveats, namely (i) "for matters falling outside the scope of this Regulation", (ii) compatibility with EU law, and (iii) provided that those obligations "do not result from the fact that the relevant undertakings have the status of a gatekeeper".[13] Member States willing to go after tech giants can also seek recourse in Article 1(6), which allows Member States to impose obligations on undertakings through the lens of competition law.[14]

Considering the UK, this effect is somewhat mitigated by the fact that the same authority will apply the DMCC and competition rules. Nonetheless, the notional separation of the DMCC is of little value, where an undertaking may practically be facing designation and different sets of rules and enforcement under various EU and UK provisions.

The DMA attempts to limit the fragmentation risk between digital regulation and competition enforcement by recognising a role for national authorities in supporting the effective enforcement of the DMA (e.g. Articles 21(5), 22, 26(5), 41)[15] and introducing cooperation provisions (Articles 37-38). These provisions do not, however, suffice to mitigate the risk of double jeopardy arising from the legislative choice to allow national digital regulation to co-exist with the DMA and competition rules.[16]

Risks of divergent outcomes also arise from the possibility of parallel private and public enforcement. The DMA / DMCC does not give precedence to public enforcement and enables private litigants to bring cases immediately once the preliminary thresholds outlined above (designation or imposition of obligations, as may be the case) are met.

4 Ibid. Potential claimants could, thus, bring a broad range of actions, including damages, injunctive relief, restitutionary and declaratory relief, or the pronouncement of nullity of contracts. Giulia Rurali and Martin Seegers, 'Private Enforcement of the EU Digital Markets Act: The Way Ahead After Going Live' (2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/06/20/private-enforcement-of-the-eu-digital-markets-act-the-way-ahead-after-going-live/> accessed 20 November 2024; Komninos (n 2); Magnus Strand, 'Private Enforcement under the Digital Markets Act: Rights and Remedies Revisited' (2024) 7 Nordic Journal of European Law 2.

5 Rurali and Seegers (n 4). The article notes the possibility of Article 8(1) of the DMA being interpreted as leading to as shift in the burden of proof regarding compliance. We think such a reading of the provision would run counter to the logic of standalone private enforcement and create perverse incentives for claimants.

6 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

7 Strand (n 4).

8 Rurali and Seegers (n 4).

9 Case C-453/99 Courage v Crehan [2001] ECR I-06297; Assimakis Komninos, EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts (Hart Publishing 2008).

10 Joe Williams and Naomi Reid, 'A New Frontier for Competition Litigation: Private Enforcement in Digital Markets Following the DMCC Act' (2024) <https://ssrn.com/abstract=4990917> accessed 23 November 2024.

11 Jasper van den Boom, 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' (2022) 19 European Competition Journal 57.

12 Case C-117/20 bpost v Autorité belge de la concurrence [2022] ECLI:EU:C:2022:202.

13 van den Boom (n 11); Alba Ribera Martínez, 'The Decentralisation of the DMA's Enforcement System' (2024) 73 GRUR International 1111.

14 Beems (n 1).

15 Beems (n 1).

16 van den Boom (n 11).

Potential litigants could take advantage of the advanced procedural protections of competition enforcement (notably the Damages Directive and opt-out collective proceedings in the UK) by relying on digital regulation to develop a competition law theory of harm. As part of this strategy, designation of a large digital platform could be used as a proxy for dominance[17]; while the obligations under the DMA or DMCC could be used to substantiate an abuse more easily. Though conceptually this attempt would run counter to the premise that abuse is less about form and more about effect on competition, practically, a lot will depend on how sympathetic to such arguments national courts will be.

Equally, the lack of a harmonised process in the EU could give rise to fragmentation between public to private, EEA to national, or national to national, enforcement. In a largely uncharted territory, this could result in the indirect shaping of aspects of digital regulation by non-specialist national courts called to adjudicate private differences.[18]

In the DMA, these risks are somewhat mitigated by Article 39(1)-39(5), which introduce cooperation mechanisms and the principle of supremacy of EC decisions.[19] A gap remains where the EC has not initiated proceedings under the DMA; then, it would be upon the national court to e.g. make a preliminary reference. Under the DMCC, courts are similarly bound by final CMA breach decisions. Nonetheless, the DMCC does not contain similar provisions to the DMA. Section 102(6), which merely allows the relevant courts to make provision in respect of "assistance" by the CMA, is a weak substitute.[20]

A similar risk is the potential of extensive forum shopping towards "friendlier" national courts.[21] While no longer part of the EU (where this risk is more pronounced), the UK could be indirectly affected by these dynamics; given the DMA's head-start and the significant overlap between the targets of the two acts, a scenario where an infringement decision against a "gatekeeper" could help substantiate a claim in the UK against the same "SMS firm" appears plausible.

Conclusion

The DMA and DMCC introduce a sector-specific enforcement route for tech giants. While the objectives of digital regulation and competition law differ, in practice their material overlap may give rise to fragmentation, double jeopardy, and legal uncertainty; though the impact of the new legislation may be more incremental given the limits on private damages inherent in it.

This makes it necessary for the EU / UK judicature to scrutinise the limits between different types of enforcement (private or public, competition or digital) and ensure the rights of designated undertakings are protected. Equally, the EC has a role to play in clearly delineating the space where the involvement of national authorities does not undermine the centralised enforcement of the DMA.

Understandably, the EC's approach will not come in a political vacuum, and it is unclear how a new Commissioner will approach big tech, particularly with a new US administration. That said, the degree of harmonisation and coordination between authorities and courts that can be achieved at the early stages of digital regulation will ultimately determine the success (or otherwise) of enforcement of competition and digital rules in relation to digital technology undertakings.

17 Ibid (n 11).

18 Hence, certain commentators had argued against allowing standalone actions in the context of the DMA. Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' (2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3914932> accessed 23 November 2024; Margvelashvili (n 3).

19 Komninos (n 2).

20 Williams and Reid (n 10).

21 Tamta Margvelashvili, 'Tracing Forum Shopping within the DMA's Private Enforcement: Seeking Equitable Solutions' (2023) Kluwer Competition Law Blog <https://competitionlawblog.kluwercompetitionlaw.com/2023/12/14/tracing-forum-shopping-within-the-dmas-private-enforcement-seeking-equitable-solutions/> accessed 25 November 2024; Margvelashvili (n 3).

THE DMA AND DMCC HAVE INTRODUCED EX ANTE REGULATORY FRAMEWORKS FOR SOME TECHNOLOGY BUSINESSES WHICH ARE INTENDED TO COMPLEMENT AND SUPPLEMENT COMPETITION LAW.

HOW WILL THIS LEGISLATION IMPACT PRIVATE ENFORCEMENT AND INTERACT WITH AND IMPACT UPON PUBLIC ENFORCEMENT OF CONDUCT IN THE DIGITAL WORLD?

Authored by: Ilyada Akça (Associate) - CoPartners

The digital age has reshaped global markets, amplifying the influence of a few dominant players known as gatekeepers. These entities, while driving innovation, have also raised concerns about competition, consumer rights, and market fairness.

The European Union ("EU"), as a pioneer in regulatory frameworks, has taken bold steps to address these challenges through initiatives like the Digital Markets Act ("DMA").

This legislation aims to ensure a competitive digital ecosystem, limit monopolistic behaviors, and protect smaller players' ability to innovate and thrive. However, the DMA is more than a regulatory tool; it symbolizes a broader geopolitical and cultural narrative. It reflects the EU's determination to assert its values and standards in a digital economy largely shaped by U.S.-based tech giants. This essay examines the DMA's implications, the balance it seeks to achieve between innovation and regulation, and its potential to influence global digital governance, particularly within the interconnected Western world.

Despite its aging population and the rapid contraction in key industries, the EU remains the world's second-largest economy, with a combined nominal GDP of approximately $18.35 trillion.[1] One of the aspects of DMA lies in the economic interdependence between the EU and gatekeepers—such as Amazon, Google, and Meta—still generate between 15% and 30% of their total revenues from the EU.[2] This makes the EU the second-largest partner of gatekeepers after the United States. In contrast, China's stringent technology regulations have largely excluded Big Tech from establishing any substantial foothold within its borders.[3] This economic reality secures its position as an indispensable actor in the digital economy.

While the EU's substantial economic power, I believe the EU's true strength lies not in its market size but in its normative framework. Emerging as a third power in the post-Cold War bipolar world, the EU has transcended being merely an economic force by establishing global alternatives through its institutions, standards, and emphasis on social welfare and economic integrity.

1 World Bank, 'Data for United States, European Union, China' (2024) https://data.worldbank.org/?locations=US-EU-CN accessed 6 December 2024

2 Statista, 'Regional distribution of Google's revenue' (2024) https://www.statista.com/statistics/266250/regional-distribution-of-googles-revenue/ accessed 6 December 2024; World Population Review, 'Amazon Revenue by Country 2024' (2024) https://worldpopulationreview.com/country-rankings/amazon-revenue-by-country accessed 6 December 2024; Stock Dividend Screener, 'Meta Revenue Breakdown by Region and User Geography' (4 Şubat 2024) https://stockdividendscreener.com/information-technology/meta-revenue-breakdown-by-region-and-user-geography/ accessed 6 December 2024.

3 Wikipedia, 'Censorship in China' (2024) https://en.wikipedia.org/wiki/Censorship_in_China accessed 6 December 2024.

Its commitment to principles ensuring human rights, democracy, and the proper functioning of democratic institutions positioned it as a beacon of cultural and social leadership for decades. Remarkably, this was achieved despite the politically charged environment of the Cold War.

In todays, the significant advancements in technology by Asia-Pacific countries and their emergence as alternative hubs challenge the dominance of American and European players in Western markets, raising the question of whether the world is returning to a bipolar order. This time, however, the contest is between the United States—where start-ups have transformed into massive economic powerhouses—and China, which, despite entering the race relatively late and maintaining internet restrictions alongside its anti-freedom stance (a reality that disrupts the conventional argument that advanced economies must develop through democracy), has become a formidable rival to the U.S. While the United States and China seem to be paving the way for a new bipolar global structure, the EU appears poised to maintain its role as a global actor by leveraging its regulatory power and still-strong economy.

Given Asia's prominence as a global economic force, its distinct socio-political framework and cultural divergence, coupled with its politically and economically protectionist stance, underscore the lack of alignment between Asian and Western governance paradigms. In particular, China's regulatory environment, characterized by state-driven policies and limited engagement with global liberal norms, renders any examination of the EU's regulatory influence in this context ineffective.

On the surface, the EU's primary objective with the DMA appears to be safeguarding the competitive market structure considered vital for the proper functioning of the free-market economy in the West. It seeks to foster opportunities for new market entrants and preserve entrepreneurial potential in sectors dominated by gatekeepers. These goals and the strategies to achieve them have been the subject of extensive debate for years. However, a deeper analysis suggests that the DMA also serves as a strategic instrument for the EU to address the dominance of gatekeepers, often associated with major U.S.-based companies, and to reinforce its regulatory sovereignty in the digital economy, thereby exerting influence over the U.S.'s leadership.

U.S.-based companies, while global in reach, are deeply rooted in American traditions and culture, serving as extensions of its economic and cultural influence.

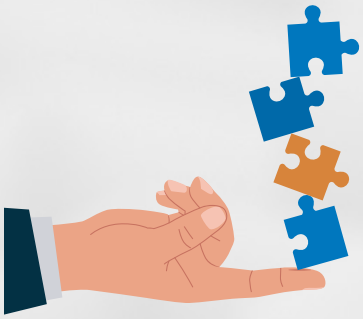
Primarily headquartered and generating most of their revenue in the U.S., these gatekeepers operate within a political system shaped by lobbying and economic interests. This structure, driven by power dynamics rather than formal principles, positions gatekeeper firms as pivotal actors in advancing the U.S.'s global agenda.

Over the past two decades, the United States, building on Reagan-era economic policies, has fostered the rise of the world's largest and most influential corporations. Unlike traditional firms in the real economy, these tech giants extend beyond selling products or targeting consumers—they integrate into daily life, leveraging personalized data to shape behaviors, influence elections, and intervene in decision-making processes. This unprecedented power, which transcends geographical boundaries, particularly within the Western world, has not only drawn the attention of EU authorities but has also directly impacted the EU's regulatory landscape, prompting actions like the DMA to address such far-reaching influence.

The EU's political influence is deeply rooted in its legislative power, exemplified by the success of the GDPR. Initially applicable only within the EU, the GDPR's impact extended globally, including to jurisdictions like the U.S., where regulatory frameworks are often less stringent. This demonstrated the "Brussels effect," compelling global tech companies to adapt to EU-imposed standards and setting a precedent for international regulatory alignment. The regulatory standards established by the EU, independent of the tech giant ecosystem, are likely to play a crucial role in shaping the intellectual and legal foundation of legal actions in the U.S. Principles defined by the EU in areas such as GDPR, human rights and environmental regulations, antitrust cases, cartel rules, and digital markets are already demonstrating significant influence.

The DMA could also make the EU a global standard-setter, but different priorities in the EU and U.S. may lead to various reactions.

When examining the DMA from the EU's perspective, it is essential to consider the challenges highlighted in the Draghi Report, which identifies overregulation as a significant issue for start-ups within the Union. This regulatory burden often drives European start-ups to seek growth opportunities in the U.S., where the ecosystem is perceived as more conducive to innovation. While the DMA aims to foster opportunities for new entrants and support entrepreneurship, the underlying problems in the EU's ecosystem extend beyond the dominance of gatekeepers. Bureaucratic hurdles, heavy tax systems, and substantial personnel costs continue to stifle start-up growth, which limits the DMA's potential benefits for the EU's entrepreneurial environment. While the expectation from the DMA seems to be the support of small start-ups and the creation of space for their growth in Europe, I do not believe this will be sufficient to revitalize the entrepreneurial ecosystem.



Nonetheless, the EU has long been engaged in a legal battle against gatekeeper companies, conducting extensive investigations into their practices. However, the ex-post nature of these measures reduces their deterrent effect due to the prolonged timelines of regulatory actions. To address this, the DMA proposes an ex-ante approach, establishing foundational principles to regulate gatekeepers proactively. This shift not only strengthens the EU's capacity to manage gatekeepers within its borders but, as discussed earlier, also enhances its potential to influence the U.S. regulatory landscape through the "Brussels effect." By adopting such proactive measures, the EU can position itself as a global regulatory leader while addressing systemic imbalances in the digital economy.

While start-ups grow faster in the U.S. compared to the EU, they face significant challenges due to anti-competitive behaviors by Big Tech companies. Numerous cases have already been initiated, highlighting the pervasive nature of these issues. The Federal Trade Commission ("FTC") has pursued cases against Facebook[4] and Google[5], imposing substantial fines for anti-competitive conduct, including early acquisitions that eliminate potential competitors and create "kill zones" where start-ups struggle to grow independently. These cases underscore that anti-competitive behaviors are a pressing problem in the U.S. as well.

The political climate under Trump further exacerbates this challenge. The Trump administration, with its close ties to tech giants like Elon Musk and other industry leaders, has shown a willingness to leverage these relationships to advance its international agenda, often prioritizing corporate interests over regulatory oversight. This dynamic makes it highly unlikely that a regulation akin to the DMA could gain traction in the U.S. over the next four years.

Nonetheless, while the Trump administration may not directly interfere with ongoing legal proceedings, the EU's legislative influence could serve as a critical factor in shaping the regulatory discourse. The interconnected nature of the Western world's cultural and social structures makes it plausible that the DMA could raise awareness of such regulatory gaps within the U.S. If public demand aligns with the right political will, the DMA might become a reference point for future regulatory initiatives.

In 2019, Spotify filed an antitrust complaint with the European Commission[6], alleging that Apple's App Store policies—such as mandatory in-app purchase commissions and restrictions on alternative payment systems—constituted anti-competitive behavior. The European Commission's subsequent decision to impose a €2 billion fine on Apple marked a significant regulatory intervention, targeting practices that hinder market competition. This ruling resonated across the Atlantic, influencing the United States, where similar concerns over Apple's practices were already under scrutiny. U.S. regulators, including the Department of Justice[7] and state attorneys general, have cited the EU's decision as a reference point in their ongoing investigations into Apple's market behavior. While the U.S. regulatory framework remains more fragmented, the EU's action has provided a compelling case study for addressing monopolistic practices.

The Spotify case demonstrates that the Brussels effect is not limited to legislative influence. It extends to judicial interpretations, shaping the application of antitrust principles globally and reinforcing the EU's role as a standard-setter in competition law.

As outlined above, it is evident that the U.S. and its tech giants will inevitably be influenced by these developments, whether through regulatory decisions or judicial outcomes. Considering the U.S.'s rapidly evolving start-up ecosystem and juxtaposing it with the EU's current regulatory challenges, the potential impact on American start-ups could prove more constructive than in Europe. However, given the historical and cultural trajectory of the U.S., expecting the implementation of an ex-ante regulatory framework similar to the DMA would be unrealistic. At best, we may foresee the establishment of stricter principles to guide the ecosystem while maintaining the U.S.'s emphasis on innovation and market-driven growth.

The DMA symbolizes the EU's ambition to establish itself as a global regulatory leader, addressing the unchecked power of gatekeepers while striving to balance innovation and competition. Through the "Brussels effect," the EU's regulatory frameworks have demonstrated a far-reaching impact, influencing not only legislation but also judicial interpretations in other jurisdictions, including the United States. While the U.S. remains constrained by its fragmented regulatory approach and cultural emphasis on market-driven growth, the EU's proactive measures set a benchmark for addressing systemic challenges in the digital economy. Ultimately, the DMA's success will determine whether the EU can solidify its role as a global standard-setter in digital governance.

4 Federal Trade Commission v. Meta Platforms, Inc., Mark Zuckerberg, and Within Unlimited, Inc., Case No. 3:22-CV-04325 (N.D. Cal. filed July 27, 2022).
5 United States v. Google LLC, Case No. 1:20-cv-03010 (D.D.C. filed Oct. 20, 2020).
6 European Commission, Case AT.40437: Apple – App Store Rules for Music Streaming Providers (4 March 2024)
7 Inno Flores, 'DOJ's Antitrust Suit Against Apple Draws Support from Spotify, Deezer' (Tech Times, 21 March 2024)

THE DMA AND DMCC HAVE INTRODUCED EX ANTE REGULATORY FRAMEWORKS FOR SOME TECHNOLOGY BUSINESSES WHICH ARE INTENDED TO COMPLEMENT AND SUPPLEMENT COMPETITION LAW.

HOW WILL THIS LEGISLATION IMPACT PRIVATE ENFORCEMENT AND INTERACT WITH AND IMPACT UPON PUBLIC ENFORCEMENT OF CONDUCT IN THE DIGITAL WORLD?

Authored by: Markus Brösamle (Associated Partner) - Noerr

A. Introduction

Digitalisation is causing markets and competition to develop dynamically. Market participants, structures and business models can change rapidly. At the same time, some digital companies have very strong and established market positions. As central (and financially strong) market participants, they often determine the 'rules of the game' and decide on access to markets or data. Numerous other companies are dependent on those 'big players'. Also, digital markets are subject to specific characteristics, and are very complex organisms, both legally and economically. Network effects increase the value of established companies and hinder market entries. Further, digital markets are data driven. Data is a resource and currency. Large digital companies have an information advantage due to their access to data, they control this data and can prefer their own business model. The complexity and fastmoving nature of digital markets poses immense challenges for regulators and market participants alike. Nothing is older than yesterday's news. Ironically, this saying from the 'analogue' era applies even more here. Antitrust law and the DMA (or DMCC) both aim to ensure effective competition in the digital age. While antitrust law generally protects undistorted competition, the DMA specifically aims to ensure contestable and fair markets in the digital sector.[1]

Antitrust law and the DMA have in common that they want to achieve their objectives by means of both public enforcement (i.e. by public authorities) and private enforcement (i.e. by means of civil proceedings).

The following article shall examine how this framework – particularly the DMA – will impact private enforcement and interact with and impact upon public enforcement of conduct in the digital world.

B. Impact of the DMA on Private Enforcement

To assess the influence of the DMA on private enforcement, the traditional antitrust actions must be observed as well as private enforcement directly related to the DMA.

I. No significant impact on Classic Antitrust Private Enforcement

Even if no significant effects on classic private antitrust enforcement by the DMA are apparent, the experience from classic private antitrust enforcement is relevant to categorise the effects of the DMA on private enforcement.

1 Cf. section 1 German Competition Act (Act against Restraints of Competition – "ARC"), Art. 1 Abs. 1 DMA.

Classical private enforcement in antitrust law primarily pertains to the enforcement of damages claims by private plaintiffs following (ceased) antitrust law infringements.[2] It involves ex post situations where anticompetitive behaviour (such as pricefixing or information exchange) has already occurred, often characterized by bilateral infringements. Plaintiffs in such cases are typically direct or indirect purchasers of products or services from the infringed market. Damages claims based on unilateral behaviour are possible but by far not as common as damages claims based on bilateral infringements. Private enforcement of antitrust damage claims is complicated and cumbersome for both plaintiffs and defendants:

- **Extensive fact finding and market understanding required:** Already in classical anti-trust damages cases, one of the biggest challenges is substantiating and proofing that one is affected by an infringement and has suffered damages. This requires a proper documentation and furthermore a deep understanding of the underlying economic relationships and mechanisms within the relevant market.
- **Complex damage theories:** In addition, the theory of damages is often complex.[3] Generally, plaintiffs must be able to develop a theory of harm and to quantify the harm they have suffered, which necessitates extensive economic analysis and possibly the engagement of expert witnesses. Although there is a tendency, at least in Germany, to lower the requirements for the plaintiff's submission, this cannot result in the defendants being deprived of their defence options. The process is not only time-consuming and costly but also risky, given the uncertainties surrounding the economic valuation and the often unclear prospects of success.

Influence and effects of the DMA on this private enforcement are barely present because the DMA focuses on current and forward-looking behaviour by so-called gatekeepers.

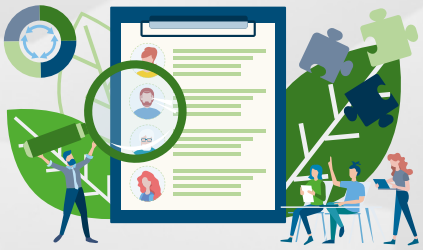
II. Impact on DMA – Private Enforcement

Certain aspects of DMA private enforcement resemble from the problems of classic private enforcement in antitrust law described above.

Additionally, the Digital Markets Act (DMA) introduces new challenges in the realm of private enforcement that extend beyond the existing issues in classical antitrust law.

- As the DMA deals with unilateral conduct by so-called gatekeepers, there is an absence of a clearly defined financial transaction to which a claim could be linked.
- A further central issue in the DMA context is the dynamic nature of the scenarios involved. Unlike "completed" infringements that are addressed in classical antitrust damages, market conditions and the behaviour of gatekeepers can change rapidly.[4] The respective situations are ongoing. This complicates the burden of proof and makes it more difficult to substantiate the claim.[5] This is because the facts of the case are in a state of flux and potential plaintiffs may have very limited information, making it difficult to successfully pursue a claim.
- Plaintiffs therefore bear a (higher) risk because the facts are less clear, and the outcome of a proceeding is difficult to predict.[6] The chances of success of such private enforcement proceedings can be even more uncertain than in classical anti-trust damages claims. This also applies already for so-called "stand-alone" antitrust cases where there is no prior decision by a competition authority. Establishing the facts and demonstrating the infringement by the gatekeeper is particularly difficult in such situations. This could deter potential plaintiffs from taking legal action at all.
- Also, (economic) theories of damages and/or the substantiation of an infringement are more difficult to present and therefore pose challenges for plaintiffs. There is no presumption of damage (at least in Germany).[7]
- In addition, it must be a fair procedure, and the gatekeepers must also be able to defend themselves appropriately.

A balanced integration of public and private enforcement could lead to higher enforcement at all.



1. Integration of Public and Private Enforcement in DMA Context

A more effective integration of public and private enforcement could help overcome these challenges. Competition authorities could play a supportive role – for plaintiffs and defendants – in the clarification (and proof or disproof) of facts, for instance, by providing data and insights from previous investigations.

Further, the obligation to notify certain claims under the DMA to specific authorities[8] could be leveraged to allow

2 Mendelsohn / Budzinski, 'Hintergrund, Ziele und wettbewerbspolitische Einordnung des DMA' (Background, objectives and competition policy categorisation of the DMA) in Schmidt and Hübener (eds), New Digital Markets Act (DMA) (Nomos 2023; German Version), 64 para 46.

3 Nils Imgarten / Lena Hornkohl, 'Antitrust Damages Actions in National Courts: An Academic Analysis of Trends in the CJEU's Case-Law' (Kluwer Competition Law Blog, 16 July 2024) < https://competitionlawblog.kluwercompetitionlaw.com/2024/07/16/antitrust-damages-actions-in-national-courts-an-academic-analysis-of-trends-in-the-cjeus-case-law/> last accessed on 05 De-cember 2024.

4 Mendelsohn / Budzinski, 'Hintergrund, Ziele und wettbewerbspolitische Einordnung des DMA' (Background, objectives and competition policy categorisation of the DMA) in Schmidt and Hübener (eds), New Digital Markets Act (DMA) (Nomos 2023; German Version), 64 para 46.

5 Becker, 'Privatrechtliche Durchsetzung des Digital Markets Act' (Private enforcement of the Digi-tal Markets Act) 2023 ZEuP 403, 428.

6 Komninos, Assimakis, Private Enforcement of the DMA Rules before the National Courts (April 05, 2024); Available at SSRN:<https://ssrn.com/abstract=4791499 or http://dx.doi.org/10.2139/ssrn.4791499>, 12.

7 Section 33 (2) ARC does not apply.

8 For example, in Germany – besides antitrust claims – also DMA claims must be reported to the FCO, section 90 (1) ARC.

institutions like the Federal Cartel Office (FCO) to "piggyback" on interesting claims and participate in fact-finding, e.g. through information requests.

This information could then be used by plaintiffs to develop a robust theory of damages and improve the prospects of successful claims. On the other hand, this instrument can also be used by gatekeepers to defend against the claim by disproving the "story" of the plaintiff.

Such integration has advantages and disadvantages.

a) Possible Advantages of Integration

aa) Efficiency and Resource Sharing

Public authorities have access to extensive investigative resources and expertise that can assist private enforcement. By sharing factual findings from public investigations, authorities can reduce the burden on private plaintiffs, enabling them to focus on legal arguments rather than factual discovery. A gatekeeper might use the information to substantiate why the plaintiff is wrong.

bb) Consistency in Enforcement Outcomes

Coordination between public and private enforcement can lead to more consistent outcomes. With public authorities establishing legal precedents through their decisions, private enforcement actions can follow and adapt the findings, leading to a more predictable path and reducing legal uncertainty.

cc) Enhanced Deterrence

When public enforcement actions signal potential wrongdoing, private enforcement can act swiftly to claim damages and/or compliance with the DMA, thereby increasing the deterrent effect. The threat of both (effective) public penalties and private claims could encourage greater compliance with competition laws.

b) Possible Disadvantages of Integration

aa) Potential Delays

The procedural requirements and thoroughness of public investigations are often timely and could thereby significantly delay private enforcement actions. This is particularly problematic in fast-moving markets where promptly action is crucial to prevent ongoing harm.

bb) Risk of Over-Reliance on Public Proceedings

Relying on the outcome of public investigations may discourage private plaintiffs from independently pursuing claims, potentially leading to a situation where only the most egregious cases are addressed by public authorities, leaving other harmful practices unchecked.

cc) Complexity and Bureaucracy

Possible infringements will often concern several countries and jurisdictions. Coordinating between different jurisdictions and legal systems can increase bureaucratic complexities and result in a delay of the investigation outcome. Different priorities and legal standards of different jurisdictions may also hinder efforts to align public and private enforcement actions.

dd) The Role of Interim Relief

Interim reliefs provide a tool for immediate action. Thus, interim relief plays a crucial role in private enforcement under the DMA, allowing for swift action to prevent ongoing harm without waiting for the conclusion of public proceedings. The fast-paced nature of digital markets demands timely interventions that traditional public enforcement mechanisms may not accommodate due to their procedural length and complexity. Involving the authorities in this type of procedure could lead to delays that do not do adequate credit to such procedures.

c) Assessment

If the possible disadvantages are minimized, then public enforcement can indeed provide support for private enforcement.

2. Conclusion | Recommendation

If the authorities were to provide support with a sense of proportion, both private and public enforcement could benefit from greater integration. In particular, the authorities could make requests for information and/or share their own findings. This could assist the parties involved. In addition, the authority would possibly gain valuable insights as well from the parties.

Of course this cannot replace classic public enforcement. It is important to maintain a balance between awaiting public investigation results and protecting private interests.

This is also important as public proceedings suspend the statute of limitations also for affected persons that have not taken legal actions themselves so far, thereby preserving the ability to claim damages without immediate pressure to engage in a standalone lawsuit.

III. Summary

The impact of the DMA on private enforcement is currently limited. Corresponding proceedings are complex (and likely even more complex than already difficult antitrust actions). In order for the DMA to support private enforcement, these hurdles must be minimized. This could be achieved by combining public and private enforcement, whereby a proper balance must be found.

Ensuring that both mechanisms complement rather than hinder each other requires careful consideration of procedural alignments and the development of European or internationally standardized frameworks that capitalize on the strengths of each approach. This includes leveraging the speed and flexibility of interim relief while ensuring public proceedings do not inadvertently stall private claims.

Ultimately, the goal should be to create an enforcement ecosystem where public and private actions are not in competition but rather work in tandem to protect competition and consumer interests in the dynamic digital marketplace. Integration could improve enforcement and support the objectives of the DMA (and antitrust law).

THE DMA AND DMCC HAVE INTRODUCED EX ANTE REGULATORY FRAMEWORKS FOR SOME TECHNOLOGY BUSINESSES WHICH ARE INTENDED TO COMPLEMENT AND SUPPLEMENT COMPETITION LAW.

HOW WILL THIS LEGISLATION IMPACT PRIVATE ENFORCEMENT AND INTERACT WITH AND IMPACT UPON PUBLIC ENFORCEMENT OF CONDUCT IN THE DIGITAL WORLD?

Authored by: Ellen Huison (Associate) - Knights

Four years ago, I submitted my Master's thesis. The essay analysed the Bundeskartellamt decision in Facebook[1] and how such a judgement could influence the development of competition law. Examining the history of the interaction between data protection and competition law, it told a story of how two disciplines once so far apart became so closely associated: a product of the growing value of data. It analysed how the Commission, alongside other competition authorities could use existing legislation prohibiting the abuse of a dominant position to pursue what might be considered ancillary aims in the digital age, namely the protection of data rights. The conclusion went a step further, arguing that the pursuit of these broader aims through the competition toolkit was a natural development of European competition law, a discipline whose aims were no stranger to evolution in comparison to its American counterparts'.

Four years on, on the eve of the digital markets regime coming into effect in the UK, and in the first year of Digital Markets Act enforcement in Europe, this essay reflects on how the digital markets regimes will shape the development of public and private enforcement of competition law in digital markets.

The Digital Markets Regimes

Competition authorities have long struggled with the regulation of digital markets. Public enforcement of competition law has increasingly targeted digital markets as technology has become further embedded in daily life. Certain organisations, "GAFAM" companies (Google, Apple, Facebook, Amazon, Microsoft), have faced intense scrutiny from competition authorities both in relation to anti-competitive practices and merger activity. Enforcement action has targeted a range of practices including self-preferencing,[2] refusal to provide interoperability,[3] and tying,[4] each of which have now been addressed in the Gatekeeper obligations under the DMA.[5] Despite the volume of investigations by competition authorities on a global scale, anti-competitive behaviour persists in these sectors, with limited challenge from competitors.

1 Bundeskartellamt Decision of 6th February 2019 into Facebook (B6-22/16)

2 See, for example: Google Search (Shopping), Commission Decision of 27th June 2017, and the current CMA investigation into Google (Adtech): https://www.gov.uk/cma-cases/investigation-into-suspected-anti-competitive-conduct-by-google-in-ad-tech

3 Microsoft/W2000 (Case COMP/C-3/37.792)

4 Microsoft Corp v Commision (Case T-201/04) EU:T:2007:289

5 EU Regulation 2022/1925, OJ [2022] L265/1, Art 5,6,7

The seemingly unshakeable dominance of GAFAM companies has captured public interest, with competition law moving out of obscurity and into the mainstream media.[6] It is in this context that the ex ante digital markets regimes were born.

The EU and UK digital markets regimes, although differing to a degree, share substantial similarities. Both systems establish a set of regulations targeting the largest businesses operating in digital markets, "Gatekeepers" in the EU or "SMS firms" in the UK. Once designated, entities are subject to additional regulations, a natural evolution from the special responsibility placed on dominant firms and informed by case law, designed to protect competition and consumer interests in the market in which the firm has entrenched market power. Failure to abide by these rules comes with significant penalties including fines of up to 10% group worldwide turnover, stretching to 20% for repeat infringements under the DMA. In addition to public enforcement, both regimes make provision for private enforcement of the obligations placed on designated entities under the digital markets regime, reinforcing competition authorities' enthusiasm for private enforcement as a compliment to public enforcement.[7]

Public Enforcement

Prior to the powers granted by the digital markets regime, competition authorities used existing toolkits to target anti-competitive behaviour in the digital marketplace. The complex nature of anti-trust investigations, coupled with the deep pockets of entities subject to investigation result in investigations and appeals spanning years (up to 15 years in the case of Google (Shopping))[8] and present both parties with significant costs. The crawling pace of the enforcement process, alongside the notable hesitancy from competition authorities to make use of interim measures, result in the anti-competitive behaviour subject to investigation severely damaging or eliminating meaningful competition whilst investigations are ongoing. The conduct requirements imposed by the digital markets regime are intended to facilitate faster enforcement from competition authorities against designated entities, imposing a clear set of rules to avoid long, drawn out investigations to establish each and every element of an abuse of dominance.

Consequently, it is envisioned that competition would remain healthier in digital marketplaces involving designated entities with more effective enforcement preventing sustained periods of abusive conduct.

The digital markets regimes are not, however, a panacea for the resourcing issues of the existing public enforcement regimes. In the UK, the CMA estimates that it will make 3-4 SMS designations each year.[9] Consequently it could be over two years before we see the first designation outside of the GAFAM network. Whilst regulation of these entities is no doubt important, and changes in behaviour would have wide reaching effects for businesses users, competitors, and consumers alike, where does this leave other markets further down the CMA's strategic priorities?

When discussing digital platforms, Uber is consistently mentioned in the same breath as TikTok and Booking,[10] both designated under the DMA, despite Uber not featuring on the Commission's list of Gatekeepers.

Despite the lack of title, Uber's behaviours bear more than a passing resemblance to those of an SMS or Gatekeeper firm, resulting in Uber being prohibited in a number of territories, globally.[11] Consumers, drivers, and competitors alike could be waiting years for an SMS designation, by which time the competitive structure of the market would have further deteriorated. Ride-hailing is not the only market which has been notably absent from the commission's list of Gatekeepers, with cloud services and music streaming services frequently cited as markets ripe for intervention.[12] There is a risk, therefore, that public enforcement evolves into a two-tier system, where GAFAM entities face significant regulation whilst other markets are left to be further conquered by technology giants, relying only upon the existing enforcement mechanisms.

Additionally, the content of conduct requirements will dictate the impact of the respective digital markets regimes and could represent an interesting area of divergence between the EU and the UK. The DMA imposes uniform conduct requirements on all gatekeepers – holding each designated business to the same standards.[13] Whilst this is undoubtedly more straightforward than the UK's bespoke conduct requirement model under the DMCC, it risks drawing criticism for over regulation, whilst at the same time risks not targeting specific harmful behaviours which may not apply across the board. Under the DMCC, however, the DMU will consult on the formulation of conduct requirements, working collaboratively with SMS firms and stakeholders alike to formulate a tailored set of conduct requirements

6 See, for example James Clayton, 'Europe agrees new law to curb Big Tech dominance' (BBC news, 25 March 2022) < https://www.bbc.co.uk/news/technology-60870287> Accessed 6th December 2024

7 See, for example: Juliette Enser, interim Executive Director for Competition Enforcement at the CMA, 'UK competition law enforcement: a look ahead', (Speech at Kings College London, 4th December 2024), <https://www.gov.uk/government/speeches/uk-competition-law-enforcement-a-look-ahead>, accessed 5th December 2024.

8 Case C-48/22 P Google LLC v Commission

9 Competition and Markets Authority, 'CMA sets out new approach to digital markets regime', (Gov.uk, 11th January 2024), < https://www.gov.uk/government/news/cma-sets-out-approach-to-new-digital-markets regime#:~:text=The%20CMA%20expects%20to%20start,to%20address%20or%20prevent%20problems.> , accessed 4th December 2024.

10 See, for example: Whish and Bailey, Competition Law, (11th Edition, Oxford University Publishing, 2024), page 1118.

11 Madison Lennon, '14 Countries Where Uber Isn't Available', The Travel, September 28th 2023, https://www.thetravel.com/countries-uber-rides-unavailable/#:~:text=Uber%20faces%20bans%20and%20restrictions,unfair%20competition%20with%20taxi%20services., accessed 3rd December 2024.

12 See, for example: Martyn Landi, 'Apple hits out at Spotify over ongoing EU competition complaint', The Independent, 23rd February 2024, <https://www.independent.co.uk/business/apple-hits-out-at-spotify-over-ongoing-eu-competition-complaint-b2500989.html>, accessed 4th December 2024.

13 EU Regulation 2022/1925, OJ [2022] L265/1, Art 5,6,7

within the confines laid out by the DMCC.[14] Whilst recent CMA decisions and conduct requirements adopted in the EU grant an insight into the likely contents of conduct requirements, much hinges on the courage of the CMA in imposing such requirements. Perhaps faced with recent criticism from business leaders in the technology space,[15] and pressures to promote growth,[16] the CMA will err on the side of caution.

If the CMA is conservative in the application of its new powers, there is a risk that healthy competition never enters back into these arenas, disadvantaging UK consumers and competitors alike.

Nascent markets have been a particular area of frustration for competition authorities. As regulators grapple with who is best placed to regulate novel technologies and how, with notable areas of divergence between the EU and the UK, the CMA has turned its attentions to Artificial Intelligence, asserting jurisdiction (albeit not always successfully)[17] to prevent a handful of organisations smothering the market before innovation gets the chance to thrive, learning from the lessons of the late 90s and 00s. New merger thresholds established by the DMCC will, increase the CMA's jurisdiction in so-called "killer acquisitions"; transactions involving an acquirer with a turnover value exceeding £350 million in the UK, and a market share of 33% in any market. The new "killer acquisition threshold" will facilitate CMA intervention on an increased number of transactions – particularly those where the activities of the parties to the merger may not overlap due to vertical relationships.[18] Moreover, the newly introduced obligation on SMS firms to notify acquisition activity with a consideration value of at least £25 million,[19] will ensure that the CMA stays informed of acquisitive activity from SMS firms. Merger control is an integral tool of competition enforcement and will be essential in restricting the cross-fertilisation of market power of the largest technology firms across the digital ecosystem.

Private Enforcement

Both the DMCC and the DMA permit private enforcement of the obligations laid down by the digital markets regimes, whereby interested parties can bring action against a designated entity for breach of its conduct requirements privately – without having to rely on the finite resources of competition authorities.[20] Similarly to public enforcement, given that the digital markets regimes were designed to expedite justice, moving away from the resource-intensive nature of traditional competition enforcement, private enforcement under the digital markets regimes is likely to be more efficient than traditional enforcement. Access to sufficient resource can be a significant barrier to claimants looking to bring private actions, and as a large proportion of private enforcement actions are stand-alone cases, rather than follow-on damages, the introduction of a more simple process to establish a breach will be welcomed. Moreover, the DMCC, in an important moment of divergence from the EU reintroduces exemplary damages in relation to digital markets infringements, opening the door to larger payouts for claimants.

Whilst the DMCC makes provision for private enforcement of the digital markets regime, the absence of a designated opt-out collective actions provision presents a perhaps unwelcome area of divergence from the EU. The decision not to extend the opt-out regime to digital markets enforcement appears at odds with an otherwise consumer focussed piece of legislation, and severely restricts redress available to consumers. Whilst it may theoretically be possible to argue the breach of conduct requirements constitute an abuse of dominance and therefore be able to rely on the opt-out regime currently in place for the private enforcement of competition law, this negates the expedited enforcement envisioned by the digital markets regimes, and could create friction as consumers in the EU receive compensation for breaches of the digital markets regime, whilst UK consumers are left without redress. Moreover, the DMCC leaves a number of questions unanswered post PACCAR, which will heavily impact the future of class actions in UK competition law. A Bill introduced by the Sunak administration promised clarity for litigation funders, however it did not make it through the election wash-up, and has not yet been picked up post-election.

Private enforcement of existing competition law will also be an important stopgap – picking up areas left untouched by the DMA and DMCC. Digital markets regimes, though powerful, will only tackle specific behaviours by specific, designated entities.

Anti-competitive behaviour outside the scope of conduct requirements and gatekeeper obligations, and anti-competitive behaviour from non-designated entities will still require enforcement under traditional competition law enforcement routes.

Private enforcement under the digital markets regime will always be dependent on a Gatekeeper, or SMS designation, and therefore is at the mercy of the resources of competition regulators. In the short-term at least, private enforcement of competition law will remain a vital enforcement tool to combat anti-competitive behaviour.

Conclusion

In summary, it is clear that the new digital markets regimes in both the UK and the EU will have a significant impact on both public and private enforcement, however just how this change will manifest is yet to be seen. The potential for divergence creates an interesting facet to this debate, as does the notable absence of an opt-out regime for consumer and digital markets private enforcement, which could lead to interesting interpretations of existing legislation to secure redress. What is certain is that in the UK, at least, we will be waiting a while for real impact to be felt.

14 Digital Markets, Competition and Consumers Act 2024, s.20.

15 Alex Hern, 'Activision Blizzard calls UK 'closed for business' after Microsoft takeover veto', The Guardian, 26th April 2023, < https://www.theguardian.com/technology/2023/apr/26/microsoft-bid-for-activision-blizzard-blocked-by-uk-competition-regulator>, accessed 6th December 2024.

16 Rashid Baxter, 'Keir Starmer pressures CMA to promote economic growth', Global Competition Review, 14th October 2024, < https://globalcompetitionreview.com/article/keir-starmer-pressures-cma-promote-economic-growth>, accessed 5th December 2024.

17 See, for example: CMA decision of 4th December 2024, Microsoft/Inflexion, (CMA 14/24), CMA decision of 17th May 2024, Microsoft/Mistral AI, (ME/7102/24)

18 Digital Markets, Competition and Consumers Act 2024, schedule 4(5).

19 Digital Markets, Competition and Consumers Act 2024, s.57.

20 Digital Markets, Competition and Consumers Act 2024, s.101, and Digital Markets Act, Article 39 and 42.

WORDSEARCH

COMPETITION EDITION

D	I	G	I	T	A	L	S	G	E	N	U	I	E
T	E	S	C	T	N	G	M	I	S	T	L	T	G
E	N	G	N	I	H	S	A	W	N	E	E	R	G
I	F	A	R	R	T	I	I	A	I	N	R	L	C
A	O	E	A	G	G	N	O	A	S	E	P	I	O
P	R	O	C	E	E	D	I	N	G	S	I	M	M
E	C	S	I	L	E	I	T	N	T	S	E	I	P
N	E	E	G	G	G	N	O	E	D	W	S	T	E
M	M	N	I	G	C	T	U	N	I	N	G	A	T
P	E	E	E	S	E	E	T	I	O	A	E	T	I
I	N	G	R	T	T	T	W	I	E	C	I	I	T
T	T	N	A	N	T	I	T	R	U	S	T	O	I
T	A	I	N	T	E	G	R	A	T	I	O	N	O
I	L	I	T	I	G	A	T	I	O	N	M	E	N

PROCEEDINGS

ENFORCEMENT

ANTITRUST

LIMITATION

INTEGRATION

GREENWASHING

ESG

COMPETITION

LITIGATION

DIGITAL

INSTRUCTIONS: Use the highlighter on Adobe to fill in the wordsearch.

Complete to redeem a 15% discount to one of our Competition events.

Once complete, please take a screenshot and send over to **maddi@thoughtleaders4.com**

*This offer expires on Friday 21st March 2025, this discount code is not eligible for use with other codes.

Competition

The EU Digital Markets Competition Litigation & Compliance Forum 2025

Navigating the Competition Law Challenges of the Digital Economy

20 March 2025

Brussels

Complimentary attendance for In-House Counsel, Regulatory Authorities and Government Representatives

For partnership enquiries, please contact Helen
on +44 (0) 20 3433 2281 or email
helen@thoughtleaders4.com

BHN | BLACKHAWK NETWORK

Global Payments

for Collective Redress

Distribute more of the available funds to claimants without risking claimant drop-outs

- Safeguarded bank accounts for fund administration and management
- A range of payment options
- Instant digital payment distribution
- Remove any need to collect claimants banking data
- End to end branded claimant journey
- Reporting on fund allocation per claimant

For more information on how we can support your payments processing, visit:

blackhawknetwork.com/uk-en/solutions/payments/settlements-appeasements

ThoughtLeaders4 Competition

Meet ThoughtLeaders4

Peter Miles
Head of Event Production & Community Director
020 3481 8843
email Peter

Helen Berwick
Commercial Director | Competition
0203 433 2281
email Helen

Alexander Edgal
Conference Producer Associate
020 3998 9752
email Alexander

Maddi Briggs
Strategic Partnership Senior Manager
020 3398 8545
email Maddi

Chris Leese
Founder/Chief Commercial Officer
020 7101 4151
email Chris

Danushka De Alwis
Founder/Chief Operating Officer
020 7101 4191
email Danushka

Paul Barford
Founder/ Managing Director
0203 398 8510
email Paul

Our Competition Corporate Partners:

AlixPartners

ANGEION GROUP INTERNATIONAL

BRG

epiq

BHN | BLACKHAWK NETWORK

shieldpay

verita

RBB Economics

CRA Charles River Associates

Economic Insight