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Direct consumer enforcement playbook (UK)

Introduction

The Digital Markets, Competition and Consumers Act 2024 ("**DMCC Act**") provides for two regimes for the enforcement of consumer law:

- a civil court-based regime, under which the Competition and Markets Authority ("**CMA**") and certain other enforcement bodies can seek orders from the court; and
- a new, direct enforcement regime, under which the CMA (and no other enforcement body) is empowered to make its own decisions on, and impose sanctions in respect of, breaches of consumer law, without having to apply to court for an order.

The CMA and a few other enforcement bodies also have the power to prosecute traders criminally where a breach of consumer law amounts to a criminal offence.

The CMA has stated that it will generally use its direct, civil powers when pursuing consumer law infringements. The exception to this is where circumstances apply which mean that pursuing the breach through the courts is necessary, for example where a criminal prosecution is deemed to be in the public interest, or if the consumer protection legislation at issue is not a 'direct enforcement enactment' under the DMCC Act.

That being said, most key consumer law enactments are in scope of the CMA's direct enforcement powers, including the provisions on rights and remedies and unfair terms in the Consumer Rights Act 2015, the unfair commercial

practices rules under the DMCC Act itself, and all of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. For the CMA to be able to take enforcement action, a trader's commercial practice, in addition to being a breach of a direct enforcement enactment, must also harm the collective interest of consumers and have a sufficient UK connection, which is satisfied where a trader has a place of business in the UK, carries on business in the UK, or the commercial practice occurs as part of activities by the trader that are directed to UK consumers. Where these three conditions are met, the breach is referred to as a 'relevant infringement'.

While the court-based regime provided for in the DMCC Act in many respects mirrors the previous court-based regime, this is the first time the CMA has had direct enforcement powers to enforce consumer law, marking a significant change to the UK consumer law enforcement framework.

This consumer protection playbook provides guidance on the CMA's powers to enforce consumer law directly, summarising the CMA's investigatory, enforcement and fining powers (up to 10% of global turnover) and functions. It breaks down each phase of the CMA's direct enforcement regime and also covers possible private claims following CMA investigations.



Pre-launch phase

The CMA will first need to determine whether there is a potential breach of consumer law to investigate and decide what the appropriate enforcement powers to use are. It may first come to know about potential breaches because a third party has written to it to complain about the issue, or it may uncover potential consumer issues as a result of its own intelligence gathering.

The CMA may use its information gathering powers throughout the direct enforcement procedure, which include requesting information in writing, making test purchases, observing the conduct of business, and entering premises without a warrant. It may also seek to gather information from the party or third parties, including those who are based overseas if they have a 'UK connection'. Non-compliance with information notices, which are issued by the CMA and set out what information is required to be provided, may lead to monetary penalties. For further details, see the section in this playbook on "Administrative Penalties".



Formal investigation process

Once the CMA has decided to open a formal investigation, it will then investigate whether consumer law has been breached in accordance with the administrative procedure described below. Over the course of the investigation, the CMA: i) may use its information gathering powers; ii) has the power to apply to court for an interim enforcement order; and iii) can discuss undertakings and settlements with the party or parties under investigation.

Provisional Infringement Notice

Once the CMA has investigated the potential breach, it may issue a Provisional Infringement Notice (“**PIN**”) to the party under investigation.

The CMA will issue a PIN where it has reasonable grounds to believe that:

- a) the respondent has engaged, is engaging or is likely to engage in a commercial practice constituting a relevant infringement; or
- b) the respondent is an accessory to such a practice.

The PIN will include certain information prescribed by the DMCC Act, including the set of grounds giving rise to the CMA’s belief that the party has engaged in or is an accessory to an infringement, proposed directions, and proposed penalty (if the CMA is considering imposing a penalty). The PIN will also set out how representations must be made and the timetable for submitting representations. The investigated party will then have a reasonable opportunity to inspect the documents on the CMA’s file.

Procedure before reaching a final decision

a) Representations

After issuing a PIN, the CMA will invite the party under investigation to make representations which it will consider before deciding whether to issue a Final Infringement Notice (“**FIN**”) (see below). These oral and/or written representations should include any new evidence or information relevant to the matters raised in the PIN on which they seek to rely. In the absence of representations, the CMA may proceed with the case.

Should a party supply false or misleading information without reasonable excuse, the CMA may issue a false information enforcement notice.

b) Substantiation of claims and new evidence

Substantiation of claims: The CMA may require substantiating evidence from the party as to the accuracy of any factual claim made as part of its commercial practice. This may be included in the PIN or be notified following the party’s representations. The CMA may determine that a factual claim is inaccurate if substantiating evidence is not supplied by the specified deadline, or if the CMA considers any evidence provided to be inadequate.

Letter of facts – new evidence supporting the grounds contained in the PIN: Where the CMA intends to rely on new evidence in the FIN which supports the infringements as set out in the PIN, the CMA will put that evidence to the addressees of the PIN in a “letter of facts” and give them an opportunity to respond to the new evidence.

Supplementary PIN – new evidence supporting different grounds to those contained in the PIN: Where the CMA has reason to believe that there is evidence of a different infringement to that set out in the PIN, or that there is a material change in the nature of the infringement described in the PIN, the CMA may issue a Supplementary PIN. The CMA will give the party an opportunity to make representations on the Supplementary PIN and inspect any new relevant documents.

The Final Infringement Notice (FIN)

Subject to a settlement or undertakings being agreed, the CMA may issue a FIN to the party where it is satisfied that the thresholds are met. These are met if the CMA is satisfied that the party has engaged or is likely to engage in a relevant infringement or is an accessory thereto. If that is not the case, the CMA will close the case. The CMA may also close an investigation on administrative priority grounds.

The FIN will set out the grounds on which it is given, provide details of any monetary penalty and may require the party to comply with directions to stop/prevent consumer harm. A monetary penalty may only be imposed if the CMA is satisfied that the party has engaged in or is engaging in an infringing practice.

Undertakings, penalties and settlement

In this section we describe the different ways in which direct consumer enforcement investigations can be brought to an end.

Undertakings

Undertakings are voluntary commitments made by parties under investigation. They are made with the intention of resolving the CMA's concern, however, without having to admit to an infringement or pay a penalty. If they are broken without reasonable excuse, this may result in the imposition of a monetary penalty. The process by which undertakings are agreed with the CMA is a public one (the accepted undertakings are published on its website) and the CMA may seek the view of third parties when deciding whether to accept proposed undertakings.

The CMA has broad discretion when deciding whether to accept undertakings in a case and will consider a range of factors, such as the anticipated effectiveness of the undertakings and the impact on consumers. While undertakings can be offered at any point during the investigation, the CMA may accept undertakings only up until a FIN has been issued. Where the CMA accepts an undertaking, it may only make a FIN or an Online Interface Notice ("**OIN**") (see section 7) to the investigated party in limited circumstances.

The CMA can accept variations to undertakings, such as when there is a material change of circumstances, and may ultimately release them, such as when they are no longer necessary. The decision to do so is at the CMA's discretion.

Penalties – substantive penalties

The DMCC Act empowers the CMA to directly impose substantive penalties for infringements of

consumer law. The value of substantive penalties must be a fixed amount not exceeding £300,000 or, if higher, 10% of the total value of the worldwide turnover of the party.

The method which the CMA will use to set substantive penalties involves consideration of several factors. The "starting point" for the fine is decided by reference to both: i) the "level of harm" caused by the breach of consumer law; and ii) the "level of culpability" of the party. These two elements are combined to arrive at one of four "starting point codes" (where % refers to UK turnover):

- A: £225,000 or 22.5% (whichever is higher) up to £300,000 or 30% (whichever is higher);
- B: £150,000 or 15% (whichever is higher) up to £225,000 or 22.5% (whichever is higher)
- C: £75,000 or 7.5% (whichever is higher) up to £150,000 or 15% (whichever is higher);
- D: Up to £75,000 or 7.5% (whichever is higher)

With the starting point for the penalty identified, the CMA will then consider whether to make adjustments to the penalty, taking into account factors relating to deterrence, size of the party, aggravating/mitigating factors, proportionality of the penalty, and any settlement discount.

Settlement

Settlement is a streamlined administrative process which results in the conclusion of the investigation, with a FIN, sooner than would otherwise have occurred. The settling party must admit to infringing consumer law but will benefit from a reduction in the level of the penalty (up to 40%). Neither party is entitled to or obliged to commit to settlement.



Administrative penalties

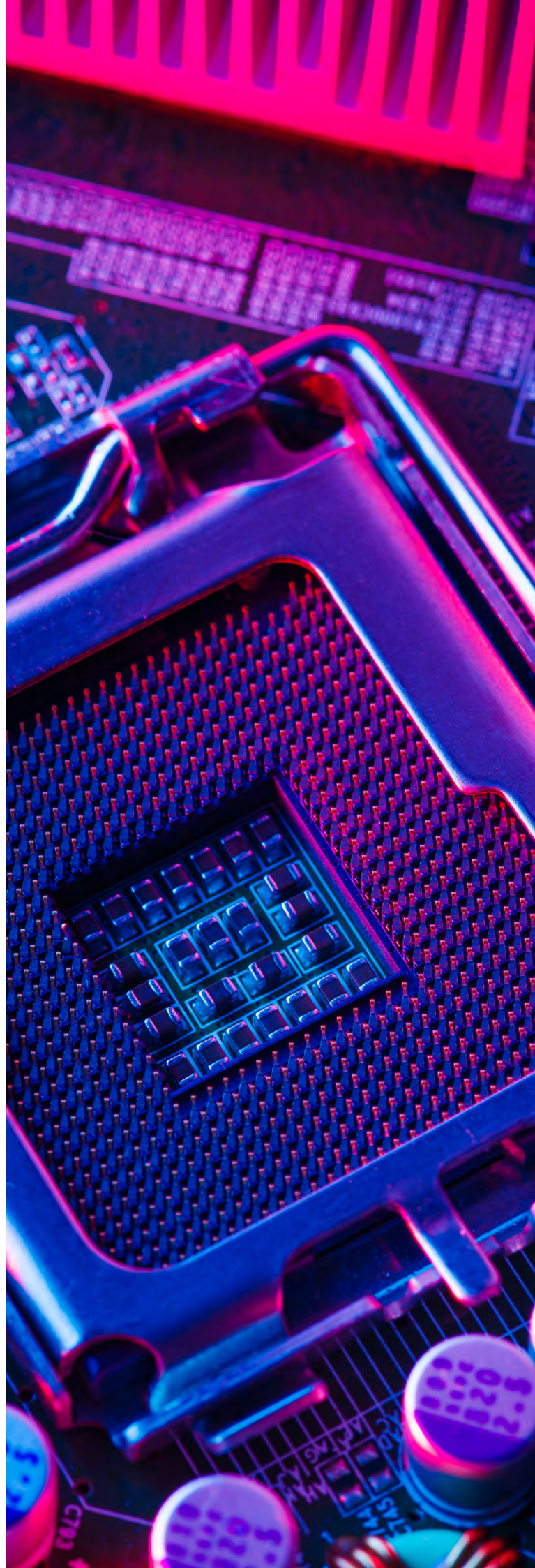
The CMA is further empowered to impose “administrative” penalties in respect of a failure to comply with its processes in a range of different contexts, such as breaches of directions and undertakings, providing false/misleading information, and non-compliance with information notices.

The CMA sets administrative penalties by first calculating a starting point which is then subject to certain adjustments. In deciding on the starting point, the CMA considers the seriousness of the breach and the culpability of the party for that breach. The CMA will then consider making adjustments to the penalty by taking into account similar factors as for substantive penalties. The CMA may not impose a penalty if there are objective reasonable excuses, such as the occurrence of a significant event which was genuinely unforeseeable, unusual or beyond the party’s control. The CMA will have to establish that this event has caused the non-compliance.

Appeals

The addressee may appeal the penalty and/or the giving of directions included in a FIN, OIN, or administrative enforcement notice to the High Court within either 28 days in case of a final false information notice or 60 days in case of any other notice. The grounds on which a notice may be appealed are that: (a) the decision was based on an error of fact; (b) the decision was wrong in law; (c) the amount of the penalty or nature of the directions is unreasonable; or (d) the decision was unreasonable or wrong for any other reason.

It should be noted that non-monetary penalty directions continue to apply during the appeal period. Further, any agreed upon settlement discount will be revoked if the party brings an appeal.



Remedies

Beyond penalties, the CMA can also apply remedies and directions when it issues the FIN.

Enhanced Consumer Measures (“ECMs”)

These can be included as part of a FIN and in undertakings and are intended to improve outcomes for consumers who have been the victims of breaches of consumer law. ECMs were introduced as part of the consumer enforcement framework and therefore their use predates the DMCC Act. Previously ECMs could only be initiated through the agreement of undertakings with the investigated party or imposed by a court order.

There are three kinds of ECMs which can be imposed: i) redress measures; ii) compliance measures; and iii) choice measures.

Redress measures

The CMA may require a party that is subject to a FIN to take redress measures – typically, to provide compensation to consumers who have been left out of pocket as a result of the infringing party’s practices as well as informing affected consumers about their legal rights. Redress measures may also compensate those who have suffered non-financial loss.

Compliance measures

Compliance measures address the risk of future conduct and are aimed at preventing the infringing party from repeating the unlawful behaviour. Examples include appointing a compliance officer, training staff or updating compliance policies/procedures.

Choice measures

The CMA can also use choice measures to improve consumers’ access to information about services, good and digital content, for example by directing a party to publicise the fact of its breach of consumer law or by taking steps to facilitate online reviews of its products.

Online Interface Notices (OINs)

The CMA can also use OINs if it is satisfied that a party has engaged, is engaging or is likely to engage in practices which infringe consumer protection laws.

OINs are to be used by the CMA to protect the collective interest of consumers using online interfaces (websites, applications, other online platforms etc.). The CMA may use OINs to, for example, require its recipient to: i) remove content; ii) disable or restrict access to online interfaces; iii) display a warning to customers online; and/or iv) delete or register domain names.

Private litigation

Follow-on

The CMA's new powers are likely to intensify its enforcement of consumer law in the UK. This could in turn have an impact on private litigation, since those who have been affected by the infringements uncovered by the CMA are able to make use of the authority's findings in "follow-on" litigation. Claimants would seek to rely on the CMA's decision-making as evidence that a breach of consumer law had occurred and so would not need the court to consider that part of their claim. This applies both to future conduct and historic conduct which the CMA may yet investigate (although noting that rules on limitation periods will apply).

Mass actions

Mass actions for breaches of consumer protection law (i.e. claims brought on behalf of consumers who share a collective interest) are permitted in the EU but not in the UK. However, there are alternative routes available for claimants seeking collective redress for consumer law breaches. These are: i) to use a Group Litigation Order; ii) to bring a representative action; or iii) to take part in a group claim, usually 'book built' by a claimant law firm, to bring a single action in which all of the various claimants are parties.

Opt-out collective proceedings (which allow a representative to bring a claim on behalf of an entire class, without having first obtained their approval) in the UK are limited to claims made in respect of breaches of competition law. However, a key trend that is already apparent in the UK is that claims which would ordinarily be consumer law claims are being creatively constituted as competition law claims in order to take advantage of the opt-out collective regime. It appears likely that this trend will accelerate following the DMCC Act as an infringement of the DMCC Act, when committed by a company with market power, can potentially be creatively constituted as an abuse of dominance claim under the opt-out collective regime. Such claims present a significant litigation risk for companies which fail to comply with the DMCC Act.

Impact of redress schemes on litigation risk

Redress schemes may provide a mechanism for consumer-facing businesses to manage litigation risk. These schemes should put right consumers who have suffered loss, inconvenience or stress as a result of unlawful conduct.



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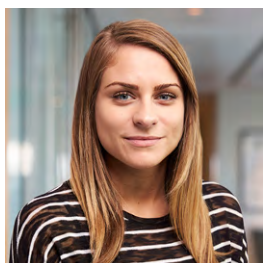
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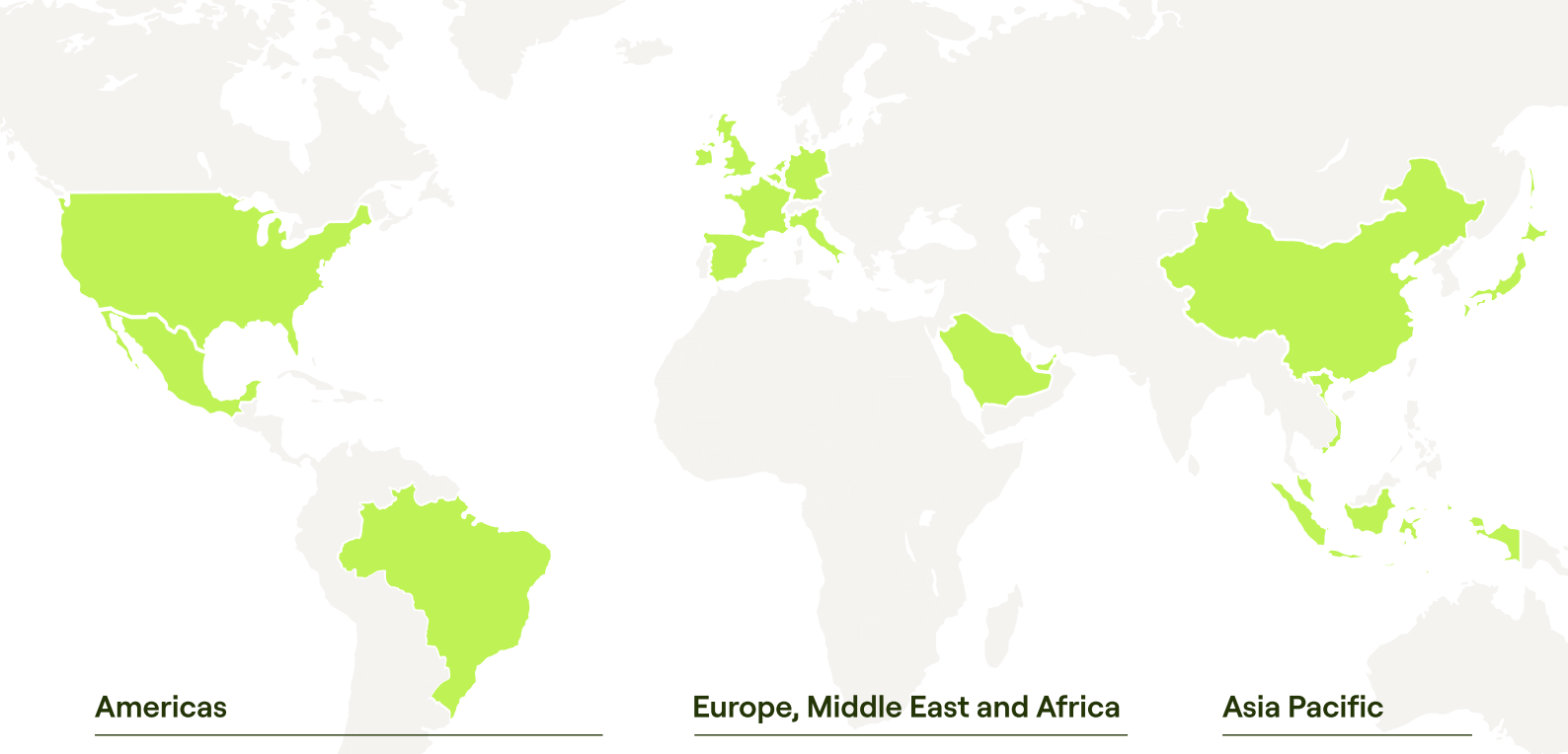
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