The Board's decision is of importance as it provides a detailed insight into the Board's assessment of the criteria for granting an exemption/negative clearance and the Board's position towards the recommended base salary application between the undertakings that are in vertical relationships.

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COMPETITION

Legislation—ex-ante control of digital markets—significant changes to UK merger control regime—extraterritoriality of UK competition law—consumer protection laws strengthened

Competition and Markets Authority; Consumer protection; Digital markets; Market investigations; Merger control

UK Government enacts Digital Markets, Competition and Consumers Act[1]

The hasty enactment of the UK Digital Markets, Competition and Consumers Act (the "Act") before the UK general election creates a new regulatory framework and enhances the Competition and Markets Authority's ("CMA") powers. The Act introduces three broad areas of reform: first, it creates a new ex-ante regulatory regime for certain undertakings active in digital markets; second, it revises general UK competition law in relation to behavioural antitrust prohibitions, merger control, and investigations; and third, it strengthens the protection and enforcement of consumer rights.

The first and arguably most impactful change created by the Act is the introduction of a new ex-ante regime that is intended to address both the sources of market power and potentially ensuing economic harm on digital markets. The Digital Markets Unit ("DMU"), a body within the CMA, is tasked with identifying and designating certain undertakings with "digital activities" as having strategic market status. To this end, the DMU may launch an investigation, which can take up to twelve months, into firms that have digital activities linked to the UK and meet the relevant turnover threshold (£25 billion worldwide or £1 billion in the UK). In its investigations, the DMU will assess whether the undertaking concerned has both substantial and entrenched market power (for the next five years) and enjoys a position of strategic significance in respect of the digital activity, considering, for example, the size or scale of the activity, the number of undertakings that use it, and whether the undertaking may leverage this power into other activities.

Following a full investigation, the DMU may designate a firm as having strategic market status, in which case it will become subject to closer scrutiny and must comply with all conduct requirements the DMU imposes. These conduct requirements must align with the high-level objectives and principles by which the Act expects the business to abide in respect of the designated activity. They must also be proportionate to meeting the standards of fair dealing, open choice, as well as trust and transparency. The DMU can enforce compliance with these requirements by issuing enforcement orders unless the firm can demonstrate that its conduct is indispensable and proportionate to achieving benefits to users of the digital activity that outweigh any competitive harm without eliminating or preventing effective competition.

[1] The author is grateful to Daniel Harrison (Knowledge Director, Antitrust Practice, Clifford Chance LLP) for his guidance in compiling this update.

Separately, the DMU now has the power to impose a range of pro-competitive interventions similar to those available to the CMA under its market investigation regime. These may be imposed where the DMU considers that one or several factors in relation to the relevant digital activity have an adverse effect on competition.

Designated firms face fines of up to 10% of their group worldwide turnover for breaches of conduct requirements and failures to comply with pro-competitive intervention orders. Commitments, third-party follow-on claims for damages, and director disqualification orders are also possible. A decision by the DMU to impose fines may be appealed to the Competition Appeal Tribunal on the merits. Affected firms will welcome the departure from the standard originally envisaged by the draft Bill which only allowed appeals on procedure, although this standard remains applicable for appeals against decisions to impose conduct requirements or pro-competitive interventions.

The second area of reform targets the UK's merger control regime. In particular, it empowers the CMA to review transactions that may harm competition even if they do not involve current, direct competitors. The CMA is now able to review mergers involving a business with UK turnover in excess of £350 million and a UK share of supply of 33% or more, provided another party generates at least some revenue or has some activities in the UK, even if negligible. At the same time, there is a safe harbour for mergers between undertakings each with less than £10 million in UK turnover, which should reduce the burden on small businesses. In addition, the Act introduces some procedural changes concerning merger reviews, such as the provision of a "fast track" reference to Phase 2, and a requirement, which has already entered into force, for the Government to block or unwind certain acquisitions by a foreign government (or linked entities) relating to UK newspaper businesses where this is reasonable and practicable, even if only a single share or voting right in such business is acquired.

Outside the realm of merger control, the CMA will enjoy stronger powers in the context of its market inquiries as well as increased flexibility, for example to narrow the scope of its Phase 2 market investigation, to accept binding commitments at any stage, or to launch a market investigation even where it had previously decided against it. The remedies available to the CMA have also been reviewed; it may now require businesses to test consumer-facing remedies or may modify imposed remedies where these do not prove to be effective.

The Act further expands the territorial reach of UK competition law to include conduct and agreements which have, or are likely to have, direct, substantial and foreseeable effects within the UK, which aligns with the approach in the EU and the US. Among other procedural changes, the Act enables UK courts to award exemplary damages in respect of particularly egregious antitrust infringements. Indeed, the Act's teeth are reflected in the increase in civil fines that may be imposed for failure to comply with the CMA's information-gathering powers and the new power to fine undertakings for breaches of commitments or remedies without first obtaining a court order.

The third and final area of reform bolsters consumer protection laws, particularly in digital markets, by introducing new rules against fake reviews, subscription traps, and other unfair practices. The Act enhances the CMA's powers to enforce consumer laws by removing the need to obtain a court order and by aligning the scale of fines with those for antitrust infringements; the CMA may further require payment of compensation or redress to affected consumers. As a result, the CMA is expected to play a more active role in the protection and enforcement of consumer rights.

Overall, the Act creates a whole suite of powers for the CMA to regulate digital markets and strengthens the position of consumers. Businesses with digital activities in the UK are well advised to review their current practices

and anticipate potential implications of the Act. While less prescriptive than the EU's Digital Markets Act due to the Act's more "flexible and principles-based" approach, it is likely that conduct requirements imposed by the DMU will be akin to those in Europe and could even be more intrusive given their bespoke nature and the broad discretion the DMU is afforded. The revised merger control thresholds may affect M&A strategies, requiring more careful planning and early engagement with the CMA. Consumers may benefit from increased protection against unfair practices and greater choice in digital markets. Once in force (expected in autumn 2024), the Act will undoubtedly reshape the digital market landscape in the UK.

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USA

ANTI-COMPETITIVE PRACTICES

Regulation—prohibition of employee non-compete agreements—court challenge

Anti-competitive practices; National competition authorities; Non-competition covenants; Sale of business; United States

Federal Trade Commission prohibits non-compete agreements: Business Groups sue

On April 23, 2024, the Federal Trade Commission (FTC) approved a rule that would largely prohibit making or enforcing employee non-compete agreements nationwide. The US Chamber of Commerce and other business groups almost immediately sued to block the new rule, which has not yet taken effect.

Timing. The earliest possible effective date for the rule is in September 2024. But the date will be even later (if ever) if a court delays or blocks the rule's implementation. If the rule goes into effect as written, however, it will prohibit making new agreements and enforcing most existing agreements.

Prohibition. The rule is broad. It prohibits every "term or condition of employment that prohibits a worker from, or penalises a worker for, or functions to prevent a worker from… seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition," or "operating a business in the United States after the conclusion of the employment that includes the term or condition."

Limited Retroactive Exemption for Noncompetes with Senior Executives. The rule prohibits new non-compete agreements across the board, but permits enforcement of non-compete agreements with certain "senior executives" that exist as of the effective date. "Senior executive" means that the employee must earn at least $151,164 in annualized compensation (including salary, commissions, and nondiscretionary bonuses, but excluding payments for medical insurance, payments for life insurance, contributions to retirement plans, and the cost of other similar fringe benefits). The "senior executive" must also hold a "policy-making position," such as president or CEO. The meaning of "policy-making position" is not at all clear.

Notice Requirement. The rule also requires employers to provide workers who are subject to covered non-compete clauses "with clear and conspicuous notice … that the worker's non-compete clause is no longer in effect and will not be, and cannot legally be, enforced against the worker."

Sale-of-Business Exception. The rule exempts non-compete clauses that are "entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets." Whether the exception applies to executives that have rights to shares in a corporation as part of their equity awards will likely be a topic of future litigation.