Kluwer Competition Law Blog

Parental Liability under the UK DMCC Bill

John Kwan (Competition and Markets Authority) · Wednesday, December 13th, 2023

Much ink has already been spilled on various aspects of the landmark Digital Markets, Competition and Consumers (**DMCC**) Bill.[1] This post focuses only on parental liability, which appears not to have received much attention. Under the current draft of the DMCC Bill, both the digital markets and consumer protection proposals envisage lifting the corporate veil but do so differently:

- The longstanding concept of an undertaking under EU competition law (retained post-Brexit) applies to digital markets regulation; and
- A bespoke regime applies to consumer protection, enabling the attribution of liability to all members of the infringer's corporate group.

The significance of the liability regime for consumer protection cannot be overstated. By way of illustration, liability can attach to a shareholder with a majority (even if significantly short of 100%) of voting rights in the infringing entity and there is no scope to rebut such determination.

Digital markets

The DMCC Bill refers to "*undertakings*" throughout Part 1 (Digital Markets). Notably, Clause 2 is titled "*Designation of undertaking*" and provides that *"[t]he CMA may designate an undertaking as having strategic market status ("SMS") in respect of a digital activity carried out by the undertaking*".

The meaning of an "*undertaking*" is not defined within the DMCC Bill. This is, however, equally the case for the Competition Act 1998 (**CA98**), which addresses the conduct of undertakings under competition law. Nothing suggests that the meaning of an undertaking is different between the DMCC Bill and CA98. Indeed, Part 2 (Competition) of the DMCC Bill (e.g., Clause 118) uses the word undertaking within the meaning of CA98.

Rather, its meaning is derived from EU (and UK) case law. The most salient aspects are: (a) an undertaking is a unit engaged in an economic activity; (b) it may comprise one or more legal persons; and (c) a legal person that exercises decisive influence over another forms part of the same undertaking as the latter.

Thus, for the purposes of attributing liability under the digital markets provisions (notably in

relation to the conduct requirements), the undertaking concept from competition law applies.

Consumer protection

The DMCC Bill does not employ the concept of an undertaking in Part 3 (Enforcement of Consumer Protect Law) for infringement of consumer protection laws. Instead, the DMCC Bill introduces a power for the court or the Competition and Markets Authority (**CMA**) to extend the scope of an order or final notice imposed on a "*body corporate*" respondent, where it is "*just, reasonable, and proportionate*" to do so, to "*all other members of the group (in addition to the respondent) as if they were the respondent*" (Clauses 175 and 199).

Two bodies would be "*interconnected*" and therefore form part of a "*group*": (a) if one of them is a subsidiary of the other; or (b) if both of them are subsidiaries of the same body corporate. "*Subsidiary*" is defined in Section 1159 of the Companies Act 2006:

- A company is a "subsidiary" of another company, its "holding company", if that other company—

(a) holds a majority of the voting rights in it, or

(b) is a member of it and has the right to appoint or remove a majority of its board of directors, or

(c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it, or if it is a subsidiary of a company that is itself a subsidiary of that other company.

The Explanatory Memorandum to the DMCC Bill lists the following factors that the court and the CMA may take into account in determining whether to exercise this power:

- To what extent other group members have been the "*brains*" behind the infringement;
- To what extent other group members have benefitted from the infringement; and
- Whether the infringing body corporate has sufficient funds to pay the penalty and thereby, whether it is necessary to extend the requirement to do so to other group members.

Analysis

The extension of the undertaking concept from competition law to digital markets regulation under the DMCC Bill mirrors the approach under the Digital Markets Act (**DMA**). It highlights the links between the two regimes. Business and Trade Minister Kevin Hollinrake described the DMCC Bill as "*empower[ing] the CMA to […] strengthen competition in digital markets*" and the new regime has been dubbed a "*new pro-competition regime for digital markets*". A similar rationale underlies the DMA, where many of the obligations take inspiration from past or ongoing competition cases.

Parental liability based on the undertaking concept is one of the most heavily litigated areas under both public and private enforcement of competition law. This reflects the general absence of

definitive statements of its scope, contents, and rationale and its incremental development through court judgments and the agencies' decisional practice. In particular, the question of the circumstances in which a shareholder may rebut a presumption that it has actually exercised decisive influence over another entity has continued to spawn significant litigation. The application of the concept to digital markets regulation could well attract the same scrutiny. It also remains to be seen whether the *ex ante* nature of the conduct requirements (as opposed to the *ex post* application of competition law) could present additional issues.

The liability regime for consumer protection under the DMCC Bill, by contrast, is clearly laid out within the four corners of the Bill. The determination of whether two corporate bodies belong to the same group is relatively straightforward to determine (e.g., a shareholder that has more than 50% of shares in another definitely belongs to the same group as the latter). The wording also leaves little doubt that liability can apply upwards, downwards, and sidewards to sister companies (although, of course, in practice, the court or the CMA is more likely to apply upwards to parent entities given their greater ability to pay any penalties).

On the other hand, this liability regime's ease of application and lack of rebuttal possibility may encourage the court or the CMA to attach liability more readily to shareholders and other members of an infringer's group. Having said that, they may only do so where it is "*just, reasonable, and proportionate*". It is conceivable that the application of these criteria in individual cases may invite litigation, particularly if the overall fine size is significantly enhanced by the inclusion of shareholders whose shareholding falls significantly short of 100%.

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**This post was written before the author joined the Competition and Markets Authority (CMA). The views expressed in this blog post are the author's personal views and do not represent the CMA's views.*

[1] In this post, references to clauses of the DMCC Bill are to those contained in the 22 November 2023 version (i.e., the version as introduced by the House of Commons).

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