

# UK Revamps Antitrust Rules With Broader Jurisdictional Reach, Tougher Penalties and More Flexible Procedure for Merger Control

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On April 20, 2022, the U.K. government announced amendments to the U.K. competition and consumer law regimes.<sup>1</sup>

- **Changes to merger control** include:

- **Expanded conditions for killer acquisitions**, which will eliminate the need for a U.K. overlap in acquirer and target activities intended to cover alleged “killer acquisition” fact patterns where the acquirer has a high share of supply (greater than 33%) and substantial U.K. presence (over £350 million).
- **Increased jurisdictional thresholds** that will (i) increase the turnover threshold and (ii) exempt from review deals between small businesses.
- **Flexible timing for remedies**, allowing remedies to be considered earlier in the Phase 2 process and also expand the ability for parties to request a “fast-track” reference to Phase 2.
- **Increased penalties** for failure to respond to information requests or the provision of misleading information.

- **Changes to antitrust investigations** include:

- **Revised interim measures** that will change the standard of appeal against interim measures to the judicial review principles and restrict access to the Competition and Markets Authority’s (CMA’s) case files.
- **Extraterritorial reach** that will extend the prohibition on anticompetitive agreements and cartels to cover activity implemented outside the U.K.
- **Updated rules for gathering evidence** and access to confidentiality rings.
- **Increased penalties** for failure to respond to information requests or the provision of misleading information.

The changes underscore a bolstered post-Brexit approach by U.K. authorities to merger investigations in which the U.K. competition regulator, the CMA, has sought to intervene even if the parties have little or no overlapping activity in the U.K.

In addition to updating the competition rules, the regulatory amendments will grant the CMA powers of direct enforcement against consumer protection breaches (which previously required the CMA to start a court case). The CMA will be able to conduct its own investigations and issue administrative fines, up to 10% of a company’s worldwide revenue, for consumer protection breaches.

## Changes to the Merger Control Rules

### Jurisdictional Changes

The updates expand the jurisdiction of the CMA by adding a new threshold for merger review, which will also give the CMA the ability to review M&A deals with a U.K. nexus where a buyer has both:

- an existing 33% (or more) share of supply of goods or services in the U.K. (or a substantial part of the U.K.); and

<sup>1</sup> For a summary of initial proposals to amend the competition law regime included in the consultation held in 2021, see our July 28, 2021, alert “[UK Antitrust Shakeup Would Increase Merger Scrutiny, Broaden Investigative Powers and Create New Oversight of Big Tech.](#)”

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- U.K. turnover exceeds £350 million (approximately €416 million or US\$449 million).

The new approach will eliminate the existing requirement that both the buyer and the target have overlapping U.K. activities, so a powerful buyer acquiring a target with little or no competitive activity in the U.K. would still be within jurisdictional reach. The definition of “U.K. nexus” is not yet explained but will be important to understanding the extraterritorial reach of the new thresholds.

The U.K. government introduced this change to address “killer acquisitions” (*i.e.*, acquisitions by incumbents of nascent competitors that could play a significant competitive role in the market in the future). Notably, the government substantially increased the turnover and share of supply elements of the new threshold from the initial proposals.

The new threshold will complement the government’s proposals to regulate acquisitions by businesses with “Strategic Market Status” that are included in the proposed new digital markets regime.

The new rules also feature changes to the existing jurisdictional thresholds, namely:

- The turnover threshold will increase to give the CMA jurisdiction over deals where the target company has U.K. turnover exceeding £100 million (approximately €119 million or US\$128 million) (increased from £70 million).
- A “safe harbor” for small businesses will provide an exemption from the CMA’s jurisdiction for deals where each party has turnover in the U.K. that is less than £10 million (approximately €11.9 million or US\$12.8 million).

The increase to the turnover threshold is a welcome change to reflect, partly, inflation over the 20 years since the current regime was introduced. Note that the change to the turnover threshold will not apply to cases where the government wishes to intervene in media mergers on public interest grounds. How effective the “safe harbor” will be — aside from very small domestic transactions — is unclear: While some foreign-to-foreign deals with little impact on the U.K. could be excluded, these are not likely to currently be reviewed by the CMA.

While the U.K. government has decided not to reform the current share-of-supply test, authorities acknowledge criticism of the uncertain application of existing rules and indicate that they will continue to monitor the test’s application and whether reform might be warranted. The government further notes that it “also expects the CMA to apply its existing thresholds more predictably once the new threshold is available.” Subject to further

elaboration of the U.K. nexus test under the new rules, these reforms may, therefore, result in more straightforward application of the CMA’s jurisdictional thresholds for transactions with apparently limited nexus with the U.K.

## Procedural Changes

The new rules amend the Phase 2 investigation process to allow parties to discuss (and potentially agree on) remedies with the CMA earlier than currently permitted. This could be useful for deals where clear-cut remedies can be offered and may enable better coordination with other regulators in global deals. Much will depend on how the CMA implements this change and the willingness of case teams and panels to engage in early discussions about possible remedies.

The amendments will also enhance companies’ ability to request a “fast-track” reference to Phase 2, with the possibility of making a request at any stage of prenotification or Phase 1. Enforcers’ intention is to save time and effort early in the review process in cases where it is clear to the parties that an in-depth investigation will be required.

However, the U.K. government decided not to proceed with proposals to restrict a Phase 2 investigation to consider only those issues flagged as a concern at Phase 1. This means that Phase 2 investigations will continue to review all aspects of a deal (starting from scratch after the Phase 1 decision). Therefore, time and effort will still be required at the start of a Phase 2 investigation to revisit issues not considered a concern at Phase 1.

The government also decided not to make any changes to the current power for the CMA to extend the deadline of Phase 2 investigations, which extensions have become more frequent in recent years. Also, despite suggestions of amendments in last year’s consultation, the final amendments introduce no changes to the CMA’s decision-making process.

## Increased Penalties

The amendments will increase fines for failure to respond to information requests or the provision of misleading information. Maximum fines for businesses will be increased to 1% of annual worldwide turnover (the current maximum fine is £30,000), with the possibility of additional daily penalties of up to 5% of daily worldwide turnover (the current maximum fine is £15,000 per day). Notably, the CMA had already increased its enforcement efforts to address breaches of merger control rules in recent years (with six fines of between £15,000 and £30,000 in the last five years each imposed for failure to provide information).

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## Changes to the Enforcement of Behavioural Rules

The amendments will introduce a number of changes to the enforcement of the behavioural antitrust rules in the Competition Act 1998, namely the Chapter I prohibition (the prohibition on anticompetitive agreements and cartels) and the Chapter II prohibition (the prohibition on abusing a dominant position).

In particular, the U.K. government announced the following amendments to the current enforcement regime:

- Appeals against decisions imposing interim measures will no longer involve a merits-based review, but an assessment that meets the judicial review standard, meaning that an interim decision can only be set aside on grounds of illegality, procedural defect or irrationality. This change creates a high hurdle for a successful challenge.
- If the CMA applies interim measures to prevent harm to competition while it conducts an investigation, it can restrict access to its file for businesses under investigation (although access will be available more quickly).
- The Chapter I prohibition will extend to also apply to activity implemented outside the U.K., allowing the CMA greater scope to investigate global cartels.
- The CMA's powers to interview witnesses will include individuals that do not have a connection to a business being investigated.
- Parties have a duty to not destroy evidence, and the CMA can issue fines for breaches of this duty.
- The CMA will have enhanced powers to conduct unannounced investigations of domestic premises and to obtain electronic information and documents stored remotely.
- The rules governing the use of and access to confidentiality rings will be placed on a statutory footing, with the CMA able to issue fines for violations.
- The CMA will have the power to determine its own process for decision-making, with the aim that this will allow decisions to be made efficiently.
- Maximum fines for failure to respond to information requests or the provision of misleading information will be increased, and the CMA can impose fines for breaching commitments, undertakings or interim measures.
- The CMA will become a "specified prosecutor" under the Serious Organised Crime and Police Act 2005, allowing the authority to use the "assisting offender" process to enhance enforcement under the criminal cartel offence.

In addition, the U.K. government will review the CMA's powers in relation to settlements.

In relation to competition litigation, the amendments will expand the Competition Appeal Tribunal's (CAT's) powers when hearing private claims to issue a declaration that competition law has been breached without claimants having to claim damages or apply for an injunction. Also, the new rules will again permit exemplary damages, reversing a 2017 change introduced through the implementation of the EU Damages Directive.

There is no change to the standard of appeal (except for appeals of decisions to impose interim measures). The CAT will continue to assess appeals on merits (and not at the lower judicial review standard).

## Market Investigations

The amendments introduce procedural changes to the market investigation regime that will allow the CMA greater flexibility to define the scope of an investigation and to amend the remedies regime. However, regulators may not impose interim measures in market investigations.

## Changes to the Consumer Law Regime

The amendments will introduce major updates to the consumer law regime. In particular, the CMA will be able to directly enforce consumer laws (where the CMA is currently required to take cases of alleged breaches of consumer law to court) and directly impose fines on businesses of up to 10% of their worldwide turnover. These powers will mirror the CMA's antitrust enforcement powers. The CMA will also gain the power to award compensation to consumers. Full-merits appeals against CMA enforcement decisions will be brought before the High Court.

Notably, the U.K. government will not allow consumer collective redress actions in CMA cases. It will, however, introduce new laws to address fake reviews and "subscription traps" and to ensure consumer prepayment schemes fully protect customer payments.

## Timing

The proposed timeline for the introduction of these amendments is not yet clear. The changes to merger control thresholds may be implemented relatively quickly through order-making powers, while changes to penalties and procedures will involve primary legislation, so are likely to take a year or more to implement.

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