

Changes To UK Competition Rules Will Extend CMA Powers

By **Bill Batchelor and Aurora Luoma** (June 20, 2022)

The U.K. government has announced amendments to the U.K. competition and consumer law regimes, with changes to merger control to include expanded conditions for killer acquisitions. This will eliminate the need for a U.K. overlap in acquirer and target activities where the acquirer has a high share of supply, that is, greater than 33%, and a substantial U.K. presence, i.e., over £350 million.

There will also be an increase to the existing turnover threshold, and an exemption from review for deals between small businesses, with flexible timing for Phase 2 investigations, which will allow earlier consideration of remedies and expanded ability for parties to request a fast-track reference to Phase 2.

In addition, increased penalties for failure to respond to information requests or the provision of misleading information will be introduced.

Changes to antitrust investigations will 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 case files, and extraterritorial reach that will extend the prohibition on anti-competitive agreements and cartels to cover activity implemented outside the U.K.

There will also be updated rules for evidence gathering and access to confidentiality rings, and increased penalties for failure to respond to information requests or the provision of misleading information.

The changes partly reflect greater readiness post-Brexit by the U.K. competition regulator, the Competition and Markets Authority, or CMA, to intervene in global mergers, even if the parties have little or no overlapping activity in the U.K.

The amendments will also grant the CMA powers of direct enforcement against consumer protection breaches, which currently require the CMA to start a court case, with the CMA being able to conduct its own investigations and issue administrative fines. This should speed up CMA cases, also allowing the CMA to take more enforcement action.

Changes to Merger Control Rules

Jurisdictional Changes

The amendments, announced in April, expand the jurisdiction of the U.K. merger regime by adding a new threshold for review, which will additionally give the CMA the ability to review deals with a U.K. nexus where a buyer has both an existing 33%, or greater, share of supply of goods or services in the U.K., or a substantial part of the U.K.; and a U.K. turnover exceeding £350 million — approximately €416 million or \$449 million.

The new threshold does not require the buyer and the target to 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 a U.K. nexus is not yet explained, but will be important to understanding the extraterritorial reach of the new thresholds. There may be situations



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in which a large buyer meets both share of supply and turnover thresholds in the U.K., but is purchasing a target with a presence entirely outside the U.K.

General principles of international jurisdiction, which see local nexus requirements as a jurisdictional point in the vast majority of merger control regimes, would suggest there should be an anchoring nexus to the U.K. as a condition of intervention.

This change has been introduced 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.

In an important change from the original proposal, the government accepted that it needed to increase substantially the turnover and share of supply elements of the new threshold. By introducing this new threshold, the U.K. is following in the footsteps of other jurisdictions that have also introduced new notification thresholds aimed at killer acquisitions, including Austria, Germany, South Korea and, most recently, Turkey.

The new threshold will complement the government's proposals to regulate acquisitions by businesses with strategic market status within new legislation aimed at the digital sector.

The amendments also feature changes to the existing jurisdictional thresholds. First, the turnover threshold will increase, giving the CMA jurisdiction over deals where the target company has U.K. turnover exceeding £100 million — approximately €119 million or \$128 million, increased from £70 million.

This increase will be welcome, and partly reflects inflation over the 20 years since the current regime was introduced. The change will not apply to media merger public interest interventions, though.

Second, there will be a small businesses' exemption from the CMA's jurisdiction, a safe harbor for deals where each party has a U.K. turnover of under £10 million — approximately €11.9 million or \$12.8 million.

How effective this safe harbor will be, aside from very small domestic transactions, is unclear, however; while some foreign-to-foreign deals with little impact on the U.K. could be excluded, such transactions are not likely to be currently reviewed by the CMA.

There will be no changes to the current 25% share-of-supply threshold. However, the U.K. government has acknowledged criticism of the uncertain application of this threshold by the CMA and indicates that it will continue to monitor the test's application.

The government noted that it "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 and the application of it by the CMA, 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

When cases are subject to in-depth Phase 2 inquiries, the current statutory timetable is rigid. There is no formal scope to discuss remedies until the substantive investigation is complete, and the remedies phase of a Phase 2 inquiry lasts a further 12 weeks after the substantive investigation closes.

This timetable is notably slower than that of peer regulators, who are able to consider remedies in parallel to the substantive analysis, so there is a risk of misaligned coordination.

The proposal now enables formal consideration of remedies with the CMA at an earlier stage. This could be particularly useful for deals where clear-cut remedies can be offered, where Phase 2 inquiries may be quicker, and may also enable better coordination with other regulators in global deals.

Much will depend on how the CMA implements this change in practice, for example whether earlier consideration is required or just possible, 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 pre-notification or at Phase 1. This should, as intended, allow merging parties and the CMA 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, and 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 of the CMA to extend the deadline of Phase 2 investigations; the CMA will still be able to extend the six-month deadline by an additional eight weeks, with such extensions having become more frequent in recent years.

Also, despite suggestions of amendments in last year's consultation, the final proposals do not introduce 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 stands at £15,000 per day.

The increased maximum fines will bring the CMA's powers more in line with other regulators around the world, including the European Commission.

The CMA has noticeably increased its recent enforcement efforts to address breaches of merger control rules, with six fines of between £15,000 and £30,000 being imposed in the last five years for failure to provide information.

Given the CMA's increasing emphasis on enforcement, merging parties should continue to take care when preparing filings and responding to CMA information requests.

Changes to the Enforcement of Behavioral Rules

The amendments will introduce a number of changes to the enforcement of the behavioral antitrust rules in the Competition Act 1998, namely the Chapter I prohibition – the prohibition on anti-competitive agreements and cartels, and the Chapter II prohibition – the prohibition on abusing a dominant position.

The proposed amendments include:

Interim Measures

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, and may make interim measures effectively review-proof in practice. The proposals will also limit the CMA's obligations to provide disclosure in interim measures cases.

Long Arm Jurisdiction

The Chapter I prohibition will extend to activity implemented outside the U.K., allowing the CMA greater scope to investigate global cartels, something it did not need to do pre-Brexit.

Expanding Investigative Powers

This includes enhanced powers in relation to interviews, dawn raids, confidentiality rings and increased maximum fines.

Streamlining Decision Making

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.

Criminal Enforcement

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 offense.

In relation to the expanded investigative powers, the CMA's evidence-gathering powers will be strengthened and expanded, partly to reflect more modern ways of working.

The CMA will be able to interview individuals who do not have a connection to a business being investigated and parties will have a duty not to destroy evidence, backed up by new fining powers for the CMA.

The CMA will also be given enhanced powers to conduct unannounced investigations of domestic premises and to obtain electronic information and documents stored remotely, which partly reflects increasing hybrid-working.

Rules governing the use of, and access to, confidentiality rings will be placed on a statutory footing, to reflect current practice, again backed up by new fining powers for the CMA.

In addition, maximum fines for failure to respond to information requests or the provision of misleading information will be increased to the same levels as in merger investigations. The CMA will also be able to impose fines for breaching commitments, undertakings or interim measures.

The U.K. government will also review the CMA's powers in relation to agreeing settlements. There is no change to the standard of appeal, except for appeals of decisions to impose interim measures.

The Competition Appeal Tribunal will continue to assess appeals on merits, and not at the lower judicial review standard.

Competition Litigation and Market Investigations

The amendments will expand the CAT's powers when hearing private claims, so that it can issue a declaration that competition law has been breached without claimants having to claim damages or apply for an injunction.

Additionally, the new rules will again permit exemplary damages to be awarded, reversing a 2017 change introduced through the implementation of the EU Damages Directive of 2014, although, based on pre-2017 cases, this is unlikely to have much impact in practice.

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, contrary to suggestions in the earlier consultation, regulators may not impose interim measures in market investigations.

Changes to the Consumer Law Regime and the Consequences

The amendments will introduce major updates to the consumer law regime. In particular, the CMA will be able to directly enforce consumer laws itself, in a change from the current position, where the CMA acts as a prosecutor and takes cases of alleged breaches of consumer law to court.

The CMA will also be able to directly impose fines on businesses of up to 10% of their worldwide turnover. These powers will mirror its antitrust enforcement powers.

These changes, requested by the CMA, should speed up investigations, and may also allow the CMA to take more enforcement action. The CMA will also gain the power to award compensation to consumers, which is designed so that consumers will be compensated more quickly than under current rules.

It will be possible to bring full-merits appeals against CMA consumer enforcement decisions before the High Court of Justice of England and Wales. However, the government rejected earlier proposals to establish a new specialist consumer law tribunal, similar to CAT, to hear these appeals; instead, the government decided that such a specialist tribunal may lead to less consistency overall.

The government will not allow consumer collective redress actions in CMA cases, unlike the position for competition law. 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. If the government chooses, 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.

However, the timing of this is now in doubt. Given that only a draft bill was announced in the government's agenda for the current legislative year, it cannot be expected to be introduced before Parliament until 2023 at the earliest.

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