UK To Revamp Merger Control, Expanding CMA's Jurisdiction and Making Procedures More Flexible

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On 25 April 2023, the UK government published the Digital Markets, Competition and Consumers Bill (Bill), which will introduce wide-ranging amendments to the UK competition and consumer law regimes that expand the powers of the Competition and Markets Authority (CMA) and significantly alter the merger control and antitrust investigation processes.

Key changes include:

Merger control:

- **New filing thresholds for "killer acquisitions" of nascent businesses,** which will eliminate the need for an overlap between merging parties' activities in the UK where one party has a high share of supply (at least 33%) and substantial UK presence (turnover exceeding £350 million).
- **Higher jurisdictional thresholds** that will (i) raise the turnover threshold, and (ii) exempt deals between small businesses from review.
- **Greater flexibility to request a "fast-track" reference to Phase 2.** In addition, the merging parties and the CMA can together agree to extend a Phase 2 review.
- **Increased penalties** for failing to respond to information requests or providing misleading information.

Antitrust investigations:

- **Revisions that will make it more difficult to appeal against interim measures,** *e.g.*, applying the more restrictive judicial review principles and restricting access to the CMA's case files.
- **Extraterritorial reach** that will extend the prohibition on anti-competitive agreements and cartels to cover activity implemented outside the UK and also give the CMA the power to issue requests for information to entities outside the UK.
- **Updated rules for gathering evidence** and powers to conduct unannounced inspections of domestic premises.
- **Increased penalties** for failing to respond to information requests or providing misleading information.

The changes build on the robust approach the CMA has taken recently to merger investigations, including cases where it has sought to intervene even where the merging parties have little or no directly overlapping activity in the UK.

In addition to updating the competition rules, the regulatory amendments will grant the CMA powers of direct enforcement against breaches of consumer protection laws, 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.

Digital Markets

Other parts of the Bill create a comprehensive new regulatory regime for digital markets. That is addressed in our 2 May 2023 client alert, "New UK Law Will Give CMA Broad Powers To Boost Competition in Digital Markets".

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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 UK nexus where one party has both:

- an existing 33% (or more) share of supply of goods or services in the UK (or a substantial part of the UK) and
- UK turnover exceeds £350 million (approximately €416 million or $449 million).

This new threshold will eliminate the existing requirement that both the buyer and the target have overlapping UK activities. For example, a powerful buyer acquiring a target with little or no revenue from overlapping activities in the UK would still be within jurisdictional reach. The UK nexus will be met if the party not meeting the above thresholds is registered in the UK, carries on activities in the UK or supplies goods or services to UK customers[1]. What exactly constitutes a "UK nexus", and thus the scope of the CMA's extraterritorial reach, will not be clear until guidance is issued.

The UK government has 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, turnover and share of supply elements of the new threshold are substantially higher than those the government initially proposed[2].

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. Under those proposed rules, all proposed transactions involving a designated company will require notification if (a) that company acquires a shareholding of at least 15%, (b) the value of the transaction is at least £25 million, and (c) the target has a UK nexus.

The new rules also feature changes to the existing jurisdictional thresholds to remove smaller transactions from the UK merger control regime, namely:

- The turnover threshold will increase from £70 million to £100 million (approximately €113 million or $124 million). However, this will not apply to interventions in media cases to preserve plurality (diversity), where the threshold will remain at £70 million.
- A "safe harbour" for small businesses will provide an exemption from the CMA's jurisdiction, even if the share-of-supply threshold is met, for deals where each party has turnover in the UK that is less than £10 million (approximately €11.3 million or $12.5 million). Again, however, the safe harbour will not apply to interventions in media mergers on plurality grounds.

The increase to the turnover threshold is a welcome change that reflects, in part, inflation over the 21 years since the current regime was introduced. How effective the safe harbour will be is unclear, aside from very small domestic transactions or global transactions where the parties happen to have limited UK revenues. While some foreign-to-foreign deals with little impact on the UK could be excluded, these are not likely to be reviewed by the CMA under current law.

While there will be no reform of the current share-of-supply test, the UK government had acknowledged criticism of the uncertain application of existing rules. The government has previously stated that it will continue to monitor the test's application and may consider further amendments in the future[3].

These reforms may, therefore, result in more straightforward application of the CMA's jurisdictional thresholds for transactions with a limited nexus with the UK, given that the new alternative threshold is designed to capture killer acquisitions, which at present are typically the subject of a more flexible approach to application of the share-of-supply threshold.

Procedural Changes

The amendments will codify companies' ability to request a "fast-track" reference to Phase 2, and allow requests at any stage of prenotification or Phase 1. The intention is to save time and effort early in the Phase 1 stage where it is clear to the parties that an in-depth investigation will be required. We have already seen the CMA implement such fast-track Phase 1 procedures in over 10 cases. If a fast-track reference to Phase 2 is made, then the CMA will have the power to extend the Phase 2 review by 11 weeks (instead of the usual eight-week extension) if required.

In addition, merging parties and the CMA will be able to agree to extend the deadline in a Phase 2 review without limit. This is in addition to the CMA's existing power to extend a Phase 2 review by eight weeks.

[1] The same wording is used when setting out the required UK nexus for the notification obligation in the National Security and Investment Act 2021. There the government has issued guidance stating that a non-UK company will be subject to the law if (1) it does business from a regional office or a research and development facility in the UK, or (2) it provides goods or services (*e.g.*, either by manufacturing goods, or distributing them) to a recipient in the UK.

[2] The government initially proposed thresholds of turnover exceeding £100 million and a share of supply of at least 25%. Following the responses to the 2021 consultation, the government raised the levels.

[3] Any future amendments to the share of supply test can be made by way of secondary legislation.

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Whilst the flexibility is welcome in what is a burdensome and, until recently with the advent of fast-track Phase 2 reviews, a relatively rigid review process, it will be important to ensure that this does not became a mechanism to extend even further what is already one of the longest review timetables amongst global regulators.

When issuing its response to the earlier public consultation on proposed reforms in 2022, the government stated its intention to amend the Phase 2 investigation process to allow parties to discuss (and potentially agree on) remedies with the CMA earlier than currently permitted. The Bill does not cover this point, but that may be covered by future amendments to the CMA's procedural rules and guidance. If so, this could be useful for deals where clear-cut remedies can be offered, and it would enable better coordination with other regulators in global deals.

Increased Penalties

The amendments will increase fines for failing to respond to information requests or providing 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).

The CMA has 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 six years for failing to provide information.

Changes to the Enforcement of Breaches of Competition Rules

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

In particular, the Chapter I prohibition will also apply to activity implemented outside the UK, allowing the CMA greater scope to investigate global cartels. The Bill will also allow the CMA to issue requests for information to entities outside the UK. That addresses the joint ruling by the UK Competition Appeal Tribunal (CAT) and the High Court in February 2023, which held that the CMA does not have the power under section 26 of the Competition Act 1998 to compel documents or information from a foreign-domiciled person with no UK connection[4].

In addition, the following amendments to the current enforcement regime will also be introduced:

- Appeals against decisions imposing interim measures (*e.g.*, temporary remedies whilst an investigation is ongoing to prevent significant harm) will no longer involve a merits-based review, but an assessment under the judicial review standard, so 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 a period for businesses under investigation.
- The CMA's powers to interview witnesses will include individuals that do not have a connection to a business being investigated, and interviews may be conducted remotely.
- Parties will have a duty to not destroy evidence, and the CMA can issue fines for breaches of this duty.
- The CMA's power to conduct unannounced investigations of, and seize material from, domestic premises will match its powers in relation to business premises, and the CMA will be able to require the production of electronic information and documents stored remotely.
- Maximum fines for failing to respond to information requests or providing 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.
- The CMA will be able to assist non-UK regulators with enforcement of competition law (with the exception of criminal offences).

In relation to private competition litigation, the amendments will also expand the 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 (except for collective proceedings), 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.

[4] For more information on that ruling, see our 17 February 2023 alert "UK Competition Regulator Cannot Compel Foreign Companies To Respond to Information Requests".

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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 also to amend the remedies regime so that remedies can be accepted by regulators at any stage of a market study or investigation. 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 and directly impose fines on businesses of up to 10% of their worldwide turnover. Currently, the CMA is required to take cases of alleged breaches of consumer law to court. These new 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 UK 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 Bill's passage through Parliament is due to take place over two sessions, and is unlikely to be passed until late 2023 or early 2024 at the earliest. Entry into force is therefore unlikely before early or mid-2024. It should be noted, however, that the parliamentary timetable is very concentrated as the UK heads towards a general election in the next 12 to 18 months, so any legislative delays related to this Bill could put its progress at risk. However, the Bill is not considered to be politically controversial.

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