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The UK Government introduces new competition rules to extend the merger review powers of the Competition Authority over the digital sector

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UK Parliament, *Digital Markets, Competition and Consumers Bill*, Draft Bill, 25 April 2023

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The U.K. Digital Markets, Competition and Consumer Bill (DMCC Bill) will amend the U.K. competition and consumer laws:

- Expanding the U.K. merger regulators' jurisdiction over mergers to target so-called "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.
- An increase to the existing turnover threshold, and an exemption from review for deals between small businesses, with flexible timing for investigations, which will allow expanded ability for parties to request a "fast-track" reference to Phase 2 and the possibility of an agreed extension of the Phase 2 review.
- Revised rules in relation to 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) case files.
- 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 the power for the CMA to issue requests for information to entities outside the U.K.
- The merger control regime and the antitrust enforcement regime will see 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 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 the Merger Control Rules

Jurisdictional Changes

The DMCC Bill expands the jurisdiction of 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 one party 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 a U.K. turnover exceeding £350 million – approximately €410 million or US\$432 million. [1]

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 U.K. nexus will be met if the other party is registered in the U.K., carries on activities in the U.K. or supplies goods or services to U.K. customers. [2] Further guidance on the U.K. nexus will be issued after the DMCC Bill is passed.

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.

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, Turkey and, most recently, India.

Regarding digital markets, the DMCC Bill also proposes to introduce mandatory reporting of transactions by firms designated as having “strategic market status” (SMS), which would complement the new notification thresholds aimed at “killer acquisitions”. Under those provisions, all proposed transactions involving a designated company with SMS 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 – approximately €29.3 million or US\$30.9 million – and (c) the target has a U.K. nexus.

Also, existing jurisdictional thresholds under the merger control rules will increase, giving the CMA jurisdiction over deals where the target company has U.K. turnover exceeding £100 million – approximately €117 million or US\$123 million – increased from the current threshold of £70 million.

This increase will be welcome, and partly reflects inflation over the 21 years since the current regime was introduced. This change will not apply to media merger public interest interventions though, where the threshold will remain at £70 million.

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 has previously indicated that it will continue to monitor the test’s application. In addition, there will be a small businesses’ exemption from the CMA’s jurisdiction (a “safe harbour”) for deals where each party has U.K. turnover under £10 million (approximately €11.7 million or US\$12.3 million).

The government has also previously noted that it “expects the CMA to apply its existing thresholds more predictably once the new threshold is available”.

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., 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 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 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, or undertakings in lieu of reference, will be 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, with such extensions having become more frequent in recent years.

Whilst the flexibility is welcome in what is a burdensome and, until recently, a relatively rigid review process, it will be important to ensure that this does not become 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 DMCC 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.

However, the U.K. government decided not to proceed with earlier 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.

Also, despite suggestions of amendments in the 2021 consultation, the government has decided not to 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 is £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 seven fines of between £15,000 and £30,000 being imposed in the last six 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 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 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 legal challenge. 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 also apply 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.

The Bill will also allow the CMA to issue requests for information to entities outside the U.K. That addresses the adverse joint ruling by the 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 U.K. connection.

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 offence.

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 that do not have a connection to a business being investigated, and interviews may be conducted remotely. 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, and seize material from, domestic premises and to obtain electronic information and documents stored remotely, which partly reflects increasing hybrid-working.

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.

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).

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, 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 2021 consultation, 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 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 be able to directly impose fines on businesses of up to 10% of their worldwide turnover. These powers will mirror the CMA's antitrust enforcement powers.

These changes, requested by the CMA, should speed up investigations, and also may 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 England and Wales (or the Court of Sessions in Scotland). However, the government previously rejected proposals to establish a new specialist consumer law tribunal, similar to the 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 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 by January 2025 at the very latest

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[1] All currency conversions are based on the average exchange rates for 2022.

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