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

Skadden

May 28, 2024

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

One Manhattan West
New York, NY 10001
212.735.3000

The United Kingdom's Digital Markets, Competition and Consumers Act (the Act) received royal assent on 24 May 2024. The Act introduces wide-ranging amendments to the UK competition and consumer law regimes that expand the powers of the UK's competition authority — the Competition and Markets Authority (CMA) — and significantly alter the merger control and antitrust investigation processes.

Key amendments 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 anticompetitive 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 been taking 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. The Act also follows the recent changes the CMA introduced to the UK's Phase 2 merger review process.

In addition to updating the competition rules, the Act grants the CMA powers of direct enforcement and ability to impose fines against breaches of consumer protection laws, which previously required the CMA to start a court case.

Digital Markets

Other parts of the Act create a comprehensive new regulatory regime for digital markets, which we discuss in our client alert "UK Enacts a New Digital Regime Regulating the Conduct of Major Tech Platforms."

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

Changes to the Merger Control Rules

Jurisdictional Changes

The Act expands the jurisdiction of the CMA by introducing a new, alternative threshold for merger review, which will give the CMA the ability to review M&A deals with a UK nexus where:

- one party has both (i) an existing 33% (or more) share of supply of goods or services in the UK or in a substantial part of the UK and (ii) UK turnover exceeding £350 million (approximately €416 million or $449 million); and
- another party has a "UK nexus," meaning it is registered in the UK, carries on activities in the UK, or supplies goods or services to UK customers.[1]

This new threshold eliminates the existing requirement that either the buyer and the target both have overlapping UK activities or that the target have substantial UK operations. For example, a powerful buyer acquiring a target with little or no revenue from overlapping activities in the UK will now come within jurisdictional reach.

The threshold has been introduced to address concerns about so-called "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 change will complement the government's proposals to regulate acquisitions by businesses with "Strategic Market Status" that are included in the new digital markets regime. It will require all proposed transactions involving a designated company to provide notification if:

- that company acquires a shareholding of at least 15%,
- the value of the transaction is at least £25 million, and
- the target has a UK nexus.

The Act also amends the existing jurisdictional thresholds to remove smaller transactions from the UK merger control regime.

- **The turnover threshold** will increase from £70 million to £100 million (approximately €117 million or $127 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 £10 million (approximately €11.7 million or $12.7 million) or less. Again, however, the safe harbour will not apply to interventions in media mergers on plurality grounds.

The increase to the turnover threshold is a change many industry participants have welcomed, as it reflects, in part, inflation over the 22 years since the current regime was introduced.

What effect the safe harbour will have is unclear, aside from in very small domestic transactions or global transactions where the parties have limited UK revenues. While some foreign-to-foreign deals with little impact on the UK could be excluded, these are already not likely to be reviewed by the CMA under the existing thresholds.

This statutory safe harbour applies in parallel to the CMA's de minimis guidance that states that it will generally not refer for in-depth investigation mergers involving UK market(s) of less than £30 million value.

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

These reforms may, therefore, result in a 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 application of the share-of-supply threshold.

Procedural Changes

The Act codifies companies' ability to request a fast-track Phase 1 review and allows such requests at any stage of prenotification or Phase 1. The intention is to save time and effort early in the Phase 1 stage, when it is clear to the parties that an in-depth investigation or remedies will be required.

[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 it (i) does business from a regional office or a research and development facility in the UK, or (ii) 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%. The government raised the levels following the responses to the 2021 consultation.

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

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

We have already seen the CMA implement such fast-track Phase 1 procedures in over 15 cases. If a fast-track reference to Phase 2 is made, the CMA will have the power to, if needed, extend the Phase 2 review by 11 weeks (instead of the usual eight weeks).

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 powers to unilaterally extend a Phase 2 review by eight weeks and to suspend the deadline if a merging party does not respond to a request for information.

The change adds flexibility to what is a burdensome and — until the amendments to the Phase 2 review process were introduced — relatively rigid review process. It will be important to ensure that the ability to extend the deadline does not became a mechanism to extend even further what is already one of the longest review timetables amongst global regulators.

Increased Penalties

The Act increases fines for failing to respond to information requests or providing misleading information, with the maximum fine increasing to 1% of annual worldwide turnover. (The current maximum is £30,000.) Possible additional daily penalties are up to 5% of daily worldwide turnover. (The current maximum is £15,000 per day.)

The CMA had already increased its enforcement efforts to address breaches of merger control rules. In the last seven years, it has issued seven fines of between £15,000 and £30,000 for failing to provide information.

Changes to the Enforcement of Breaches of Competition Rules

The Act also introduces a number of changes to the enforcement of the Competition Act 1998, namely to the Chapter I prohibition on anticompetitive agreements and cartels, and the Chapter II prohibition on abusing a dominant position.

In particular, the Chapter I prohibition will now also apply to activity implemented outside the UK, allowing the CMA greater scope to investigate global cartels. The Act also codifies the CMA's ability to issue requests for information to entities outside the UK.

In addition, the following amendments to the current enforcement regime are being 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 rather 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 potentially 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.
- The CMA may conduct interviews with witnesses remotely, and the CMA will have the power to interview individuals that do not have a connection to a business being investigated.
- Parties under investigation will have a duty to not destroy evidence, backed up by the ability for the CMA to 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 are being 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 Act expands 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, exemplary damages will once again be permitted (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 in relation to interim measures). The CAT continues to assess appeals on merits rather than at the lower judicial review standard.

Market Investigations

The Act introduces procedural changes to the market investigation regime that gives the CMA greater flexibility to define the scope of an investigation and also allows remedies to be accepted at any stage of a market study or investigation. However, regulators may not impose interim measures in market investigations.

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

Changes to the Consumer Law Regime

The Act introduces major updates to the consumer law regime, with the CMA gaining the power 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 mirror the CMA's antitrust enforcement powers. The CMA will also be able to directly award compensation to consumers. Full merit appeals against CMA enforcement decisions will be possible before the High Court.

The Act also introduces new laws to address fake reviews and "subscription traps" and to ensure consumer prepayment schemes fully protect customer payments. However, the Act does not permit consumer collective redress actions in CMA cases.

Next Steps

It is not yet clear when the amendments introduced by the Act will take effect. The effective date will depend, to a large extent, on the priorities of the new government that will take office following the UK's general election on 4 July 2024. However, companies should prepare for the possibility that the amendments may enter into force later this year.

Contacts

Niels Baeten
Partner / Brussels
32.2.639.0321
niels.baeten@skadden.com

Bill Batchelor
Partner / Brussels
32.2.639.0312
bill.batchelor@skadden.com

Frederic Depoortere
Partner / Brussels
32.2.639.0334
frederic.depoortere@skadden.com

Aurora Luoma
Partner / London
44.20.7519.7255
aurora.luoma@skadden.com

Giorgio Motta
Partner / Brussels
32.2.639.0314
giorgio.motta@skadden.com

Ingrid Vandenborre
Partner / Brussels
32.2.639.0336
ingrid.vandenborre@skadden.com

Professional support lawyer **Simon Dodd** contributed to this article.