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UK CMA Receives Enhanced Merger Control, Enforcement Powers Through Landmark Legislation

June 12, 2024

Shortly before the UK Parliament was prorogued on 30 May 2024, the long-awaited Digital Markets, Competition and Consumers Act (DMCC) received Royal Assent on 24 May 2024.

As we explained in our first update, the DMCC represents a major shift in UK digital, competition and consumer protection regulation. In particular, the DMCC:

1. Introduces a new regulatory regime for large digital firms (covered in our first update).
2. Significantly widens the enforcement remit of the UK Competition and Markets Authority (CMA) in consumer protection – particularly in relation to online activities.
3. Gives the CMA broader powers to review mergers and conduct investigations.

This is the second of our three updates on the DMCC, in which we set out the key merger and competition investigation reforms included in the legislation. These are expected to come into force in autumn 2024.

New merger thresholds

Currently, the CMA has jurisdiction to review mergers where the target company's annual UK turnover exceeds 70 million pounds sterling, or where the merger leads to an increment on a combined share of supply of 25% or more in the UK. Whilst the CMA in recent years has pushed the boundaries of these requirements, in practical terms, this test requires the target to have a substantial presence in the UK – or for the merger parties to have a competitive overlap in the products or services they offer.

The DMCC makes three reasonably significant changes to the CMA's jurisdiction to review business transactions.

First, the DMCC introduces a new 'no increment' share of supply test aimed at capturing so-called killer-acquisitions and allowing the CMA to intervene in mergers where there may not be any clear competitive overlap between the parties. Specifically, the CMA will have the additional ability to review transactions where one party has an existing share of supply of 33% in the UK and UK turnover exceeding 350 million pounds sterling and the other party has a nexus to the UK (e.g., by virtue of having a legal presence in the UK, carrying out activities in the UK, and/or supplying goods or services in the UK).

These additional tests will certainly provide the CMA with greater flexibility to intervene in mergers. However, we expect that, in practice, this new threshold will not result in a significant uptick of deals that are reviewed by the CMA. In an impact assessment, the UK government estimated that the new no-increment share of supply test would lead to the CMA investigating between two and five additional cases of this type per year, capturing deals by very large firms operating in already concentrated markets.

Second, and at the same time as widening the range of transactions the CMA can review, the DMCC also narrows the CMA's jurisdiction to review mergers by:

- Increasing the target turnover threshold from 70 million pounds sterling to 100 million pounds sterling.
- Introducing a new safe harbour with mergers being exempt from review if each party's UK turnover is less than 10 million pounds sterling.

Third, whilst the above changes will apply to deals across all sectors, the DMCC also introduces a new mandatory pre-closing reporting requirement for transactions involving firms designated under the new digital regulatory regime to have 'Strategic Market Status' (SMS firms). This applies where a deal is worth at least 25

million pounds sterling and where the target is 'UK-connected', meaning that it carries out activities in the UK or supplies goods or services in the UK. Each report will trigger a mandatory standstill obligation of at least 10 working days during which the CMA can decide whether to 'call in' the merger for review using its usual powers. As acquisitions of shares and voting rights of as little as 15% will trigger the reporting obligation, this change will give the CMA more visibility over an SMS firm's investment activity – including in growth markets, such as artificial intelligence. This requirement will not apply until such time as the CMA has designated a firm as having Strategic Market Status.

Broadened remit to investigate and enforce competition law breaches

The DMCC also broadens the CMA's investigation and enforcement powers for competition law breaches. In particular, the DMCC:

- Amends the jurisdictional scope of the 'Chapter I prohibition' against anticompetitive agreements. Previously, the prohibition only applied extraterritorially where it was implemented, or was intended to be implemented, in the UK. The amendment means the prohibition also now captures agreements implemented outside of the UK, where there is, or is likely to be, an immediate, substantial and foreseeable effect on trade in the UK.
- Widens the CMA's dawn raid powers under warrant in two important aspects:
    - Allowing it to 'seize and sift' evidence at domestic premises (a power the CMA already had in respect of business premises), meaning it can now remove large quantities of evidence from executives' homes.
    - Confirming that the CMA can access and copy information and documents held outside the UK (e.g., on foreign servers) which are accessible from local premises.
- Imposes new – and very general – obligations on third parties to preserve evidence where they know or suspect that the CMA is carrying out (or is likely to carry out) an investigation.
- Broadens the CMA's interview powers in antitrust investigations beyond persons connected to a business under investigation, meaning the authority can now compel third parties (unconnected to parties under investigation – such as customers, suppliers or competitors) to submit to an interview or produce documents.

To prepare for these changes, businesses with a UK presence will need to review their dawn raid procedures and refresh them as needed, also considering recent enforcement trends in the UK. However, the new powers also have considerable implications for third parties beyond merely having to produce documents on request in relation to an investigation and potentially provide access to witnesses for interviews by the CMA. The scope of the 'duty to preserve' evidence is potentially very wide and will require a company to consider its potential application when it becomes aware of any investigation or potential investigation in the sector in which it operates.

Extraterritorial information-gathering powers backed by higher noncompliance penalties

Finally, the DMCC clarifies the scope of the CMA's information-gathering powers in merger and antitrust investigations and introduces higher penalties for noncompliance with information requests.

Specifically, the DMCC expressly provides that information and document requests can be served on companies outside of the UK, where the company is subject to a merger or antitrust investigation, or has a UK connection. The amendment here appears designed to address the situations in *BMW v. CMA* and *VW v. CMA*, where the Competition Appeal Tribunal held that an information request notice and decision to impose a penalty for noncompliance in respect of foreign-domiciled companies was outside the scope of the CMA's powers – although that judgment was subsequently overturned by the Court of Appeal. The DMCC's amends mean that information request notices can be served on companies located outside of the UK and require them to produce documents held abroad where a company is under investigation or has a 'UK connection', which includes a person who carries on business in the UK. There may be some residual uncertainty about the meaning of 'person', given the Court of Appeal's judgment in the BMW and VW cases that 'person' in the context of the CMA's competition enforcement powers should be read to include an undertaking as a whole (i.e., an entire corporate group). This could suggest that the power is very broad and can apply to a parent company which has

a subsidiary operating in the UK.

As important as the scope of the extraterritorial power to request documents, the DMCC also increases the penalties the CMA can impose on corporates for failing to respond to information and document requests. This applies in relation to antitrust investigations and in relation to the CMA's mergers and market investigations powers. Penalties have increased from relatively modest fixed fees to more substantial turnover-linked amounts (up to 5% of global daily turnover capped at 1% in total for competition enforcement cases and up to 5% of global daily turnover with a 5% total cap for breaches of merger and market investigation remedies).

Next steps

The changes the DMCC makes in respect of the CMA's merger and antitrust jurisdictions garnered less attention than the new digital markets regime introduced by the act, but they significantly modify the CMA's ability to review mergers and collect evidence in antitrust cases. The changes are expected to come into force in autumn 2024 and will require amendments to the CMA's procedural guidance in both areas. If you would like assistance in assessing the impact of the DMCC on your business, please contact a member of the Cooley team.

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