DMCC Act: Key changes to the UK's merger control regime

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The Digital Markets, Competition and Consumers Act (**DMCC Act**), which received Royal Assent on 24 May 2024 (see our May 2024 update), includes significant changes to the UK's voluntary merger control regime. The reforms enhance the CMA's jurisdiction to review transactions, in particular so-called "killer acquisitions", while also giving the CMA and merger parties more flexibility during the investigative process. The DMCC Act also significantly increases the CMA's ability to fine undertakings for failures to comply with statutory requests, undertakings or enforcement orders.

Key takeaways

- The Act increases the jurisdictional threshold based on the target's UK turnover to GBP 100 million and creates a new safe-harbour from the application of the share of supply test for transactions where each party's UK turnover is less than GBP 10 million.
- The CMA also has the ability to review certain so called "*killer acquisitions*" where only one party has a significant presence in the UK and the share of supply test is not met.
- Changes to the CMA's procedure include the option for parties to proceed straight to a Phase 2 assessment and to extend Phase 2 timelines by consent.
- Significant enhancements have been made to the CMA's enforcement powers, including the power to impose fines for breaches of undertakings and orders (calculated by reference to the party's global turnover).
- While the majority of the merger control provisions are not expected to enter into force until the Autumn, there are two exceptions: (i) the Secretary of State's ability to scrutinise newspaper enterprise mergers involving foreign powers is already in force and has retroactive effect, capturing transactions that completed on or after 13 March 2024; and (ii) the provisions relating to Energy Network Enterprise mergers will enter into force on 23 July 2024.
- Businesses should also proactively consider whether their transactions could be impacted by the other key changes, particularly those transactions that may have signed, but not completed, before the Act comes into force.

While much of the commentary on the DMCC Act has focused on the CMA's new digital markets and consumer enforcement powers, the Act also makes significant changes to the UK merger control regime.

Changes to the CMA's jurisdiction

The CMA currently has jurisdiction to review mergers if: (i) the target's UK turnover is more than GBP 70 million or (ii) the merger creates or enhances a share of 25% or more in the supply or consumption of goods or services in the UK (or in a substantial part of the UK).

The new Act gives the CMA broader powers to review transactions that may affect the UK, by:

- adding a **new jurisdictional threshold** which gives the CMA the ability to review "*killer acquisitions*"; and
- **increasing the turnover threshold** to GBP 100 million.

The new jurisdictional threshold will allow the CMA to review transactions where the standard turnover and share of supply tests are not met, for example, because there is no overlap or increment in the parties' UK activities. The CMA will be able to review transactions where at least one party (most likely the acquirer):

- has a share of supply of goods or services in the UK (or substantial part of the UK) of at least 33%; and
- UK turnover of at least GBP 350 million, provided that the other party (i.e. the target) has a UK nexus (essentially this requires that the target has activities in, or supplies goods or services, in the UK).

While the highly (and some would say unpredictably) flexible share of supply test has not been changed, the Act creates a new safe-harbour from review for transactions where each of the parties have UK turnover of less than GBP 10 million.

Changes to sector-specific merger control regimes

The DMCC Act also introduces a number of sector specific merger control regimes for:

- digital companies which are designated as having strategic market status (**SMS**) under the new digital markets regime (see our May 2024 update);
- newspapers where the acquirer is a foreign enterprise; and
- energy network enterprises.

SMS firms' duty to report mergers

Firms designated as having SMS will be required to report mergers involving targets with a UK presence where:

- the transaction results in the SMS firm crossing through the 15%, 25% or 50% share ownership / voting thresholds (which includes new joint venture vehicles); and
- the total consideration is at least GBP 25 million.

Successive transactions between the same parties may trigger the duty to report more than once. The notification obligation does not apply if the transaction has already been notified to the CMA under the standard merger control process.

The CMA has five working days from receiving a notification to confirm whether the notification is sufficient (the waiting period) and then a further five days to review the transaction (the review period). The transaction must not be closed until the review period has ended.

Foreign state newspaper mergers

The Act creates a new regime for mergers involving newspapers and foreign enterprises. The Secretary of State must give the CMA a foreign state intervention notice if:

- the target's UK turnover exceeds GBP 2 million (notably, a significantly lower turnover threshold than the increased standard turnover threshold); and
- a foreign power acquires, or would acquire, (directly or indirectly) any shares or voting rights, the ability to appoint or remove officers, or any other right or ability to direct, control or influence, policies or activities.

Foreign power is defined broadly: it includes the head of state (in their public or private capacity), foreign governments, senior members of a foreign government in their private capacity, foreign government agencies and governing political parties and their members in a private capacity.

These provisions, which were introduced in response to the proposed acquisition of the Telegraph Group by the UAE-backed investment group RedBird IMI entered into force on 24 May 2024 and the new regime applies to all transactions that completed on or after 13 March 2024. The regime will apply alongside the existing power for the Secretary of State to intervene on the basis of the media plurality public interest ground.

Energy network enterprise mergers

The energy network enterprise mergers regime was introduced to give the CMA the ability to assess whether such transactions would prejudice Ofgem's ability to carry out its functions regulating gas and electricity supply in the UK.

The DMCC Act makes clear that the CMA is able to refer a transaction for an in-depth assessment on competition grounds, even if the transaction has been separately referred to assess whether it may prejudice Ofgem's ability to regulate gas and electricity supply. Following a reference, the CMA can publish a report concluding that there is:

- no anticompetitive or prejudicial outcome;
- an anticompetitive or prejudicial outcome and the CMA has decided not to accept undertakings or to make an order; or
- an anticompetitive or prejudicial outcome and the CMA has decided to accept undertakings or to make an order.

These amendments will apply from 23 July 2024.

Changes to the CMA's review process

Information gathering powers confirmed to be expressly extra-territorial

The question of whether the CMA's compulsory information gathering powers are extra-territorial arose in the CMA's Competition Act 1998 (**CA98**) investigation into suspected anti-competitive conduct relating to end-of-life vehicles. At first instance, the Competition Appeal Tribunal (**CAT**) concluded that the CMA's powers were not extra-territorial. While the CAT's decision was overturned by the Court of Appeal (see our January 2024 update), the decision has been appealed to the UK Supreme Court.

In light of the uncertainty, the DMCC Act expressly confirms that the CMA's information gathering powers (including in the exercise of its merger functions) are extra-territorial in effect.

Flexibility for parties to fast-track to a Phase 2 review

Where the parties accept that a Phase 2 reference will very likely be made, they can request the CMA to "fast track" the case during pre-notification or at any point in the Phase 1 process. To request a fast track to Phase 2, parties must accept (in writing) that there is sufficient evidence available to meet the statutory threshold for a reference (e.g., there is a realistic prospect the transaction may be expected to result in a substantial lessening of competition). In a notable change from the current 'fast track' process, the DMCC Act will remove the need to concede that the merger may give rise to competition concerns.

Extending Phase 2 review period

Where a case is fast-tracked to Phase 2, the CMA can extend the statutory Phase 2 review period of 24 weeks by up to 11 weeks if it considers there are special reasons to do so. This is in contrast to the CMA's ability to extend Phase 2 investigations by up to 8 weeks if it considers there are special reasons to do so.

In addition, the DMCC Act allows a Phase 2 review to be extended beyond the statutory time period where the parties and the CMA agree to do so.

Revamped civil penalties

Failure to comply with CMA information gathering powers

Currently, the CMA has the power to issue fines to companies that fail to respond to a statutory request for information or provide false and misleading information: however, the maximum penalties are GBP 30,000, a daily sum of GBP 15,000 or both a fixed and daily sum.

While these amounts remain unchanged for individuals, the new Act gives the CMA the power to levy significantly greater fines for undertakings, with companies facing potential fines of:

- for a fixed amount, up to 1% of global turnover;
- for a daily amount, up to 5% of global daily turnover; or
- both a fixed amount and daily amount, provided that the fixed amount is no more than 1% of global turnover and the fixed amount is less than 5% of global daily turnover.

Prior to issuing a penalty notice, the CMA is required to issue a provisional penalty notice and provide an opportunity for the company to make representations.

Breaches of CMA orders before or after a merger investigation

Under the Enterprise Act 2002 (**EA02**), the CMA can impose penalties of up to 5% of a company's global turnover for failing to comply with interim enforcement orders (**IEOs**) and interim undertakings or orders. However, the CMA cannot currently fine companies for failing to comply with final orders, undertakings in lieu of a reference (**UILs**) or final undertakings.

The DMCC Act (once in force) will give the CMA the power to fine companies for breaches of enforcement undertakings (including UILs and final undertakings) and enforcement orders (including final orders and orders issued to companies to comply with undertakings). The CMA will be able to impose:

- a fixed amount fine of up to 5% of global turnover;
- a daily fine of up to 5% of global daily turnover; or
- both a fixed amount and daily amount, provided that the fixed amount is no more than 5% of global turnover and the fixed amount is less than 5% of global daily turnover.

Assisting overseas regulators

The DMCC Act creates a framework allowing the CMA to respond to requests from overseas regulators for assistance with foreign mergers: for example, an overseas regulator could ask the CMA to use its information gathering powers under the EA02. The CMA may only assist if the request is made pursuant to a qualifying cooperation arrangement (or otherwise approved by the Secretary of State) and the CMA considers it appropriate to assist in the particular case.

The CMA is currently consulting on its draft guidance on the use of its new powers and the factors it will take into account when exercising these powers.

The DMCC Act also amends Part 9 of the EA02, which gives the CMA more flexibility to share information with overseas regulators in certain circumstances.

With thanks to Isabella Hunt for her contribution.