UK merger control: Key changes to the CMA's ability to investigate deals

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The Digital Markets, Competition and Consumers Act (the "Act") received Royal Assent on 24 May 2024, and will strengthen the powers of the UK's Competition and Markets Authority (CMA) in relation to:

- consumer protection, including enabling the CMA to sanction businesses for breaches of consumer protection law;
- digital markets, including giving the CMA a central role with regard to the regulation of businesses active in the digital sector in the UK;
- UK merger control, including expanding the basis upon which the CMA is able to assert jurisdiction to investigate transactions under the UK merger control regime; and
- UK competition law enforcement, including giving the CMA broader investigatory powers.

Key changes to the UK merger control regime are summarised within this update, with the majority of these amendments expected to enter into force later in 2024.

UK merger control regime: Voluntary and non-suspensory

The general merger control regime in the UK is voluntary and non-suspensory. Unlike in many other jurisdictions, this means there is no general legal requirement in the UK for an acquirer to notify and obtain merger clearance before completing an acquisition.

However, an acquisition that has not been notified and cleared pre-completion risks subsequent investigation by the CMA under the UK merger control regime.

The CMA is able to investigate post-completion, and has the power to order that a completed acquisition is undone (e.g. with the acquirer divesting all or part of the acquired business in order to remedy identified competition concerns).

General UK merger control regime: Changes to the jurisdictional thresholds

While the Act does not alter the voluntary and non-suspensory nature of the general UK merger control regime, it does change the jurisdictional thresholds under which the CMA will be able to assert jurisdiction to investigate.

The amendments to the jurisdictional thresholds for the general UK merger control regime are summarised below.

Current alternative jurisdictional thresholds	Amendments introduced by the Act
"Turnover test": the annual UK turnover of the enterprise[1] to be acquired (the "target") exceeded£70 millionin its most recently completed financial year.	"Turnover test": the annual UK turnover of the target exceeded£100 millionin its most recently completed financial year. The amendment to the turnover test (i.e. raising the relevant UK turnover threshold to £100 million) has been made to reflect the impact of inflation over the period since the £70 million threshold was first applied.
"Share of supply test": ▪ the parties to the transaction both supply or procure goods or services of a particular description; and ▪ post-transaction, the parties will supply or procure at least 25% of those goods or services in the UK, or in a substantial part of the UK.	"Share of supply test": ▪ the annual UK turnover of at least one party to the transaction exceeds £10 million; ▪ the parties to the transaction both supply or procure goods or services of a particular description; and ▪ post-transaction, the parties will supply or procure at least 25% of those goods or services in the UK, or in a substantial part of the UK. The amendment to the share of supply test introduces a safe harbour within which "small mergers" will be exempt from review on competition grounds (but may still be reviewed on public interest grounds, as noted below). This safe harbour is intended to reduce the burden upon small and micro enterprises. For example, if the annual UK turnover of each of: (i) the acquirer (including its corporate group); and (ii) the target was less than £10 million, this acquisition would fall within the safe harbour, and the CMA would not be able to assert jurisdiction to investigate on competition grounds.
	New additional alternative jurisdictional threshold: ▪ the annual UK turnover of one party to the transaction (e.g. the acquirer and its corporate group) exceeds £350 million **and** that party supplies or procures at least 33% of any goods or services of a particular description in the UK, or a substantial part of the UK; and ▪ another party to transaction (e.g. the target) is either: (i) a UK business; (ii) has activities in the UK; or (iii) supplies goods or services in the UK. This new threshold will enable the CMA to assert jurisdiction to investigate transactions involving non-competitors (e.g. vertical and/or conglomerate transactions) where previously the CMA would have been unable to do so.

Sector-specific changes to the UK merger control regime

The Act also introduces sector-specific changes to the UK merger control regime, including an obligation to notify the CMA of certain planned transactions affecting the digital sector in the UK, as outlined below.

Digital mergers: Transactions planned by undertakings with "strategic market status"

The Act enables the CMA to designate an undertaking[2] as having "strategic market status" where the CMA:

- considers that the undertaking has substantial and entrenched market power, and a position of strategic significance in the digital sector; and
- estimates that the undertaking's annual UK turnover exceeds £1 billion, or its annual worldwide turnover exceeds £25 billion.

Where the CMA designates an undertaking as having "strategic market status" this means that, subject to limited exceptions, the undertaking (or a member of its corporate group) must report to the CMA any planned acquisition of shares or voting rights in an entity if:

- that entity (or a subsidiary of that entity) carries on activities in the UK, or supplies goods or services in the UK;
- the planned acquisition will result in the undertaking's overall shares or voting rights in the entity increasing:
- from less than 15%, to 15% or more;
- from 25% or less, to more than 25%, or
- from 50% or less, to more than 50%; and
- the total value of the overall consideration provided by the undertaking for shares or voting rights in the entity is at least £25 million (i.e. including any consideration provided in **any prior transactions**, as well as in the context of the planned acquisition).

An undertaking designated as having "strategic market status" is also required to report to the CMA the planned acquisition of shares or voting rights in joint venture vehicles (again subject to limited exceptions).

Where this reporting requirement applies, the planned acquisition may not proceed until:

- the CMA has confirmed it has accepted the report (with the CMA required to confirm within five working days after having received the report whether or not it is accepted); and
- a "waiting period" of five working days has expired (commencing the working day after the CMA has confirmed its acceptance of the report), although the CMA may consent to the planned acquisition proceeding before the end of this waiting period.

If an undertaking fails to comply without reasonable excuse, the CMA will be able to impose a penalty of up to 10% of the undertaking's annual group worldwide turnover. The CMA will also be able to commence civil proceedings (e.g. seeking an injunction), as will third parties (e.g. to seek to recover damages for losses allegedly caused by the undertaking's non-compliance).

Media mergers: Transactions involving newspaper enterprises and "foreign powers"

In the context of a planned or completed acquisition of a newspaper enterprise, the Act requires the Secretary of State to notify the CMA if:

- the Secretary of State has reasonable grounds for suspecting that, as a result of the transaction, a "foreign power" will be - or is - able to control or influence the newspaper enterprise (or will be - or is - able to do so to a greater extent); and
- the annual UK turnover of the target newspaper enterprise exceeded £2 million in its most recently completed financial year.

The CMA must then investigate and report to the Secretary of State on the transaction. If the CMA concludes that the transaction would enable, or has enabled, a "foreign power" to control or influence the newspaper enterprise (or to do so to a greater extent), then the Secretary of State must make an order blocking the transaction (if planned), or undoing the transaction (if completed).

Significantly, the concepts of "foreign power" and "control or influence" are defined broadly:

- a "foreign power" includes: (i) a sovereign or head of a foreign state in their public or private capacity; (ii) a foreign government; (iii) the head, or senior members, of a foreign government in their private capacity; (iv) an agency or authority of a foreign government; (v) the head, or senior members, of such an agency or authority in their private capacity; (vi) a political party that is a governing political party of a foreign government; and (vii) the officers of such a party in their private capacity; and
- "control or influence" may be deemed to exist by reference to factors including: (i) holding shares and/or voting rights in the person carrying on the target newspaper enterprise; (ii) having the right to appoint or remove an officer of that person; or (iii) otherwise having the right or ability to direct, control, or influence to any extent, that person's policy or activities.

These specific provisions are already in force, and apply to transactions completed on or after 13 March 2024, with this new "foreign powers" regime existing in addition to the Secretary of State's ability to intervene in so-called "public interest" and "special public interest" merger cases.

Energy mergers: Energy network enterprises

Under the specific regime applicable to energy network enterprises, the CMA was able to investigate planned and completed transactions where:

- the turnover of the target enterprise achieved in Great Britain (GB) exceeded £70 million in its most recently completed financial year; and
- the transaction will result, or has resulted, in the merger of two or more energy network enterprises[3] of the same type.

The Act has amended this regime, increasing the GB-specific turnover threshold to £100 million, with this change applying from 23 July 2024.

If a transaction falls outside of this specific regime (e.g. due to only one party being an energy network enterprise, or the relevant parties being energy network enterprises of different types), then the CMA will remain able to seek to assert jurisdiction to investigate under the general UK merger control regime (as outlined above).

Expanded information gathering powers

The Act expands the territorial scope of the CMA's information gathering powers, enabling the CMA to require a natural or legal person located **outside of the UK** to provide information, and produce documents in that person's custody or under their control, where the person:

- is - or was - carrying on an enterprise that has been -or may be - involved in a transaction that is being - or may be - investigated by the CMA; or
- has a "UK connection", meaning that they: (i) are a UK national; (ii) are an individual who is habitually resident in the UK; (iii) are a body incorporated under the law of any part of the UK; or (iv) carry on business in the UK.

Increased penalties for non-compliance

The Act also increases the levels of the penalties that the CMA may impose for non-compliance with obligations arising in the context of an investigation, including, for example where a person has, without reasonable excuse:

- failed to comply with a request to provide information or produce documents;
- altered, suppressed, or destroyed a document they were required to produce; or
- provided information to the CMA that is materially false or misleading.

The Act will enable the CMA to impose upon a business: (i) a fixed penalty of up to 1% of its annual group worldwide turnover; and/or (ii) a daily penalty of up to 5% of its daily group worldwide turnover.

In relation to individuals, the CMA will remain able to impose: (i) a fixed penalty of up to £30,000; and/or (ii) a daily penalty of up to £15,000. Alternatively, depending upon the nature of the act or omission, an individual may face criminal prosecution for non-compliance, with the Act expanding the scope for the criminal prosecution of individuals (e.g. under the Act, an individual will commit an offence if they intentionally alter, suppress, or destroy a document that they were required to produce).

Key takeaways

As outlined above, the Act introduces a number of key changes to the UK merger control regime, including: (i) the creation of an additional basis upon which the CMA will be able to assert jurisdiction to investigate transactions; (ii) the creation of new sector-specific requirements, including in relation to certain transactions connected to the digital sector in the UK; and (iii) increases to the penalties that the CMA will be able to impose in respect of procedural non-compliance.

Businesses planning transactions with a UK nexus should have these in mind, and ensure that any potential UK merger control issues are proactively addressed at an early stage.

If you have any questions about how the Act may affect your business, please contact Gowling WLG's EU, Trade & Competition team.

Footnotes

[1] "Enterprise" is defined by section 129 of the Enterprise Act 2002 as "*the activities, or part of the activities, of a business*".

[2] Section 118 of the Act provides that "undertaking" has the same meaning as it has for the purpose of Part 1 of the Competition Act 1998. The CMA's draft "Digital markets competition regime guidance" provides that "undertaking" covers: "*any natural or legal person engaged in an economic activity regardless of its legal status and the way in which it is financed. Multiple persons (such as a parent company and its subsidiaries) will usually be treated as a single undertaking if they operate as a single economic entity, depending on the facts of each case*".

[3] An "energy network enterprise" is an enterprise carried on by a company holding a licence under section 7 of the Gas Act 1986 (gas transporter), section 6(1)(b) of the Electricity Act 1989 (transmission of electricity), or section 6(1)(c) of the Electricity Act 1989 (distribution of electricity), except in relation to the transmission or distribution of electricity, where the licence was awarded by way of a competitive tender (see, section 68A(2) of the Enterprise Act 2002; and "Energy network mergers - Guidance on the CMA's procedure and assessment", CMA190, 3 April 2024, footnote 1).