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THE DIGITAL MARKETS, COMPETITION AND CONSUMERS BILL - IMPORTANT CHANGES TO THE UK'S EXISTING COMPETITION LAW

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SUMMARY

As we reported previously, on 25 April this year the UK Government introduced the Digital Markets, Competition and Consumers Bill ("DMCC Bill"). Many of the headlines about the DMCC Bill have understandably related to the new regulatory regime for digital markets and companies with "strategic market status", and there are also changes proposed to the UK's consumer protection laws. However, the DMCC Bill will also make a number of other fundamental changes to the UK's competition law regime – including in relation to merger control, the territorial reach of UK competition law and public enforcement.

This article focuses on the aspects of the DMCC Bill that impact the UK's existing merger control and competition law enforcement framework, and considers how these changes may impact businesses operating across the UK.

MERGER CONTROL

The DMCC Bill proposes a number of significant changes to the UK merger control regime. The UK's merger control regime is voluntary, meaning that there is never on obligation to notify a transaction to the Competition and Markets Authority ("CMA"). However, when the jurisdictional thresholds in the Enterprise Act 2002 are met, the CMA may review a transaction even if it is not notified (and can decide to "call in" non-notified transactions for review). Currently, the CMA has such jurisdiction if either:

- The target's UK turnover in its most recently completed financial year exceeded £70 million; or
- The parties have a combined share of supply of 25% or more in relation to any product or service in the UK or a substantial part of the UK.

The DMCC Bill seeks to amend these thresholds in a number of ways. On the one hand, the amendments seek to more easily capture so-called “killer acquisitions”. A number of other changes are proposed with a view to removing the jurisdiction of the CMA in respect of transactions that are less likely to harm the UK’s economy.

Possibly the most eye-catching amendment is the introduction of a new threshold which will grant the CMA jurisdiction to review transactions where one party has a UK share supply of at least 33% and UK turnover exceeding £350 million. In practice, given the separate target-turnover threshold, this new threshold will only bite if the acquirer meets the requirements. This new threshold is aimed at capturing “killer acquisitions”, where a large firm (often in the technology or pharma sector) acquires a smaller and typically innovative firm (that may not yet be generating any revenue), sometimes with a view to eliminating the threat of future competition. While the CMA’s current 25% share of supply threshold has shown itself to be flexible in capturing many such transactions already, it is estimated that this new threshold will lead to an increase of between two and five Phase 1 cases per year. The DMCC’s digital regime, which includes mandatory reporting of acquisitions by firms with Strategic Market Status, will likely bring many transactions that meet these thresholds to the CMA’s attention.

While the new £350 million threshold is aimed at expanding the CMA’s jurisdiction, other jurisdictional amendments seek to reduce the burden on merging companies by removing certain transactions from the CMA’s jurisdiction. These amendments are:

- Increasing the current target turnover threshold from £70 million to £100 million. It is estimated that the changes to the turnover test will lead to a reduction of two or three Phase 1 cases per year.

- The introduction of a safe harbour threshold to the existing share of supply test where, even if the 25% share of supply threshold is met, the CMA would not have jurisdiction if no party to the transaction has more than £10 million of UK turnover. It is hoped that this amendment will give comfort where an acquisition involves only smaller companies, and it is estimated to lead to a reduction of two or three cases per year.

Armed with its new acquirer-focused threshold, we would expect the CMA to continue its aggressive stance against large technology transactions. At the same time, the increased target turnover threshold and safe harbour should bring peace of mind to many businesses, while also freeing up resources at the CMA to focus on more significant transactions.

TERRITORIAL SCOPE

Another standout provision of the DMCC Bill is the increased extra-territorial scope of the Chapter I prohibition under the Competition Act 1998, which prohibits anticompetitive agreements and concerted practices. Currently, an agreement can only be investigated and fined under Chapter I if it is implemented in the UK. The UK Government has long had an eye on such measures, describing the current Chapter I extra-territorial provisions as “too restrictive in the digital age”. By extending the prohibition beyond arrangements implemented within the UK, to those implemented outside the UK but that are likely to have an effect on trade within the UK, the DMCC Bill empowers the CMA to investigate (and potentially fine) contraventions of competition law - such as cartel conduct - that occur outside the UK. This amendment brings the UK in line with the EU on this issue.

Alongside the increased territorial scope of the Chapter I prohibition itself, the DMCC Bill also clarifies the CMA’s ability to exercise its investigatory powers outside the UK. More specifically, the CMA will be granted the ability to seek information and documents from companies and people outside the UK in the course of UK competition law investigations. This is expected to avoid the issues faced by the CMA in its recent investigation in respect of Volkswagen and BMW, where information requests sent to BMW and Volkswagen entities in Germany were overturned by the Competition Appeals Tribunal.

EVIDENCE GATHERING

The DMCC Bill grants the CMA stronger evidence-gathering powers during Competition Act investigations. This includes an extended legal duty upon companies to preserve evidence, and a new “seize and sift” power (the power to seize evidence and search through it at a later date) when conducting inspections of domestic premises - presently the CMA only has such an ability when conducting inspections at business premises.

Reflecting the increased number of people working remotely post-pandemic, the DMCC Bill enables investigators to require the production of information which is “accessible” from the premises despite not being physically on-site (e.g. information stored in the cloud). Additionally, the CMA will be able to compel individuals to undergo an interview regardless of whether or not they are linked to a business under investigation. Continuing the theme of alignment with flexible working practices, remote interviews will also be permitted.

NEW CIVIL PENALTIES

The DMCC Bill also introduces harsher civil penalties (in addition to existing criminal penalties) for infringements of procedural aspects of UK competition law. Currently, most failures to comply with CMA investigations attract a maximum fine of £30,000 or a daily fine of £15,000 for business. Such breaches, for example failing to comply with an information request, will now face a fixed civil penalty of up to 1% of global turnover. Further, daily penalties of up to 5% of daily worldwide turnover can also be imposed. Individuals such as company directors will now also be held accountable under the regime, facing fixed penalties of up to £30,000 and additional daily penalties of £15,000 for failing to comply with the CMA’s investigative powers.

At the same time, companies that fail to comply with CMA orders, directions, undertakings or commitments will face fines of up to 5% of annual global turnover, as well as daily penalties of up to 5% of daily global turnover.

MARKET STUDIES

There are also a number of procedural amendments to the CMA's market investigations regime included in the DMCC Bill, which will add further flexibility to the CMA's powers when conducting such investigations. The CMA will have greater power to define the scope of its market investigations, and the obligation to consult on a market investigation reference within the first six months of a market study has been removed.

The CMA will be permitted to conduct "trials" to assess the final effect and format of its remedies. In a novel reform, the CMA will be able to vary the remedies it imposes upon parties whose activities are found to have an adverse effect on competition for a period of up to 10 years where the CMA believes that the original remedy is ineffectual. This will not require a new market investigation, but it will be subject to a "cooling off" period of two years during which the CMA will be unable to reassess the remedy.

CONCLUSION

While the proposed amendments to competition law are significant, there are a few Parliamentary hurdles to overcome before the DMCC Bill comes into effect. BCLP is continuing to monitor the Bill and its impacts. In the meantime, do not hesitate to contact any of the lawyers listed if you have questions on the DMCC Bill or your competition law obligations more generally.

RELATED CAPABILITIES

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MEET THE TEAM

Andrew Hockley

Australian Registered Foreign Lawyer (admitted in England and Wales) and Global Practice Group Leader - White Collar, Antitrust, and International Trade, Sydney

andrew.hockley@bclplaw.com
+44 20 3400 4630

Paul Culliford

Senior Associate, Brussels

paul.culliford@bclplaw.com
+32 (0) 2 792 2424

Tom Wright

Associate, Brussels

thomas.wright@bclplaw.com
+32 (0) 2 792 2437

