UK COMPETITION'S WATERSHED MOMENT: SWEEPING DIGITAL, COMPETITION AND CONSUMER REFORMS WILL GIVE THE UK CMA SIGNIFICANT ADDITIONAL POWERS

The UK Government's Digital Markets, Competition and Consumers Bill has been introduced to Parliament as the first formal stage of its journey to becoming UK law. As well as significantly bolstered competition and consumer powers for an already powerful UK Competition and Markets Authority, the Bill will give the CMA's Digital Markets Unit targeted powers to administer a new digital regime for the largest tech companies, including the mandatory pre-closing reporting of significant M&A deals with a UK nexus.

The Bill will also modestly increase the current UK merger control jurisdictional thresholds to reflect inflation, whilst introducing a new "acquirer threshold" to give the CMA even wider scope to review potentially problematic deals in all sectors. The CMA already enjoys one of the most elastic merger control regimes globally, with wide discretion to review deals in line with its own enforcement priorities. But businesses should be aware that even more deals will be caught within the new rules and plan accordingly.

Describing the Bill as a potential "watershed moment", the CMA says it stands ready to apply its new powers – although there is a long journey ahead to the Bill becoming law.

The Bill represents the most significant transformation of the UK competition regime since the creation of the CMA in 2014, as well as the continued accumulation of power for an authority which already enjoys significant power – with limited restrictions on its ability and determination to intervene in mergers especially – compared with most of its peer agencies.

FROM DAMP SQUIB TO WATERSHED

The UK was previously at the forefront of attempts to regulate digital markets, following the 2019 Furman Report and subsequent initiatives. Although the DMU was established in 2021, it has since stayed in shadow form without a statutory footing. Following a government announcement in 2022, the long-promised Bill was first announced in the Queen's speech in May 2022, with the Government confirming its intention to expedite the Bill in last year's Autumn Statement.

THE DMU'S NEW TOOLKIT

The Bill closely follows the CMA Digital Markets Taskforce's report published in December 2020, and will give the DMU its long-promised statutory footing with new powers to tackle potentially anti-competitive practices (including mergers) in the digital space. In particular, the DMU will have the power to:

- Designate firms based on a forward-looking assessment as having "Strategic Market Status" where they have (1) "substantial and entrenched market power" and "a position of strategic significance" in respect of a (broadly defined) digital activity linked to the UK; and (2) global turnover above £25bn or UK turnover above £1bn;
- Set tailored, firm-specific rules for the conduct of SMS firms, including for example to provide more choice and transparency to their customers, and to fine SMS firms up to 10% of their global turnover for non-compliance with those rules;

- Carry out targeted "pro-competition interventions" in digital markets, designed to open up competition for start-ups and smaller firms; and
- Require SMS firms to report M&A deals before closing when (1) they acquire equity or voting shares of more than 15%; (2) the value of their holding is more than £25m; and (3) the merger meets a UK nexus test (i.e. the target carries out activities or supplies goods or services in the UK). The requisite report is expected to be much more limited than a full merger notice, requiring only the information necessary for the CMA to determine whether the deal warrants a full-scale merger control review. Absent the CMA's consent, the parties will need to wait five working days following the CMA's acceptance of a "sufficient" report before closing their deal.

SMS designation requires an investigation which could take up to nine months. The DMU will have discretion regarding which designations to prioritise, and has indicated that it expects to designate four SMS firms in the regime's first year.

KEEPING UP WITH THE REGULATORY JONESES

The landmark Digital Markets Act is the EU's own attempt to regulate digital markets, which establishes "do's and don'ts" with which a set of designated digital "gatekeepers" must comply.

With the DMA already applying from 2 May 2023, it is arguably too late for the UK to keep in step. Undeterred, the UK has positioned its "pro-competitive" approach to regulating SMS firms under the Bill as more proportionate and flexible than the blanket approach of the DMA. In particular, the DMU's ability to tailor its designation to specific activities of an SMS firm and then develop tailored obligations is expected to be less burdensome than the EU's wider approach.

But given that most big tech companies have global activities, it remains to be seen whether the UK's more tailored approach will avoid the EU (among other jurisdictions introducing similar regulatory regimes) setting the global standard for regulatory compliance in this space, especially when engagement with the European Commission on DMA compliance is already well underway.

EVEN MORE SCRUTINY FOR ALL M&A DEALS

The Bill (modestly) updates the UK merger control thresholds by:

- Increasing the UK turnover threshold from £70 million to £100 million in line with inflation; and
- Introducing a new small business safe harbour for mergers where each party's UK turnover is less than £10 million, which is unlikely to make much impact in practice given the significant turnover of acquirers in most CMA cases.

The current UK thresholds already give the CMA considerable leeway to intervene in mergers – more than most of its peer agencies enjoy. Pre-Brexit, many of the largest, high-profile deals would have been reviewed by the European Commission alone due to the EU "one-stop-shop" principle, but now can fall for parallel EU/UK review. The CMA has shown itself increasingly willing to diverge from the Commission in its bold decision-making and has earned a consistent reputation for being highly interventionist, with currently less than 30% of qualifying deals being cleared unconditionally at phase 1. Meanwhile, the CMA has blocked eight deals outright since 2020, versus two for the Commission.

Against this backdrop, the Bill introduces a further expansion of the CMA's jurisdiction: a new "acquirer threshold" which captures deals where: the acquirer supplies at least 33% of a good or service in the UK and has turnover above £350 million, and the target business is carried on by a UK business or body, at least part of its activities are in the UK, or it supplies goods or services in the UK. This is designed to give the CMA even more latitude to review potentially problematic acquisitions of smaller competitors (so-called "killer acquisitions"), regardless of the sector and without the target having to exceed the £100 million UK turnover threshold.

While the UK regime will remain voluntary and non-suspensory in principle, more merging parties will need to consider its potential impact at the outset of their deal strategy and in light of the CMA's enforcement priorities.

FAR-REACHING CHANGES TO UK COMPETITION AND CONSUMER REGIMES

In parallel with expanded merger control powers, the Bill gives the CMA greater competition and consumer powers, designed to super-charge its enforcement capabilities, including:

1. **Bolstered (extra-territorial) competition toolkit.** The Bill gives the CMA a range of strengthened powers to more swiftly and effectively enforce UK competition law, including:
   - extending the Chapter I prohibition to anti-competitive conduct implemented outside the UK which are likely to have an "immediate, substantial and foreseeable effect" on trade within the UK; and
   - strengthening the CMA's information and evidence gathering powers during the course of competition investigations, including additional powers to seize evidence from domestic premises.
2. **Direct consumer powers under a new administrative model.** The CMA has long cited effective consumer protection as a strategic priority, but without the requisite enforcement teeth. Amongst other far-reaching reforms to consumer law (including in relation to subscription traps and fake online reviews), the Bill will enable the CMA to decide itself whether consumer law has been broken (without going to Court), and to issue infringement notices and impose fines of up to 10% of global turnover for consumer law breaches.

   The CMA may take particular interest in using its new powers to pursue misleading "green claims" by businesses contrary to the CMA's Green Claims Code, having already opened investigations in the fashion and FMCG sectors. Businesses active in the UK which make statements about the eco-friendliness of their business should ensure they are Code-compliant before the level of risk and fines significantly increases.

A LONG ROAD AHEAD

Even though the Bill is unlikely to face significant political resistance, Royal Assent – and its entry into law – is not expected until spring next year (depending on the time it takes to gain parliamentary approval). This means that the DMU's digital remit is unlikely to apply to the first SMS firms until early 2025 following the potential nine-month designation process. In the meantime, the CMA is doing its utmost to fill the void by using its already expansive competition and merger control toolkits to their absolute limits.

FOR MORE INFORMATION

Our Antitrust/Competition team is available to discuss any of these issues with you and answer any specific questions you may have. If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below:

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