UK Antitrust Shakeup Would Increase Merger Scrutiny, Broaden Investigative Powers and Create New Oversight of Big Tech

07 / 28 / 21

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The U.K. government is consulting on far-reaching reforms to U.K. competition and consumer laws, which would substantially expand the powers of the Competition and Markets Authority (CMA) and reduce procedural protections. Key proposals include:

- **Merger control jurisdiction enlarged:** The CMA will have jurisdiction to "call in" mergers for investigation even if the acquirer and target do not compete where (i) the acquirer has over £100 million in U.K. revenue and (ii) one party has over 25% share of supply.
- **Enhanced scrutiny for tech M&A:** "Strategic market status" (SMS) digital firms — large tech companies designated by the CMA as having SMS status — will be subject to heightened M&A controls:
  - Mandatory prior notice to the CMA of *all* mergers;
  - The CMA would gain the power to investigate any deals with a U.K. nexus that exceed a certain global value threshold, which the government proposes to set between £100 million and £200 million;
  - The burden of proof for blocking an acquisition will be lower. A "realistic prospect" of harm will suffice, rather than the civil "balance of probabilities" standard.
- **Enhanced conduct restrictions for the tech sector:** A code of conduct would be established, with the potential for the CMA to make additional remedial orders.
- **Faster sectoral inquiries with interim order powers:** The CMA's investigation powers would be enhanced so it can conduct sector reviews more quickly. The government could provide input regarding the economic sectors to be reviewed and the CMA could issue sector-wide interim orders to address uncompetitive sectors.
- **Enhanced immunity for cartel whistleblowers:** The first party to report a cartel would receive immunity from both sanctions and civil damages claims in the U.K.
- **Direct CMA enforcement, plus potential class actions for consumer protection breaches:** The CMA would directly enforce consumer protection laws and the consultation asks whether a class actions should be authorised for consumer protection laws.

The proposals are set out in two consultations: Reforming Competition and Consumer Policy and A Pro-Competition Regime for Digital Markets. The consultation on each runs through 1 October 2021.

1. Market Inquiries

The CMA has powers to investigate and impose regulatory orders where it determines that competition is working ineffectively, even where no antitrust violation is identified.

Historically, these powers have resulted in far-reaching changes to market sectors, including divestiture of assets (*e.g.*, requiring airports be divested so that they were no longer under common ownership) or wholesale regulatory changes (*e.g.*, the U.K.'s open banking regime, which forced incumbent lenders to create open software to facilitate upstart competition and new services).

The new proposals would enable the U.K. to use this power more frequently and complete industry studies more quickly. The current two-stage inquiry process would either be shortened to a single stage or the CMA would be empowered to adopt remedies after the first-stage study. The CMA would also be allowed to apply interim remedies, including market-wide regulatory orders, while the inquiry is pending.

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The government will also take a more active role in recommending areas of inquiry, through a regular non-binding "steer" (guidance) to the CMA. Finally, companies would be able to offer remedies at any stage of an inquiry, and the CMA would have the power to test and vary remedies without requiring a fresh inquiry or change of circumstances.

2. Merger Control

Companies are not currently obliged to notify the CMA of mergers in the U.K. The authority has jurisdiction to investigate acquisitions where (i) the target has £70 million of U.K. revenue (the revenue test); or (ii) the parties have over 25% overlapping share of supply in the U.K. (the share of supply test). If the transaction is found to create competition concerns, the CMA can block or unwind it.

The proposals expand the CMA's jurisdiction to deals involving large acquirers and small targets, and add a particularly heightened standard in the digital sector.

(a) Changes to Jurisdictional Thresholds

(i) Acquirers With Over £100 Million in U.K. Revenues

The proposals will raise the revenue test to £100 million from £70 million. The 25% share of supply test will remain the same.

A supplemental basis for jurisdiction is also proposed: Where one party has over £100 million in U.K. revenue, there would no longer be a requirement that both parties contribute to the 25% U.K. share of supply (by overlapping in the supply of the relevant products or services). It would suffice that one party alone satisfies the 25% U.K. share test. So an acquirer with a share of over 25% in a segment upstream or neighbouring the target would still be subject to CMA jurisdiction.

(ii) Special Rules for Digital Companies With 'Strategic Market Status'

Alongside the changes to the thresholds, the U.K. government proposes enhanced scrutiny of SMS firms, and they will be overseen by a separate CMA function, the Digital Markets Unit DMU.

SMS status applies where a company has:

- a "*core*" digital activity. This is defined to mean that digital technologies are "a core component of" rather than just "material to" the firm's activity. "Activity" is to be defined as the DMU sees fit. It is not necessarily an economic market.
- *substantial and entrenched market power*. Substantial market power arises when users of a firm's product or service lack good alternatives, and there is a limited threat of entry or expansion by other suppliers. Entrenched market power exists when a firm's market power is expected to persist over time and is unlikely to be competed away in the short or medium-term.
- *a strategic role in the digital economy*. A firm holds a strategic position where the effects of its market power are likely to be particularly widespread or significant, taking into account the following:
  - The firm has achieved very significant size or scale in an activity;
  - The firm is an important access point to consumers;
  - The firm can use the activity to further entrench or protect its market power in that activity, or to extend its market power into a range of other activities; and
  - The firm can use the activity to determine the "rules of the game", for example by controlling the terms on which sellers can use a significant platform to access the market.

The CMA will prioritise the designation of SMS status for companies with the greatest revenue and market strength. It will take into account whether other regulators are better placed to determine priorities, for example, the Financial Conduct Authority or Payment Systems Regulator for fintech or Office of Communication (OFCOM) for media. The CMA's prior statements suggest that it envisages SMS status for major search, social media and marketplace platforms.

The proposals will subject SMS acquirers to heightened merger scrutiny:

- *Mandatory notice:* SMS firms must give prior notice of all acquisitions.
- *High-value transactions:* The CMA would have wider jurisdiction, extending to any transaction where the transaction value is over the new threshold of £100 million-£200 million and there is a U.K. nexus: Nexus is broadly defined to encompass, potentially, any assets or revenues, users, employees, R&D activities or legal presence in the U.K.
- *Lower burden of proof:* The new merger regime would lower the burden of proof for the CMA, requiring only a realistic prospect of harm to block a deal, rather than the civil balance of probabilities.
- *Possible suspensory effect:* The consultation also asks whether SMS acquirers should be forced to wait for approval before consummating notified transactions.

(iii) De Minimis Exemption

The consultation suggests a *de minimis* safe harbour for acquisitions where acquirer and target each have less than £10 million in global revenues.

(b) Changes To Speed Up Phase 2 Merger Reviews and Facilitation of Remedies

The U.K. merger review process is subject to a statutory timetable that limits flexibility.

During phases 1 and 2, the CMA is not formally able to discuss remedies until the end of the merits analysis. The impracticality of this process has been highlighted since Brexit, when the U.K. has had to defer consideration of global remedies — even ones that would obviate the need for its merits inquiry — until the CMA has completed its substantive merits analysis.

The government proposes changes to make the phase 2 process more flexible: a simpler fast track to phase 2 at the parties' request, an opportunity for early stage remedies at phase 2 and a smaller, more focused pool of phase 2 adjudicators (senior "fresh-pair-of-eyes" officials).

3. Antitrust Investigations

(a) Long-arm Investigative Jurisdiction, Lower Bar for Interim Measures and Immunity for Whistleblowers

The proposals would widen the U.K.'s jurisdiction over foreign conduct that has a direct, substantial or foreseeable effect on competition in the U.K. This would align the U.K. with other jurisdictions, such as the U.S. and EU. It is a marked change in tone for U.K. legislation, which historically required a stronger national nexus for jurisdiction (and expected foreign countries to likewise delimit their jurisdiction).

The consultation also suggests lowering the bar for issuing interim measures and limiting companies' procedural rights. Interim measures have only been used once in a U.K. antitrust investigation, and the CMA is wary both of setting a high bar (*e.g.*, urgency and potential for irreparable harm) and the procedural burdens of providing access to its investigative file during the process. The government proposes dispensing with access to underlying evidence and limiting appeal rights. No merits-based appeal would be allowed — only judicial review, where there is a much higher threshold to obtain relief. In court, the litigant must show that the measures are irrational, illegal or procedurally unfair.

Another proposal would improve whistleblower incentives under the U.K.'s leniency programme for cartel violations. The first party to report a violation to the CMA before the authority has evidence of a cartel would gain immunity from penalties and civil damages actions. It is not clear how effective this would be as an incentive, however, given the cross-border nature of cartels, and the limited facts available at the earliest stages of an internal company investigation. Immunity from civil damages in the U.K. is a limited benefit if the immunity applicant finds it is also exposed to civil claims in the U.S. and/or EU.

(b) Increased Procedural Penalties and Streamlining the Investigative Process

The proposals would also empower the CMA to impose higher civil penalties for non-compliance with its information-gathering orders, increasing the maximum penalties from £30,000 to 1% of annual turnover for non-compliance with investigative measures and 5% of daily turnover default fines for each day of delay. Sanctions of up to 5% of annual turnover would be authorized for non-compliance with remedy orders.

The proposals also envisage streamlining of the investigative process, allowing more flexibility in settlements, statutory use of confidentiality rings (to allow select individuals to have access to confidential materials) and closing loopholes in the CMA's powers to obtain documents and witness evidence, as well as allowing reciprocal information sharing with foreign authorities.

(c) Additional Digital Sector Conduct Obligations

Enhanced merger scrutiny is not the only area where the tech industry would face changes under the proposals. The DMU would be given oversight powers for large tech companies that it designates as having SMS status.

(i) Code of Conduct

SMS firms would be subject to three new sets of obligations:

Fair trading:

- To trade on fair and reasonable terms;
- Not to apply unduly discriminatory terms, conditions or policies to certain users; and
- Not to unreasonably restrict how users can use a firm's services.

Open choices (preventing barriers to choosing freely and easily between SMS firm services):

- Not to unduly influence competitive processes or outcomes to self-preference;
- Not to bundle or tie services in a way which has an adverse effect on users;
- To take reasonable steps to support interoperability, where not doing so would have an adverse effect on customers;

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- Not to impose undue restrictions on competitors or on the ability of users to use competing providers; and
- Not to make changes to non-designated activities that further entrench the firm's position, unless this benefits users.

Trust and transparency:

- To provide clear, relevant, accurate and accessible information to users;
- To give fair warning of and explain changes that are likely to have a material impact on users; and
- To ensure that choices and defaults are presented in a way that facilitates informed and effective customer choice, and that choices are takes in users' best interests.

(ii) Conduct Remedies

The CMA would also gain the power to order further conduct remedies ("pro-competitive interventions" or PCIs) where it identifies an adverse effect on competition. Examples given of possible regulatory measures include (a) mandating interoperability or third-party access to data and (b) divestitures/separation of business units.

The power over SMSs sought by the CMA are similar to those proposed for the European Commission under the EU's draft Digital Markets Act (DMA). Both proposals focus on transparency, and preventing exclusionary behavior from alleged "gatekeepers." But the U.K. proposals are potentially broader in scope and leave more discretion to the DMU to determine which companies have SMS status and, through an open-ended intervention power, how they should be regulated.

Unlike the proposed European regulation scheme, the revised U.K. system would include no right to appeal on the merits within the CMA, only a right to seek to judicial review.

4. Consumer Protection Enforcement

Historically, there has been a sharp divide between antitrust and consumer protection enforcement at the CMA. The CMA has direct powers to sanction antitrust infringements, but it plays only a prosecutorial role in consumer protection, by bringing court cases against alleged infringers. The consultation suggests a radical overhaul of consumer protection enforcement powers, giving the CMA direct administrative powers to order remedies and to impose fines of up to 10% of annual worldwide turnover.

5. Collective Actions, Appeals and Role of the Competition Appeal Tribunal

In previous reviews of U.K. antitrust laws, the CMA had sought to curtail the role of the Competition Appeal Tribunal in reviewing antitrust decisions (currently a full merits review) and to limit the resources the CMA expends in hearings. The consultation asks for feedback on the correct standard for appeals, leaving open whether the government will weaken the Tribunal's role (by raising the bar for successful appeal, for example, or shortening or dispensing with hearings).

The consultation outlines two possible changes with potentially large implications. First, it proposes that the Tribunal should be able to hear declaratory actions, providing a definitive view on the application of competition law. Because the CMA has a discretion to conduct investigations, this would provide a novel, private means of seeking declarations of infringement or, defensively, non-infringement. Second, the consultation asks whether consumer protection laws should permit class action collective redress. In light of the very substantial class actions for antitrust matters currently before the Tribunal, any extension of the class action regime to consumer protection laws would likely result in a substantial uptick in litigation.

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