May 24, 2022

On April 20, 2022, the UK government **announced wide-ranging reforms to UK competition and consumer law policy**, including significant threshold changes to the UK merger control regime. In particular, while the government aims to retain the UK's voluntary and non-suspensory merger regime, the proposed reforms plan to expand the already extensive ability of the UK's Competition and Markets Authority (CMA) to scrutinize mergers. Helpfully for merging parties, however, the reforms introduce an objective, turnover-based safe harbor for small mergers by exempting those below specified turnover thresholds from review. The planned reforms were included in the Queen's most recent speech, although the timing of their entry into force is still unclear. In this alert, we will explain the main merger control reforms proposed and provide some early details for dealmakers.

Key reforms proposed

Under the proposed reforms, the existing thresholds used to establish the CMA's jurisdiction over mergers will be amended as follows:

- **Increased turnover threshold:** The UK target turnover threshold will be increased in line with inflation from £70 million (approximately $87 million) to £100 million (approximately $124 million). Target companies whose annual UK revenue is less than £100 million will fall outside this increased threshold, unless the share of supply threshold is met.[1]
- **New "no-increment" share of supply threshold:** The existing share of supply threshold, which gives the CMA jurisdiction where a merger leads to an increment on a combined share of supply of 25% or more, will be retained, and a new share of supply threshold will be introduced. This is "to enable review of so-called 'killer acquisition' and other mergers which do not involve direct competitors." Under this new threshold, an acquirer must have an existing share of supply of goods or services of 33% or more in the UK or a substantial part of the UK, and a UK turnover of at least £350 million (approximately $433 million). No increment is required. This new threshold also will include some form of UK nexus to capture only mergers with an appropriate link to the UK, although no further details on what this would entail have been published.
- **Safe harbor for small mergers:** To reduce the burden on small and micro businesses, the UK government is planning to introduce a safe harbor to exempt mergers from review where each party's UK turnover is less than £10 million (approximately $12 million).[2]

Some changes to the merger review procedure have been proposed to enable the CMA to deliver more effective and efficient merger investigations, including by:

- Allowing the CMA to accept binding commitments from businesses earlier during a Phase 2 review.
- Enhancing the "fast-track" procedure that allows a case to be referred to Phase 2 at any stage of pre-notification or the Phase 1 review if requested by the merging parties. Importantly, under this new procedure, parties won't have to accept that the merger may create a substantial lessening of competition.

The UK government also has proposed including the new competition regime for digital markets within the reform package. While these reforms initially proposed new merger control rules for large digital firms, including mandatory reviews and a lower standard of proof at Phase 2, the merger-related proposals have been pared back significantly. Firms that are designated as having "strategic market status" (SMS) will have to give advance notice to the CMA of some of their transactions, but they will not be obliged to make full notifications.

What dealmakers need to know

Although the UK will retain a voluntary regime and dealmakers will retain discretion as to their UK merger control filing strategy under the proposed reforms, dealmakers should be aware that the expanded flexibility brought about by these proposals is likely to increase the risk that the CMA could intervene if transactions are not notified.

- The effect of the proposals is to significantly expand the CMA's jurisdiction through the introduction of a "no-increment" share of supply threshold. Mergers involving significant market players with a UK turnover of more than £350 million (approximately $433 million) will have to consider whether the new thresholds apply to their transactions, even where the target has a very small presence in the UK or where it has no competitive overlaps with the acquirer.
- Although the new share of supply threshold is meant to make it easier for the CMA to establish jurisdiction, don't expect that the same will be true for dealmakers. As the new test does not specify that the market in which a merging party has a 33% share must be connected to the merger, the application of the new threshold likely will require a careful case-by-case assessment that takes into account all business activities.
- As with the current share of supply test, it may not be enough to rely on the familiar metrics of volume or value to assess jurisdiction. The CMA has broad discretion in choosing how to measure shares of supply – and in the past has used the number of employees, patents filed and conversations in business-to-consumer messaging as suitable metrics.
- Although SMS firms will not have to get approval for their deals under a distinct mandatory merger control regime for transactions in the digital sector as previously anticipated, these companies will be subject to the new "no-increment" share of supply test, which may to some extent plug the gap left from the UK government's pared-back digital proposals.

---

1. The threshold for intervention in media mergers on public interest grounds will continue to be £70 million.
2. Public interest interventions in media mergers will be exempted from the small-merger safe harbor.

Key Contacts

Christine Graham London	cgraham@cooley.com +44(0) 20 7556 4455
Caroline Hobson London	chobson@cooley.com +44 20 7556 4522

Anna Caro London	acaro@cooley.com +44 20 7556 4329

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.