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New UK Merger Control Thresholds

CMA Adopts New Merger Control Thresholds

SUMMARY

The thresholds that govern when the UK's Competition & Market Authority (“**CMA**”) has jurisdiction to review mergers have changed. The changes, which came into effect on 1 January 2025, include an increase in the turnover test, the introduction of a safe harbour in the share of supply test, and, most significantly, a new “hybrid” test giving the CMA broader jurisdiction to review non-horizontal mergers and so-called ‘killer acquisitions’.

BACKGROUND

The Digital Markets, Competition and Consumers Act (the “**DMCC**”) received Royal Assent on 24 May 2024, making significant changes to the UK's competition and consumer law landscape. The DMCC sets out new merger control thresholds that commenced on 1 January 2025.

I. OVERVIEW

The DMCC amended the quantitative merger control thresholds contained in the Enterprise Act 2002 as follows:

The CMA has jurisdiction to review a merger only if at least one of the following quantitative tests is met:

- (a) **Turnover Test:** *The value of the turnover in the UK of the party being acquired exceeds ~~£70 million~~ £100 million;*
- (b) **Share of Supply Test:** *At least one of the parties has a UK turnover exceeding £10 million, and the parties together supply or acquire at least 25% of all goods or services of a particular*

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description in the UK (or in a substantial part of it). The merger must also result in an increment to the share of supply or acquisition;

- (c) **Hybrid Test:** *One party supplies or acquires at least 33% of all goods or services of a particular description in the UK (or a substantial part of the UK), the same party has a UK turnover exceeding £350 million, and the other party has a UK nexus (the “Hybrid Test”).*

II. DEEPER DIVE

1. Turnover Test

The turnover test is met where the annual UK turnover of the target exceeds £100 million (increased from £70 million to take account of inflation). Where two or more companies form a joint venture incorporating their businesses in a particular area of activity, the relevant turnover is the sum of the turnover of each of the contributed businesses, and where two or more companies form a joint venture incorporating all of their businesses, the relevant turnover is that of all the existing companies, excluding the company with the higher UK turnover. In the event of a full legal merger, the relevant turnover is that of the party with the lower UK turnover.

2. Share of Supply Test

The share of supply test requires the merging parties to have a combined share of supply of at least 25% in the sale or purchase of goods or services in the UK (or a substantial part thereof) in which they overlap. In determining whether the share of supply test is met, the CMA may have regard to value, cost, price, quantity, capacity, number of workers employed or any other criterion, and is not limited to considering economic markets. As such, the share of supply test enables the CMA to adopt an expansive approach to jurisdiction and has often been criticised for reducing the predictability of the regime.

Nevertheless, the share of supply test was retained by the DMCC, which instead introduced a new safe harbour threshold. To be within the safe harbour each of the merging parties must generate UK turnover not exceeding £10 million.

To help interpret the new rules, the CMA has published revised mergers guidance (“**Mergers Guidance**”).¹ The Mergers Guidance provides examples of how the safe harbour threshold would apply in practice:²

- (a) In a straightforward acquisition, each of the acquirer and target would need to have UK turnover of £10 million or less for the safe harbour threshold to apply;
- (b) In a joint venture scenario where two or more companies (A and B) contribute their businesses (T1 and T2) in a particular area of activity to the joint venture, each of T1+T2 (together), company A and company B would need to have UK turnover of £10 million or less for the safe harbour to apply;

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- (c) In a full legal merger, each of the merging parties would need to have UK turnover of £10 million or less for the safe harbour to apply; and
- (d) In a joint venture scenario where two or more companies (A, B and C) form a joint venture incorporating all of their businesses, each of A, B and C would need to have UK turnover of £10 million or less for the safe harbour to apply.

3. Hybrid Test

(a) *General Conditions*

The DMCC introduced a new hybrid test to enable the CMA to review: (a) mergers that remove potential competition from a market (e.g., so-called ‘killer acquisitions’, where a company that is developing a new product or service is acquired before it can develop to become a competitor); and (b) mergers that facilitate the leveraging of market power across products or services that exist in different markets or at different levels of the supply chain.

The hybrid test is met if, pre-merger:

- (i) one party supplies or acquires at least 33% of all goods or services of a particular description in the UK (or a substantial part of the UK) (the “**share of supply condition**”);
- (ii) the same party has a UK turnover in excess of £350 million (the “**turnover condition**”); and
- (iii) the other party meets one of the following conditions (the “**UK nexus condition**”):
 - (1) the business is carried on by a body of persons corporate or unincorporate formed or recognised under the law of any part of the UK;
 - (2) any part of the activities of the business are carried on in the UK; or
 - (3) the person, or persons, by whom the business is carried on supply goods or services to persons in the UK in connection with the business.

The share of supply condition and UK nexus condition could be met by either the acquirer or the target. However, the hybrid test has been described as “acquirer focused” which reflects the fact that, in practice, transactions in which the target has UK turnover exceeding £350 million (the turnover condition under the hybrid test) would also meet the (standard) £100 million turnover test, which does not require an assessment of the share of supply condition.³

Unlike the share of supply test described in Section II above, the share of supply condition does not require an increment **and can therefore be met by one party alone**. The same party (intended to be the acquirer, for the reason set out above) must have UK turnover exceeding £350 million.

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(b) *UK Nexus Condition*

The UK nexus condition must be met by the other party. For the purposes of the following overview, this is assumed to be the target.

(i) The business is carried on by a UK body of persons

The first limb of the UK nexus condition will be satisfied if, pre-merger, the target carries on any of its activities through companies or partnerships formed or recognised under the law of any part of the UK.

If the target comprises assets only, this limb will not be satisfied.⁴

(ii) At least part of its activities are carried on in the UK

The second limb of the UK nexus condition will be satisfied if, pre-merger, any part of the activities of the target are carried on in the UK. This may occur, for example, if it has an office, branch or any kind of facility in the UK, has intellectual property rights in the UK, or has obtained a licence or regulatory approval to enable it to supply goods or services (whether directly or indirectly) in the UK. The Mergers Guidance even goes so far as to state that a target having intellectual property rights or consumers in the UK having access to the goods or services of the target would be sufficient to satisfy this limb.⁵

(iii) It supplies goods or services to persons in the UK

The third limb of the UK nexus condition will be satisfied if, pre-merger, the target supplies (directly or indirectly, e.g., through a subsidiary or an agent) goods or services to a person or persons in the UK. For example, this would generally include a non-UK company that produces goods for exporting to a company in the UK, or is responsible for distributing them to the UK company.⁶

The Mergers Guidance notes that the supply of goods or services includes, *inter alia*, the supply of digital content, the supply of digital services by means of the internet, rendering services to order, the provision of services by making them available to potential users, and making arrangements for the use of computer software or for granting access to data stored in any form which is not readily accessible.⁷

III. CONCLUSION

Although the changes introduced by the DMCC appear, on their face, to enhance legal certainty in comparison with the previous jurisdictional thresholds, in practice, the CMA's ability to assert jurisdiction is unlikely to materially change. The CMA has always taken a purposive approach to jurisdiction, and has interpreted the share of supply test notoriously widely e.g., in *Meta/Giphy*,⁸ notwithstanding that Meta (previously, Facebook) and Giphy are generally considered to operate at different levels of the supply chain, the CMA asserted jurisdiction on the basis of a horizontal overlap in the broadly defined category of "the supply of apps and/or websites that allow UK users to search for and share GIFs". The only difference is that the CMA will now have a more comprehensive and effective jurisdictional basis to review

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non-horizontal mergers and mergers involving potential competition only, since the hybrid test does not require the existence of horizontal overlap. The CMA's expansive approach to jurisdiction is expected to continue. In fact, the Mergers Guidance makes it clear that the CMA will apply a purposive approach to the UK nexus condition.⁹

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ENDNOTES

- 1 Available at: [Mergers: Guidance on the CMA's jurisdiction and procedure](#).
- 2 Paragraph 4.60, Mergers Guidance.
- 3 See paragraph 4.75 of the Mergers Guidance.
- 4 Paragraph 4.86, Mergers Guidance.
- 5 Paragraph 4.89, Mergers Guidance.
- 6 Footnote 129, Mergers Guidance.
- 7 Paragraph 4.91, Mergers Guidance.
- 8 Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. (notified: 18 October 2022).
- 9 Paragraph 4.82, Mergers Guidance

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