

# Guidance on changes to the jurisdictional thresholds for UK merger control

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# 1. Introduction

- 1.1 The Enterprise Act 2002 (**the Act**) has been amended to introduce different jurisdictional thresholds for certain mergers involving a relevant enterprise.<sup>1</sup> Section 23A of the Act defines relevant enterprises to include enterprises active in the development or production of items for military or military and civilian use, quantum technology and computing hardware (**Relevant Enterprise**).<sup>2,3</sup>
- 1.2 As a result of this amendment, the jurisdictional tests that apply to a transaction vary depending on the activities of the enterprises involved. In particular, the turnover and share of supply tests applicable to mergers in which the enterprise being taken over is a Relevant Enterprise are different from those applicable to other mergers under the UK merger control regime.
- 1.3 The amendments to the Act were introduced by the Government principally to enable the Secretary of State to intervene on public interest national security grounds in transactions involving changes of control of Relevant Enterprises. However, the amended thresholds also apply to the jurisdiction of the Competition and Markets Authority (**CMA**) to review such a merger on competition grounds.
- 1.4 This guidance is therefore intended to provide guidance for merging parties and legal advisers on the circumstances in which merging parties should notify transactions affecting Relevant Enterprises to the CMA for a competition assessment. It should be read in conjunction with the BEIS Guidance<sup>4</sup>, which explains further the Government's reasons for introducing section 23A and provides guidance on which enterprises will be considered Relevant Enterprises. For more general information on the merger control regime see [Mergers: Guidance on the CMA's Jurisdiction and Procedure \(CMA2\)](#).
- 1.5 This guidance sets out the CMA's intended practice as from the date of publication. It may be revised from time to time to reflect changes in law and best practice. The CMA's website will always display the latest version of the

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<sup>1</sup> The amendments apply only in relation to cases where enterprises cease to be distinct after 11 June 2018.

<sup>2</sup> The concept of Relevant Enterprises and the share of supply test applying to transactions involving Relevant Enterprises were introduced by [The Enterprise Act 2002 \(Share of Supply Test\) \(Amendment\) Order 2018](#) (SI 2018/578) and [The Enterprise Act 2002 \(Turnover Test\) \(Amendment\) Order 2018](#) (SI 2018/593).

<sup>3</sup> See the Act, as amended, for the full definition of a Relevant Enterprise. For a more detailed discussion of Relevant Enterprises, see chapter 3 of the guidance issued by the Department for Business, Energy & Industrial Strategy (**BEIS**) entitled [Enterprise Act 2002: Changes to the turnover and share of supply tests for Mergers](#) (the **BEIS Guidance**).

<sup>4</sup> See footnote 3 above.

guidance. Where there is any difference in emphasis or detail between this guidance and other CMA guidance, the most recently published guidance takes precedence.

- 1.6 Although it covers most of the points likely to be of immediate concern to businesses and their advisers, this guidance is not a substitute for the Act and the regulations and orders made under the Act, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt about whether they may be affected by the legislation should consider seeking legal advice. Furthermore, although the CMA will have regard to this guidance in handling mergers under the Act, the CMA will apply this guidance flexibly and may depart from the approach described in the guidance where it is appropriate to do so.

## 2. Jurisdictional thresholds and public interest

### Jurisdiction for the CMA or the Secretary of State to intervene

- 2.1 Under the Act, the CMA has jurisdiction to review a transaction on competition grounds if it has reasonable grounds to suspect that the transaction may give rise to a relevant merger situation (**RMS**).<sup>5</sup> In addition to the other requirements for a RMS to arise, either the turnover test or the share of supply test set out in section 23 of the Act must be met.
- 2.2 The Act also allows the Secretary of State to intervene in transactions giving rise to an RMS that raise specified public interest concerns, including national security.<sup>6</sup> The Secretary of State can intervene by giving the CMA a Public Interest Intervention Notice (**PIIN**)<sup>7</sup> or a European Intervention Notice (**EIN**).<sup>8,9</sup> For further information on these procedures, which are unchanged by the amendments made to s.23A, see CMA2 chapter 16.
- 2.3 Parties who think that their transaction might give rise to national security issues, or who are unsure whether their transaction affects a Relevant Enterprise<sup>10</sup>, can discuss their transaction with the government department that has responsibility for their sector by contacting [NSIIRewiew@beis.gov.uk](mailto:NSIIRewiew@beis.gov.uk) or the sector-specific contacts listed at the end of this document.

### The Jurisdictional thresholds for Relevant Merger Situations

- 2.4 For mergers in which the enterprise being taken over is **not** a Relevant Enterprise:
- (a) the turnover test is met if the annual UK turnover of the enterprise being taken over exceeds £70m.

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<sup>5</sup> Chapter 4 of [CMA2](#) explains in detail what is meant by RMS.

<sup>6</sup> The Secretary of State can also intervene on other specified public interest grounds, related to the media and financial stability. See sections 42-68 of the Act. See point iii of the executive summary of the [BEIS Guidance](#).

<sup>7</sup> Section 42 of the Act.

<sup>8</sup> Section 67 of the Act.

<sup>9</sup> If enterprises are ceasing to be distinct and certain additional requirements are satisfied, the Secretary of State can also intervene on public interest grounds on the basis of a Special Public Interest Intervention Notice (**SPIIN**), even if the transaction does not give rise to a RMS. See section 59 of the Act. Such mergers are investigated on public interest grounds only and no competition assessment takes place. This guidance focuses on transactions giving rise to a RMS. The SPIIN regime is therefore not considered further in this guidance.

<sup>10</sup> As defined in paragraph 1.1.

(b) the share of supply test is met if the transaction results in one enterprise having a share of supply of goods or services of any description of at least one-quarter in the UK or in a substantial part of the UK (ie, share of supply increases as a result of the merger and exceeds 25%).

2.5 For mergers in which the enterprise being taken over (or part of it) **is** a Relevant Enterprise<sup>11</sup> the turnover and share of supply tests can be met in the following additional ways:

(a) the **turnover** test is met if the Relevant Enterprise's annual UK turnover exceeds £1m.

(b) the **share of supply** test is met if before the merger, the Relevant Enterprise being acquired or merged has a share of supply or purchase of at least one-quarter in a substantial part of the United Kingdom. In other words, the test is met even if share of supply does not increase as a result of the merger so long as the Relevant Enterprise has 25%. The relevant goods or services for the purposes of deciding whether the share of supply test is met are those by virtue of which the target enterprise qualifies as a Relevant Enterprise. The new provision adds to, rather than replaces, the existing share of supply test.

2.6 In assessing whether the enterprise being taken over is a Relevant Enterprise or whether the merger may give rise to national security concerns, merger parties are advised to consult the [BEIS Guidance](#). Where merger parties consider that further clarification of that guidance would be useful they are advised to contact [NSIIRewiew@beis.gov.uk](mailto:NSIIRewiew@beis.gov.uk) or the sector-specific contacts listed at the end of this document. The CMA is unlikely to be able to offer guidance, beyond that available in its published practice (as it develops), to inform merger parties' assessment of whether the enterprise being taken over is a Relevant Enterprise. Nor is the CMA well placed to advise merger parties as to whether their transaction may give rise to national security concerns.

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<sup>11</sup> The separate thresholds for Relevant Enterprises apply to Relevant Enterprises which ceased to be distinct after 11 June 2018.

### 3. Competition assessment

#### Calling a transaction in on competition grounds

- 3.1 The CMA will only investigate a transaction on its own initiative if there is a reasonable chance that the transaction may give rise both to an RMS and to a realistic prospect of a substantial lessening of competition (**SLC**).<sup>12</sup> Both elements must be present. The CMA will not open an own-initiative investigation simply because a transaction gives rise to an RMS, whether under the thresholds relating to Relevant Enterprises or under the thresholds relating to all other enterprises.
- 3.2 The Government has made clear<sup>13</sup> that jurisdictional thresholds for Relevant Enterprises are intended to enable the investigation of potential national security-related issues raised by such transactions. They are not motivated by any other public interest or competition concern. From a competition perspective the CMA does not believe that there is any need to treat mergers involving Relevant Enterprises differently from mergers in other sectors. Therefore, the CMA does not expect the changes brought about by the introduction of separate jurisdictional thresholds for Relevant Enterprises to bring about a material change in its approach to the assessment of mergers on competition grounds.
- 3.3 Given the nature of the CMA's statutory duties, it is not able to state that it will never call in a merger involving relevant enterprises in circumstances where it would not, prior to the amendments to the Act, have had jurisdiction. However, horizontal mergers (ie, merger between parties operating at the same level of the market) that might raise competition concerns would typically already fall under the CMA's jurisdiction through the share of supply threshold. Accordingly, the CMA does not anticipate opening any own-initiative competition investigations on the basis of horizontal concerns into transactions where it would previously not have had jurisdiction.
- 3.4 In theory, the introduction of separate jurisdictional thresholds for Relevant Enterprises could enable the CMA to assert jurisdiction over non-horizontal mergers (ie mergers between parties operating at different levels of the market) where the enterprise being taken over has a lower level of turnover than the £70 million threshold applicable to other enterprises.<sup>14</sup> The CMA

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<sup>12</sup> See [Guidance on the CMA's Mergers Intelligence Function \(CMA56\)](#) for further information.

<sup>13</sup> See the BEIS Guidance at paragraph iii of the executive summary and also at paragraphs 1.12 and 6.4

<sup>14</sup> Mergers that have both horizontal and vertical aspects are often captured by the share of supply test.

notes that most non-horizontal mergers are benign and do not raise competition concerns.<sup>15</sup> The CMA is also not currently aware of other cases which it would wish to investigate but that it has not been able to investigate because of the current thresholds. Accordingly, the CMA does not anticipate that the introduction of separate jurisdictional thresholds for Relevant Enterprises will result in any material change to its approach to opening own-initiative competition investigations on the basis of non-horizontal concerns.

## **Self-assessment of whether to make a voluntary notification**

- 3.5 The Act does not oblige merging parties to notify the CMA of a merger. For mergers that give rise to an RMS but where competition concerns do not arise, there is no need to notify the CMA. When self-assessing whether to submit a voluntary notification on competition grounds, merger parties should take the same approach to a merger involving the acquisition of a Relevant Enterprise as they would to any other RMS. For further guidance on factors relevant to self-assessment see [CMA2](#).
- 3.6 As noted in paragraph 2.6 above, merger parties considering whether a business is a Relevant Enterprise are advised to consult the [BEIS Guidance](#) and, where necessary, to seek clarification from the contacts listed in that document.
- 3.7 Merger parties who consider that their transaction may give rise to an RMS but consider that it does not give rise to competition concerns can choose to inform the CMA about the transaction (explaining why they do not propose to submit or have not submitted a Merger Notice to the CMA) by submitting a briefing note to the CMA's mergers intelligence function in accordance with the existing procedure set out in *Guidance on the CMA's mergers intelligence function* (CMA56).
- 3.8 As set out in paragraph 6.14 of CMA2, the CMA may also take into account the existence of its statutory discretions not to refer when determining which cases to investigate. One such exception to the duty to refer arises when the CMA considers the market in question is of insufficient importance to warrant a reference (the 'de minimis' exception).
- 3.9 Merger parties who choose to inform the CMA about a RMS, through the process set out in CMA56, may therefore wish to consider whether CMA's guidance on markets of insufficient importance is relevant to the transaction. It

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<sup>15</sup> See the [Merger Assessment Guidelines](#), (CC2/OFT1254) at paragraph 5.6.1.

should be noted that, in deciding whether to exercise this discretion, the CMA takes into account considerations beyond the turnover of a target enterprise or its share of supply.<sup>16</sup>

- 3.10 For merger parties that choose to submit voluntary notification to the CMA, the procedure that will be followed (including the fees payable) is described in detail in the CMA's guidance (in particular CMA2).

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<sup>16</sup> See CMA64 for further information on markets of insufficient importance. If a PIIN has been issued, the CMA is required to submit a report to the Secretary of State and it is for the Secretary of State, not the CMA, to decide whether or not to refer the merger to a phase 2 investigation. The report is required to include a decision on the applicability of the exception relating to markets of insufficient importance – see Section 44(4)(c) of the Act.

## 4. Who to contact

4.1 For clarification of BEIS Guidance or government policy on public interest interventions:

<b>Area</b>	<b>Contact</b>
Military	<a href="mailto:NSII-Defence@mod.gov.uk">NSII-Defence@mod.gov.uk</a>
Dual-use	Parties should contact their existing Government contact. Where there is not a clear email contact <a href="mailto:publicinterestandmergers@beis.gov.uk">publicinterestandmergers@beis.gov.uk</a>
Computing hardware	<a href="mailto:NSII-ComputingHardware@beis.gov.uk">NSII-ComputingHardware@beis.gov.uk</a>
Quantum technologies	<a href="mailto:NSII-Quantum@culture.gov.uk">NSII-Quantum@culture.gov.uk</a>
Public interest and Mergers generally	<a href="mailto:publicinterestandmergers@beis.gov.uk">publicinterestandmergers@beis.gov.uk</a>
General queries	<a href="mailto:nsiireview@beis.gov.uk">nsiireview@beis.gov.uk</a>

4.2 If unsure whether to notify the CMA of a RMS or possible RMS which may give rise to an SLC: [mergers.intelligence@cma.gsi.gov.uk](mailto:mergers.intelligence@cma.gsi.gov.uk)

4.3 If you wish to submit a formal notification to the CMA, see: <https://www.gov.uk/government/publications/mergers-forms-and-fee-information>