ALLEN & OVERY

UK Government confirms reforms to competition and consumer laws

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Changes to strengthen the UK competition and consumer law regimes have been debated for several years. A series of expert reports and a letter from the previous Chair of the Competition and Markets Authority (CMA) set out the case for reform. In July 2021, the UK Government **consulted on wide-ranging proposals** to amend the rules. It has now **set out which of these proposals it plans to take forward**.

As yet we do not have clarity on the timing of the reforms. The Government acknowledges that many of the changes will need legislation to implement and it will identify the appropriate legislative vehicles "as Parliamentary time and priorities allow".

We also await the Government's response to its consultation – also published last July – on a **new pro-competition regime for digital markets**. It remains to be seen which of these digital proposals will be taken forward, and how they will interact with the more general reforms (particularly in relation to the merger control rules).

In this alert we set out the key amendments to the merger control, markets and competition regimes. Watch out for our upcoming alert which will focus on the Government's major plans for reform to UK consumer law.

Merger control: significant threshold changes

The CMA's tough merger control enforcement record has made plenty of headlines in recent years (see our latest ***Global trends in merger control enforcement*** report for more details).

The Government believes that the UK's merger control regime is working well. However, there are areas it wants to improve, while at the same time ensuring that the costs and burden for businesses are limited.

Significantly, the Government does not plan to move away from the current voluntary and non-suspensory merger review process. But it does intend to make major amendments to the jurisdictional thresholds.

Increasing the turnover threshold

The target turnover threshold will be increased from GBP70 million to GBP100m to adjust for inflation. Notably, this change will not apply to public interest interventions in media mergers – here, the threshold will remain at GBP70m.

Introducing a new "acquirer" threshold

A new threshold will give the CMA jurisdiction to review a transaction where the acquirer has:

i) a share of supply of at least 33% of any goods or services in the UK (or a substantial part of it); and
ii) a UK turnover of more than GBP350m.

The Government's aim is to enable the CMA to more easily review vertical and conglomerate mergers, in particular "killer acquisitions" (ie purchases of start-ups or potential new entrants by larger players).

Importantly, taking into account responses to the consultation, the Government has increased the thresholds from those originally proposed (25% and GBP100m). It also plans to introduce a "UK nexus test", which it says will ensure that only mergers with an appropriate link to the UK will be captured. There is no further detail on the formulation of this test in the Government's response.

These tweaks from the original proposals are clearly welcome news. They should decrease the number of additional transactions falling within the CMA's jurisdiction. But uncertainties remain as to the impact that this new threshold will have in practice.

Share of supply test remains but under close watch

The current share of supply test gives the CMA jurisdiction over mergers that result in a share of supply of at least 25% of any goods or services in the UK (or a substantial part of it). The Government does not plan to make any changes to this threshold.

However, given the CMA's recent expansive interpretation of the share of supply test, it is no surprise that many respondents to the consultation raised concerns about its application. In light of these comments, the Government will continue to monitor the operation of the share of supply test and may consider further reforms at a later date. Interestingly, the Government notes that it "expects the CMA to apply its existing thresholds more predictably" once the reforms have been made.

Creating a small merger safe harbour

The CMA will have no jurisdiction to review mergers where each party has UK turnover of less than GBP10m (although this will not apply to public interest interventions in media mergers).

This change is designed to provide greater comfort to small businesses and parties to mergers that are less likely to raise competition concerns.

The Government had originally proposed that the safe harbour threshold would be set on the basis of worldwide turnover. It has taken on board feedback and decided that a UK turnover threshold would provide greater certainty in relation to the application of the regime to foreign-to-foreign transactions.

A more efficient merger control process

One of the Government's core objectives is to improve efficiency and reduce costs to businesses undergoing merger reviews.

To this end, the Government plans to take forward two key changes:

- allowing the CMA to agree remedies at any stage of a phase 2 merger investigation (with the exception of public interest intervention cases)
- implementing a new fast track route that would enable parties to request an automatic reference to phase 2 at any stage of pre-notification or the phase 1 review, without the need for the CMA to consult on the reference or issue a reasoned decision – importantly, parties will not be required to accept that the merger may create a substantial lessening of competition (and safeguards will prevent the fast-tracking of potential public interest intervention cases)

These reforms are welcome. They should give the review process some much-needed flexibility and enable certain investigations to be completed more quickly.

Markets: greater flexibility

The market inquiry regime enables the CMA to remedy harmful practices and structural barriers to competition across entire markets. It is a strong tool, and one that is largely unique to the UK. The Government is concerned, however, that the current system – and in particular the in-depth market investigation process – is cumbersome and underused.

In its consultation, the Government set out ambitious proposals for the regime. These included enabling the CMA to impose remedies at the end of a first phase market study or, alternatively, creating a new single-stage tool.

In light of the feedback received, the Government intends to retain the current two-stage framework for market inquiries. It has also dropped the proposals to enable the CMA to impose interim measures from the beginning of the market inquiry process and remedies at the end of the market study stage. Instead, its focus is on injecting flexibility into the existing regime by:

- allowing the CMA to accept binding commitments from businesses at any point during a market inquiry
- removing the requirement to consult on a market investigation reference within the first six months of a market study
- giving the CMA greater flexibility to define the scope of a market investigation
- enabling the CMA to require businesses to conduct implementation trials of certain consumer information remedies
- giving the CMA greater powers to review and amend existing remedies for up to ten years after the finding of an adverse effect on competition – the CMA will be able to vary, expand or supplement remedies, but there will be a two-year cooling off period during which no further amendments can be made (unless instigated by the parties in response to a change in circumstances)

Crucially, the Government more generally encourages the CMA to make maximum use of the flexibility its market study and market investigation tools provide. In particular, it supports the CMA more regularly consulting on a market investigation reference directly without first carrying out a market study. We may therefore see more of these types of investigation in future.

Anti-competitive conduct: stronger and faster enforcement

In relation to the competition regime, the Government's objective is to ensure stronger enforcement which will deliver faster and more flexible investigations.

Its original proposals covered a wide range of issues. It plans to take many of these forward, but in some instances has taken on board feedback regarding the need for fair and certain processes for businesses. Below are the most significant reforms.

Expanding the territorial scope of the prohibition on anti-competitive agreements

The Government will amend the scope of the Chapter I prohibition so that it will apply to agreements that are implemented outside of the UK, but which have, or are likely to have, effects within the UK.

It has decided against a corresponding change to the Chapter II prohibition (abuse of dominance) on the basis that there is less compelling evidence of an enforcement gap. Instead, the main change to the Chapter II rules is a reduction in the turnover threshold for immunity from fines for abuse of dominance infringements from GBP50m to GBP20m.

Greater evidence-gathering powers for the CMA

The Government plans to introduce a number of new powers to facilitate evidence gathering in competition investigations, including:

- a broader power for the CMA to interview individuals regardless of their connection with the firm under investigation
- a duty not to destroy evidence in competition investigations, with civil (but not criminal) sanctions for breach
- the CMA having seize and sift powers when carrying out dawn raids at domestic premises under a warrant – with the increase in hybrid working patterns the Government thinks it is more likely that relevant evidence will be located in private homes
- greater powers for the CMA to obtain electronic information, eg in the cloud, when carrying out raids under a warrant

No immunity from damages for leniency applicants

In its consultation the Government sought views on the merits of providing holders of full immunity in the public enforcement process with additional immunity from liability for damages caused by a cartel. This would have been a radical change.

The Government is not taking forward the proposal. It notes that there is mixed evidence of leniency applications being frustrated by the risk of private damages liability. Changes already made in 2017 to provide some protections to leniency recipients may need more time to take effect, and therefore any further amendments at this stage would be premature. But the Government will keep the issue under review.

Changes to Competition Appeal Tribunal processes

Continuing a long-running debate, the Government sought views on whether the current "on the merits" standard of review – which enables the Competition Appeal Tribunal (CAT) to carry out an in-depth review of the law and facts in appeals against CMA infringement decisions – remains appropriate, or whether there should be a switch to a judicial review standard. Significantly, the Government has followed the vast majority of respondents and decided to maintain the full merits standard.

However, the Government does intend to change the standard of review for appeals against interim measures decisions from full merits to judicial review. This is despite respondents being similarly opposed to this proposal. It thinks that the current review standard risks interim measures not being applied when they are warranted.

Other important changes the Government plans to make to CAT procedures include:

- giving it (and the courts) the discretion to award **exemplary damages** for breaches of competition law – this possibility was removed by the EU Damages Directive, but post-Brexit the UK has the flexibility to take a different approach (although, crucially, exemplary damages will not be available in collective proceedings)
- enabling it to grant **declaratory relief** – the Government believes this will avoid the need for parties to formulate their claims as damages claims or applications for injunctions, when a statement of how the law applies to the facts would be the most helpful

Separately, the Government is reviewing the CAT's rules, which date from 2015. More reforms may therefore be on the cards.

Tougher sanctions for non-compliance across the board

For many years, the CMA has called for tougher powers to sanction companies **for failing to comply with investigations**, including information requests, to bring the UK rules in line with the EU and other international equivalents. At the moment, UK penalties are capped at GBP30,000 (or a GBP15,000 daily rate).

The Government plans a significant increase: fixed penalties of up to 1% of annual turnover and additional daily penalties of up to 5% of daily turnover while non-compliance continues. Natural persons who fail to comply with investigative measures face fixed penalties of up to GBP30,000 and a GBP15,000 daily penalty.

However, proposals to introduce personal accountability for the provision of evidence, and to extend the current prohibition against the provision of false or misleading information to the CMA to voluntary submissions (both of which were criticised by many respondents to the consultation), have been dropped.

Where companies **fail to comply with remedies**, the CMA's current powers are limited to asking the court for an enforcement order. The Government will change the rules to enable the CMA to impose fixed penalties of up to 5% of annual turnover (and additional daily penalties of up to 5% of daily turnover).

These reforms will significantly bolster the CMA's powers to enforce against procedural breaches. We have seen the CMA impose huge fines recently for breaches of interim enforcement orders in merger control cases. We can therefore expect that the CMA will not be shy in making full use of these new sanctions.

A more active role for Government

More generally, the Government wants to implement a "more active pro-competitive strategy" for the UK. It intends to pursue three reforms:

- **More "State of Competition" reports**, where the CMA reports to Government on the health of competition in the UK economy. In good news, the Government has dropped the proposal for the CMA to be able to make compulsory information requests to gather evidence for these reports.
- **A new duty of expedition**. This will require the CMA to carry out its competition and consumer functions (including any functions under the new digital markets regime) expeditiously. This reflects the Government's general objective that competition and consumer cases should be conducted as efficiently as possible.
- **More regular "strategic steers" to the CMA**. The Government plans to provide greater clarity about its priorities and expectations, and to update these more regularly. They will remain non-binding, but as we noted when the proposals were announced, the Government will need to be careful to ensure that the CMA retains its position as an independent authority.

We will continue to keep you updated as the Government progresses the reforms.

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