

September 2021

Change on the horizon...CMA consults on proposed reforms to UK competition & consumer policy

On 20 July 2021, the Secretary of State for Business, Energy and Industrial Strategy ("**BEIS**") published a consultation which puts forward the most significant and extensive set of proposed reforms to the UK's competition and consumer policy since the creation of the Competition & Markets Authority ("**CMA**") almost 10 years ago.¹

The Government's proposed reforms are underpinned by its 'levelling up' agenda, its economic recovery plans post Covid-19/post-Brexit and the perception that some markets are not sufficiently competitive. The Consultation recognises that the UK's competition regime has been working well (across most metrics and internationally) but indicates that it could be improved to reduce the burden on businesses and allow for more timely, efficient and effective procedures and outcomes. The reforms aim to give businesses the confidence that they are competing on "*fair terms*" and "*getting a good deal*".² The Consultation closes on 1 October 2021.

Given there are numerous competition and consumer proposals, this briefing focuses on the Government's key suggested reforms.

Key Competition Policy Reforms

Merger Control Makeover

The Consultation considers that it is in consumer and business interests alike to maintain the voluntary and non-suspensory nature of the UK's merger control regime as it currently strikes an "*appropriate balance between consumer protection and regulatory burden*".³ However, the Government has proposed a number of far-reaching reforms, including:

- (a) Revised turnover thresholds increasing the current target turnover threshold of £70 million to £100 million to reflect inflation and focus on mergers more likely to lead to competitive harm.
- (b) A new jurisdictional threshold to address emerging threats to competition (i.e., 'killer acquisitions') in fast-moving markets (e.g., technology, pharmaceuticals) and to enable the CMA to review a wider range of potentially harmful deals (including vertical mergers) where only one party has at least: (a) a share of supply of 25% or more of goods/services supplied or acquired in the UK (or a substantial part of the UK); and (b) a UK turnover of £100 million.
- (c) Introduction of a 'safe harbour' for mergers between small businesses where the worldwide turnover of each of the parties is below £10 million to provide greater comfort to small businesses thereby promoting innovation.
- (d) Reforms to the CMA's investigative procedures, including: enabling parties to agree commitments to address competition concerns earlier in a Phase 2 investigation; narrowing the scope of the Phase 2 review to issues identified at Phase 1; and allowing parties to request a 'fast track' merger route to a Phase 2 without being compelled to concede the transaction gives rise to a substantial lessening of competition.

Transforming Market Reviews

The Consultation identifies concerns with the current UK market study and investigations regime, indicating it is overly cumbersome and significantly underused. The Government has proposed the following reforms in order to deliver more efficient, flexible and proportionate processes:

¹ Department for Business, Energy and Industrial Strategy, '*Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers*', July 2021.

² The reforms follow contributions from a range of stakeholders the Government sought feedback from on competition policy, including, Professor Furman, Lord Tyrie (CMA Chair) and John Penrose MP. These commentators argued the regime could be slow and lacking in powers necessary to prevent harms in the 21st century economy.

³ Note, while the Government does not currently intend to alter the voluntary nature of the regime, it recognises in its separate

consultation on the Digital Markets Unit (i.e. '*A new pro-competition regime for digital markets*'), that mandatory notifications may be appropriate in specific sectors, such as large transactions for companies with strategic market status in digital markets. The Government simultaneously opened this Digital Markets Unit Consultation on 20 July 2021 which also closes on 1 October 2021.

- (a) Replacing the existing market study and market investigations system with a new single stage 2-year market inquiry tool to speed up the review process,⁴ or enable the CMA to impose certain remedies (most likely non-structural) at the end of a market study without a need for a market investigation (as the current process requires).
- (b) New powers for the CMA to impose interim measures to prevent potential harm while market reviews are ongoing to resolve issues more quickly, including accepting binding commitments at any stage during the market review.⁵
- (c) A more versatile and effective process for remedy design, specifically, giving the CMA a power requiring businesses to participate in implementation trials and allowing the CMA to test and trial how best to implement its remedies.⁶ Alternatively, expanding powers for the CMA to review and vary the remedies it imposes (or the commitments it accepts) from previous investigations to ensure they are effective and that the objectives of the remedy are being implemented comprehensively.
- (d) Ability to resolve cases sooner through binding commitments whereby the CMA could accept commitments at any stage of a market study or investigation in order to avoid a full investigation.

Elevating Enforcement

Stronger enforcement against unlawful anticompetitive conduct

The Government's ambition is to make enforcement stronger so that the CMA can deliver faster and more flexible investigations which will both identify and resolve anticompetitive conduct more quickly to the benefit of businesses and consumers alike.⁷ The Government's proposals here include:

⁴ Currently, a market study followed by a market investigation can take more than 3 years and so it can take the CMA more than 3 years to impose any remedies to address any competition concerns.

⁵ Unlike Competition Act cases, the CMA cannot impose interim measures during a market investigation even if urgently required to prevent significant damage and/or protect the public interest.

⁶ The Government is concerned that the CMA is not able currently to change remedies after the event, even if they are failing to deliver on their objectives.

⁷ Currently, some investigations under the Competition Act can take a very long time, on average taking over 3 years.

- (a) Expanding the territorial scope of the UK's prohibitions on anticompetitive conduct⁸ to bring the UK's competition law in line with its international partners in globalised markets. The reforms will enable the CMA to investigate conduct which takes place outside the UK but where the anticompetitive conduct has, or, is likely to have, *'direct, substantial, and foreseeable effects within the UK'*. Currently, the CMA can only investigate anticompetitive conduct (including cartels) where that was (or intended to be) implemented in the UK and abusive conduct by dominant firms where that business has a dominant position within the UK (or any part of it).



- (b) Introducing greater incentives for businesses and individuals to inform the CMA of unlawful anticompetitive conduct, including, providing leniency applicants with immunity from follow-on damages actions⁹ and greater protection of whistle-blowers' identities across the enforcement process (unless the CMA relies on the whistle-blower's evidence as part of its infringement decision).¹⁰
- (c) Enhancing the ability of the CMA to impose interim measures during investigations to prevent harm to individuals, businesses and markets from anticompetitive conduct, specifically, removing the obligation on the CMA to provide the parties' access to its file of evidence before issuing the interim measures

⁸ Comprising the Chapter I prohibition on anticompetitive agreements (including cartels) and the Chapter II prohibition on abuse of a dominant position.

⁹ This raises the question as to the impact of this proposal on the rights to damages of victims of anti-competitive behaviour. Co-cartelists may also find themselves liable for significant more damages given the principle of joint and several liability.

¹⁰ Provided the evidence can be corroborated by other third-party sources, the CMA could offer assurances that identities would not be disclosed, for instance.

decision and instead only obliging the CMA to provide notice of the decision itself; and changing the standard of review if an interim measures decision is appealed to the Competition and Appeal Tribunal ("**CAT**").

- (d) Streamlining the CMA's handling of the evidence it obtains and giving the CMA broader evidence gathering powers - in particular, expanding the CMA's power to interview individuals (regardless of their 'connection' to a particular business under investigation) and extending the legal duty to preserve evidence that exists relevant to an investigation but which the CMA has not yet asked for¹¹ as well as extending the "seize and sift" powers to include inspections of domestic premises.
- (e) Increased ability to settle cases at any point during an investigation and for the CMA to streamline the process (e.g., short form decisions) in order to implement a more robust and efficient settlement process. Introduction also of an 'Early Resolution Agreement' tool in dominance cases (that would not be binding as to matters of fact and liability in follow-on damages actions).
- (f) Review of the appeal procedures and standards of review, with the potential to shift from the current standard of a 'full merits' review to a standard based on the principles of 'judicial review'¹² which would make it more difficult for companies to successfully appeal adverse decisions and penalties.

Upgraded investigative and enforcement powers across competition tools

Importantly, as the CMA anticipates that its caseload will grow in both size and complexity post-Brexit, the Government is seeking to elevate the CMA's information gathering and enforcement powers. The objective is to enable the CMA to conduct investigations more swiftly and effectively, align with international best practice and compel businesses of all sizes to cooperate with investigations. Key proposed reforms include:

- (a) Tougher penalties for non-compliance with CMA investigations, allowing the CMA to impose fixed penalties of up to 1% of a

business' annual turnover as well as the additional daily penalties of up to 5% of daily turnover while non-compliance continues.¹³ This is a significant uplift from the current £30,000 fixed penalty and/or daily rate of £15,000 for failure to comply with the CMA's information gathering powers.

- (b) Enhanced personal liability for businesses that provide false or misleading information by requiring directors to take personal accountability for the accuracy of that information through a 'personal declaration', as well as, the potential for false declarations by directors to attract the same civil penalties as supplying false and misleading information to the CMA (i.e. up to £30,000 fixed and £15,000 daily fines) with flagrant breaches of this obligation potentially providing grounds for director disqualification.



- (c) Extension of the current prohibition against the provision of false or misleading information to the CMA (including the fining regime for this offence) to cover the provision of information in response to its voluntary information requests.
- (d) Stronger civil penalties for companies that fail to comply with undertakings or commitments imposed or accepted by the CMA or orders or directions the CMA has given - with the penalty to be capped at 5% of annual turnover and an additional daily penalty being available of up to 5% of daily turnover of the company's

¹¹ Note, importantly, the Government is also considering whether breaches of this proposed new obligation in the context of Competition Act investigations should attract criminal sanctions.

¹² A judicial review standard would be consistent with that imposed for CMA decisions taken on merger control, market studies and market investigations.

¹³ These will be the statutory maximum penalties where the CMA believes, on a civil standard of proof, that a company or individual has failed to comply with an information request or other investigative notice issued by the CMA and lacks a reasonable excuse for non-compliance/or, concealed, destroyed or falsified evidence, or, provided false or misleading information.

corporate group where non-compliance continues.

- (e) Strengthening the ability of the UK's competition authorities to cooperate with their international counterparts. Although the CMA has signed numerous cooperation frameworks with a number of countries (e.g. US, Australia, Canada and New Zealand), it has not done so with some of its largest neighbours.

Active Role for Government

Given the increasing politicisation of competition law that has become apparent globally, it is little surprise that the reforms also propose a more active role for the Government in directing UK competition policy and enforcement. Proposed reforms include:

- (a) Using the CMA as a 'micro-economic sibling' for the Bank of England to better monitor the state of competition in key UK markets.
- (b) Providing clearer and more regular steers and granular strategic targets for the CMA to help align competition policy with that of the Government's, *'Building Back Better: our plan for growth'*¹⁴ and wider economic policy.
- (c) Requiring the CMA to produce regular "State of Competition" reports assessing and documenting the "vibrancy of competition" in the UK.
- (d) Requesting advice from the CMA on how competition law can better support the UK's transition to an environmentally sustainable and net zero economy.

Certainly, the critical question is how Government will perform this role against the backdrop of its traditional independence from the CMA and society's broader need for impartial CMA investigations.

CMA Panel Reshuffle

Interestingly, the Government has proposed reforms to the CMA's Panel¹⁵ in a bid to deliver faster and more consistent decisions in merger and market cases, including:

- (a) A smaller, more dedicated pool of Panel members with their work on the Panel constituting their primary employment thereby

leading to quicker and more consistent decision-making for businesses; and

- (b) A revised role for CMA Panel members to make final decisions on theories of harm and remedies (instead of the full review process) which would allow the CMA greater administrative flexibility in investigations while retaining the role of the Panel as a 'fresh pair of eyes'.

Consumer Policy Reforms

The Government has also proposed a number of different consumer policy reforms to help improve competition and protect consumers (especially vulnerable consumers) from exploitation and to protect their spending – in particular, in light of the increase in online shopping following the Covid-19 pandemic and a rise in consumer spending on subscription contracts that can be difficult to cancel.



Proposed reforms include:

- (a) Strengthening and clarifying the law on the provision of pre-contract information to consumers to tackle "traps" consumers fall into (e.g., minimum contract terms, price per billing period, choice on auto-renewal, minimum notice periods for cancellation to avoid indefinite rollover of contracts, etc.).
- (b) Reminding consumers of their subscriptions and how they may easily cancel such subscriptions that are automated so that this can be achieved in a simple and timely manner.
- (c) Strengthening the legislation on fake online reviews by imposing a total ban on traders paying or incentivising consumers to submit reviews – or at least limit it to fake reviews.

¹⁴ The Government's *'Building Back Better'* plan sets out its strategy for growth focusing on investment across three pillars, infrastructure, skills and innovation.

¹⁵ Currently there are 33 Panel members most of whom perform their roles on a part time basis serving as decision makers on investigations as and when required.

- (d) Mandating the protection of customers' money to reduce the risks faced by pre-paying consumers of traders that become bankrupt/insolvent.
- (e) Enhancing the powers and legislation to take action against website operators which collect and use consumer data to unfairly exploit consumers' behavioural biases and influence purchasing decisions.
- (f) Strengthening enforcement powers, including introducing fines of up to 10% of global turnover for traders in breach of consumer protection law and sanctions for traders that fail to comply with the enforcement process.
- (g) Improving access to, quality and oversight of alternative dispute resolution services, such as arbitration and mediation in order to encourage faster independent dispute resolution for consumers.
- (h) Strengthening the UK's collective redress scheme to improve direct access to remedies for victims of consumer law infringement.

Next Steps

The proposed reforms if adopted (some of which will of course fall away) look to generate significant efficiencies in policy and procedure. However, it is debatable whether some of these reforms which look to introduce speed and quicker decision-making may result in unfair bias interventions, impair rights of defence and make the already heavy regulatory landscape even more challenging and difficult for businesses to navigate. The proposals are at the initial stage and the Consultation is an opportunity for third parties to help frame the way UK competition law and consumer policy develops. It awaits to be seen which of the wide-ranging reforms are ultimately put in place, but, no doubt, the UK's competition and consumer rules are in for a radical change!

Contact us



Marta Isabel Garcia

Partner

T: +44 20 7809 2141

E: marta.garcia@shlegal.com



Anna Victoria Delahey

Senior associate

T: +44 20 7809 2013

E: anna.delahey@shlegal.com



Rhiannon Davies

Senior associate

T: +44 20 7809 2033

E: rhiannon.davies@shlegal.com



Will Spens

Associate

T: +44 20 7809 2365

E: will.spens@shlegal.com