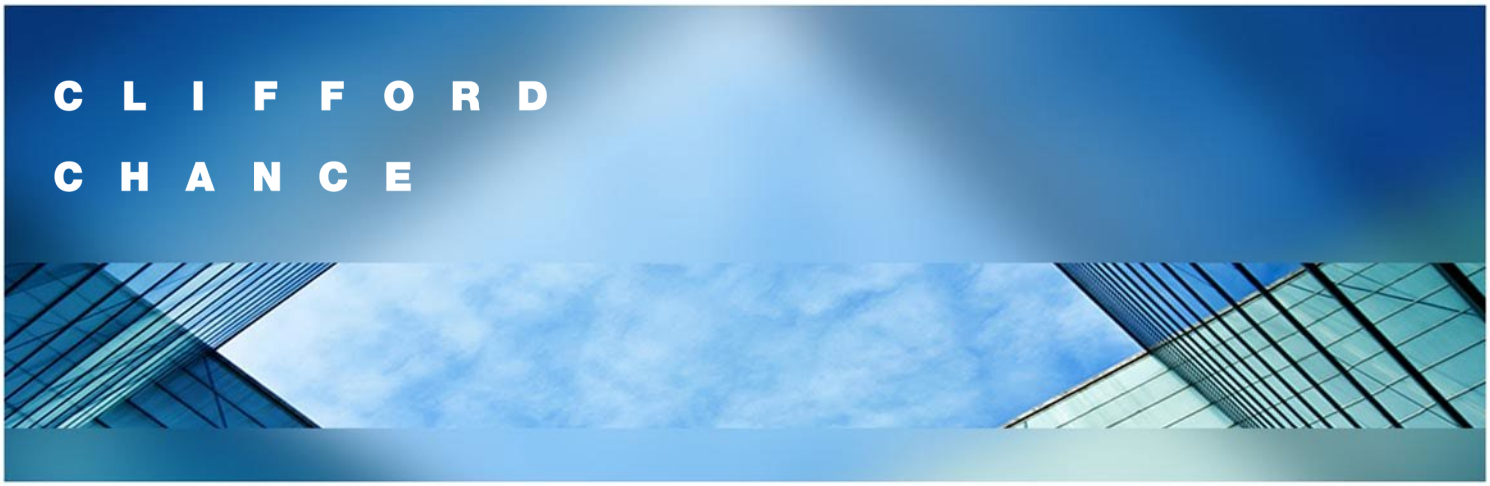

REFORMING THE UK COMPETITION AND CONSUMER REGIMES: DIGITAL MARKETS AND BEYOND

The UK Government has published not one, but two consultations on proposals to reform the UK competition and consumer law regimes. These include the Government's proposals for the new pro-competition regime for digital markets to be enforced by the Digital Markets Unit (**DMU**) in the Competition and Markets Authority (**CMA**).

BACKGROUND TO THE REFORMS

The proposals have been a long time in the making, and widely anticipated following:

- the report published by John Penrose MP in February 2021 to update and modernise the UK competition and consumer rules for an increasingly digitised economy (see our February 2021 briefing); and
- the launch of the DMU in "shadow form" in April 2021 (see our April 2021 briefing).

The reforms also build on the thinking and advice received by the Government over the last couple of years through the Furman Report in March 2019; proposals of the former Chair of the CMA, Lord Tyrie in 2019; the CMA's market study into online platforms and digital advertising in July 2020; and the Digital Markets Taskforce's (**DMT**) advice in December 2020, as well as a number of Government consultations going back as far as 2016.

The consultations are open until 1 October 2021.

PROPOSALS FOR DIGITAL MARKETS

The Government's proposals set out the roadmap for the DMU's likely powers to oversee the new pro-competition regulatory regime for digital activities. The DMU will be forward-looking and equipped to act swiftly in response to rapidly-evolving digital sectors, with the core purpose of addressing both the sources of market power and the economic harms that result from the exercise of that market power.

While the Government accepts that the size and presence of big digital firms is not inherently bad, the proposals reflect concerns that certain characteristics of digital markets may lead them to "tip" in favour of a single incumbent, or a few firms.

Key issues

Digital markets proposals

- How will the DMU assess whether businesses have Strategic Market Status?
- How will the DMU's code of conduct be designed and enforced?
- What powers will the DMU have to implement pro-competitive interventions to address the root causes of market power?
- What obligations will be imposed on Strategic Market Status firms in the context of the revised merger review framework?

Competition regime proposals

- What new jurisdictional thresholds are proposed?
- What procedural reforms are in store for the merger and markets regimes?
- What new investigation and remedy powers are proposed for the CMA?
- Will the standard of appeal for infringement decisions change?

Consumer regime proposals

- How will the enforcement of consumer protection laws be reformed?

The DMU's role and objectives

The Government considers that the DMU's duty should be limited to promoting competition for the benefit of consumers, in line with the "tried and tested" statutory duty of the CMA. In particular, the consultation document rejects the DMT's proposal to have regard to the interests of citizens, which would extend beyond competition policy. One question for consultation is whether the DMU should have a supplementary duty to have regard to innovation.

The DMU will be tasked with implementing and enforcing a code of conduct for businesses, or parts of businesses, that will be designated as having Strategic Market Status (**SMS**). It will likely also have the power to impose so-called pro-competitive interventions (**PCI**) on SMS businesses to tackle the underlying sources of market power and promote competition.

How will Strategic Market Status be assessed?

The Government proposes that SMS designation would not require formal market definition for a robust assessment of market power, to avoid what the Government currently regards as an otherwise "less efficient" designation process. Instead, the DMU should be able to group certain products, services and processes into a single activity – provided digital technologies are "core components" of that activity – such that SMS designation would be based on firms' market power in respect of activities, rather than relevant markets. This approach would also allow for shorter assessment periods than the 12 months suggested by the DMT.

The proposal is that SMS designation should require a finding of both substantial *and* entrenched market power, with particularly widespread or significant effects which provide the firm with a strategic position. The assessment will be based on quantitative thresholds as well as a range of qualitative evidence, including competitive interactions between firms, customer switching and behaviour, and barriers to entry. The definition of a "strategic position" and assessment criteria are to be set out in legislation.

It is envisaged that SMS status would apply to the whole corporate group, not just the part of the group undertaking the relevant activities.

An enforceable Code of Conduct for SMS businesses

The DMU will enforce a code of conduct consisting of high-level objectives and principles that specify the behaviour expected of businesses with SMS in connection with their SMS designated activity. A key area that remains subject to consultation is the extent to which principles and rules are either set in legislation or determined by the DMU, or a combination of both. The Government's preference is for high-level principles to be set in legislation, with DMU powers to specify additional firm-specific legally binding requirements tailored to the harms specific to each SMS activity. However, the Government is also consulting on whether the DMU's role should be limited to applying legislative principles, or expanded so that it sets the high-level principles itself.

The Government also proposes to give the DMU the power to issue code orders and interim code orders to address breaches.

Potential for wide-ranging pro-competitive interventions

A key proposal is to grant the DMU powers to impose a wide range of PCIs to "*address the root causes of substantial and entrenched market power*", which

suggests that the Government views market power as problematic in itself (unlike the concept of dominance under antitrust rules). The proposed PCIs and consequences of non-compliance effectively amount to a hybrid between sanctions under the market investigation and antitrust regimes.

Remedies would be similar to those available to the CMA under the market investigation regime and based on the same legal test of an "adverse effect on competition". The Government has rejected the DMT's proposal to broaden the scope to focus on consumer harm without needing to show that competition has been undermined.

The Government also proposes to empower the DMU to trial, review, modify and terminate remedies (including voluntary, enforceable undertakings), and to direct firms with SMS to take specific actions to comply with a PCI order. It is envisaged that the DMU will be able to implement PCIs anywhere within an SMS firm, including outside the designated activity, provided the concern relates to the designated activity.

Breaches of the code and failures to comply with PCI orders could attract fines of up to 10% of worldwide turnover, similar to antitrust infringements.

Appeals limited to judicial review standard

The Government currently proposes no more than a judicial review standard of appeal to ensure that "*appropriate deference is given to the DMU's position as an expert regulator*". However, it recognises that a higher "merits" standard of review may be necessary for decisions that impose significant financial penalties – it has not mentioned significant PCI remedies in this context even though their impact could be at least as significant as financial penalties.

Revised merger review framework for SMS businesses

The Government proposes to introduce a revised statutory framework for reviewing mergers involving SMS designated businesses, which includes a requirement for SMS designated businesses to report all mergers and acquisitions to the CMA, and a new mandatory and suspensory merger notification regime based on a transaction value threshold (i.e. a purchase price in the region of £100 million - £200 million) coupled with a UK nexus test.

Even more strikingly, the proposals envisage that a lower and more cautious standard of proof could apply in Phase 2 investigations: rather than assessing whether there is a substantial lessening of competition (**SLC**) based on the balance of probabilities (i.e. more likely than not), the intervention threshold would be lowered to allow the CMA to block mergers where there is a "realistic prospect" of an SLC, i.e. the threshold currently used in Phase 1 to identify competition concerns and decide whether to refer a case for a Phase 2 investigation. Accordingly, the CMA would be able to block mergers that may be efficiency-enhancing or pro-competitive, on the basis of competition concerns to which it assigns a considerably lower probability of occurrence.

Given the CMA's recent track record – showing a sharp increase in Phase 2 interventions in the last 24 months – it is questionable whether the existing substantive test and burden of proof have actually prevented the CMA from intervening and, therefore, whether a lowering of the intervention threshold really is needed.

BROADER REFORMS TO THE COMPETITION REGIME

The Government also proposes wide-ranging reforms to the UK competition regime, intended to support the Government's growth strategy, following declining levels of competition since 1998, compounded by the economic effects of the COVID-19 pandemic.

Greater role for government in competition policy

The Government proposes to take a more active role in setting the strategic direction for the UK's competition policy, including issuing more detailed and regular strategic steers to the CMA based on the CMA's State of Competition reports.

New and revised merger control thresholds

The merger control proposals include revised jurisdictional thresholds designed to reduce the burden on small businesses as well as to better address "killer acquisitions" (see box to the right). The Government proposes to change the jurisdictional thresholds for merger review, in particular by adding a new threshold that is intended to empower the CMA to review mergers that may harm competition even if they do not involve current, direct competitors. A striking feature of this threshold is that it would give the CMA jurisdiction over a large number of transactions with no nexus whatsoever to the UK, purely on the basis of the acquirer's business activities in the UK. The Government's proposals do not address the rationale for this.

The Government's plans to improve efficiency during merger reviews are more welcome. These include allowing the CMA to agree binding commitments earlier during Phase 2; restricting the scope of the CMA's Phase 2 review to only the concerns the CMA identified at Phase 1; enabling parties to request automatic reference to Phase 2 review (with no need for Phase 1 and three weeks added to the Phase 2 timeline) without a requirement to formally accept that the merger could result in an SLC; and reducing unnecessary delays at Phase 2.

Stronger CMA powers in market inquiries

The Government has also proposed a number of changes to strengthen the CMA's powers and increase flexibility in the markets regime. In particular, the proposals include:

- enabling the CMA to impose remedies at the end of a market study to remedy an adverse effect on competition (likely limited to non-structural remedies);
- as an alternative, replacing market studies and market investigations with a single stage market inquiry of up to two and a half years;
- providing the CMA with the power to impose interim measures at an earlier stage in market inquiries, and to accept binding commitments at any stage in the process; and
- reforming the CMA's toolbox of remedies, including the power to require businesses to participate in trials to test its consumer-facing remedies.

Proposed merger thresholds

- The target must have UK turnover of more than £100 million (*increased from £70 million*); or
- The creation or enhancement of at least a 25% share of the supply of particular goods or services in the UK, or a substantial part of the UK (*no change*); or
- Any party to the merger (including the acquirer) has at least a 25% share of supply, and UK turnover of more than £100 million (*new threshold*).
- However, irrespective of the above thresholds, no CMA jurisdiction if the worldwide turnover of each of the merging entities is less than £10m (*new safe harbour for small mergers*).

Antitrust investigations: wider jurisdiction, more powers of investigation and greater incentives for leniency

The proposals introduce changes to incentivise businesses and individuals to report infringements, including:

- extending immunity under the leniency regime to cover also immunity from follow-on damages claims (to address concerns regarding the ease of targeting leniency applicants and the potentially extensive scale of exposure to private damages claims);
- protecting the identity of whistle-blowers, unless the CMA relies on their evidence in the infringement decision; and
- streamlining of the settlement process, including enabling the CMA to rely on businesses' admissions of fact or liability as binding, and allowing the CMA to produce short form decisions.

In addition, the territorial scope of the CMA's jurisdiction would be extended to include agreements and conduct which have, or are likely to have, direct, substantial, and foreseeable effects within the UK, even if not "implemented" in the UK.

Stronger CMA investigative and enforcement powers

The Government proposes to strengthen the CMA's information collection and related sanctioning powers for companies that slow down or obstruct investigations (see box to the right).

It is also considering:

- making it easier for the CMA to impose interim measures, by removing the access to file requirement such that the CMA would only have to provide the business with notice of the proposed decision to impose interim measures and the related reasons;
- new antitrust powers for the CMA to interview third parties with no connection to a business under investigation and to seize evidence during dawn raids without a warrant;
- wider legal duties for investigated parties to preserve evidence and stronger powers of inspection for the CMA;
- giving the CMA the freedom to dispense with the requirement that officials who decide whether to find an antitrust infringement and impose a penalty must be different from those that have overseen the investigation up to the issue of a statement of objections; and
- given that many companies' activities are increasingly cross-border, enhanced powers for the CMA to cooperate with international counterparts, including compulsory information gathering powers to obtain information on behalf of overseas authorities.

The Government is also seeking views on the appropriate level of judicial scrutiny by the Competition Appeal Tribunal (**CAT**) of CMA antitrust interim measures, infringement and fining decisions. These appeals are currently reviewed on the "merits" standard, rather than the less exacting judicial review standard. However, the consultation recognises that businesses and the CAT itself are strongly supportive of the merits standard, and that the CMA's strong success rate in appeals of its decisions before the CAT suggests that concerns

Tougher penalties

- For failure to comply with information gathering requirements in competition and consumer law investigations, fines of up to 1% of annual worldwide turnover plus a daily penalty of up to 5% of daily turnover while non-compliance continues.
- For failure to comply with remedies, fines of up to 5% of annual worldwide turnover, plus a daily penalty of up to 5% of daily turnover while the non-compliance continues.
- Expanded personal accountability to apply to false declarations by a director, in line with the penalties for providing false or misleading information (£30,000 cap). Flagrant breaches could result in director disqualification.
- Extension of the prohibition against the provision of false or misleading information to information provided under voluntary requests.

about the current standard may not be borne out in practice. Consequently, while the Government invites views on the appropriate standard of review, it has not put forward any proposal for reform, and notes that any change would need to be justified by its contribution to improved efficiency of enforcement, without prejudicing the quality of the CMA's decision-making.

REFORMS TO THE CONSUMER LAW ENFORCEMENT REGIME

As recommended by the Penrose Report, the Government proposes to strengthen the enforcement of consumers' rights, in particular by enhancing the CMA's (and sector regulators') civil consumer enforcement powers to match its competition powers. This would include powers to issue decisions and impose fines for infringements – such as non-compliance with information gathering powers, breaches of undertakings, and breaches of consumer protection law – without having to seek a court order. This administrative model would enable the CMA to conclude cases faster and incentivise compliance. The consultation seeks views on the level of judicial scrutiny that should apply to such administrative decisions by the CMA, including whether appeals should be heard by a generalist court or a specialist tribunal, and whether it should be able to review issues of fact, admit fresh evidence, quash decisions, and/or substitute its own decision.

For failure to provide information, fines for non-compliance would be in line with the proposals under the competition regime (see box on the previous page).

The Government is also considering the option of a voluntary redress payment instead of, or in addition to, a financial penalty, and the possibility of allowing private organisations and consumer organisations to bring collective redress cases.

MAKING YOUR VIEWS HEARD

These two consultations mark the most extensive and ambitious proposals in a decade for reform of the UK competition and consumer regimes, reflecting the significant changes to market dynamics since existing legislation was enacted, and the perceived need for a bespoke regulatory regime for digital markets.

The Government is particularly interested in the views of large and small technology companies, investors in technology companies, start-ups advertisers, and publishers. Businesses and other stakeholders are invited to submit their views on the proposals until 1 October 2021:

- Open consultation: A new pro-competition regime for digital markets;
- Open consultation: Reforming competition and consumer policy.

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