

CHANGES TO THE UK COMPETITION AND CONSUMER PROTECTION REGIMES ANNOUNCED

The UK Government has confirmed its plans for various reforms of competition and consumer protection laws. Most are refinements to make enforcement processes more effective and efficient. However, some could have significant implications for businesses, such as the ability for the Competition and Markets Authority (**CMA**) to impose fines of up to 10% of global turnover for consumer law breaches, the introduction of a new merger control threshold and the possibility for the CMA to change market investigation remedies for up to 10 years after they are imposed.

BROADER REFORMS TO THE COMPETITION REGIME

Following a consultation in 2021 on various options for reform of competition laws (see our briefing "[Reforming the UK Competition and Consumer regimes: Digital markets and beyond](#)"), the Government has now decided which reforms it will take forward in legislation. It has not yet announced its decision on proposals for a new regulatory regime for digital markets – this will be published separately and there are signs that any reforms focusing on digital regulation may be subject to further delays.

Greater role for government in competition policy

The Government is 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 UK merger control regime will remain a voluntary filing regime. However, the Government intends to change the jurisdictional thresholds, so that the CMA will be able to review a merger if:

- The target has UK turnover of more than £100 million (increased from £70 million); or
- The merger creates or enhances 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 33% share of supply, and UK turnover of more than £330 million (new threshold).

Key issues

- What new jurisdictional thresholds are intended for merger control reviews?
- What procedural reforms are in store for the merger and markets regimes?
- What new investigation and remedy powers are intended for the CMA?
- How will the enforcement of consumer protection legislation change?

However, irrespective of the above thresholds, the CMA will no longer have jurisdiction if the UK turnover of each of the merging entities is less than £10m (new safe harbour for small mergers).

In response to concerns raised during the consultation, the Government has confirmed that the new threshold will be accompanied by a UK nexus criterion, to ensure that only mergers with an appropriate link to the UK will be captured.

The new threshold will make it easier for the CMA to investigate certain acquisitions of potential competitors that do not yet supply in the UK. However, the CMA has already asserted jurisdiction over such cases under the current thresholds, albeit on the basis of an interpretation that was vulnerable to challenge. The change will also allow certain "vertical" mergers between operators at different levels of the supply chain to be reviewed, that previously fell outside the CMA's jurisdiction.

In a welcome development for many businesses, the Government is also proposing to implement various reforms to improve efficiency during merger reviews. These include allowing the CMA to agree binding commitments earlier during Phase 2 and enabling parties to request automatic reference to Phase 2 review (with no need for Phase 1 and an option for the CMA to add three weeks to the Phase 2 timeline) without a requirement for the parties to formally accept that the merger could result in a substantial lessening of competition. However, it has decided not to require the CMA to limit its Phase 2 investigations to competition issues that are identified during the Phase 1 review.

Stronger CMA powers in market inquiries

The Government has decided to refine the market inquiry regime by:

- allowing more opportunity for binding commitments to be accepted during both Phase 1 market studies and Phase 2 market investigations;
- providing the CMA with greater flexibility to define the scope of market investigations;
- removing the requirement to consult on a market investigation within the first six months of a market study;
- enabling the CMA to require businesses to conduct trialling of remedies, to determine their final format; and
- enhancing the CMA's ability to amend remedies in a 10-year period following its finding of an adverse effect on competition.

However, the Government has opted not to proceed with proposals to allow the CMA to impose remedies at the end of a Phase 1 market study, or to impose interim measures at an earlier stage than is currently possible. It will also not replace the two-stage structure of the market inquiry process with a single stage market inquiry.

Antitrust investigations: wider jurisdiction and more flexible investigations, but no new incentives for leniency

The intended reforms will expand the territorial scope of the CMA's jurisdiction 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 (similar to EU and US antitrust rules).

The CMA will also be freed from the existing 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.

However, the Government has opted not to create additional incentives for businesses and individuals to report infringements by extending immunity under the leniency regime to cover also immunity from follow-on damages claims, and by protecting the identity of whistle-blowers. It has also decided against a new mechanism that would have allowed businesses to settle abuse of dominance investigations without an admission of an infringement, and with no binding findings of fact or law for the purpose of follow-on damages claims.

Stronger penalties and investigative powers

The Government intends 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 also intends to introduce:

- an easier process for the CMA to impose interim measures, by removing the access to file requirement (so that the CMA will only have to provide reasoned notice of a proposed decision to impose interim measures) and making appeals against such decisions more difficult by subjecting them to the judicial review standard;
- new antitrust powers for the CMA to interview third parties with no connection to those under investigation. It will also have new powers when carrying out dawn raids with a warrant to seize evidence from domestic premises and to obtain electronic information stored remotely (e.g. in the cloud);
- wider legal duties for investigated parties to preserve evidence; and
- 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 also sought views on the appropriate level of judicial scrutiny by the Competition Appeal Tribunal (**CAT**) of CMA antitrust interim measures, infringement and fining decisions. In light of consultation responses, it has decided not to move from a "merits" standard of review for appeals against infringement decisions to a weaker "judicial review" standard, and will legislate for the merits standard to apply also to appeals against decisions imposing penalties for non-compliance with the CMA's investigative measures and remedies.

Separately, the CAT and other courts that hear private competition law claims are to be given the discretion to award exemplary damages (i.e. punitive damages, in excess of a claimant's proven losses) for breaches of competition law.

REFORMS TO THE CONSUMER LAW ENFORCEMENT

The Government has confirmed that it will proceed to implement reforms to strengthen the enforcement of consumers' rights, in particular by enhancing the CMA's (and other sector regulators') civil consumer enforcement powers to match its competition powers. This will include powers to issue decisions and impose fines for infringements without having to seek a court order. This

Tougher penalties

- For failure to comply with information gathering requirements in competition and consumer law investigations, fines for businesses of up to 1% of annual turnover plus a daily penalty of up to 5% of daily turnover while non-compliance continues. For individuals these caps will be £30,000 and £15,000 respectively.
- For failure to comply with remedies, fines of up to 5% of annual turnover, plus a daily penalty of 5% while the non-compliance continues. The maximum penalty for individuals that breach consumer protection remedies will be £150,000, plus daily fines of £15,000.
- Extension of the prohibition against the provision of false or misleading information to information provided under voluntary requests.

includes breaches of consumer protection law, for which fines of up to 10% of annual worldwide turnover will be possible, as well as procedural infringements such as breaches of undertakings given to the CMA and non-compliance with information gathering powers (see "Tougher Penalties" box, for details of the maximum penalties). Decisions by the CMA to impose fines will, however, be subject to the possibility of an appeal to the courts on the merits standard.

This administrative model will enable the CMA to conclude cases faster and incentivise compliance. However, only "core" pieces of consumer protection legislation will be brought into this model. For others that "go beyond resolving 'structural market problems' adversely impacting consumer choice", the CMA will still be required to enforce them before the courts. These will be identified in forthcoming legislation.

In light of differing views put forward during the consultation, the Government has decided not to implement proposals to allow private and consumer organisations to bring collective redress cases under consumer protection laws.

The Government's announcement also includes various reforms to consumer protection legislation relating to subscription traps, fake reviews, consumer prepayment schemes and package travel.

COMMENT

The announced reforms are numerous and wide-ranging, but most are refinements to make enforcement processes more effective and efficient, rather than wholesale structural changes of the type that the Government implemented in its last major reform of the competition rules a decade ago.

The change that is likely to have the widest impact is the ability for the CMA to impose fines of up to 10% of global turnover for consumer law breaches. However, for companies subject to market investigations the possibility for the CMA to tinker with remedies for up to 10 years after they are imposed could also have adverse effects, by making remedies much more intrusive.

From the Government's perspective, the proposed changes to the market inquiry regime and merger control thresholds may be sufficient to allow the CMA to address key challenges it has identified in "digital markets", meaning that enhanced powers for the CMA's Digital Markets Unit as part of a separate digital regulation regime may no longer be a priority in the UK.

In any event, for many businesses, the most significant aspect of the Government's announcement relates to mooted reforms that are not being pursued. In particular, collective actions for consumer law breaches, watering down the review standard for appeals against competition law penalties and greater use of interim remedies in market investigations could all have had significant adverse impacts.

CONTACTS

Chandralekha Ghosh
Counsel

T +44 20 7006 8438
E chandralekha.ghosh
@cliffordchance.com

Elizabeth Morony
Partner & Head of
Global Antitrust
Litigation Group

T + 44 20 7006 8128
E elizabeth.morony
@cliffordchance.com

Matthew Scully
Partner

T + 44 20 7006 1468
E matthew.scully
@cliffordchance.com

Samantha Ward
Partner

T + 44 20 7006 8546
E samantha.ward
@cliffordchance.com

Sue Hinchliffe
Partner

T + 44 20 7006 1378
E sue.hinchliffe
@cliffordchance.com

Alex Nourry
Partner

T + 44 20 7006 8001
E alex.nourry
@cliffordchance.com

Jennifer Storey
Partner

T + 44 20 7006 8482
E jennifer.storey
@cliffordchance.com

Nelson Jung
Partner

T + 44 20 7006 6675
E nelson.jung
@cliffordchance.com

Greg Olsen
Partner & Head of
London Antitrust
Practice

T + 44 20 7006 2327
E greg.olsen
@cliffordchance.com

Luke Tolaini
Partner

T + 44 20 7006 4666
E luke.tolaini
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

© Clifford Chance 2021

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.