Clifford Chance

BRIEFING

The UK government's proposed competition law reforms

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The UK government has issued a consultation on a swathe of reforms to the regimes for enforcement of the prohibitions on anticompetitive agreements and abuse of dominance, opt-out collective damages actions for infringements of those prohibitions and appeals of decisions of sector regulators.

Some of the most significant proposals include immunity from damages actions for companies that report cartels, allowing damages-based agreements for litigation funders, tightening the requirements for certification of opt-out collective damages actions and allowing the CMA to impose fines of up to £300,000 on businesses with no, or unrepresentative, turnover.

What will change?

Following a call for evidence in 2025, the government has issued for further consultation details of proposed changes to UK competition law. A summary of the various proposed reforms is below, with those that we consider to be the most significant highlighted in blue.

For opt-out collective actions, key reforms should benefit claimants and litigation funders by increasing availability of funding through the removal of the prohibition on agreements that reward funders based on a percentage of damages awarded. Defendants, for their part, may benefit from a tightening of the conditions for certifying claims to make it harder for weak claims to progress.

Reforms to enforcement of the Competition Act 1998 prohibitions on anticompetitive agreements and abuse of dominance are largely aimed at improving the speed and procedural efficiency of investigations by the Competition and Markets Authority (CMA) and sector regulators. However, many of these improvements would come at a cost to the existing safeguards for parties to the investigation. For instance, proposals to give the CMA more discretion to decide how it makes decisions would result in greater potential for confirmation bias, by allowing officials that make a decision to open investigation also to be part of the panel responsible for deciding, at the end of an investigation, whether an infringement was committed. Rights of parties to access the CMA's case file and to limit or object to the disclosure of confidential information that they have provided would also be curtailed in certain circumstances.

Changes to the regime for challenging decisions of sector regulators (e.g. in relation to price controls) are largely sensible – the Competition Appeal Tribunal (CAT) is more suited than the CMA to decide on such appeals and the introduction of a harmonised review standard would reduce disparity between the various sector regulatory regimes.

The consultation is open until 25 September. If you would like to discuss the implications of the proposals for your business, please reach out to one of the contacts listed at end of this briefing.

Opt-out collective actions

- Ruling out a narrowing of the regime (i.e. to cover only follow-on claims) or an expansion of the regime (i.e. to non-competition law causes of action), subject to the outcome of the ongoing review by the Law Commission of whether to create an opt-out regime for infringements of consumer protection laws.
- Permitting litigation funders to enter damages-based agreements (DBAs), so lifting the prohibition on DBAs in opt-out collective actions that was held to exist by the Supreme Court's judgment in *PACCAR*.
- Requiring the CAT to give an indication of a reasonable return to the funder at certification and the order of payment at certification (based on the expected damages award/settlement sum) and introducing a presumption that funders receive payment at the point of a damages award (i.e. rather than after distribution).
- Raising the certification threshold to require the CAT, when certifying opt-out collective actions, to give greater weight to the strength of the claim, the costs of pursuing the claim in comparison to the expected returns for class members and whether there is sufficient evidence to assess damages on an aggregate basis.
- Full immunity from civil litigation damages for businesses that are the first to report a cartel with no pre-existing investigation ("Type A" leniency applicants), with the CAT retaining discretion to set aside immunity where damages would otherwise be unrecoverable.
- Giving the CMA powers to order businesses to establish mandatory schemes to provide redress to those that have suffered loss because of a competition law infringement, and to accept binding voluntary undertakings to implement such a scheme. Redress schemes for consumers could be based on a presumed level of overcharge.
- Empowering the CAT to order mediation between parties following the exchange of expert reports, with unreasonable failure to engage reflected in costs orders.

- Requiring both parties to file cost budgets following certification and codifying sanctions for behaviour that unreasonably drives up costs.
- A mechanism for settlement offers with automatic cost-shifting consequences in collective proceedings, akin to Rule 45 offers available elsewhere before the CAT.
- Introducing fees for applications before the CAT, initially only for private litigation and linked to the value of claims filed subject to a cap, with the structure to be reviewed within five years.
- More flexible composition of CAT panels that rule on cases, removing the requirement for CAT panels to consist of three members.

More efficient Competition Act 1998 enforcement

- Removing the requirement for CMA officials that take decisions on infringements and penalties in a given case to be different from those who opened the investigation and issued a statement of objections. This would remove the independent scrutiny of case decision groups, and might be seen as similar to the moves to change the panel system in merger control – i.e. prioritising efficiency over checks and balances against confirmation bias.
- Introducing a fixed-amount penalty cap of up to £300,000 for undertakings with no or unrepresentative turnover (where a company has no turnover in the last business year, or the year preceding it, even if they held substantial cash or other assets – addressing situations where the existing cap of 10% of turnover would lead to an excessive or inappropriate penalty.
- Giving the CMA greater flexibility over whether to seek representations before disclosing information for which confidentiality has been claimed.
- Introducing a prescribed framework for the disclosure of information in "confidentiality rings", with standardised terms and civil sanctions for breaches, potentially extended to mergers and markets functions.
- Removing the requirement for the CMA to give companies on which it intends to impose interim measures access to its case file, enabling the CMA to determine disclosure on a case-by-case basis.
- Requiring parties who settle a CA98 investigation to agree not to challenge or appeal the infringement decision (formalising existing CMA practice), and to remove the requirement to issue a formal statement of objections in cases settled before that stage.
- Clarifying that competition disqualification orders (CDOs) can be imposed on former directors of an infringing company (not only current directors) and that conduct of directors in respect of competition law infringements by overseas companies can be taken into account when deciding whether to impose a CDO.

Simplifying the Regulatory Appeals Framework

- Transferring to the CAT responsibility for all regulatory appeals currently determined by the CMA (across the water, energy, air traffic, airports, and postal services sectors), as well as price control matters in the telecoms and water sectors and licence condition modifications in the water sector.
- Introducing a single harmonised appeal standard, under which the CAT would apply judicial review principles while also taking account of the merits to assess whether the regulator's decision was materially wrong, with specified grounds of appeal (error of fact, error of law, or error in the exercise of discretion) and the power to quash and remit decisions, but not substitute them.
- Harmonising eligibility to appeal across sectors so that the right to appeal is granted to licence holders, companies holding appointments and persons whose interests are materially affected, including representative consumer bodies, with permission of the CAT required.
- Introducing cost-capping or other cost-recovery mechanisms to support consumer bodies and others in exercising regulatory appeal rights (in addition to the cost savings resulting from making the CAT responsible for appeals).

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