

Insights

ALL CHANGE: UK GOVERNMENT PUBLISHES SIGNIFICANT REFORM PROPOSALS TO DRIVE CHANGES IN COMPETITION AND CONSUMER LAW POLICY

Apr 29, 2022

SUMMARY

On 20 April 2022, the Department of Business, Energy and Industrial Strategy (BEIS) published its reforms to competition and consumer policy in the UK (see here for the reforms in full). The proposals follow BEIS' July 2021 consultation, and introduce a number of significant changes to the UK's competition law rules, in what the UK Competition and Markets Authority (CMA) considers "perhaps the most important review of competition and consumer policy in a decade". These reforms are designed to bolster the UK's post Brexit competition regime, with the Government seeking to enhance its oversight of the CMA's work and strategy and to ensure that the UK's competition agencies have the right tools and flexibility to investigate and enforce competition laws in an ever-changing landscape.

The BEIS reforms comes at a time of significant change in the UK 's competition law landscape, as the UK begins to diverge from the EU, with upcoming changes to the rules applicable to vertical agreements and cooperation between competitors, as well as new rules relating to digital platforms. Although the UK government is signalling, at least in some respects, a more "business friendly" approach to competition enforcement, we can expect the UK to continue to build on its reputation internationally as one of the world's most active and assertive competition enforcers.

In this article, we consider some of the key competition reforms being pursued by the Government and what they mean for companies doing business in the UK.

Following the conclusion of BEIS' consultation on *Reforming competition and consumer policy*, amid general concerns that competition in the UK has weakened over the last 20 years, the Government has identified a number of areas for reform intended to strengthen competition in UK markets.

The key to the reforms is a more “active pro-competition” strategy. The CMA will be given a statutory duty of expedition in relation to its competition and consumer law functions, including those relating to the new digital competition regime. The Government will enhance its cooperation and communication with the CMA and will work the CMA to deliver “growth, innovation and increased competition, while minimising burdens on business”.

The reforms introduce a number of significant changes to almost all aspects of UK competition policy:

1. CMA’S MARKET INQUIRY REGIME

Market inquiries are a valuable ex-ante tool allowing the CMA (and in some cases, the sectoral regulators) to assess markets, and where necessary, to impose remedies to resolve any competition concerns. However, the process can be highly burdensome and lengthy for businesses. The Government is looking to ensure continued use of market inquiry tools, but at the same time wants to make the process more efficient, flexible and proportionate. Proposed changes include:

- a. Allowing the CMA to accept binding commitments at any stage during market studies and market investigations to remedy or address identified competition concerns (rather than, as is currently the case, towards the end of the statutory timetable).
- b. Removing the requirement for the CMA to consult on whether a market investigation reference should be made within first 6 months of the launch of a market study.
- c. Giving the CMA the power to require businesses to conduct trials when determining the final format of remedies.
- d. Enhancing the CMA’s ability to amend remedies without the need to conduct a fresh market investigation within 10 years of a finding of an adverse effect of competition.

2. REBALANCED MERGER CONTROL

Although the Government considers that the UK’s merger control regime is working well generally, it concludes that there is room for improvement. The Government has been particularly keen to reconsider the CMA’s jurisdictional thresholds, which have historically prevented the CMA from reviewing certain types of transactions, such as “killer acquisitions” where the target has neither the domestic turnover nor the market share to trigger existing jurisdictional thresholds, or other cases where there is no direct competitive overlap between the parties. Although the Government has decided to retain a voluntary regime, it has proposed a number of significant changes designed to better reflect its strategic priorities. These include:

- a. Raising the turnover threshold for CMA jurisdiction in line with inflation from £70m to £100m UK turnover.

- b. Creating an additional basis for establishing jurisdiction, allowing the CMA to review a transaction if one of the parties has a share of supply of 33% in the UK and a UK turnover of £350m.
- c. Introducing a 'small merger' safe harbour exempting mergers from review where each party's UK turnover is less than £10 million, even where the existing 25% market share test is met.

STRONGER ENFORCEMENT OF ILLEGAL ANTICOMPETITIVE CONDUCT

The Government intends to give the CMA enhanced powers to investigate and enforce unlawful conduct, where it has a UK nexus.

- a. The Competition Act '98 Chapter I prohibition on anticompetitive agreements will be amended to apply to agreements which are implemented outside of the UK, but where the conduct has an effect within the UK.
- b. The Government will also enhance the CMA's evidence gathering powers in Competition Act '98 investigations by:
 - i. broadening the CMA's interview powers to permit interviews of any relevant person, regardless of their connection to a business under investigation;
 - ii. extending a legal duty to preserve evidence in cartel investigations to all Competition Act investigations. This duty is likely to be enforced by civil penalties;
 - iii. giving the CMA powers to 'seize and sift' evidence even when it inspects domestic premises under a warrant; and
 - iv. strengthening the CMA's powers to obtain information stored remotely when executing a warrant.
- c. The Government will make it easier for the CMA to pursue an interim measures decision, by lowering the standard of appeal assessment from 'full merits' to that of judicial review principles and amending the rules governing how the CMA grants access to its case file when taking interim measures.
- d. The turnover threshold for immunity from financial penalties under the Competition Act '98 for breaches of the Chapter II prohibition (abuse of a dominant position) will be reduced from £50m to £20m.
- e. The Competition Appeal Tribunal ("CAT") will also be given enhanced powers:
 - i. The Government proposes to expand the jurisdiction of the CAT enabling it to grant declaratory relief, with the intention that parties would no longer need to formulate claims for private redress as damages claims or injunctions when a declaration of how the law applies to the facts of the case would be more appropriate.

- ii. Additionally, the courts and the CAT will be able to award exemplary damages for particularly egregious breaches of competition law (unless the case in question is a collective proceeding).

4. CROSS-CUTTING REFORMS TO CMA'S COMPETITION ENFORCEMENT TOOLS

The Government is also progressing policies aimed at enabling the CMA to remedy “more harm and sooner”, pursuing a range of reforms that would apply across the CMA's competition tools.

Following a general trend towards greater enforcement of the procedural rules and a number of high profile penalty notices, the Government is enhancing the CMA's powers to implement fines for breaches of procedural rules:

- a. Increasing fines for failure to comply with an investigative measure, (including failing to comply with an information request, concealing, falsifying or destroying evidence and providing false or misleading information):
 - i. in the case of businesses, this fine could be up to 1% of a business' annual worldwide turnover, as well as the power to impose an additional daily penalty of up to 5% of daily worldwide turnover while non-compliance continues;
 - ii. for individuals this fine could be up to £30,000, as well as the power to impose an additional daily penalty of up to £15,000 while non-compliance continues.
- b. Increasing fines for non-compliance with orders imposed by the CMA, or with undertakings or commitments accepted by the CMA in the context of competition enforcement. This fine could be up to 5% of a business' annual turnover, and the CMA will have the power to impose an additional daily penalty of up to 5% of the corporate group's daily worldwide turnover while non-compliance continues.

5. INTERNATIONAL COOPERATION

The Government also wants better international cooperation by updating the rules governing information sharing between authorities, and by enabling the UK's competition authorities to use compulsory information gathering powers to obtain information on behalf of overseas authorities. This comes as the UK seeks to increase its ties with overseas agencies, including its recently agreed MoU with competition authorities in the US, Canada, New Zealand and Australia (the Multilateral Mutual Assistance and Cooperation Framework).

Although the CMA has yet to enter into a formal cooperation agreement with the European Commission, recent examples of coordinated antitrust enforcement also signal a continued desire to maintain a close working relationship with EU.

NEXT STEPS

The Government is considering the ways in which to implement the various policy reforms, a number which will require legislative change. BCLP's Antitrust & Competition team is working closely with clients in relation to proposed changes to the competition policy regime. If you would be interested in hearing about any of these proposed changes in greater detail, or to discuss how the proposals might impact upon your business, please do get in touch.

RELATED PRACTICE AREAS

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