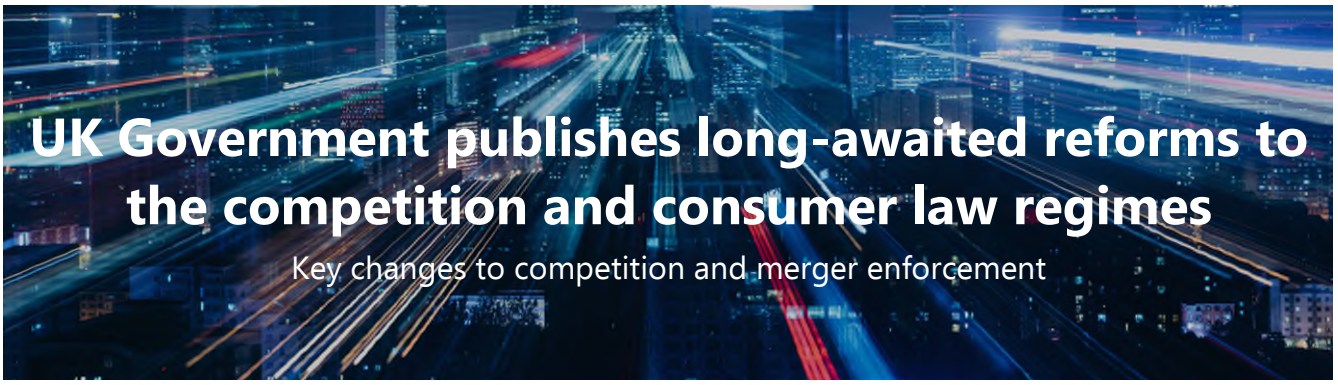
Freshfields Bruckhaus Deringer



UK Government publishes long-awaited reforms to the competition and consumer law regimes

Key changes to competition and merger enforcement

The UK Government's extensive reforms to the competition and consumer law regimes follow a lengthy period of debate and consultation on the changes that should be made to deliver on the Government's policy objectives: a strengthened competition regime and enhanced rights for consumers in order to promote innovation, growth and productivity across the economy (see our earlier briefing).

We have outlined below the key reforms to competition and merger enforcement which will now be taken forward in legislation. Please get in touch if you would like to discuss any of the issues raised.

1. A new pro-competition strategy for the UK

The Government has committed to a '*more active pro-competition strategy*' to strengthen competition in UK markets. Much of the underlying rationale is that markets have become too concentrated to the detriment of consumers, although evidence of widespread concerns remains debatable.

The reforms point to a more interventionist approach ahead, with particular implications for businesses active in markets likely to be in the spotlight due to perceived concerns about concentration levels, margins or consumer satisfaction. They include:

- **More state of competition reports**: the CMA's role as an economic adviser to Government will be enhanced through regular reports on the state of competition in UK markets. Responding to feedback (including our own), the Government has acknowledged the burden on business and decided not to grant the CMA additional information gathering powers for the purpose of preparing these reports.
- **More regular strategic steers**: the Government will give the CMA more regular and clearer steers on its priorities and expectations. Although these steers remain non-binding, there are inevitable concerns about an increased level of political influence over how the independent authority exercises its functions.
- **A new duty of expedition**: the Government intends to introduce a new statutory duty for the CMA to act expeditiously in competition and consumer cases. This reflects the Government's desire for faster decision making, although it remains to be seen how the CMA should speed up its processes whilst retaining robust procedures and protecting parties' rights of defence. The devil will be in the detail.

2. More effective market inquiries

The Government has decided not to proceed with the particularly ambitious, structural proposals it consulted on, such as creating a new single market inquiry tool or enabling the CMA to impose remedies at the end of a first-stage market study. Instead, the Government intends to retain the current two-stage framework, whereby the CMA's power to impose binding remedies by order will remain reserved to the second-stage market investigation. In response to feedback received (including our own), the Government does not intend to give the CMA the power to impose interim measures in market inquiries.

Instead, the Government is encouraging the CMA to make maximum use of the flexibility provided by its market study and investigation tools, including (where appropriate) consulting on a market investigation reference directly without first conducting a market study. In turn, the main reforms focus on procedures to increase efficiency and flexibility and the effectiveness of any remedies, including:

- Enabling the CMA to **accept binding undertakings from businesses at any stage** in market studies and market investigations.
- **Removing the requirement to consult on a market investigation reference within the first six months of a market study**.
- Enabling the CMA to require businesses to **conduct trialling** in order to determine the final format of certain remedies.

- Enhancing the CMA's **ability to amend remedies in a 10-year period following its finding of an adverse effect on competition** (without the need for a fresh market investigation). This would be subject to a mandatory two-year 'cooling-off' period starting at the end of a remedy review, in which the CMA would not, of its own volition, be able to conduct a further review of the same remedy. Further consideration will be needed on appropriate safeguards to ensure that the CMA exercises this power in a proportionate manner and without creating undue legal uncertainty.

To make market inquiries more effective, we consider that the CMA could also make improvements in its administrative process without the need for legislative changes, for example increasing opportunities for parties to engage with the case team and decision makers throughout the process.

3. Rebalanced merger control

The CMA's recent merger control decisions, including a series of high profile prohibition decisions where other international regulators (including, in one case, the European Commission) had cleared the deals, have underscored its post-Brexit ambition to be 'at the top table discussing international mergers'. This aggressive enforcement coupled with the CMA's recent expansive interpretations of the share of supply test to assert jurisdiction over transactions with only a limited UK nexus have ensured that the CMA's voluntary regime is firmly on the map for international dealmakers. The proposed reforms will see the CMA given further powers to scrutinise transactions involving so-called 'killer acquisitions' and/or deals which do not involve direct competitors, as well as introducing procedural reforms to how the CMA reviews transactions with the aim of making procedures more efficient.

While the Government has decided to retain the UK's voluntary and non-suspensory merger regime, it has signalled its intention to progress the following key reforms:

- Adjusting the thresholds for the CMA's jurisdiction to better target the mergers most likely to cause harm and ensure the regime remains proportionate by:
  - **Raising the target's UK turnover threshold in line with inflation from £70m to £100m** (although the threshold for intervention in media mergers on public interest grounds will continue to be £70m).
  - **Introducing a new threshold** '*to provide a more comprehensive and effective jurisdictional basis for certain vertical and conglomerate mergers, in particular so called '**killer acquisitions**' that risk the development of new products or services*'. Under the new rules, jurisdiction would be established where at least one of the merging businesses has: (1) an existing share of supply of goods or services of 33% in the UK or a substantial part of the UK (compared to the 25% threshold consulted on); and (2) a UK turnover of £350m (compared to the £100m UK turnover threshold consulted on). The Government also proposes to add a UK nexus criterion which will ensure that only mergers with an appropriate link to the UK will be captured, although no further details have been provided on this proposal.
  - Introducing a **small merger safe harbour** to support the Government's desire to make it easier for small and micro enterprises to grow and expand by exempting mergers from review where each party's UK turnover is less than £10m (public interest interventions in media mergers will be exempted from the small merger safe harbour).
- While considering it premature to set out proposals for reforming the share of supply test at this time, the Government will also continue to **monitor the operation of the share of supply test and may consider further proposals on how to reform it**.
- Enabling the CMA to deliver more effective and efficient merger investigations by:
  - Introducing a **more flexible Phase 2 commitments procedure** allowing the CMA to accept commitments from merging parties which resolve competition issues earlier during a phase 2 investigation (public interest cases will be excluded from this flexibility).
  - Enhancing and streamlining the 'fast track' procedure to give the CMA discretion to automatically refer a merger straight to Phase 2 where the merging parties have requested this and without requiring the parties to formally accept that the merger may create a substantial lessening of competition (appropriate safeguards will, however, be introduced to prevent potential public interest intervention cases from being 'fast tracked').
- Encouraging the CMA to keep its merger review procedures under review to ensure that these remain proportionate and appropriate to the cases under consideration, in particular regarding non-statutory pre-notification procedures and when dealing with small and medium-sized businesses.
- The Government recognises the key role of the CMA Panel as an independent 'fresh pair of eyes' in CMA

merger and market investigations and reiterates its support for the retention of the Panel model while noting its intention to work with the CMA where appropriate to consider potential non-legislative changes to the Panel recruitment process, future members' terms and conditions and CMA processes and procedures.

While it is no surprise that Government has chosen to follow the CMA's recommendation to introduce a new jurisdictional threshold, it is notable that the Government intends to set the threshold at a much higher level than what was initially proposed, i.e. increasing the share of supply required from 25% to 33% and the turnover threshold from £100m to £350m.

The CMA had flagged in its response to the consultation that the originally proposed new threshold should result in a more efficient approach to establishing jurisdiction in some cases, helping merger control investigations to proceed more efficiently and saving time and money for businesses and the CMA. It remains to be seen whether the Government's decision to proceed with a significantly higher threshold will mean that its expectation that the new threshold '*will allow the CMA to apply its existing thresholds more predictably*' will be borne out in practice.

The Government is still consulting on a separate merger regime – to be enforced by the Digital Markets Unit – for firms designated as having 'strategic market status'. Given the Government has confirmed its intention to introduce a new jurisdictional threshold to tackle 'killer acquisitions', it is not clear that another merger control regime is required to address similar concerns for a subset of companies. The Government has not yet published its response to the consultation on a new competition regime for digital markets, although reports suggest that it will be 2023 before legislation is taken forward for this new regime due to competing demands on parliamentary time.

The announced reforms to the CMA's merger procedures to facilitate fast-track references to Phase 2 and early settlement of Phase 2 investigations are to be welcomed. The rigidity of the UK's existing Phase 2 merger regime and the important implications for deal timetables has always been a challenge for merging parties in substantively challenging cases – the option for merging parties to discuss remedies early on in the Phase 2 investigation will align the CMA with the more flexible Phase 2 procedure under the EU's merger regime and may help to deal with the challenges of aligning remedy discussions in multiple jurisdictions.

4. Stronger and faster enforcement against illegal anticompetitive conduct

A key plank of the Government's proposed reforms is improving the speed and flexibility of competition law investigations and enforcement. The Government's desire for speed across investigations appears to be underpinned by a perception that consumers have been losing out as a result of lengthy competition law investigations.

However, a comparison against the original proposals suggests that the Government has been receptive to concerns that any reforms must also take into account businesses' rights of defence. The key reforms that will now be taken forward into legislation are:

- **Expanded territorial scope of the UK Competition Act 1998 Chapter I prohibition**: the Government will seek to amend the Chapter I prohibition to apply to anticompetitive agreements which have been implemented *outside* of the UK but have an effect within the UK. Responding to feedback (including our own), the Government will not seek to amend the territorial scope of the Chapter II prohibition (abuse of dominance).
- **No immunity from private damages claims for cartel whistleblowers**: the Government will not seek to extend the protection granted to cartel whistleblowers to also provide immunity from private damages claims. While the stated intention of this proposal was to incentivise more leniency applications, concerns were raised during the consultation that this could, among other things, leave affected businesses with inadequate recourse to seek compensation.
- **Stricter standard of review for appealing interim measures imposed by the CMA**: the Government considers that the current full merits appeal standard may lead to interim measures not being applied when they were warranted. Despite recognising that a majority of respondents were opposed to this change, the Government will now seek to legislate that appeals against the CMA's interim measures decisions should be determined by reference to the (more beneficial for the CMA) judicial review standard. A significant outcome from the Government's consultation is that the standard of review for appeals against infringement decisions in Competition Act 1998 cases will not be changed.

- **More evidence gathering powers**: the Government will seek to legislate for a package of new CMA information gathering and investigative powers. This includes broader rights to interview individuals, stricter obligations on businesses to preserve evidence and powers for the CMA to 'seize-and-sift' evidence when it inspects domestic premises. As dawn raids are likely to start occurring at a greater frequency following the easing of lockdown restrictions, these new powers will be of particular interest to businesses.

5. Stronger investigative and enforcement powers

Aimed at enabling the CMA to remedy more harm and sooner, the Government has proposed a range of reforms that would apply across the CMA's competition tools. Despite concerns from some respondents about the lack of evidence justifying tougher penalties, the Government remains of the view that the existing package of sanctions for non-compliance with the CMA's investigative measures does not provide effective deterrence.

Although declining to introduce *personal accountability* for the provision of evidence, or widening the prohibition against the provision of false or misleading information to the CMA so as to include information provided voluntarily, the Government is progressing with the following reforms:

- **Fixed penalties of up to 1% of a business' annual worldwide turnover** for failure to comply with an investigative measure, including failing to comply with an information request, concealing, falsifying or destroying evidence or providing false or misleading information to the CMA, as well as an additional daily penalty of up to 5% of daily worldwide turnover for as long as non-compliance continues.
- **Fixed penalties of up to £30,000 for natural persons** who conceal, falsify, or destroy evidence, or who provide false or misleading information to the CMA, as well as an additional daily penalty of up to £15,000 while non-compliance continues.
- **Introduction of a civil turnover-based penalty regime** for non-compliance with orders imposed by the CMA, or undertakings and commitments accepted by the CMA, capped at 5% of annual turnover, as well as an additional daily penalty of up to 5% of daily turnover of the company's corporate group while non-compliance continues.

Noting the importance of effective and flexible international cooperation with overseas counterparts, in particular post-Brexit, the Government proposes that the UK competition and consumer protection authorities are able to:

- **Share information with international partners** while ensuring that confidential business information is protected by both the UK and overseas authority.
- **Use their compulsory information gathering powers to obtain information on behalf of overseas authorities**, subject to reciprocity and Ministerial consent and other public interest safeguards.

6. Other reforms to UK competition law

The Government has also proposed the following important changes:

- **Exemplary damages**: the Government has proposed providing the courts and Competition Appeal Tribunal (***CAT***) with the discretion to award exemplary damages in private competition law claims. Although the proposal states that an award of exemplary damages would only be expected in a limited set of cases (and will not be available in collective proceedings before the CAT), the proposal represents a significant departure from the approach set out in the UK legislation implementing the EU Antitrust Damages Directive, which prohibited the award of exemplary damages in individual claims relating to infringing conduct after 9 March 2017. It remains to be seen how such a rule would be implemented, including whether the Government intends simply to revert to the position under the case law preceding the implementation of the Damages Directive, or to establish specific statutory criteria governing any award of exemplary damages by the CAT or High Court in individual competition law damages claims.
- **Declaratory relief for the CAT**: the Government has proposed that the CAT should be able to grant declaratory relief, i.e. a legally binding statement from a court on the application of competition law to a set of facts. The Government has suggested that this reform would avoid the need for parties to formulate their competition law claims as damages claims and would allow parties to obtain a declaration on how the law applies to the facts of a case.
- **Potential further reforms to CAT rules and procedures:** the Government will consider further reforms to the CAT's processes and will consult further before making any changes to the CAT Rules.

This material is provided by the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the laws of England and Wales authorised and regulated by the Solicitors Regulation Authority (SRA no. 484861)) and associated entities and undertakings carrying on business under, or including, the name Freshfields Bruckhaus Deringer in a number of jurisdictions, together referred to in the material as 'Freshfields'. For further regulatory information please refer to www.freshfields.com/support/legal-notice.

Freshfields Bruckhaus Deringer has offices in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Russia, Singapore, Spain, the United Arab Emirates, the United States of America and Vietnam.

This material is for general information only and is not intended to provide legal advice.

©Freshfields Bruckhaus Deringer LLP 2022