

UK COMPETITION AND CONSUMER REFORM PROPOSALS - THE GOVERNMENT'S RESPONSE

The UK Government has recently published responses to its July 2021 consultations on [reforming competition and consumer policy](#) and [introducing a new pro-competition regime for digital markets](#). The reforms being taken forward are wide-ranging and, when fully developed and implemented, will bring about the most significant changes to the UK competition landscape since 2014. This briefing picks out some key points likely to be of interest to competition lawyers.

A significant strengthening of consumer law enforcement powers

The changes to consumer law enforcement are perhaps the key aspect of the Government's reforms. Central to the changes are the introduction of an administrative enforcement model, giving the Competition and Markets Authority (CMA) the power to enforce certain consumer protection legislation directly and impose fines of up to 10% of global turnover, as well as impose penalties for procedural breaches such as breaching undertakings, failing to comply with information requests, providing false or misleading information or destroying, concealing or falsifying evidence. This will bring the CMA's powers in relation to consumer law more closely into line with its competition powers. The Government also plans to give the CMA flexibility to introduce a process akin to the settlement agreements that exist under the competition regime, and will be consulting further on this aspect of its proposals.

Decisions of the CMA that lead to a fine will be subject to full merits appeal in the High Court in England and Wales (or the Court of Session in Scotland). The CMA will also be able to use its current enforcement powers via the civil and criminal courts, with the civil powers being strengthened with additional fining powers.

In addition, the Government is taking forward proposals to tackle subscription traps and fake reviews, as well as introducing protections for consumers using Christmas savings clubs and similar savings schemes not covered

by existing Financial Conduct Authority regulation and financial protections. It will also update and simplify regulations around package travel.

A shift towards greater political influence and accountability?

Consistent with its July 2021 proposals, the Government's response indicates a potential shift towards greater political influence and accountability within the UK competition regime. In particular, it intends to provide more regular strategic steers to the CMA - it is envisaging one or two updates per parliament, with some aspects of the steer potentially updated more regularly - in which it will provide "greater clarity" on the Government's "priorities and expectations". In turn, and while emphasising that the steers will remain "non-binding", the Government "expect[s] the CMA's own plans and reporting to be clear on how it is delivering against [these] priorities and expectations".

As noted in our [previous briefing](#), it would probably be an exaggeration to see these reforms as a significant politicisation of *decision making* in competition cases. The extent of their impact on competition *policy* and *priorities* will depend amongst other things on the content and level of detail of the steers - on this, the Government has said it will be consulting on the next strategic steer in due course.

Earlier intervention and tougher enforcement in Competition Act cases

A general theme of the July 2021 consultation was that the current UK competition regime is cumbersome and lengthy, with a number of the proposals aimed at enabling the CMA to intervene earlier in investigations through the use of interim measures.

Of these, the Government has decided to take forward proposals aimed at streamlining the use of interim measures in Competition Act 1998 investigations.¹

¹ The Government is not taking forward proposals that would have enabled the CMA to impose interim measures from the beginning of a market inquiry (as opposed to only after the final report is issued finding adverse effects on competition, as currently). While some

Specifically, and despite opposition voiced during the course of the consultation, the Government plans to: (i) move to a judicial review standard for appeals against interim measures; and (ii) amend the rules governing access to file in respect of interim measures decisions. While the Government has not yet specified how it will amend the rules on access to file, it seems to envisage the CMA only having to provide reasons for its decision, with no right for businesses concerned to see the underlying evidence. As [previously noted](#), this will clearly impact the ability of businesses that are the target of such measures to resist their application.

The Government is also taking forward a number of other proposals aimed at bolstering enforcement in Competition Act cases. Amongst these is amending the territorial scope of the Chapter I prohibition so as also to apply to conduct which, although implemented outside the UK, has effects within the UK. It will also grant the CMA new evidence-gathering powers in Competition Act investigations, including: (i) a broader power to interview any relevant person regardless of their connection to the business under investigation; (ii) a duty to preserve evidence in all Competition Act investigations; (iii) powers to ‘seize and sift’ evidence when inspecting domestic premises under warrant; and (iv) stronger powers to obtain information stored remotely (e.g. in the cloud) when executing a warrant.

It will also introduce a new statutory framework for confidentiality rings, including civil sanctions where confidentiality rings are breached - although prompt reporting and rectification of unauthorised disclosures will be a defence to less serious breaches.

More mergers subject to CMA review

The key change to UK merger control will be the introduction of a new threshold to capture certain vertical and conglomerate mergers and so-called ‘killer acquisitions’.² The Government has however taken on board the feedback received during the consultation that the new threshold should be clearly targeted towards acquisitions by larger businesses. The new threshold will therefore apply where the acquirer has both:

- 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
- A UK turnover of £350m (compared to the £100m UK turnover threshold consulted on).

The threshold will also require there to be a ‘UK nexus’, although no detail has been provided yet about how this criterion will be formulated. It therefore remains to be seen whether this requirement will curb an otherwise significant extension of the CMA’s jurisdiction. Somewhat pointedly, and likely reflecting criticism from stakeholders around the CMA’s recent willingness to exploit the flexibility of the ‘share of supply’ test, the Government indicates that it “*expects the CMA to apply its existing thresholds more predictably once the new threshold is available*”.

A new pro-competition regime for digital markets

The Government also plans to [take forward](#) its proposals for a new pro-competition regime for digital markets when parliamentary time allows.

The regime will be implemented and enforced by the Digital Markets Unit (DMU) and targeted at a small number of firms designated as having ‘strategic market status’ or ‘SMS’ in one or more activities (as well as a ‘UK nexus’, to ensure a focus on competition in the UK). SMS firms will be subject to a code of conduct - the Government has taken on board feedback that such conduct requirements should be tailored to the firm in question and, while it will specify categories of requirements in legislation, it will allow the DMU to determine the precise (binding) conduct requirements for each SMS firm. SMS firms will be able to put forward evidence that conduct that would otherwise breach a conduct requirement brings about benefits to consumers. The DMU will be able to impose financial penalties of up to 10% of a firm’s global turnover for breaches, and will be able to prevent individuals guilty of serious misconduct from acting as directors of UK companies. It will also be able to impose civil penalties on senior managers who fail to ensure their firm complies with requests for information.

The DMU will also be empowered to tackle the root causes of entrenched market power through targeted

respondents to the consultation had been supportive of this proposal (particularly in the context of fast-moving markets), the majority raised concerns, with many echoing our [previously expressed view](#) that the case for such measures in this context is not as clear-cut, given market investigations do not require there to have been unlawful conduct.

² The Government also plans to increase the target turnover test threshold to adjust for inflation, and to create a safe harbour from review for mergers where the UK turnover of each of the merging parties is less than £10m.

pro-competitive interventions - to this end, it will have broad discretion to design and implement remedies (including ownership separation remedies where other remedies are insufficient).

On the merger front, SMS firms will have to report their most significant merger transactions to the CMA prior to completion - the Government has in mind that this should be when: (i) the SMS firm acquires over a 15% equity or voting share; (ii) the value of the SMS firm's holding is over £25m; and (iii) the transaction meets a 'UK nexus' test. The Government is not taking forward proposed changes to the Phase 2 threshold for intervention, on the basis that it would represent a significant change to the mergers regime and there is not currently sufficient evidence to support it.³

More flexible and faster investigations

The Government is taking forward a number of measures aimed at concluding investigations more quickly.

Amongst these is the introduction of a statutory duty of expedition across the CMA's functions (extending the existing duty that applies to its merger control functions). This is a direct response to feedback received during the consultation - the Government had previously indicated that it had no plans to propose such an expanded duty.

The Government will also be progressing a number of other reforms aimed at speeding up investigations:

- In order to speed up enforcement against anti-competitive conduct, the Government will remove statutory requirements regarding who can take infringement decisions - this is despite concerns from stakeholders that, while this may allow the administrative phase to complete more swiftly, it could increase the risk of poor decisions and ultimately lead to more appeals.
- As regards merger control, the Government will introduce a more flexible Phase 2 commitments procedure to allow the CMA and the parties to resolve a merger investigation at any stage of the Phase 2 process. It will also put the existing non-statutory 'fast track' procedure on a statutory footing, allowing the CMA to automatically refer a merger straight to Phase 2 where the merger parties have requested this. The parties will be

able to request a 'fast track' referral at any point during pre-notification or Phase 1, and will not have to accept that the merger may create a substantial lessening of competition.

- In respect of market inquiries, the Government plans to: (i) allow the CMA to accept binding commitments at any stage of the process; (ii) empower the CMA to focus market investigation references on key issues; and (iii) remove the requirement to consult on a market investigation reference within the first six months of a market study. While it is not taking forward its proposal to create a single stage market inquiry tool, it encourages the CMA to "*make maximum use of the flexibility provided by its market study and market investigation tools*". In particular, where the CMA already has reasonable grounds to suspect adverse effects on competition in a market it should feel able to consult on a market investigation reference directly without first conducting a market study. The Government considers *this would "deliver many of the benefits offered by the single stage market inquiry process [...] without losing the flexibility offered by a market study."*

Stronger investigative and enforcement powers across competition tools

In addition to the measures specific to the markets, mergers and Competition Act regimes outlined above, the Government is introducing additional evidence gathering and enforcement powers across the UK competition tools, in order that the CMA's enforcement capabilities remain effective and in line with international best practice. Amongst these, it is planning to increase the penalties the CMA can impose for failure to comply with its investigative measures and for breach of commitments/undertakings, directions, orders or interim measures. The Government is however not going as far as introducing personal accountability for the provision of evidence or expanding the prohibition against providing false or misleading information to include information provided voluntarily.

Conclusion

The Government's initial proposals in July 2021 were wide ranging. While some of the more controversial aspects have been modified in light of responses

³ The Government is also not taking forward proposals to introduce a transaction value threshold for SMS mergers, in light of feedback highlighting the risk of complexity this would entail in the context of the proposed reforms to the general merger thresholds and the need for a joined up approach across the UK's merger regime.

received during the consultation, a lot of the detail remains to be developed (in particular in relation to the concept of 'UK nexus') which means that the full implications of the reforms will only become apparent once the draft Bill is published.

The key unknown remains the timing of all of this - while the [Queen's speech](#) on 10 May indicated that the Government will be publishing draft legislation implementing the reforms, it provided no indication of timeframe. The fact that the Government only plans to publish draft legislation has been generally understood to mean a Bill will not be introduced in the 2022-2023 parliamentary session, meaning these reforms are still some way off becoming law.

A [CMA blog post](#) on the digital markets proposals indicated that it supports the final proposals and will work with the Government on the draft measures and with Parliament and stakeholders.

CONTACT



ISABEL TAYLOR
PARTNER
T: +44 (0)20 9070 4316
E: Isabel.Taylor@slaughterandmay.com



TIM BLANCHARD
PARTNER
T: +44 (0)20 9070 3931
E: Tim.Blanchard@slaughterandmay.com



ANNALISA TOSDEVIN
SENIOR PSL
T: +44 (0)20 9070 4555
E: Annalisa.Tosdevin@slaughterandmay.com



ROBERT WALMSLEY
ASSOCIATE
T: +32 (0)2 737 9411
E: Robert.Walmsley@slaughterandmay.com