

## Competition and consumer policy reforms: power to the CMA

On 20 July 2021, the government launched a consultation containing substantial proposals that could herald the most important reform of the UK competition regime in 25 years (the consultation). The proposals follow multiple reports and papers and, if they survive the consultation process, could be implemented in the near future (see *News brief "The Penrose report: power to the people"*, [www.practicallaw.com/w-030-2580](http://www.practicallaw.com/w-030-2580); and *feature article "UK merger control in 2019: emerging themes"*, [www.practicallaw.com/w-023-4963](http://www.practicallaw.com/w-023-4963)).

The proposals are numerous and wide-ranging, covering competition law, consumer law and the enforcement regime, but of particular interest are those that would have a significant effect on the role and powers of the Competition and Markets Authority (CMA). If implemented, these proposals will result in a stronger and more powerful CMA, albeit one that is more overtly the subject of influence from government.

### Competition reforms

The stated aims of the proposals are to produce an improved competition regime, in order to help the government to address its "levelling up" agenda and "build back better" strategy in the context of recovery from the COVID-19 pandemic. In addition, the government seeks to empower the CMA to become a micro-economic sibling for the Bank of England by tasking it with monitoring the state of competition in key UK markets.

In terms of building on the CMA's current powers, the consultation's proposed reforms include the following:

**Merger control.** The government proposes increasing the target turnover threshold from £70 million to £100 million, and to introduce a safe harbour exempting transactions from review where each party's worldwide turnover is below £10 million, although the effects of this are expected to be limited.

It seeks to expand the CMA's jurisdiction so it can scrutinise a greater number of transactions, including in relation to so-called "killer acquisitions" where there is suspicion that the aim of the acquisition is to remove an emerging competitive threat. The CMA would be able to scrutinise transactions where one party has both:

- At least a 25% share of supply, irrespective of whether its activities overlap with those of the other party.
- Turnover in the UK of over £100 million.

In addition, the government proposes improve the efficiency of merger control review by, for example, allowing the CMA to agree binding commitments earlier during its Phase 2 review, and narrowing the scope of the Phase 2 review to include only issues identified at Phase 1. Parties would be allowed to request the fast track to a Phase 2 review without having formally to accept that there is a realistic prospect that either the CMA has jurisdiction to review the transaction, which may be relevant for the share of supply test, or that the transaction could substantially lessen competition.

**Markets regime.** The government proposes either to replace the existing market study and market investigation system with a new single-stage market inquiry tool or, alternatively, to enhance the CMA's powers to allow it to impose remedies at the end of a market study without the need for a market investigation. The CMA would have new powers to impose interim measures to prevent potential harm while reviews are ongoing, or to resolve concerns more quickly through accepting binding commitments. It would also have new powers to require businesses to participate in remedy implementation trials, and increased powers to review, expand and supplement remedies imposed following a market investigation.

**Antitrust enforcement.** The government proposes to expand the territorial scope of prohibitions under Chapter I and II of the Competition Act 1998 in order to include agreements and conduct that have, or are likely to have, direct, substantial, and foreseeable effects within the UK. The threshold for immunity from fines would be limited to situations where parties have a turnover of £10 million (or possibly a combined turnover of £10 million in the context of anti-competitive agreements). However, the leniency regime would be expanded in order to provide holders of full immunity with additional immunity from liability for damages.

In relation to granting interim measures, the government proposes streamlining the CMA's approach and making it harder for parties to challenge the CMA's use of its interim measure powers. The CMA would have wider powers to interview witnesses, including those unconnected to the businesses under investigation, and more flexible powers to use seize and sift powers when inspecting domestic premises.

In addition, the government proposes to streamline the settlement process, including the ability to adopt short-form decisions, and introducing a new early resolution agreement settlement procedure in order to facilitate the early settlement in abuse of dominance cases.

**Stronger investigative and enforcement powers.** The government proposes to give the CMA the power to impose penalties on companies failing to comply with CMA investigations or orders, including fixed penalties of up to 1% of annual turnover in relation to investigations and 5% for orders or remedies, as well as additional daily penalties of up to 5% of daily turnover where non-compliance continues. Individuals, including company directors, would be personally accountable for responses to information requests, which would expose those individuals to civil penalties and potentially disqualify directors for non-compliance. In addition, the prohibition against the provision of false or misleading information, including the imposition of penalties, would be extended to cover responses to voluntary requests for information.

Although the proposals would result in a more powerful CMA, the consultation also proposes providing the CMA with clearer and more regular steers from government to help align the UK's competition policy with wider government policy. As a result, while the CMA may have enhanced powers if the proposals are implemented, it may also find that, in practical terms, it has less discretion on how to use those powers.

### Consumer policy

Although there are fewer proposed reforms in the consultation on consumer policy and enforcement, these nonetheless represent seismic changes to the way in which consumer

law is enforced, and will significantly increase the powers of the CMA.

**Consumer law enforcement.** The government seeks to enable direct CMA intervention and increase effective consumer law enforcement, which should result in a greater number of consumer law cases and a corresponding increased deterrent effect.

This involves empowering the CMA, and potentially other regulators, to enforce consumer law directly without needing to bring court proceedings. It would address concerns raised by the CMA, and others, about the cost and time commitment of bringing court proceedings. This proposed change is intended to result in faster and less resource-intensive enforcement, allowing the CMA to pursue more cases.

In addition, the government proposes to give the CMA the power to impose fines for breaches of consumer law of up to 10% of a non-compliant company's global turnover, and impose fines for non-compliance in line with those proposed with regard to competition law.

**Strengthening and modernising consumer rights.** In addition to proposing changes to the

nature of consumer law enforcement in the UK, the consultation also proposes a number of updates to consumer rights law to reflect, in particular, the rise of online shopping and an increase in subscription contracts.

The following changes would considerably enhance the ability of the CMA, through its consumer enforcement powers, to protect consumers rights, including:

- Strengthening the law to prevent fake online reviews by prohibiting commissioning or incentivising someone to submit fake reviews, and by requiring businesses to take reasonable and proportionate steps to ensure that reviews originate from consumers who have used or purchased the relevant good or service.
- Powers to address subscription traps by requiring businesses to be clearer on pre-contract information so that consumers know what they are signing up for, and have a choice on auto-renewal. Businesses may also have to take greater steps actively to remind consumers of auto-renewals and long-term inactive subscriptions, and make it as easy for consumers to cancel subscription contracts as it is to enter into them.

- Strengthening prepayment protections for consumers by requiring certain schemes, such as Christmas savings clubs, to safeguard customers' money through insurance or trust accounts.

### Scrutiny and intervention

The proposed reforms to the competition and consumer regimes will have a significant impact on businesses and consumers. If implemented, businesses, whether directly consumer-facing or not, should expect greater levels of scrutiny from the CMA, and swifter and more direct intervention where the CMA decides to investigate or otherwise identifies concerns.

However, the proposals are not yet set in stone, and interested parties have until 1 October 2021 to provide feedback to the government on the proposals.

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*The consultation is available at: [www.gov.uk/government/consultations/reforming-competition-and-consumer-policy](http://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy).*

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