

COMPETITION AND REGULATORY NEWSLETTER

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UK government seeks to create “*best in class*” competition regime

On 20 July 2021 the government launched a [consultation](#) on its proposals to update and strengthen competition policy, consumer rights and consumer law enforcement in the UK, in order to better tackle the challenges of the 21st century. Many of the proposals address reforms proposed by then Chair of the Competition and Markets Authority (CMA), Lord Tyrie in February 2019 (discussed in a previous [briefing](#)), and by John Penrose in his February 2021 report (also discussed in a previous [briefing](#)). This article discusses some of the key proposals.

CHANGES TO THE UK’S MERGER CONTROL REGIME

Despite the recent debate amongst competition lawyers as to whether the UK would be better served by a mandatory, suspensory merger control regime, the government is unequivocal in its view that the current voluntary, non-suspensory system strikes the right balance between consumer protection and regulatory burden for the UK’s economy-wide merger control regime. It is nevertheless open to hearing how the current system can be improved.

A key proposal would see updates to the jurisdictional thresholds in order to focus on those mergers most likely to harm UK consumers. To this end, the government proposes to increase the target turnover threshold from £70 million to £100 million. The government also plans to retain the ‘share of supply’ test, but - in a nod to growing consternation at the CMA’s recent flexible application of this test - has invited views on how the test may be reformed to increase predictability. Additionally, the government is considering introducing a new jurisdictional threshold which would allow the CMA to review transactions where only one of the parties has both a share of supply of at least 25 per cent and UK turnover over £100 million. This proposal is the government’s response to the issue of so-called “killer acquisitions”, in which companies are bought out before they can become a competitor. As an exception to the jurisdictional thresholds, the government has suggested a safe harbour for mergers where the worldwide turnover of each merging party is less than £10 million.

The suggested reforms also extend to streamlining the merger review process. The proposals include allowing merging parties to agree binding commitments with the CMA earlier in Phase 2 (instead of waiting for provisional findings), and amending the current (and little-used) ‘fast track’ review process so as to allow merging parties to request an automatic reference to Phase 2 without having to formally accept that the merger could result in a substantial lessening of competition.

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The government notes that, while the UK's competition enforcement regime is well-regarded around the world, aspects could still be improved. It proposes a number of measures aimed at making investigations faster and more flexible.

Amongst other things, it suggests expanding the territorial scope of the rules to catch not only anti-competitive conduct which is implemented in the UK, but also anti-competitive conduct which is likely to have direct, substantial and foreseeable effects within the UK. This would bring the UK into line with the approach taken in the EU and USA.

The government is also looking at whether potential exposure to liability for damages may be disincentivising cartel members who are considering applying for leniency. To address this, the government is seeking views on whether those who receive full immunity should also benefit from immunity from liability for damages caused by the cartel. Though this appears to allow businesses to benefit from unlawful conduct, the government believes that the proposal would incentivise businesses to make an application and mitigate concerns that leniency applicants are easy targets in follow-on claims.

MORE EFFICIENT MARKET INQUIRIES

While noting that market studies and market investigations are the CMA's "*most powerful tools*" for promoting competition in UK markets, the government is concerned that the current process is "*overly cumbersome and significantly underused*". It makes a number of proposals to address this, and is in particular seeking views on whether to, either: (i) allow the CMA to impose certain remedies at the end of a market study (as opposed to only after a market investigation, as is currently the case); or (ii) introduce a streamlined, single-stage market inquiry tool with a default statutory timeline of two years (being significantly shorter than the current combined timeline for a market study followed by a market investigation).

Additionally, the government is seeking views on whether the CMA should be able to impose interim remedies on businesses during a market inquiry (instead of only after issuing a final report in a market investigation) and accept binding commitments from businesses at any stage in the market inquiry process. Together, the government believes that the proposals would allow the CMA to address harm sooner and make the market inquiry process more efficient.

MORE RESPONSIVE COMPETITION POLICY

Following the first '[State of Competition](#)' report being commissioned in 2020, the government believes that the CMA should now produce such reports more regularly, with the view that they will influence competition policy and shape future action by the government and the CMA. Similarly, the government is also consulting on a more active approach to setting the CMA's priorities, by proposing to have the ability to update the strategic steer that it gives to the CMA more regularly than once a parliament (as is currently the case). The government believes that this approach would ensure that the steer "*remains current and relevant to the issues facing the UK*".

PROTECTING CONSUMERS

In the area of consumer rights, the government has identified particular concerns with subscription contracts and fake or misleading reviews. To address the issue of 'subscription traps', the government has suggested a number of measures, which include, among others: (i) providing consumers with clear and prominent information before entering into a subscription agreement; (ii) reminding customers when a subscription is due to renew automatically; and (iii) making the process of exiting a subscription agreement as easy as possible.

The government is also considering whether to prohibit the commissioning of consumer reviews in all circumstances, or whether (given the importance for new businesses of being able to commission genuine customer reviews) a narrower prohibition would be more appropriate, preventing only the commissioning and/or incentivising of fake consumer reviews.

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The government considers that “*slow action and weak sanctions available to the CMA and the courts charged with ruling on consumer protection law breaches mean businesses can get away with rip-offs*”. Consequently, the government is consulting on whether the CMA and other enforcers should be able to enforce consumer law directly, without the need to go to court and if so, what safeguards (such as an appeals process) should be in place. The direct enforcement of consumer protection law would allow the CMA and others to control the timetable for investigations, which the government hopes will result in cases being concluded faster and customers securing redress sooner.

The government is also consulting on expanding the range of civil sanctions available to the CMA and others. In particular, for breaches consumer law, the government proposes to introduce fines of up to 10 per cent of global turnover, with separate fines for breaching undertakings or not complying with the CMA or other regulators’ information gathering powers.

NEXT STEPS

The consultation is open until 1 October 2021, and runs in parallel with the government’s consultation on creating a “*world-leading*” pro-competition regime for digital markets (discussed in more detail in this [blog post](#)). It will be interesting to see stakeholders’ reactions to the proposals, and what shape the new regime will ultimately take.

OTHER DEVELOPMENTS**MERGER CONTROL****CHINA ISSUES FIRST ORDER TO RESTORE COMPETITION AFTER AN UNNOTIFIED MERGER**

On 24 July 2021 the Chinese State Administration for Market Regulation (SAMR) issued its first gun-jumping [decision](#) which, in addition to imposing the maximum fine of CNY 500,000 (approximately £56,000), ordered the company in breach to restore market competition after having already completed the transaction. In July 2016 Tencent Holdings acquired China Music Corporation (CMC) without seeking merger control approval from SAMR. In January 2021 SAMR began its investigation and after seven months found that the transaction had, or may have had, the effect of eliminating or restricting competition in the online music playing platform market in China.

In the relevant market, SAMR considered that copyright of original music works are core assets for platform operators. After its acquisition of CMC, Tencent owned more than 80 per cent of exclusive music library resources. This allowed Tencent to urge upstream copyright holders to enter into more exclusive copyright agreements, or raise entry barriers through copyright payment models such as high advance payments. SAMR’s decision also recognised the increasing growth rates of Tencent’s key competitors, the trend of dynamic competition and the potential entry of some short video platforms with a broad user base in the online music playing platform market in China.

SAMR ordered Tencent to adopt various measures to restore market competition within 30 days, including:

- Not reaching or cancelling exclusive copyright agreements with upstream copyright holders, with some limited exceptions, e.g. exclusive deals with independent musicians for a term less than three years;
- Not requiring copyright holders to give Tencent preferential terms compared with its competitors without justifiable reason, or waiving any such preferential terms; and
- Offering quotations to copyright holders that accord with actual usage and other circumstances, and not charging high prepayments (to copyright holders) to increase competitors’ costs.

Although this is a landmark decision in being the first gun-jumping decision involving competition concerns in China, it is worth noting that, instead of making use of its power to unwind the completed transaction, SAMR was willing to accept

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behavioural remedies. This suggests that SAMR is willing to take a pragmatic approach, even when competition concerns have been identified.

ANTITRUST**CMA PUBLISHES RESULTS OF ELECTRIC VEHICLE CHARGING MARKET STUDY**

On 23 July 2021 the CMA [published](#) its final report in its market study into the supply of charging for electric vehicles (EVs) in the UK. The aim of the market study, which began in December 2020, was to examine how competition is developing in the EV charging sector.

The results of the market study raise concerns that chargepoint rollout in some areas has been slow and disjointed. The CMA has warned that more needs to be done in the sector ahead of the UK government's planned ban on sales of new petrol and diesel cars by 2030, with forecasts suggesting ten times more chargepoints will be needed in the UK by 2030. The CMA has in particular identified concerns in relation to the (lack of) choice and availability of chargepoints at motorway service stations, the fact that the roll-out of on-street charging is slow, and the fact that rural areas lack investment - with the result that access to chargepoints can be a "postcode lottery".

The CMA recommended that:

- The UK government sets out a National Strategy for rolling out EV charging between now and 2030;
- Governments support local authorities to boost on-street charging roll out;
- New conditions are attached to the UK government's Rapid Charging Fund with the aim of opening up competition and providing customers with a choice of charging provider at each motorway service station; and
- A public body is tasked with monitoring the EV charging sector.

The CMA also [announced](#) on the same day an antitrust investigation into Electric Highway's long-term exclusive arrangements with motorway service operators MOTO, Roadchef and Extra. Those arrangements last 10-15 years and cover around two thirds of motorway service stations. The CMA said it is concerned that "*these arrangements make it difficult for other operators to provide competing chargepoints at motorway service stations*", which could "*result in drivers losing out on the benefits of competition such as greater provision, more choice, competitive prices and reliable, high-quality chargepoints*".

GENERAL COMPETITION**UK GOVERNMENT ANNOUNCES NSI ACT COMMENCEMENT DATE**

On 20 July 2021 the UK government [announced](#) that the National Security and Investment Act 2021 will fully come into force on 4 January 2022.

Businesses are being urged to get ready for the changes, with four pieces of guidance published to ensure a smooth transition. The government also published a revised draft statement explaining when the government intends to exercise its call in powers, and a revised draft list of the seventeen sensitive sectors that will fall under the mandatory notification regime.

Further detail on this latest announcement is available in our recently published client [briefing](#). For detail on the substance of the new national security regime, please see this [briefing](#) and subsequent [update](#).

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