
Kluwer Competition Law Blog

Green light for more active UK antitrust regulator - A snapshot overview of the UK government's reform proposals

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On 20 April 2022, following a lengthy consultation, the UK government announced final plans to strengthen its merger and antitrust regime. Designed to address a concern that competition in the UK may have weakened over the past 20 years, the plans are wide-ranging. They include proposals to expand the powers of the UK Competition and Markets Authority (CMA) to review so-called “killer acquisitions” with a new jurisdictional test, as well as enhanced investigative and enforcement powers against anti-competitive conduct.

The CMA has already established itself as one of the most activist and interventionist antitrust regulators. The reform makes it clear that this role is going to continue.

Key revisions

The government's proposals are set out in a response to the UK government's July 2021 consultation on reforming competition and consumer policy. The implementation of many of the proposals will require legislative change. The government has not yet published the text or timeframe for any new proposed legislation.

Set out below is a snapshot overview of the key proposed reforms.

Currently, the CMA has jurisdiction to review a merger or acquisition, where:

- The business that is being acquired has a UK turnover of more than £70 million (the “turnover test”); or
- The merger would result in the creation or enhancement of at least a 25% share of the supply of particular goods or services in the UK, or a substantial part of the UK (the “share of supply test”).

The government now proposes to introduce a new jurisdictional 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”.

The new, additional, threshold will apply where an acquirer has both:

- An existing share of supply of goods or services of 33% in the UK or a substantial part of the UK; and
- A UK turnover of £350 million.

This new threshold does not require any horizontal overlap for it to be triggered (unlike the current test). However, the thresholds have been set at a higher level than those initially proposed earlier in the consultation (25 per cent and £100 million).

Other changes include the following.

Merger control

- An increase of the target turnover test threshold from £70m to £100m in line with inflation. However, the threshold for intervention in media mergers on public interest grounds will continue to be £70 million.
- A UK nexus criterion to ensure that only mergers with an appropriate link to the UK will be captured. No detail of the proposed criterion has been published, but this is a welcome break on the extended powers contemplated, although recent case law has shown that this test is broad.
- A new safe harbour exempting mergers from review where each party’s UK turnover is less than £10 million. This safe harbour will not apply to public interest interventions in media mergers, but will otherwise function to ensure that CMA resources are targeted at those transactions that are most capable of affecting competition in the UK.
- A more flexible Phase 2 commitments procedure to allow the CMA and the merging parties to resolve a merger investigation at any stage of the Phase 2 process. This will apply to mergers reviewed on competition grounds, but will exclude public interest intervention cases.
- Placing the existing non-statutory “fast track” procedure on statutory footing, giving the CMA discretion to refer automatically a merger straight to Phase 2 where the merging parties have requested this.

The government proposes to retain the CMA Panel as an independent “fresh pair of eyes” in merger and market investigations. There will be no changes to the size and make-up of the Panel, but the government will work with the CMA to consider potential changes to the Panel recruitment process and future members’ terms and conditions.

Territorial scope of application of cartel prohibition

- Amendment of the UK Competition Act 1998 Chapter I prohibition so that it also applies to anti-competitive agreements implemented outside of the UK, but which have an effect within the UK.

The government will not seek to amend the territorial scope of the Chapter II prohibition (abuse of dominance).

Immunity from private damages claims

The government has decided not to introduce a new immunity from private damages claims to cartel whistleblowers who hold immunity from public authority fines via the cartel leniency programme.

The government decided to retain the current structure of the market inquiry process. It rejected the proposals it consulted on (i) to introduce a new single-stage market inquiry tool (replacing the existing market study and market investigation system), and (ii) to accept binding commitments at any stage in the market inquiry process. The CMA's power to impose binding remedies by order will remain reserved to the second-stage market investigation, rather than the end of a first-stage market study. The government has decided not to give the CMA the power to impose interim measures in market inquiries.

However, the government will proceed with the following procedural reforms.

- More opportunity for binding undertakings to be accepted at any stage during market studies and market investigations.
- Greater flexibility to define the scope of market investigation to allow the CMA to conduct properly targeted and proportionate market investigations more easily where appropriate.

The market inquiry regime

- Removing the requirement to consult on a market investigation reference within the first 6 months of a market study.

- If the CMA already has reasonable grounds to suspect adverse effects on competition in a market, the government supports the CMA more routinely consulting on a market investigation reference directly, without first conducting a market study.

- The CMA will be able to require business to conduct trialling 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 to adopt an improved remedy. This power will be subject to a mandatory two-year "cooling-off" period starting at the end of a remedy review, in which the CMA may not, of its own volition, conduct a further review of the same remedy.

The government proposes to strengthen its evidence gathering powers by:

- Broadening the power to interview individuals as part of Competition Act investigations, so it aligns with the existing powers in the Enterprise Act;

- Extending the legal duty to preserve evidence that exists in the context of investigations into the cartel offence to all Competition Act investigations;

- Giving the CMA powers to "seize-and-sift" evidence when it inspects a domestic premises under a warrant; and

- Strengthening the CMA's powers to obtain information stored remotely when executing a warrant.

- Appeals against the CMA's interim measures decisions to be determined by reference to the principles of judicial review.

Investigative powers

Interim measures

The government considered that the current full merits appeal standard may be preventing interim measures from being applied when they are warranted.

The government does not propose any change to the standard of review for appeals against infringement decisions in Competition Act 1998 cases.

The government considers that the current package of sanctions for non-compliance with investigative measures does not provide effective deterrence. It therefore proposes to introduce sanctions with the following caps on companies that slow down or obstruct cases.

Penalties

- Fixed penalties 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: cap at 1 per cent of a business' annual worldwide turnover, as well as an additional daily penalty of up to 5 per cent of daily worldwide turnover for as long as non-compliance continues.
- Fixed penalties on natural persons who conceal, falsify, or destroy evidence, or who provide false or misleading information to the CMA: cap at £30,000 as well as an additional daily penalty of up to £15,000 while non-compliance continues. With respect to penalties for companies that fail to comply with remedies imposed or accepted by the CMA, the Government intends to set the penalty caps to be in line with the existing ones for the infringement of interim enforcement orders for mergers, as follows.
- Turnover-based penalties for companies that breach commitments or undertakings, directions, orders or interim measures: cap at 5% of annual turnover, with additional daily penalties of up to 5% of daily turnover of the company's corporate group while non-compliance continues.

Immunity from fines for abuse of dominance

- The minimum turnover threshold for immunity from penalties for abuse of dominance will be lowered from £50 million to £20 million.

Court powers

- Courts and the Competition Appeal Tribunal (CAT) to have discretion to provide exemplary damages in private competition claims, with the exception of collective proceedings. This changes the approach taken by the current UK legislation implementing the EU Damages Directive that prohibits the award of exemplary damages in competition law claims.

- CAT to have power to grant declaratory relief (legally binding statement on the application of competition law to a set of facts). The government considers that *"empowering the CAT to grant declaratory relief would avoid the need for parties to formulate their competition law claims as damages claims, or applications for an injunction, when what would be most helpful is a declaration of how the law applies to the facts of the case"*.

The government considers that *"there is evidence that competition in the UK may have weakened over the past 20 years"*. To address this, it proposes a *"more active pro-competition strategy"* consisting of the following.

A more active pro-competition strategy

- Further CMA "State of Competition" reports which assess the strength of competition in the UK. These reports will enhance the CMA's role as an economic advisor to government. To avoid a disproportionate burden on business, the government has decided not to grant the CMA additional information gathering powers for the specific purpose of preparing these reports. The government considers that the reports should still aim to report on the health of competition *"across the economy"*, but comments that because of the challenges involved in this assessment, there would also be *"value in reports considering certain key markets as case studies for more in-depth analysis"*.

- Clearer and more regular non-binding strategic steers from the government to the CMA about the government's economic priorities, and its expectations from the CMA. The government currently expects to provide between one and two updates to the strategic steer per parliament (with the possibility of some parts of the steer being updated more regularly as appropriate).

- A statutory duty of expedition for the CMA in relation to its competition and consumer law functions, essentially pushing for faster decision-making.

International cooperation

- Share information more flexibly with international partners, while still ensuring that confidential business information is protected by both the UK and overseas authority. A more streamlined approach is proposed where an international cooperation arrangement is in place.

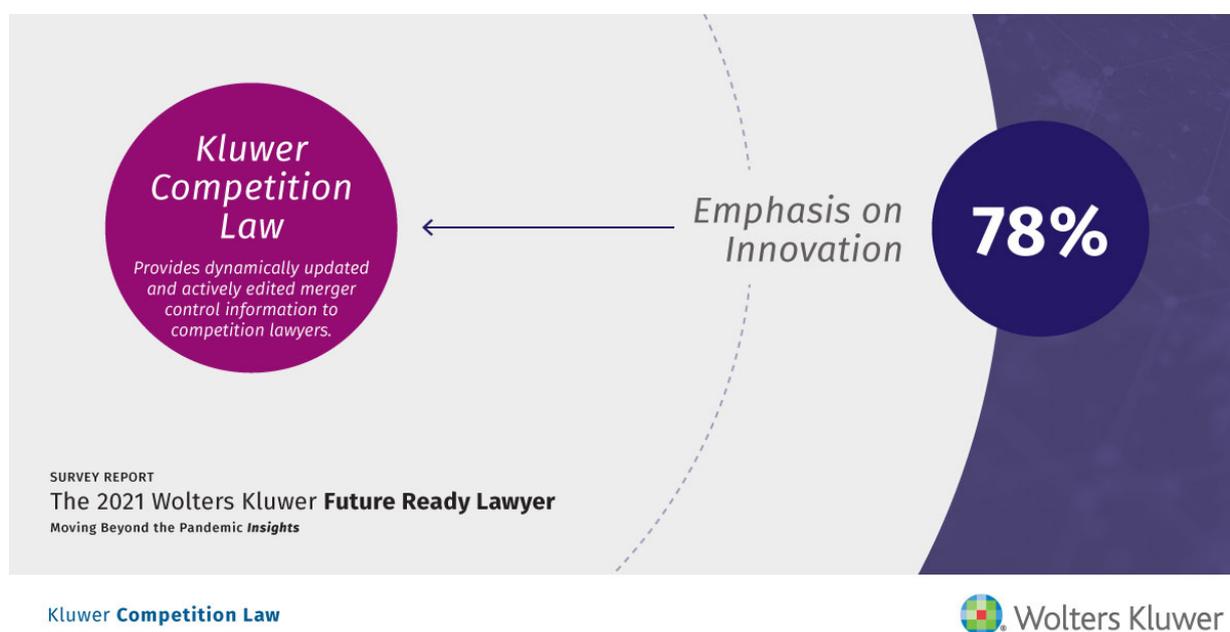
- Use of compulsory information gathering powers to obtain information on behalf of overseas authorities, subject to reciprocity and Ministerial consent, confidentiality and public interest safeguards.

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