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CMA publishes second report on state of UK competition

BACKGROUND

On 29 April 2022 the Competition and Markets Authority (CMA) published a report on the state of competition in the UK. It is the second report of its kind to be published (the first being published in November 2020) after the government commissioned the CMA in February 2020 to publish regular reports on the state of competition across the UK economy. Such reports would "*provide the CMA, Government and the public with valuable evidence to inform whether and where any additional action on the part of the CMA or Government may be required to boost competition across UK markets*".

FINDINGS

One of the key findings in the 2022 report is that market concentration remains high. The report assesses the average market share of the five largest firms in each industry and notes that there was a marked increase in concentration in the years after the 2008 financial crisis. Whilst concentration is not as high as it was in the early 2010s, it still remains above the levels seen prior to 2008. The CMA also found that concentration is higher when 'common ownership' (where competing firms are owned by the same companies) is factored in, but lower when taking international trade into account. This highlights the important role that international trade plays in contributing to keeping UK markets competitive. In addition, the report also reveals that the largest and most profitable firms are able to sustain their strong position for longer than used to be the case.

The CMA also found that those on low incomes are significantly more likely to consume goods and services produced in more concentrated markets and are therefore more vulnerable to the effects of concentration. This is because a higher proportion of their income is spent on essential services, such as gas and water, which tend to be produced by a limited number of companies.

The report also notes that high profitability in an industry may be a signal that competition is weak. There is some evidence that, on some measures, profitability is higher than before the 2008 financial crisis. Average mark-ups have increased since 2008, from just over 20% to about 35%, with the increase being higher for the 10% most profitable firms.

The report also analyses the problems consumers have encountered with the goods and services they purchase. Survey responses demonstrate that:

- In the year to April 2021 most consumers (around 7 in 10) experienced some sort of "*detriment*" or "*harm*" caused by a problem with something they had bought or used. Problems were more frequently encountered with services than with goods, and the average cost to consumers of these problems was higher with services (£41) than with goods (£14);

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- Issues with purchased goods and services cost UK consumers £54.2 billion in the year to April 2021, with two-fifths of that arising in respect of renting services, vehicle maintenance and repair, second-hand vehicles, and internet provision; and
- Detriment is more widespread and more costly among younger people, and among those in more difficult financial situations.

The CMA also raised concerns regarding competition in digital markets, noting that, to deliver their potential to improve lives and living standards, these markets need to be competitive. In this respect, it noted:

- Google, Meta and Apple are highly profitable and have very high market shares (and have done for some time);
- Weak competition in search and social media markets risks harming innovation and choice, as well as requiring consumers to give up more data than they would like. In addition, businesses are more likely to pay more for digital advertising given Google and Meta's strong position (which will ultimately be felt by the consumer further down the line); and
- Apple and Google represent two 'ecosystems' in the smartphone market. Once a consumer elects to enter into one of the two ecosystems (by buying a smartphone), Apple and Google are then able to determine how a range of content is delivered to that consumer. This means that the provision of a range of smartphone services, including operating systems, app stores and mobile browsers, is highly concentrated. Competition is further harmed by the difficulties users face in switching between the two 'ecosystems'. Operating within such an uncompetitive market may result in reduced innovation and choice and higher prices for consumers.

Finally, the report notes that its analysis of the impact of the COVID-19 pandemic is hindered by a lack of available data and that it is too early to draw any firm conclusions about any long-term impact of the COVID-19 pandemic on concentration or profitability.

CONCLUSIONS

In the first report on the state of competition in the UK (published in November 2020), the CMA considered its analysis indicated that competition in the UK may have weakened over the last two decades. That conclusion was only "*tentative*", but the report considered that it gave sufficient cause for the CMA, regulators and the government to remain vigilant in protecting and promoting competition. The 2022 report seems less tentative in this regard. Mike Walker, Chief Economic Adviser at the CMA, said: "*Our State of Competition report shows a worrying combination of trends. We are seeing markets getting more concentrated, companies enjoying higher mark-ups and the biggest firms maintaining their leading positions for longer. The fact that all these indicators are pointing in the same direction provides a warning sign about the state of competition in the UK*".

It remains to be seen how the government and the CMA will respond to the outcomes of the report. What is clear is that the government sees value in the CMA continuing to produce regular state of competition reports going forward – in the government's recent response to its July 2021 consultation on 'Reforming Competition and Consumer Policy' (covered in a previous briefing), it has said that the reports "*represent valuable analysis*" and that the CMA "*will produce further such reports in due course*". Whilst the government envisages that the reports will look at the health of competition across the economy, it has also said that there may be value in the reports considering certain key markets as case studies for more in-depth analysis. The government's response to the July 2021 consultation will be the subject of a forthcoming client briefing.

OTHER DEVELOPMENTS

ANTITRUST

EC SENDS STATEMENT OF OBJECTIONS TO APPLE OVER APPLE PAY PRACTICES

On 2 May 2022 the European Commission announced that it had sent a Statement of Objections to Apple. The Commission informed Apple of its preliminary view that Apple may have illegally distorted competition in the market for mobile wallets on its devices in breach of the Article 102 TFEU prohibition on the abuse of a dominant market position.

The Commission's preliminary view is that: (i) Apple has a dominant position in the market for mobile wallets on its operating system (iOS); and (ii) by limiting access to a standard technology used for contactless payments with mobile devices in stores (Near-Field Communication technology (NFC), also referred to as 'tap and go'), Apple is restricting competition and innovation in that market. Mobile wallets allow for payments with a mobile device, in shops and online. Apple Pay is Apple's own mobile wallet solution on iPhones and iPads, used to enable mobile payments in physical stores and online. The NFC 'tap and go' technology is embedded on Apple mobile devices for payments in stores.

In reaching this preliminary view, the Commission concluded that Apple enjoys significant market power in the market for smart mobile devices and a dominant position in markets for mobile wallets on iOS devices, with Apple Pay being by far the largest NFC-based mobile wallet on that market. Apple Pay is the only mobile wallet solution that can access the necessary NFC input on iOS, and Apple does not make it available to third party app developers of mobile wallets. As a consequence, other payment providers are unable to provide NFC contactless payments on the iPhone and develop other mobile wallets which could compete fairly with Apply Pay. Executive Vice-President Margrethe Vestager, who is in charge of competition policy, stated: "*we preliminarily found that Apple may have restricted competition, to the benefit of its own solution Apple Pay. If confirmed, such a conduct would be illegal under our competition rules*".

This Statement of Objections was made within the context of the Commission's formal investigation into Apple's practices regarding Apple Pay which was opened in June 2020. The investigation concerned: (i) terms, conditions and measures applied by Apple for the integration of Apple Pay in merchant apps and websites on iPhones and iPads; (ii) Apple's limitation of access to NFC functionality on iPhones; and (iii) restrictions of access to Apple Pay for specific products of rivals on iOS and iPadOS smart mobile devices. The Statement of Objections only relates to the second concern, and does not address the other areas of the Commission's investigation.

HONG KONG COMPETITION COMMISSION CONSULTS ON THE RENEWAL OF THE BLOCK EXEMPTION ORDER FOR VESSEL SHARING AGREEMENTS

On 5 May 2022 the Hong Kong Competition Commission (HKCC) published a notice on its proposed renewal of the Competition (Block Exemption For Vessel Sharing Agreements) Order 2017 between liner shipping companies, which was issued in August 2017.

The 2017 Order declared that certain operational arrangements of Vessel Sharing Agreements between liner shipping companies are exempted from the application of the First Conduct Rule in the Hong Kong Competition Ordinance, in light of their overall economic efficiencies generated. The exemption is subject to certain conditions, including market share limits and prohibitions on price fixing and the allocation of markets or customers. The 2017 Order is due to expire on 8 August 2022. Having conducted its review (including an initial consultation), the HKCC has reached a provisional view that the economic efficiencies continue to apply, and proposes to renew the 2017 Order on the same terms, albeit for a period of four years rather than five, until August 2026.

The HKCC's review coincided with a time of high freight rates and ongoing global supply issues. This was carefully considered by the HKCC, which concluded that such issues do not cast doubt on the appropriateness of the 2017 Order itself. The notice appears to be in line with other major jurisdictions across the world, where the regulatory norm continues to grant exemptions and renewals to such agreements, with exemptions having been granted in the EU, Japan, Singapore, Malaysia, China, South Korea, Australia, New Zealand and the United States.

Interested parties are invited to submit representations to the HKCC by 6 June 2022.

STATE AID

UK SUBSIDY CONTROL BILL RECEIVES ROYAL ASSENT

On 28 April 2022 the Subsidy Control Bill received Royal Assent and became the Subsidy Control Act 2022. The new regime is expected to come into force in Autumn 2022.

The Act will establish a legal framework for a UK subsidy control regime. Two specific categories of subsidy will be introduced: (i) Subsidies of Interest and (ii) Subsidies of Particular Interest. Public authorities intending to grant a subsidy will be required to carry out a detailed economic and legal analysis and make an assessment as to whether the subsidy is consistent with the seven subsidy control principles set out in the Act. Moreover, public authorities will have a duty to consider certain energy and environment principles in addition to the subsidy control principles if they are making a scheme or giving a subsidy in relation to energy and the environment.

The Act prohibits certain subsidies (e.g. unlimited guarantees and subsidies to ailing or insolvent undertakings with no credible restructuring plan), requires that other categories of subsidy can only be granted where the Act’s requirements are met, and exempts certain other categories of subsidy (e.g. subsidies for emergency relief or where required for safeguarding national security).

A new Subsidy Advice Unit (SAU) will be established within the CMA, which will monitor and report on certain subsidies and schemes before and after they are given or made.

Appeals by interested parties or the Secretary of State against subsidy decisions will be heard by the Competition Appeal Tribunal (CAT), using judicial review principles. The CAT will also be able to order recovery in certain cases.

In advance of the Act coming into force, the Government will publish guidance to prepare public authorities for the new regime. Separately, on 25 March 2022 the Department for Business, Energy and Industrial Strategy launched an open public consultation on the secondary legislation surrounding Subsidies and Schemes of Interest and of Particular Interest, which closed on 6 May 2022.

For more details on the new regime, see our blogpost.

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