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CLIENT BRIEFING

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UK COMPETITION REFORM PROPOSALS – SIX THINGS COMPETITION LAWYERS SHOULD KNOW

On 20 July 2021 the UK Government published its long-awaited consultation on reforms to competition and consumer policy. It is the first major review of the UK competition landscape since 2014 and sets out a large number of detailed proposals. This briefing focuses on six overarching themes coming out of the review that are likely to be of interest to competition lawyers. The consultation closes on 1 October 2021.

There is likely to be a bigger role for Government in the regime

A key feature of the current UK competition regime is the extent to which it is insulated from political influence, with decisions taken by impartial, independent regulators. While this is a key strength of the regime, there have nevertheless been calls for greater accountability to elected officials and bodies, given the very broad and intrusive powers competition regulators exercise and the considerable discretion they have in how to exercise those powers (and, by extension, in how they spend public resources).

In this latest consultation, the Government is proposing a shift towards slightly greater political influence and accountability; it suggests that the role of competition law should include responding to the strategic needs of the UK economy. In particular, it envisages providing the Competition and Markets Authority (CMA) with clearer and more regular steers to ensure alignment between UK competition policy and economic policy. It also agrees with John Penrose's recommendation that the CMA should act as a "micro-economic sibling" to the Bank of England and produce regular reports on the state of competition in the UK economy, to inform the Government's overall competition policy and shape future action.

Although it would probably be an exaggeration to see these proposed reforms as leading to a significant politicisation of *decision making* in competition cases, the impact on competition policy and on choices about priorities may be more significant. Much will depend on the content and level of detail of the strategic steers provided to the CMA. At the very least, it seems that the Government is keen to provide the CMA with greater clarity about which sectors of the economy should be strategic priorities.

Consumer law enforcement will get a significant upgrade

In many ways the consumer law enforcement reforms are the key element of this consultation. A detailed review of these proposals is beyond the scope of this briefing, but at a very high level the proposal is to give the CMA powers in relation to consumer law that are much closer to their competition law powers including, for example, the ability for the CMA to act as the decision maker and the ability to impose fines of up to 10% of global turnover.

This clearly represents a serious upgrade to the consumer regime and will have significant implications for businesses that are the subject of consumer law investigations.

From a competition law perspective, this reform is overall welcome, as it will likely to lead to a better balance between the two sets of powers. Stronger consumer enforcement powers will reduce the incentives to use competition powers to try to tackle consumer law issues, and should bring greater clarity as to the goals and objectives of the two regimes.

Expect more scope for the CMA to intervene earlier and more decisively

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

While the CMA has long had the power to impose interim measures during investigations of potentially anticompetitive conduct under the Competition Act 1998, it has only done so once.[1] The consultation paper expresses concerns that the interim measures power in its current form may be ineffective and seeks views on how to streamline the process. An inevitable trade-off will need to be made here with rights of defence: the options proposed (changing the rules on access to file in

[1] *Investigation into the Atlantic Joint Business Agreement*, CMA decision of 17 September 2020.

relation to interim measures and/or changing the standard of review of an interim measures decision) would inevitably impact on the ability of a business that is the target of such measures to resist their application.

The Government is also seeking views on extending these powers to allow the CMA to impose interim measures at any stage during a market investigation (currently this power is limited to the period after a final report is issued finding that there are adverse effects on competition). This is potentially a significant increase in the CMA's powers and it is not clear that the 'in principle' case for interim measures applies in the same way in this context. While an investigation in relation to potentially unlawful conduct requires there to be at least "*reasonable grounds for suspecting*" an infringement, this is not the case for market investigations, which do not at any point require there to have been any unlawful conduct. Market investigations also typically involve a detailed review of the dynamics of a particular market, and an understanding of the issues and challenges can therefore evolve over the course of an inquiry. There is therefore a particular risk associated with an earlier and more liberal use of interim measures in this context – this is recognised in the consultation paper, with the Government seeking views on whether additional limitations or safeguards would be required.

There are also likely to be further measures to try to speed up investigations

As well as facilitating early intervention, the Government is consulting on proposals aimed at wrapping up investigations more quickly.

A number of the proposals centre around making it easier for the CMA to accept commitments to resolve concerns - including enabling the CMA to accept commitments at any stage during the market inquiry process, and at any stage during a Phase 2 merger investigation. In respect of investigations under the Competition Act 1998, the Government is looking to improve voluntary resolution of cases, by streamlining the current settlement process and introducing a new settlement tool - Early Resolution Agreements - for abuse of dominance cases.

The Government is also concerned that statutory timeframes are often long. In particular, conscious that the end-to-end market inquiry process can currently take over three years, it is considering ways to make this process more efficient – either by retaining the market study/market investigation distinction and enabling the CMA to impose certain remedies at the end of a market study,[2] or replacing the existing system with a new, shorter, single stage market inquiry tool.

It seems unlikely that many would object 'in principle' to the idea of speeding up processes and enabling early resolution of cases where there is consensus on how to proceed. But some of the processes by which this might be achieved will have implications for the ability of parties to these investigations to participate in the process. In particular the suggestion that some remedies might be capable of being imposed at the end of a market study (when currently parties typically have very little access to or visibility of the regulator's process); and/or that there could be a scaling back of the role of the "independent panel". A number of the current proposals would therefore be trading off procedural efficiency against the parties' rights of defence (and indeed the rights of complainants to be heard). A greater use of early resolution processes in infringement cases may also have implications for potential private damages claimants if it reduces the scope to rely on adverse findings of the CMA in follow-on damages actions.

A key question for the consultation will therefore be whether these proposals go too far in prioritising speed over quality of decision making – particularly bearing in mind that the Government has also invited views on the appropriate level of judicial scrutiny of the CMA's decisions in Competition Act investigations, including in respect of interim measures, and when reviewing penalties for failure to comply with the CMA's investigative and enforcement powers.

More mergers will be subject to CMA review

Perhaps surprisingly, the Government has not taken the opportunity of this consultation paper to revisit the question of whether the UK should move to a mandatory merger regime. Instead it is proposing (amongst other things) a "rebalancing" of the jurisdictional tests so as to broaden the ability of the CMA to review vertical and conglomerate mergers and so-called "killer acquisitions" - acquisitions of emerging companies in fast-moving markets that have very low turnover at the point of acquisition but high growth potential.

Although described as a rebalancing, these changes are overall likely to be seen as a significant extension of the jurisdiction of the CMA. Whilst this may assist with legal certainty for cases that might currently be on the borderline, it is inevitably also going to mean that a large number of cases that do not raise competition concerns will be brought within scope of the regime for the first time. The proposed new "safe harbour" that would carve out of the regime transactions involving businesses with worldwide turnover below £10m seems unlikely to redress the balance. Businesses engaging in transactions that do not warrant the time and costs (both public and private) associated with a full filing will therefore be left to rely on the CMA's approach to exercising its discretion to call-in transactions or to engage with the (non-statutory) briefing paper process.

[2] Currently, market studies tend to be used by the CMA as a precursor to opening a market investigation. A market study can last up to 12 months and result in a number of outcomes, including the opening of a market investigation or the acceptance of 'undertakings in lieu', but crucially not binding recommendations. The CMA is therefore obliged to open a market investigation lasting up to 24 months, if it wishes to impose non-voluntary structural or behavioural remedies to fix competition problems in a market.

The proposals have implications for individuals responsible for competition processes

The Government is seeking views on whether to require individuals or company directors whose company is responding to an information request to make a personal declaration, certifying that the information provided is full, complete and correct to the best of their knowledge and that they have carried out all reasonable checks to verify this.

The Government has said that flagrant breaches of this obligation might provide grounds for director disqualification. This presents a marked increase in the level of individual responsibility for responses to information requests, and is likely to present a particular challenge and concern for very large businesses where responses to information requests are typically a team effort and no single individual has full knowledge of the matters concerned.

The Government is also considering whether civil sanctions should be available (in addition to the already-existing criminal sanctions) where confidentiality rings are breached. It proposes that these sanctions could be imposed upon either the individual that breached the ring and/or their employer, so that both are subject to the same incentives to protect the integrity of confidential information.

Conclusion

The detailed consultation, and the fact that the Government is conducting this consultation alongside another, separate consultation on a new pro-competition regime for digital markets, suggests that it is serious about reforming competition policy in the near future. Yet we've been here before: Theresa May's ill-fated Better Markets Bill from 2016 made similar promises, before falling by the political wayside.

Competition policy has however made its way up the political agenda since then, and with the Government's aim of "building back better" from the COVID-19 pandemic, it is likely that many of these reforms, possibly with some modifications, will become law.

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