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Briefing note May 2016

Proposed refinements to UK competition law

The UK government has published a consultation on a range of proposed reforms to UK competition law. In contrast to the more fundamental reforms recently introduced in the Enterprise and Regulatory Reform Act 2013 and the Consumer Rights Act 2015, the proposed reforms are, for the most part, refinements - albeit extensive ones - to the existing competition law regime.

Again, already?

It is just over two years since major reforms of UK competition law were last implemented, and only eight months since opt-out collective actions for competition law damages claims came into force. So why does the UK government consider that more changes are already needed?

The answer is that the proposed reforms are largely a "tidying up" exercise, intended to strengthen the impact of the last round of reforms in 2013, to correct oversights in those reforms or to address certain issues that have arisen as a result of them. Other proposals – such as changes to the system of "part-time" panel members for merger and market investigations – were advocated by many when previous reforms were under consideration, but were not considered a priority for legislation at the time.

Nevertheless, the proposals – which are summarised below - are extensive, covering market investigations, mergers, civil and criminal investigations of antitrust infringements, appeals of decisions of sectoral regulators and competition litigation.

The deadline for responses to the Consultation is 24 June, giving an unusually short one month period for businesses and practitioners to consider the proposals.

Market investigations: time limits and remedies

The proposals would:

- Amend the time limits for market investigations (currently 18 months, extendable by 6 months by inquiry groups where there are "special reasons") to either:
  - 12 months, extendable by 6 months by inquiry groups, subject to approval of the Competition and Markets Authority (CMA) Board to ensure that there are truly special reasons for extension;
  - 18 months, but with no possibility of extension; or
  - 18 months, with power for the CMA Board to determine the timeline of a market investigation, linked to its scope. The Consultation recognises that this would give the Board influence over the

Key proposals at a glance

- Greater oversight by the CMA Board of resources used in phase 2 merger and market investigations.
- A more streamlined CMA panel, with members required to commit to availability, shorter periods of appointment and possibility of ad-hoc appointments.
- Tighter statutory deadlines for market investigations and possibilities to "revisit" failed remedies.
- Obligations on the CMA to ensure proportionality of merger information requests.
- Fines for breaches of commitments and higher maximum fines for procedural infringements.
- Greater scope for the CMA to incentivise cooperation in criminal cartel proceedings.
- Jurisdiction for the CAT to hear judicial review applications relating to procedural issues in civil investigations and to issue declaratory judgments.

scope of the investigation and may, therefore, impinge on the independence of the inquiry groups.

- Allow the CMA to revisit market investigation remedies (subject to a prior consultation) where they are shown not to be working. This could include a "targeted reconsideration of certain aspects of a previous market investigation". At present the CMA can only reconsider remedies where there is a material change in circumstances.

Information requests in merger reviews

The CMA is currently working on proposed (non-legislative) changes which will streamline its merger review procedures by: (i) clarifying its information requirements in pre-notification, under the Merger Notice and during a phase 1 review; (ii) holding pre-notification meetings to obtain information and better understand markets earlier in the process; and (iii) publishing additional guidance on derogations from initial enforcement orders, including consideration of objective criteria that might be applied to determine when such orders may be disproportionate. A consultation on these proposals will be published by the CMA "in due course".

The government is considering supplementing these proposals by legislative measures to:

- Introduce a new obligation that all CMA information requests must be proportionate, considering the impact on business, including a requirement for the CMA to review its requests periodically and report to Ministers on how information is used. In cases where the CMA has requested information to decide whether to "call in" a merger for formal review, the CMA would be required subsequently to inform businesses where they are in the process and whether the CMA is likely to call in the merger; or
- Restrict the frequency and type of information request which the CMA could make before and during a phase 1 review, e.g. by creating a restricted list of documents that the CMA can request and/or limiting the number of requests the CMA is allowed to send. The government appears not to favour this option.

Changes to the panel system in merger and market investigations

The proposals would:

- Allow the CMA Board and its delegates to question the allocation of significant resources in individual phase 2 investigations and to require inquiry groups to (i) provide regular updates to the Board on progress of investigations and changes that are likely to have a significant impact on resources or timing, and (ii) to seek the agreement of the Board to extend the period permitted for a market investigation. The purported aim of these proposals is "to address concerns of process and resource allocation at an early stage in the course of an investigation".
- Significantly reduce the overall size of the CMA Panel to twelve members and to require panel members to commit to make themselves available for a minimum number of hours or days each year (to be determined on appointment by operational need). This could be supplemented by the *ad hoc* appointment of non-panel experts (including senior CMA staff, officials from other regulators and other external experts) for the purpose of a particular investigation. These proposals would address the difficulties often experienced by the CMA when trying to put together a panel from its roster of part-time panel members, who frequently have other commitments and/or conflicts of interest in individual cases.
- Require that, when appointing panel members, the Secretary of State should ensure that the panel contains an appropriate mix of skills and experience that includes business experience, consumer experience (including "behavioural insights"), competition law and economics and relevant sectoral experience. As well as ensuring a broad range of experience, the government is keen to explore whether this would allow panels to be constituted more quickly, by removing the need to designate experts with particular specialisms.
- Reduce the standard period of appointment of panel members from eight years to four years, to allow for the panel to be "refreshed" more regularly with new members who are aware of developing business models, technologies and practices and to allow scope for better "performance management" of the panel membership by the Chair or Board of the CMA.
- Clarify which decisions phase 2 inquiry groups must reserve to themselves, and which elements they may delegate to CMA staff, to ensure that inquiry groups are not distracted by day-to-day aspects of an investigation, such as directing specific information requests or dealing with confidentiality issues.

The government considers that any concerns that these changes would undermine the independence and impartiality of inquiry groups would be addressed by

ensuring "sufficient routes of appeal at a suitable standard of review".

Fines for breaches of commitments and increasing the maximum fines for procedural infringements

These proposals would:

- Introduce powers for the CMA to impose fines for breaches of commitments that are given in return for bringing to an end an investigation under the Competition Act 1998 (CA98), and undertakings that are given by parties under the merger control and markets regimes (e.g. undertakings-in-lieu to avoid a phase 2 investigation). At present, such undertakings and commitments can only be enforced by an application to the High Court for an enforcement order. Introducing the possibility of fines would bring enforcement of commitments in the UK into line with the European Commission's antitrust enforcement regime under Regulation 1/2003.
- Allow the CMA to impose civil fines on those who provide false or misleading information (at present only criminal penalties are available).
- Increase the maximum fines for procedural infringements in antitrust, market or merger investigations, such as failure to respond to an information request. At present these are capped at £30,000 for fixed fines and £15,000 for daily fines, in contrast to the maximum of 1% of worldwide turnover that the European Commission can impose. The proposed options (which could be implemented together or separately) are:
  - Increase the £30,000 / £15,000 limits, or set the maximum as a percentage of turnover; and/or
  - Allow the CMA to "back date" daily fines, so that they run from the date on which it considers a person had no reasonable excuse for not complying. At present, daily fines can only run from the date on which they are imposed.

Greater scope for the CMA to incentivise cooperation in criminal cartel investigations

The Consultation proposes the designation of the CMA as a prosecutor, for the purposes of the criminal cartel offence, under sections 72-74 of the Serious Organised Crime and Police Act 2005 (SOCPA). This would allow it to:

- Offer suspects a "restricted use" undertaking that information will not be used against them;
- Enter into agreements with a defendant that he or she will assist or offer to assist in an investigation. Such agreements, and the nature of assistance given or offered, "may" be taken into account by courts when determining what sentence to impose. (Note, however, that defendants' cooperation in criminal cartel investigations can already be taken into account in sentencing, and has been in the past); and
- Apply for a review of a person's sentence in circumstances where that person: (i) received a discounted sentence on the basis of an offer of assistance that was not subsequently given; or (ii) gives or offers assistance (or additional assistance) that was not previously taken into account in sentencing.

The government considers that allowing the CMA to take advantage of the transparency and safeguards available under these SOCPA procedures would enhance its ability to prosecute criminal cartel activity, particularly in cases where suspects are not eligible for ‘no action letters’ or immunity from prosecution, but nonetheless wish to help the CMA’s investigation by, for example, giving evidence against co-defendants.

The provisions of s.71 SOCPA (which allow prosecutors to offer immunity) would not be applied to criminal cartel proceedings, which would continue to be governed by the immunity regime under s.190 of the Enterprise Act 2002 (EA02).

Appeals against decisions of the Payment System Regulator (PSR)

The Consultation proposes the introduction of a two month statutory time limit for appeals to the CMA against certain decisions of the PSR (such as decisions to require granting of access to a payment system and decisions to require disposal of an interest in the operator of a payment system). This would align the appeal deadline with that for appeals of PSR decisions to the CAT and with those for appeals to the CMA of decisions of other sectoral regulators.

Competition Appeal Tribunal (CAT)

The proposals would:

- Confer jurisdiction on the CAT to hear judicial review applications relating to procedural issues in CA98 investigations, such as a refusal by the CMA of

access to documents. At present, such challenges can only be brought in the High Court, although the CAT can hear such applications in merger and market investigations under the EA02.

- Allow the CAT to issue declaratory judgments. This would allow parties to seek clarification of whether their particular situation or obligations are affected by competition law without waiting until there is a claim for damages (e.g. to clarify the validity of contractual restrictions in a supply agreement). At present, only the High Court can issue such declarations.
- Correct the current anomaly whereby only the High Court (and not the CAT) has jurisdiction to hear claims for damages based on infringements of the antitrust prohibitions contained in the EEA Agreement (these are, broadly, infringements found to have affected competition in Norway, Iceland and/or Liechtenstein).
- Abolish the Competition Service, which currently acts as the supporting administrative body to the CAT, and transferring its functions to the CAT. The Competition Service is for practical purposes largely indistinguishable from the CAT, so this is unlikely to make any significant difference for businesses or practitioners.
- Correct an oversight whereby the government is not currently able to make rules governing the supervision by the CAT of the execution, variation or discharge of warrants to enter premises during competition law investigations.

Comment

The proposed reforms may be a tidying up exercise, but they are nevertheless extensive. While many appear to be broadly sensible, some could have adverse impacts. For instance, limiting the ability of inquiry groups to determine the appropriate level of resources that they require could affect the quality of their assessments, while the inclusion of senior CMA officials in those groups might undermine their independence and impartiality. Revisiting market investigation remedies that are perceived to have failed risks causing significant prejudice to legal certainty. Moreover, as the government recognises, limiting the timescales for phase 2 market investigations "may not be desirable for carrying out a full diagnosis and proposing remedies", and could simply result in more work being done during or before the phase 1 market study, with no change to the overall length and burden of investigations.

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