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Skadden Discusses UK Antitrust Authority's Proposals for More Scrutiny and Weaker Judicial Review

By Bill Batchelor and Tom Selwyn Sharpe March 13, 2019

Comment

On February 21, 2019, the U.K. Competition and Markets Authority (CMA), at the U.K. government's request, set out "wide-ranging and radical" proposals to reshape U.K. competition enforcement and consumer protection regime.¹

These are proposals at the very earliest stage, and they remain far from becoming government policy. Still, the CMA has been vocal in positioning itself as a consumer champion and ties this effort to its role within a post-Brexit U.K. Some of these proposals may therefore have traction. If enacted, they would represent a step change in U.K. antitrust enforcement.

Summary

The proposals mark a significant intensification of merger control and antitrust investigations in the U.K.:

- **Mandatory merger control regime:** for the first time, the CMA recommends that large international mergers be subject to mandatory U.K. filings. This will significantly increase the regulatory burden, and potentially the approval timetable, in cross-border M&A.
- **Power to issue consumer protection interim orders, fines and regulations:** the CMA seeks to add to its power the issuing of consumer protection rules, whether or not competition harm is identified. It also seeks the power to injunct consumer protection breaches on an interim basis and levy fines for breach of consumer laws (up to 10 percent of turnover).
- **Consumer presumption for interim relief and marketwide interim orders:** the CMA seeks the power to order an interim change to the market pending the publication of the final report in a market investigation. It also seeks to impose a statutory duty on the CMA and courts to prioritise consumer interest over any corporate burden in interim relief proceedings. This would create a lower barrier for ordering interim relief, a power historically rarely used by the CMA.
- **A whistleblowers' charter:** the CMA recommends substantially increasing the rewards to whistleblowers from the current £100,000 limit, noting that the increased fines that might be imposed under the new powers would more than pay for the increase. It references — though does not advocate — the SEC's power to award 10 to 30 percent of any fine to the whistleblower.
- **Ceding criminal powers to the Serious Fraud Office (SFO):** conceding its weak record and limited resources for criminal cartel enforcement, the CMA suggests this power be transferred to the SFO. It recommends instead increasing the use of director disqualifications and contemplates personal administrative penalties.
- **Weakening judicial review and civil-immunity for CMA actions:** the CMA asks that its actions be immunized from civil liability and, in particular, defamation, allowing it to have robust communications with companies — so-called 'naming and shaming' — without exposure to lawsuits. It also seeks to water down judicial review of its actions, by requiring the Competition Appeal Tribunal (CAT) to show deference to CMA rulings, refuse admission of new evidence, limit oral evidence and provide detailed reasons for reducing a penalty.

Post-Brexit Merger Control

After Brexit, the CMA will need to review a larger number of multijurisdiction mergers that previously would have been considered by the European Commission. With this in mind, proposals are made to abandon the U.K.'s 40-year-old regime, whereby firms notify the CMA of mergers on a voluntary

basis. The changes would require the mandatory notifications of mergers above a certain threshold, in order to catch the sort of larger mergers that are typically reviewed by multiple international competition authorities. This means that large companies currently notifying their transactions in Brussels under the EU mandatory notification regime would do the same in the U.K. post-Brexit. The mandatory regime would be accompanied by a 'standstill obligation' designed to prevent the parties from proceeding with the transaction prior to the CMA's approval.

The Brexit-led changes to merger control already run the risk of parallel U.K. and EU inquiries replacing the current EU one-stop-shop regime. A mandatory merger regime such as the one proposed will further add to the significant regulatory burden and potentially lengthen the approval timetable in cross-border M&A.

The CMA also contemplates a significant increase in merger fees. Currently, CMA resources expended on merger review is only part-funded from the parties' filing fees. The CMA proposes considering a substantial increase to this fee scale to recoup all costs through filing fees, in light of the post-Brexit expected rise in high-value mergers filed with the CMA.

Power to Issue Consumer Protection Interim Orders, Fines and Regulations

The CMA currently enforces consumer protection legislation to tackle practices and market conditions that make it difficult for consumers to exercise choice by taking individual businesses to court and seeking orders to cease infringing conduct. The CMA believes that this is not sufficient, as it cannot order the cessation of consumer-harming practices it considers to be illegal without pursuing companies through the courts.

The CMA therefore proposed that it should be able to decide whether consumer protection law has been broken, declare that fact publically, direct businesses to bring infringements to an end and impose fines of up to 10 percent of turnover. The CMA's decision would then be subject to an appeal, just as it is in competition cases.

Further, the CMA proposed that it also be able to order the cessation on an interim basis of practices that it suspects may be harming consumers, pending final decision on whether the law has been broken.

Consumer Presumption for Interim Relief and Marketwide Interim Orders

The CMA already has wide law-making powers to regulate by ordering legally enforceable remedies upon completion of an investigation that proves an adverse effect on competition. The proposals recommend expanding these powers in order to add one to issue regulations on an interim basis before an adverse effect on competition is proven. This wider scope is intended to address instances of unfair trading practices or exploitation of consumer vulnerability, rather than being limited to competition.

In addition to imposing legally enforceable requirements on an interim basis, the CMA wants to bolster its ability to accept and enforce undertakings with companies about their practice and conduct. This would involve allowing it to accept undertakings at any time (for instance, before or during a market study) and, secondly, by enabling it to fine firms that breach such undertakings. The CMA's fining powers also would be brought into line with those available to other regulators.

The CMA asks that protecting competition in the interests of the consumer be made a primary duty of the CMA and U.K. courts. Historically, the CMA has very rarely issued interim relief orders, as the balance of convenience often favours the defendant companies. By legislating for the CMA and courts to be bound by a primary consumer protection duty, the CMA seeks to tilt the balance of convenience in favour of interim relief, so that the interests of protecting consumers outweighs any burden on defendant companies.

Competition Appeal Tribunal

Changes are proposed to the standard of review of the CMA's competition decisions and the CAT rules of procedure. These changes are intended to improve the efficiency of the appeals process and shorten the duration of proceedings. The measures would include greater restrictions on the admissibility of new evidence and less reliance on oral testimony.

Currently, the CAT reviews all CMA findings of fact and law under a 'full merits' standard of review. The CMA suggests that this enables opponents to have a 'second bite of the cherry' in rearguing the merits of the case and introducing new evidence not presented to the CMA. The change would seek to move to a judicial review standard (review for irrationality, or legal or procedural error) or limiting review to specified grounds.

The CMA also proposes that its actions be legally protected from civil liability, in particular defamation, so that its communications with companies do not prevent or prejudice enforcement proceedings or any subsequent actions under the markets regime.

Comment

If enacted, these proposals would materially reshape U.K. antitrust enforcement.

The U.K. competition regime has historically had a relatively light touch — but high impact and high quality — where required. Merger control is voluntary but involves very detailed review of potentially harmful deals when required. The CMA's wide-ranging enforcement powers are balanced by a rigorous, specialist appellate tribunal (the CAT). The CMA's proposals may be criticized as upsetting this historic balance in U.K. competition policy, by increasing regulatory burden (through mandatory merger control, wider rule-making powers, non-judicial fines and interim relief presumptions) while weakening judicial scrutiny.

The CMA states that the proposals require further work and that they may face “opposition from many parts of the competition ‘establishment’”. It remains to be seen whether they become government policy. They come at a time when the 2014 amendments to U.K. competition law are still bedding in, and they seek to resurrect proposals rejected in that last legislative review. Any such proposals should be subject to a full consultation, and consideration of the extent to which wider-ranging powers should be accompanied by accountability through the courts.

ENDNOTE

1 Letter From the Chair of the CMA to the Secretary of State for Business, Energy and Industrial Strategy (BEIS), published 25 February 2019, available here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letterfrom AndrewTyrie to the Secretaryof State BEIS.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/LetterfromAndrewTyrie%20to%20theSecretaryofStateBEIS.pdf). This letter came in response to a request from BEIS in August 2018 and earlier discussions with the secretary of state and prime minister.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s memorandum, “UK Antitrust Authority Seeks Powers to Increase Merger Scrutiny, Issue Sectoral Interim Regulations and Weaken Judicial Accountability,” dated February 28, 2019.

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