



Competition Law Forum

BIS consultation: Options to refine the UK competition regime

Introduction

This paper is submitted to the Department for Business, Innovation & Skills (BIS) by the Competition Law Forum (CLF),¹ as a response to its public consultation “Options to refine the UK competition regime”.²

BIS is seeking answers to 18 questions including measures, which may require primary or secondary legislation or change in practice and procedure.

The CLF welcomes the opportunity to respond to the consultation. This response does not purport to reflect the views of all CLF members or of their firms and companies or necessarily the views of all individuals in the consultation group.

¹ The Competition Law Forum (CLF) was set up by the British Institute of International and Comparative Law in January 2003, with the aim of facilitating discussion and recommendations on the most pressing competition law issues. The Forum comprises of leading legal practitioners, economists, representatives of industry, consumer groups, regulators and academics, selected on the basis of their contribution to competition law and policy. For further information, please see www.competitionlawforum.org or contact its Director, Dr Liza Lovdahl Gormsen, at l.lovdahlgormsen@biicl.org or +44 207 862 5164.

² The members of the CLF consultation group are: Peter Davis (former Deputy Chairman, UK Competition Commission); Mark Friend (Allen & Overy); Farin Harrison (Baker & McKenzie); Jackie Holland (Slaughter & May); Keith R. Jones (Baker & McKenzie); Munesh Mahtani (in his capacity as a CLF board member). The group’s chairman is Liza Lovdahl Gormsen (BIICL) and the rapporteur is Emily Daniels (BIICL).

General remarks

In common with the Secretary of State, the CLF wishes to see an effective and efficient competition regime and a reduced burden on business. Ensuring that the CMA delivers robust decisions is essential, although it is acknowledged that there is a trade-off between two possible desirable (but potentially conflicting) policy objectives: quality of decisions and the length of time taken to reach those decisions.

We note that the current regime has only been in place for just over two years. This is a short period of time from which to draw firm conclusions about the effectiveness of the regime and we have not observed a significant groundswell of opinion seeking change during that period, particularly regarding far-reaching changes to the system, such as in relation to the CMA independent inquiry panels and timetables for market investigations. We consider that, in broad terms, the current regime has been working well although we recognise that the CMA has had two sizeable market investigation cases for which it has had to seek time extensions.

We can nonetheless see the rationale for some of the proposed changes, particularly in the later part of the Consultation, such as refinements to the CAT's jurisdiction, where the proposals are addressing specific gaps.

The CLF believes that some of the changes suggested in the Consultation document are ambitious. Two years might appear an appropriate period after which to ask the question whether the current market regime is - or is not - fit for purpose. Some of our members are of the view that there is sometimes a 'disconnect' between the panel members and staff at the CMA, with panel members sometimes being too remote from the evidence or the detailed analysis underpinning the provisional conclusions of the investigation, and that the market investigation regime in particular provides

very little opportunity for main parties to have direct interaction with panel members (particularly where multi-party hearings are used). Others have had a different experience and remain firmly of the view that the current system of panels to carry out phase 2 mergers and markets investigations has on the whole worked well in ensuring independent decision making and providing a fresh pair of eyes at phase 2.

However, we believe there is room for improvement in how the panel members are appointed and we therefore consider this review to be sensible.

But we would caution against the hasty adoption of legislative changes without an appropriate period of reflection on the issues raised in this Consultation.

A separate point is that since the creation of the CMA there seems to be less focus on international engagement despite it being written into the legislation as an activity of the CMA. If not globally, at least within the ECN, the CMA has the potential to be a thought leader.

Q 1 – In light of the fact that the CMA has been in operation for over two years, is the government right to consider changes to the way that the CMA panels and decision making processes work?

As noted above, we consider this review to be largely premature but to the extent that BIS is minded to introduce reforms, we have the following comments.

The CLF considers that the Government needs to be wary of the Consultation being seen as an implicit criticism of the CMA for taking too long to complete the energy and banking market investigations in particular, or for clearing too many of the mergers that have been referred to phase 2. We think it would be wrong to criticise the CMA for this given the small "sample" of cases.

Some of the proposed changes to the panel system and decision-making process are far-reaching and we are concerned that these have been triggered by the way in which the CMA has handled the energy and banking market investigations. These investigations are exceptional in terms of scope and complexity, and do not necessarily reflect the CMA's future caseload. We therefore do not consider that the Government should take these cases as the baseline for introducing drastic reforms. In particular, the CLF considers that it is essential to preserve the independence of the panels and the "fresh pair of eyes" approach in phase 2 for both mergers and market investigations, which is rightly recognised as one of the outstanding features of the UK system. Some of the merger decisions in the period have clearly benefited from this fresh pair of eyes. In energy, the panel has looked at a number of areas and challenged the perceived wisdom/the sectoral regulator's pre-existing views.

Some members of the CLF working group are concerned that some of the proposals in the Consultation risk removing - or being perceived as removing - this independence, such as giving the CMA Board the power to approve requests for time extensions, and to approve resource allocation. Our experience is that business strongly favours the panel system and the independence of thought brought to bear.

Q 2 – If yes, on which areas considered in this consultation should the government focus its efforts?

The main concern here is whether the proposals would in reality bring about the desired effects and improve the current system. We agree that the Consultation should examine refinements to the existing system, streamlining the inquiry group role, improvements to the constitution of panels, panel size and time commitment, experience of panel members and length of appointment.

Challenges under the current panel system

Some members of the CLF working group consider that the panels have been well prepared in a number of investigations while others have noted that panel members in market investigations sometimes appear not to be sufficiently close to the detailed evidence and analysis.³ Panels can also sometimes be criticised for appearing to have a tendency to fix their direction of travel at a very early stage in the investigation and then appear reticent to change direction – even when the evidence would justify doing so. Again, this is not the case for all investigations. Where valid, it is unclear whether such concerns arise in whole or part:

1. because panel members have to rely on summaries of evidence prepared by staff; or
2. because panels do not always have the competition expertise to enter into the debate in a well-informed manner; or

³ Some CLF working group members have expressed the view that there is a tendency for hearings to sometimes be a relatively superficial ‘box ticking’ exercise, where panel members read out questions from a list prepared beforehand by staff, and insufficient time is allowed for proper debate on the central issues underpinning the CMA’s emerging conclusions. That is not, however, a view that is consistent across the working group.

3. because panel members are unable to commit sufficient time to mastering the detail.

Length of appointment

A study by Professor Paul Grout indicates that the tenure of the Panel Chairman may affect the likelihood of an adverse finding in competition investigations – so much so that “after chairing around 30 cases, a chairman is predicted to find almost every case guilty.”⁴ This finding suggests that there could be advantages in panel members being appointed for periods that are sufficient to gain the necessary experience but not so long that biases and prejudices risk becoming entrenched. It also suggests that there could be advantages in employing more panel members on a ‘revolving door’ basis, albeit it is likely to be challenging for many private practice competition lawyers to make such a career move, and there would be extra costs in implementing such a system successfully. There is hence a concern that too long appointments may lead to the lessening of independence and accountability of panel members. The CLF suggests considering employing a panel consisting of both longer- and shorter-term members to address this problem.

One option could be to provide mixed appointment terms (e.g. between 4 and 8 years) as this could provide more flexibility and encourage a greater diversity of panel members.

⁴ Grout, PA, Zalewska, A & Garside, LBE, 2013, ‘Does experience make you ‘tougher’? Evidence from competition law’. *The Economic Journal*, vol 123., pp. 474-490

Panel composition

To alleviate the disconnect between panel members and staff at the CMA, one model could be a combination of senior staff members mixed with independent panel members; in this way, there would be senior members of staff that are familiar with the case in full. However, some CLF working group members do not favour this model since they consider it would severely compromise the independence of the decision making process, not least because staff members will have career concerns that may influence their decisions to a greater extent than (say) former city lawyers who have spent their professional lives in private practice and are close to retirement age.

The CLF is in favour of keeping the present number of panel members,⁵ but improving the diversity, with more women and more diversity in background. The CLF notes that the CMA is currently at risk of being short of real competition economics expertise. The CLF believes it would be desirable to have more panel members with real business experience and competition economics expertise.

Furthermore some members of the CLF consider that a greater amount of diversity in the makeup of the panel may be more desirable; for example, by introducing members or advisers with expertise in the markets involved in a particular investigation. This would increase the pool of potential panel members, and arguably improve the quality of decision making. As noted above, we consider that a more flexible approach to appointment terms

⁵ A review of the Competition Commission annual accounts for 2012-13 reveals there were 50 active Panel members given 15 members had their terms extended (those who joined in 2005) and also a new intake of 17 members. (See Chairman's Statement, page 6 and also members' biographies on page 95, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246540/0466.pdf.) Clearly this is notably more than the CMA's current ability to draw on just 32 panel members and chairs. To the extent that the CMA is facing challenges in organization, it may be that it should increase again rather than decrease the number of panellists available.

could encourage a broader mix of people with the necessary expertise to join the panels. We note this is possible under the existing legislation.

Panel size and time commitment

There is a suggestion in the Consultation of reducing the overall size of the CMA panel to twelve members. A move to full-time panel members may risk reducing the availability of particular types of expertise – for example academic economists who are unable to commit more than two days a week, or senior city lawyers, bankers and accountants towards the end of their careers who would prefer a part-time role.

The CLF is not in favour of ad hoc appointment of experts. This could create a delay to the start of phase 2 as it would take time for experts to familiarise themselves with the procedure.

Q 3 – Do you have any further comments on the UK’s approach to decision making in market and merger investigations?

The CLF considers that allowing the CMA to revisit remedies may be appropriate in regulated sectors, but these mini-market investigations could risk becoming effectively a form of ongoing regulation by the CMA. Granting the CMA unfettered ability to re-open decisions on remedies in non-regulated industries systematically could be highly undesirable for the economy, creating uncertainty and cost for business, thereby disincentivising businesses from cooperating with the CMA, and therefore it is important to get the balance right. The thresholds for intervention would need to be clearly defined and the companies affected by the remedies must be given proper opportunity to make their views known and to test the evidence.

Consideration would also need to be given to how one defines a 'regulated market' for this purpose.

Q 4 – Which, if any, of the options for reducing the end-to-end time taken for market investigations should the government pursue?

The CLF is not in favour of any of the three options suggested in the Consultation. In particular, the CLF believes it would be a significant mistake to impose a maximum twelve-month time period for investigations, as, thus far, the CMA have rarely concluded a case in less than two years, and hence there is a fear that quality would have to be sacrificed in order to meet the demands of tighter deadlines. However, the CLF does believe there is merit in the CMA considering whether there is more it can do to reduce the timetable in appropriate cases.⁶ But it is vital that this does not come at the expense of compromising the panel's understanding of the evidence, and the overall quality of its analysis, ultimately leading to less robust conclusions which would not be in the interests of consumers.

There are many difficult trade-offs between a more streamlined process and the depth of analysis that can be undertaken within the constraints of a more compressed timetable. The CLF questions whether employing a shorter time period, which would presumably apply also for more complex cases, would be effective. A proper analysis is needed for cases, and there are risks in cutting corners in investigations. If a tighter timetable was to be adopted, it would probably mean information gathering timelines would be pushed

⁶ The CMA has, in the past, sought to re-engineer aspects of its process incrementally. For example, the Emerging Thinking documents have progressively become shorter and less detailed – and are now titled the 'Updated Issues Statement'. While such changes may have saved resources, it is notable that the overall time required for the investigations has not reduced markedly as a result of such incremental changes.

harder with less time for discussion before requests are issued and potentially unnecessary fines for alleged non-cooperation. That said, some members of the CLF working group consider that there could be a clearer articulation of the suspected harm being investigated.

Some members of the CLF working group believe there should be proper access to files, which would speed up the process of investigations although the Consultation appears to suggest a path which would lead to less, rather than more, access to the CMA's underlying evidence.

To see how such a change could potentially work, suppose the CMA released its market wide data into a Confidentiality Ring for the period of the investigation. Doing so would potentially significantly reduce the timescale required between each iteration of the CMA's economic and financial analyses as well as its evidence derived from available documents. (At the moment, the CMA tends to work for 6-9 months to develop its Provisional Findings and then consult the parties for a 3-4 week period. It then works for another 4-6 months to develop its Provisional Decision on Remedies and then consults the parties for 3-4 weeks. Thus the parties' submissions on the CMA's analysis can be as infrequently as bi-annual.) If parties' advisors had much greater access to the file - the data and documents on which the CMA may rely - then parties in favour of intervention could help develop the CMA's evidential and analytical foundation for action while those against could ensure they benefitted from the transparency allowed through Confidentiality Rings which is vital to a fair process leading to a robust outcome. Granting advisors such access to the CMA's evidence base in investigations could have the potential to make the CMA's decision-making process far more dynamic - reducing the time between incremental improvements in its analysis.⁷

⁷ A drawback to the use of confidentiality rings, however, is that authorised advisers can then find themselves in the uncomfortable position of having to make submissions to the CMA based on materials that their client has not been permitted

Q 7 – Is the government right to believe that there is no legislative change required in relation to the CMA’s merger assessment powers?

Some members of the CLF working group believes there is a case for the introduction of a legal obligation to make information requests proportionate.⁸ Potentially, one could consider limiting the obligation only to statutory information requests under section 109 of the Enterprise Act. However, given that this power is rarely used in practice, such a change would have very little perceptible impact. An over-arching requirement on the CMA to ensure that all information requests are proportionate could therefore provide a useful discipline on unfocused and unduly burdensome requests for information.

Some members of the CLF working group believes there is also a broader policy issue associated with CMA phase 1 mergers. Currently, the UK has arguably the most burdensome phase 1 merger process of any developed merger control jurisdiction. The level of information required for a UK merger notice is at least as detailed as for a Form CO under the EU Merger Regulation, and in some respects, arguably more so (e.g. the requirements for internal documents, including reports produced by economists). According to the CMA’s statistics ‘pre-notification’ takes an average of 25 working days, but it is important to realise that this time period appears to have been calculated only from the date on which a complete draft of the merger notice, including all supporting internal documents, has been provided. It is common for the initial contact with the CMA to be made by way of a briefing paper, but this is not treated by the CMA as the start of the ‘pre-notification’ process. Added to this is the fact that the UK also has a longer statutory phase 1 period than the EU Commission (40 vs. 25 working

to see; effectively this can sometimes mean that authorised advisers are unable to take proper instructions from their client.

⁸ Paragraph 67 of the Consultation document.

days, albeit the CMA claims an average of 34 working days).⁹ Some members of the CLF working consider it symptomatic of this tendency to over-engineer the phase 1 review is the fact that unconditional clearance decisions now commonly run to 20-30 pages, and in some cases may be considerably longer than this, often containing far more detail than is necessary to justify the final decision not to refer. In the Government's (laudable) desire to create a world class competition regime, some members of the CLF working group consider that the pendulum has now swung too far, and a degree of 'reining back' is now required. It is also felt by the CLF that many of the CMA's information requests are unfocussed and poorly targeted, adding to the burden on business.

Some members of the CLF working group also believes the use of hold-separate (initial enforcement) orders is relatively heavy-handed and that these are used somewhat indiscriminately and too often. The CLF suggests that the approach to these should be more proportionate, requiring clear evidence of pre-emptive action.

Q 9 – Do you agree with the government's proposal to allow for a parallel fining power on the civil standard of proof for parties who provide false or misleading information?

The question here is whether the case for change has been made out. The CLF believes that there is too little information on the number of cases where these powers would have been desirable, and that the case for this change has not been sufficiently evidenced in the Consultation. While the CMA has

⁹ Alex Chisholm, 'The CMA's achievements over the last 2 years' (11 May 2016). Available at: <https://www.gov.uk/government/speeches/alex-chisholm-on-the-cmas-achievements-over-the-last-2-years>

issued a fine for delaying information in the case of *Pfizer*,¹⁰ it has yet to do so for the provision of false or misleading information. There is little or no evidence of cases where misleading information has been given to the CMA. The experience of the CLF working group members is that lawyers will, as a matter of course, make clear to clients involved in CMA proceedings that the CMA should not be misled and businesses understand that. The threat of criminal sanctions is a real one.

Q 12 – Is the government right to seek to designate the CMA as a prosecutor under SOCPA for criminal cartel cases?

Yes, the CLF agrees with this proposal.

Q13 - Do you agree that the government should introduce a statutory time limit of two months for appeals against PSR decisions that are heard by the CMA?

The CLF considers the 2-month time limit to be sensible on the basis that this would align the period for a CMA appeal with that for a CAT appeal. Although the CLF questions why the legislation has created two appeal routes (i.e. to the CMA and the CAT for different categories of decisions), we note that this issue is not currently on the table for re-consideration. It is important that the CMA should adopt rules of procedure for such appeals (as it has for regulatory appeals in other sectors) and we would also argue strongly for payment systems to be given a clear voice in any appeals brought by third parties.

¹⁰<https://assets.publishing.service.gov.uk/media/570cbc96ed915d117a00005a/pfizer-penalty-notice.pdf>

Q14 Do you agree that the Competition Service should be abolished and that the CAT should assume its functions?

The overall consensus amongst the members of the CLF working group is that, while its functions are clearly important, it does not make any difference whether the Competition Service is there or not as a separate entity.

Q 15 – Do you agree that the jurisdiction of the CAT should be extended to allow it to hear cases (or elements of cases) which relate to breaches of articles 53 and 54 of the EEA agreement as well as breaches of UK competition law and Articles 101 and 102 of TFEU?

The CLF thinks it is sensible to extend jurisdiction, although the wider jurisdictional issues needs to be considered when making this proposal, for example, for those cases which are primarily competition cases, but also contractual claims. In such cases, it would be difficult to split these hearings and the CAT does not have jurisdiction in relation to contract cases.

Although not raised in the Consultation, the CLF suggests that the Government consider reforming Rule 119 of the CAT Rules. We note that the Consumer Rights Act 2015 sought to remove many of the jurisdictional oddities which limited the CAT's ability to use its expertise in private actions for competition law breaches. However, there are many of the view that the limitations on its jurisdiction have effectively been preserved for a transitional period by Rule 119 of the CAT Rules. Rule 119 states that the old CAT Rules on limitation continue to apply to claims that arose before 1 October 2015, being the date the current CAT Rules came into force. These transitional provisions have a wide scope but may effectively make it difficult for claimants to bring standalone actions before the CAT if the facts giving rise

to them took place before 1 October 2015. This ongoing complexity is likely to continue for some time and may merit further consideration.¹¹

Q 16 – Is the government right to allow the CAT to hear judicial review applications in respect of matters arising in the conduct of ongoing CA98 cases?

Yes.

Q 17 – Is the government right to give the CAT a power to give declaratory judgments in private actions for damages?

Yes.

Q 18 – Is the government right to seek to amend ERRA to ensure that the government has a comprehensive power to make rules allowing the CAT to exercise judicial supervision of all aspects of warrants in competition investigations?

Yes. The CLF questions whether this is a concern, but it was conceded that this would bring little change to the current situation.

¹¹ See blog by Tom de la Mare, Blackstone Chambers, *Private Actions: The CRA 2015 giveth; and the 2015 CAT Rules taketh away* available at <https://competitionbulletin.com/2015/10/01/private-actions-the-cra-2015-giveth-and-the-2015-cat-rules-taketh-away/>