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Reforming the UK Competition Regime – assessing the impact of new legislation and challenges ahead for the CMA

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"Enforcement of the competition rules – next steps for reform"

Introduction

It is a pleasure and an honour to address such a distinguished body. Thank you for asking me.

The number and quality of the attendees is testimony to the importance of the subjects being discussed today. It is difficult to think of another time when there have been so many crucial changes in this area, whether actually in train or in contemplation. These developments, and potential developments, encompass not just the fundamental institutional change which is at the core of today's discussion, namely the replacement of the CC and OFT by a single CMA, but also other far-reaching proposals for modifying key aspects of both public and private enforcement. Many of these are interlinked: changes which affect the institution or institutions responsible for public enforcement of the competition laws inevitably affect public enforcement of those rules; and public and private enforcement are often intertwined, since many private claims rely upon the infringement decisions of public enforcers to establish liability on the part of a defendant. Such reliance is likely to continue to be the bedrock of most private enforcement for the foreseeable future, as the difficulties of proof in competition cases are notorious. Similarly, private actions serve to promote the aims of public enforcement by providing an additional deterrent effect through the threat of substantial damages.

Despite the crucial importance of the institutional changes which are now in the final stages of implementation, I shall direct my brief remarks mainly to the procedural and jurisdictional proposals currently under consideration. The institutional questions have been well-rehearsed today, and in any event it is perhaps unnecessary, if not impertinent, for a judge to comment on the important and onerous task facing the new CMA, in combining within a single institution many of the functions of both the CC and OFT. Effective enforcement is not, of course, measured just in terms of the number of infringement decisions. However, it is true that in recent years there have been a relatively small number of infringement decisions, with correspondingly few anti-trust appeals coming before the CAT. It remains to be seen whether this will change with the advent of the CMA. One thing is clear: the CMA has a strikingly able and energetic leadership team who will provide it with the very best prospect of being a worthy successor to its well-respected predecessor bodies.

Administrative decision

In its anti-trust enforcement role the CMA will continue to operate an administrative decision system. Two alternatives to such a system were looked at in the course of the consultation exercise which led to the creation of the CMA. One of these alternatives was to move to a prosecutorial approach similar to that adopted in a number of other jurisdictions both within and outside the EU. Those deliberations coincided with a more general debate, in the EU and elsewhere, about the fairness and appropriateness of the administrative model of decision making, where the same body investigates a possible infringement, decides the case and, if the infringement is established, imposes a financial penalty (now increasingly substantial). A further concern raised in this context is the perceived risk of so-called “confirmation bias”. This alludes to a danger

that the decision-maker may be strongly inclined to conclude that the case which it has initiated and investigated is proven.

These risks can be, and are being, mitigated by, for example, separating investigators from decision makers as much as possible within the single authority, and by other safeguards including subjecting the proposed outcome to a “devil’s advocate” process. Nevertheless, some people consider that the only truly effective way of avoiding the risks in question is for the authority to be required to present its allegations of infringement to a separate and unquestionably independent court or tribunal, which will itself make what is then a judicial decision. There have been voices urging the EU to adopt such an approach, with the European Commission in effect prosecuting a case before the General Court. However this would mean a change to the Treaties and there appears to be little prospect of such a step at the moment.

Interestingly, Germany operates *both* administrative *and* prosecutorial models at the same time: the enforcement authority (the Bundeskartellamt) first investigates and takes the infringement decision. If there is an appeal from that administrative decision, the decision then becomes an indictment, on the basis of which the Bundeskartellamt prosecutes the appellant before the relevant court. That court treats the matter as a full rehearing, and reaches its own decision accordingly.

As well as neutralising the objections of lack of fairness and objectivity, a prosecutorial approach provides an enforcement authority with a much less ambiguous role, which seems to be enthusiastically embraced by a number of authorities abroad. The Government gave serious consideration to changing to such a system, but there was fierce resistance in some quarters. The most cogent argument in favour of retention of the administrative system is that the UK has

now had more than 10 years experience of operating it. In the end this won the day.

Standard of review in competition appeals

Let me now turn to more recent developments.

A finding that a company has infringed one of the competition prohibitions is regarded as criminal in nature for the purposes of the ECHR: it can have very serious financial and reputational implications for those concerned, with the risk not just of substantial penalties, but also that the decision will be used as a foundation for a follow-on damages action.

One of the main planks in defending retention of administrative decision-making in this context is that there is a full merits appeal to an independent tribunal from such a finding. I must emphasise that this does not connote a re-hearing of the decision under appeal. What it means is that any finding of fact or of law contained in the decision can be challenged as being wrong. In other words, as far as findings of fact are concerned, for example, the appeal court (the CAT) is not limited to assessing whether, on the evidence before it, the decision-maker could reasonably have reached the disputed conclusion (a judicial review approach), but must go on to consider whether the conclusion in question is wrong, if that is what is being alleged by the appellant. I am, of course, here referring only to *material* findings of fact: if there is an error in relation to an *immaterial* finding then the error itself would be immaterial and of no consequence.

When the Government decided to stick with the current administrative decision-making system, it was on the basis that appeals against infringement decisions by the CMA would continue to be subject to an appeal on the merits. In its March 2012 response to the relevant consultation paper the Government said this:

"*The Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and therefore intends that full merits appeal would be maintained in any strengthened administrative system.*"

However, in the current consultation "*Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform*" issued by the Government in June this year, the Government is re-visiting this issue, and is consulting again on whether the standard of review and permitted grounds of appeal in challenges to infringement decisions under the Competition Act 1998 should be scaled down to the more limited "judicial review" standard or to more closely defined grounds of appeal than at present. No convincing justification for any such change is put forward in the paper, and its genesis is obscure – there has certainly not been a groundswell of opinion seeking to re-open the issue so far as I am aware.

This is a cause for concern in view of the issue of compliance with Article 6 ECHR, and the very serious reputational and financial consequences to which I have referred. It would be deeply troubling if a decision of that kind made by an administrative body carrying out the roles of investigator, prosecutor, judge and jury, were subject to anything less than a full merits review by a court. It is also puzzling, to say the least, that these apparent second thoughts should have arisen so soon after the Government's firm conclusion following extensive consultation only last year. Any change of the kind envisaged would be ironic, given the current lively debate in Europe about the adequacy of the General Court's jurisdiction to review the European Commission's infringement decisions. Also, one cannot help but wonder what kind of message it would send to businesses and investors both here and abroad about our confidence in regulatory decision-making in the UK. Dumbing down the intensity of judicial oversight does nothing to enhance that confidence, or indeed the quality of the regulatory decisions themselves.

“New” evidence on appeal

The same consultation paper raises the possibility of significantly restricting the introduction, on appeal, of what the paper calls “new evidence”, by which is meant material which, for one reason or another, was not available to the regulator at the regulatory decision-making stage before it made the decision which is being appealed. The implication of the consultation seems to be that the CAT either lacks power to prevent this, or is unwilling to use its existing powers to full effect. Neither proposition is in fact correct. To the extent that evidence is produced at the appeal stage which could reasonably have been brought before the regulator in the course of the investigation, the CAT’s current rules are perfectly adequate to enable it to admit, exclude or limit evidence to whatever extent the interests of justice require. The CAT can also “punish” culpably late production of evidence by means of its wide discretion to make costs orders.

If restrictions of the kind proposed are introduced in relation to the admission of evidence by the CAT, the result will not be a reduction in the number of appeals or a shortening of their overall length. On the contrary, there are likely to be additional and longer appeals both in the CAT and in the Court of Appeal as the parties dispute the admission or exclusion of material by reference to the proposed statutory criteria for admission of such evidence. This would be most undesirable, and exactly the opposite of the streamlining which is the expressed object of the consultation.

If a party, whether appellant or defendant, wishes to put evidence before the CAT which is relevant to the main matter which the CAT has to decide, it should be left to the CAT’s judicial discretion whether to admit or exclude the material in question, and if it is admitted to determine the terms on which that

admission takes place. The imposition of the proposed statutory criteria of admissibility is likely to lengthen and complicate procedures.

Regulatory appeals consultation generally

The current consultation raises a number of other issues that are probably outside the scope of today's business. No doubt most people here are familiar with them in any event. Some of those proposals are very positive and seek to improve and rationalise the various systems for regulatory appeals, and enhance the effectiveness of the CAT. Others, including the ones I have just been discussing, are less positive, and contemplate changes the need for which, and the benefits of which, are unclear and unsubstantiated. In view of their potential adverse impact on the effectiveness and acceptability of competition and regulatory appeals procedures, the CAT has provided BIS with its detailed comments, and a copy of the CAT's response is on our website.

Private enforcement

Let me end on a happier note!

Having expressed some criticism of certain recent initiatives, it is only fair that I should indicate sincere admiration for the way in which BIS ministers and officials have picked up and run with possible reforms to the procedures for private enforcement of the competition rules, with a view to enhancing the protection available to victims of infringements of those rules, particularly consumers and SMEs. In 2012 the Government consulted on such reforms. In January 2013, the Government published its response to that consultation, signalling its intention to make the Tribunal a "major venue" for private enforcement of the competition rules in the United Kingdom, and foreshadowing a number of landmark measures which together will mark the single biggest reform to this aspect of UK competition law in recent years.

These are now formulated in schedule 7 of the Consumer Rights Bill, published by the Government in June this year.

In particular it is proposed that the Tribunal should have jurisdiction to entertain not merely follow-on actions for damages as at present, but also "stand-alone" claims, and to grant interim and final injunctions (but not interdicts in Scotland). This reform will remove the existing limitations attaching to the Tribunal's "follow-on" claims jurisdiction, and will and provide claimants with a real choice whether to begin such proceedings in the High Court or the CAT. Few if anyone opposes this extension of the CAT's remit. It will represent a very welcome rationalisation of the private enforcement regime and will enable further appropriate use to be made of the CAT's specialist judicial resources.

More controversially the Government also proposes to establish a collective redress regime including, for the first time in the United Kingdom, the possibility of an "opt-out" claim procedure. This new procedure is aimed at providing an effective remedy in respect of mass claims for relatively small individual amounts of loss suffered by victims of cartel or other anti-competitive conduct. The Tribunal is to be given the exclusive jurisdiction to hear claims for collective redress brought under the new procedure.

I know that this is not universally welcomed, and there are genuinely held fears that an opt-out procedure in particular may lead to abuses of a kind associated with US-style class actions.

Can I very briefly indicate why despite its novelty in the UK I believe we should embrace this reform.

First, the clue is in the novelty: In our UK jurisdictions there is simply no procedure suitable for dealing with mass claims of small individual amounts. The competition rules, both EU and national, provide rights for individuals

which courts are required to protect. Yet there is no point in having rights which cannot be enforced because there is no effective remedy: *ubi jus ibi remedium*.

In practice the only effective procedure for certain claims of that kind is an opt-out representative action.

Secondly, without underestimating the challenges likely to be encountered, we can be reasonably confident that the perceived abuses will not occur here:

(1) The procedure is not to be rolled out generally: competition law, and the CAT, are to be used as a test bed.

(2) There are to be no US-style triple damages, and no exemplary damages.

(3) Unlike in the US, the loser pays principle will apply.

(4) Unlike in the US, there are to be no juries.

(5) Most importantly of all, the use of opt-out is to be subject to a strict judicial certification procedure to ensure that the case is suitable for that approach, and that the proposed representative is an appropriate person or body to fulfil that role. The criteria for certification are still to be worked out, but they will clearly include a requirement that the proposed proceedings raise issues of fact and/or law with sufficient "commonality" to justify use of the procedure, and it is possible that they may also include a preliminary merits test - although there are mixed views about whether such a criterion should be applied as a matter of course in every case, as opposed to being left to the court's discretion. In any event, my hope is that there will be a wide discretion overall, which would enable the CAT to have regard to all the circumstances of the case.

For these reasons I frankly doubt that there is going to be an avalanche of cases certifiable as suitable for opt-out. The fears of abusive litigation are

also, I believe, unjustified. And it is surely undesirable that victims of unlawful anticompetitive conduct should be unable to recover their loss simply because it is too small for them to claim individually, particularly when the corollary of this is that the wrongdoers are thereby unjustly enriched, to the tune perhaps of many millions of pounds.

There is another, less noble, reason for embracing this proposal: there is a good deal of competition in the area of international competition litigation. Much of this work does come to the UK as things stand, but we do have at least two active competitors within the EU. Others are gearing up. We cannot be complacent if we wish the UK to remain at the forefront. Having a viable, effective, procedural vehicle for mass claims of small individual amount is likely to be an important factor in our appeal as a venue for international litigation.

I therefore very much hope that this opportunity to create such a procedure will not be lost.

Thank you for listening.