

Competition & Regulatory Newsletter

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UK government consults on its statutory review of the competition regime and its Strategic Steer to the CMA

The UK government has [announced](#) the launch of a consultation in relation to the five year statutory review of the competition regime and the UK Competition and Markets Authority (CMA) as required by the Enterprise and Regulatory Reform Act 2013 (ERRA). The government also published a consultation on its Strategic Steer for the CMA. The announcements came with the publication of a [Green Paper](#) entitled Modernising Consumer Markets. The Green Paper invites views on four broad areas of the consumer markets: (i) improving deals and services in the utilities markets; (ii) protecting consumers when they buy and sell online and helping them to take advantage of their data; (iii) improving alternative dispute resolution; and (iv) supporting local and national enforcers to collaborate to protect consumers. The consultation will close in July 2018, and the government will publish its review of the current regime by the statutory deadline in April 2019.

The consultation on the current competition regime and the Green Paper

The Business Secretary, Greg Clark, revealed that the government will consider whether the current regime gives the CMA, and other sector-specific regulators, adequate tools to deal with anti-competitive behaviour. It will also look at the regime's ability to handle novel challenges; there is a particular focus on the digital economy (a chapter of the Green Paper is dedicated to looking at issues in respect of the digital markets).

The ERRA overhauled the UK competition regime in 2014. The CMA was established pursuant to the ERRA by merging the functions of the Office of Fair Trading and the Competition Commission. The review will consider whether the administrative and policy tools of the current regime enable consumers and the wider economy to benefit from competition, including the competition regime's ability to respond to the rapid development of the digital economy.

The Green Paper states that the challenges posed by the digital economy span the breadth of competition law. Rules and practice on mergers, cartels and other anti-competitive agreements, market investigations and enforcement of

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consumer protection laws are all relevant. The Green Paper uses the example of merger control, suggesting that the nature of the digital economy means that there might be difficulties in assessing how a market may develop when reviewing a large market player's acquisition of a smaller competitor. Further, it suggests the traditional theory that consumers will be harmed by rising prices if competition is ineffective is not straightforward to apply when services are essentially paid for by consumers' data. Algorithms also potentially enable competitors to collude on prices, and problems can even arise without the algorithm users' knowledge. The consultation invites views on the challenges digital markets pose for effective competition enforcement, and what can be done to address them.¹

This is an interesting time for the government's review to take place in light of Brexit. The Green Paper notes that post-Brexit there will be fewer constraints on the UK's ability to modify the regime, which suggests that a wider range of amendments could be considered.

Other areas of focus in the Green Paper are better outcomes for consumers participating in regulated markets and proposals to improve the enforcement of consumer rights, including in particular a new power enabling all consumer law enforcers, such as the CMA and Trading Standards, to ask courts to fine companies that breach consumer law up to 10 per cent of global turnover. It is proposed that the fines can be standalone remedies or be used in conjunction with other civil remedies. These areas tie in with the CMA's work and that of other industry regulators some of which have concurrent competition powers. Again, the consultation requests views in relation to these areas.

The Strategic Steer

The government is also consulting on the new 'Strategic Steer' for the CMA. The government issues a Steer for the CMA for each Parliament. The Steer is non-binding and its purpose is to "*support the CMA in achieving its objectives and delivering real benefits for UK consumers and the UK economy*".² It also shows how the government views competition in the context of its wider economic objectives. The current Steer was adopted in December 2015 and broadly provides that the CMA should focus on markets where competition may enable better consumer choice and facilitate innovation and productivity, be fair and effective when enforcing antitrust rules and take the lead on using its tools to provide alternatives to regulation to help meet the objective of removing regulatory burdens for businesses.

The government has set out a draft new Steer as an **annex** to the Green Paper, and it invites views on the draft.

The draft Steer highlights three key areas:

- (i) The government's Industrial Strategy - the CMA should take timely action to improve competition throughout the UK in sectors that considerably impact productivity, act to minimise entry barriers for new market participants and publicly report on competition matters impacting productivity, bringing to light issues requiring government intervention, and steps the CMA is taking towards improvement.
- (ii) The championship of consumers - the CMA should centre its activities on areas where there is a clear risk of harm, deal with market failures and use a cross-discipline approach, lead sector

¹ Modernising Consumer Markets, Consumer Green Paper, Department for Business, Energy & Industrial Strategy p.36.

² Ibid, p.66.

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regulators to maintain a coordinated competition regime and protect consumers from illegal and anti-competitive practices and make markets work well for vulnerable consumers.

- (iii) Embracing the challenges and opportunities arising from the digital economy - the CMA should foresee and embrace competition challenges arising from new and emerging markets, and seek high-impact outcomes, assist consumers in exploiting the digital economy by building trust and providing law enforcement and engage in international discussion on consumer policy and competition in the digital economy.

The draft Steer suggests that the CMA should have regard to all of these areas when it carries out its activities, and that it should be active in dealing with anti-competitive conduct and unfair trading both pre and post-Brexit. In particular, the CMA should:

- (i) be ambitious in terms of the volume, type and pace of its cases;
- (ii) provide a voice for consumers and work to grow public knowledge of competition law;
- (iii) be robust, fair and effective when applying competition rules; and
- (iv) publicly report on its impact on competition in the UK, and on developing and preserving well-functioning markets for all. It should make public the actions it is taking to tackle issues and be vocal when a matter requires government intervention.

The broad theme underlying the government announcement and the Green Paper is consumer protection. The government also shows that it has a particular interest in the CMA's ability to adapt to deal with the new challenges posed by the digital economy. Many challenges and opportunities that will emerge from Brexit remain to be seen, but it is important to note it is part of the backdrop to this review. It will be interesting to see how this shapes the CMA of the future, and the impact it may have on competition law.

Other developments

Antitrust

UK estate agent directors disqualified over price-fixing cartel

On 10 April 2018 the CMA **announced** that it had secured legally binding undertakings to disqualify two directors of Abbott and Frost Estate Agents Limited. This follows an investigation, which resulted in an infringement decision issued in May 2017, in which the CMA imposed fines totalling £370,000 on five Somerset estate agents, including Abbot and Frost, for secretly agreeing to fix their minimum commission rates at 1.5 per cent. A sixth agency was granted immunity under the CMA's leniency programme.

The CMA's investigation revealed that a number of company directors were either actively involved in the cartel, or failed to take action after becoming aware of its activities. The CMA secured commitments from Messrs David Baker and Julian Frost, who both served as Abbott and Frost directors during the time of the infringement, disqualifying them from acting as company directors or being involved in the management of any UK firm for three and a half and three years respectively. The CMA is continuing its investigation into whether it should seek the disqualification of directors in the other two companies that did not qualify for leniency.

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This is the second time that disqualification undertakings have been secured in connection with a breach of competition law. The CMA first secured director disqualification undertakings for breach of antitrust rules in December 2016, when online poster supplier Trod was fined £160,000 for operating a cartel with competitor GB eye on the Amazon Marketplace (for more information, see our previous [newsletter coverage](#) on this topic). As in the current case, the CMA accepted a binding undertaking from director Mr Daniel Aston instead of applying to the court for a disqualification order, in accordance with its powers under the Company Directors Disqualification Act 1986 (as amended by the Enterprise Act 2002).

Hong Kong Competition Commission highlights risks in the employment marketplace

On 9 April 2018 the Hong Kong Competition Commission (HKCC) issued an [advisory bulletin](#) setting out its guidance and advice on certain practices in relation to hiring and terms and conditions of employment. The HKCC highlighted that, in this context, undertakings that compete with each other to hire employees are considered to be competitors, regardless of whether they compete in the same product or services market. The advisory bulletin was especially concerned about undertakings agreeing or exchanging their intentions regarding any aspect of compensation (which is not limited to salaries and wages but can include benefits and allowances) or the solicitation, recruitment or hiring of employees (including non-poaching arrangements), since such arrangements may amount to price fixing and market sharing. The advisory bulletin includes a number of hypothetical scenarios in relation to these topics, as guidance for employers, employees and businesses.

In the accompanying [press release](#), Mr. Jindrich Kloub, Executive Director (Operations) of the HKCC, reminded companies that, “[e]mployers must make their decisions about hiring and the terms and conditions of employment offered to workers independently. Where the Commission has reasonable cause to suspect that conduct contravening the Competition Ordinance has taken place, it will take the appropriate enforcement action.”

In a sign that anti-competitive employment practices are also under the spotlight of competition authorities in the U.S., the HKCC’s advisory bulletin was released shortly after the U.S. Department of Justice Antitrust Division [announced](#) its first prosecution of non-poaching agreements under its [guidance for human resources professionals](#), issued in October 2016. Given the increasing attention of the competition authorities in this area, companies should remain alert to competition law when making employment-related decisions.

Regulatory

Department for Transport publishes outcome of consultation on new aviation strategy

On 7 April 2018 the UK Department for Transport (DfT) published [the results](#) of its consultation into the future of UK aviation following a call for evidence in July 2017. The aviation strategy will set the direction for UK aviation policy to 2050 and beyond. The government will hold a further consultation on policy detail later this year and aims to publish the final strategy in early 2019.

The government will use the new aviation strategy to address whether there is a need to promote further competition within the marketplace, as part of the aim to achieve a “safe, secure and sustainable

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aviation sector that meets the needs of consumers and of a global, outward-looking Britain". A number of issues raised in the call for evidence are addressed, including the importance of consumer choice, the challenge of delivering future airport capacity beyond 2030, the need for airspace modernisation, the importance of environmental and noise concerns and the continued success of the aviation industry post-Brexit. The latter will involve a review of the UK's air service agreements to ensure that they continue to drive competition.

Areas flagged for further review include the emergence of single dominant carriers at airports, the market in ground handling services and the UK terminal air navigation services market. For the air navigation market, the DfT requested that the Civil Aviation Authority (CAA) review whether the sector is subject to the right level of market conditions at relevant UK airports. The CAA's [draft finding](#) suggests that appropriate market conditions do exist, although the final advice is expected to be published in May 2018.

The industry will also be consulted on the rules for the allocation of new capacity as part of the government's analysis of existing airport slot regulation and on potential reform to Air Passenger Duty. The DfT has invited views on the options available to deliver the objectives of aviation expansion, including increasing domestic connectivity, opening access to new global markets and increasing competition on existing routes.

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