SLAUGHTER AND MAY

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CMA and FCA publish joint report on lessons learned about consumer-facing remedies

On 1 October 2018 the Competition and Markets Authority (CMA) and the Financial Conduct Authority (FCA) published a **joint report** titled '*Helping people get a better deal: Learning lessons about consumer facing remedies*'. The report summarises lessons learned from the UK Competition Network (UKCN)'s *Consumer Remedies Project*, which aimed to improve its members' understanding of both consumer behaviour and of the selection, design, testing and evaluation of consumer-facing (or "demand side") remedies.[1]

Understanding the problem

The report begins by outlining how competitive markets produce good outcomes for consumers, which can only be realised if both the supply and demand sides of the market are working effectively. Just as suppliers should compete vigorously to win customers, active and informed consumers should buy products which offer them the best value. This "virtuous cycle" relies on the ability of consumers to access, assess and act on information, otherwise the demand side of the market will not work effectively and the cycle will be broken.

Indeed, where consumers face obstacles to making good decisions, suppliers may be able to exploit greater market power.

Obstacles may arise from a combination of factors, particularly behavioural biases and costs to exercising choice, both of which may be exacerbated by actions taken by suppliers. Examples of exploitative actions include 'drip pricing'[2], artificial time pressures and relying on consumer overconfidence.

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

[1] The UKCN *Consumer Remedies Project* was launched in 2016 in response to a recommendation made by the National Audit Office in its **report** on the UK competition regime (see para. 27(h) of the Summary).

[2] 'Drip pricing' is where additional charges are added to the headline price later in the purchasing process, capitalising on the time and effort the consumer has already invested.

Remedy options

The report continues by discussing lessons learned in respect of the five main categories of remedies used to address demand side problems:

- *Promoting consumer engagement* can be an effective means of increasing competitive pressure, particularly where consumer disengagement is unconscious. The report highlights the need to change "choice architecture", which can have a significant influence on consumer decision-making. For example, the majority of consumers will choose default options, even when they would otherwise make very different decisions. The report proposes that consumers should be automatically enrolled into the best option(s) with the ability to opt out. This would benefit the majority of consumers while maintaining consumers' ability to exercise effective choice.
- *Increasing transparency* can play a key role in supporting effective competition by ensuring that consumers can make informed decisions. Noting evidence on the mixed effectiveness of disclosure remedies, the report concludes that rules on disclosure of information may need to be more prescriptive to ensure that disclosures are clear. This could be achieved by specifying a set format, as well as including both relative and absolute measures of suppliers' performance to provide context. The report also highlights the need to promote consumer awareness of disclosures and proposes that they are embedded in wider communications strategies, such as using both traditional and social media to highlight their existence.
- *Helping consumers shop around* enhances competition by making it easier for consumers to compare products and services, and ultimately to make more informed decisions. The report suggests that it is often better to encourage the development of digital comparison tools designed by commercial organisations rather than by regulators, given the strong financial incentive for those organisations to make their services as reliable and user-friendly as possible. However, the report proposes that regulation or accreditation of comparison websites could be used to ensure good governance of digital comparison tools.
- *Making it easier to switch* enables consumers to act on their informed decisions. The report observes that measures designed to overcome financial barriers and "hassle factors" can be very effective, particularly because such measures can inhibit suppliers from adopting practices that increase costs or exploit behavioural biases, which can discourage consumer proactivity. In this regard, the report highlights that it is also important to tackle consumers' disengagement and misconceptions about switching, as well as improving the switching process.
- *Controlling outcomes* may prove necessary where the type of remedies described above do not sufficiently protect the interests of some consumers. The report notes that measures to control outcomes, such as price caps, must be carefully designed and implemented to avoid limiting innovation.

Effective remedies are tested remedies

To design effective consumer-facing remedies it is necessary to have a proper understanding of how consumers behave, derived from evidence rather than assumptions. The report notes that consumers often behave in ways that traditional economic models, based on the 'rational consumer', might not expect; and that, even when consumers do behave rationally, it can be difficult to predict their behaviour in complex environments. The report therefore explains that testing remedies can diagnose harmful market features, compare how different remedies perform in respect of their objectives and narrow the pool of potential remedies. Once a likely remedy is identified, testing can be used to consider how design and implementation features will affect the performance of that remedy.

Speaking at the UKCN conference for the publication of the report, Christopher Woolard, FCA Executive Director of Strategy and Competition, further emphasised the importance of testing remedies as it "*reduces uncertainty about what will work and gives us insight about how markets might respond*".

It is equally important to evaluate the effectiveness of remedies after they are implemented, which involves understanding how best to conduct evaluations and which factors to consider. Evaluation can provide evidence to inform future decision-making and greater accountability to ensure that funding has been spent effectively.

Looking to the future

The report highlights two areas that represent the greatest opportunity for further improvements, and on which UKCN members are intending to focus.

The first area is consumer diversity and vulnerability, where suppliers are able to benefit from characteristics of particular consumers, which is of acute concern when the most vulnerable bear the costs. In this regard, the CMA has this year started a proactive program of work on consumer vulnerability.[3]

The second area of focus is the opportunities and challenges of the digital economy. Just as the digital economy provides opportunities to redesign markets, develop personalised tools and improve testing, it also risks increasing price-discrimination, disadvantaging those without internet access and increasing the speed of market changes.

The report's conclusion that UKCN members should be "*bold in identifying possible remedies options…and not rule out radical solutions too quickly*", suggests that we can expect more novel, but well tested, interventions in these two areas going forward.

[3] As set out in the **2018/19 CMA Annual Plan.**

Other developments

Merger control

Ride-hailing platform services under scrutiny in Singapore (Grab/Uber) and China (Didi Chuxing)

On 24 September 2018 the Competition and Consumer Commission of Singapore (CCCS) issued an **Infringement Decision** against Grab and Uber for completing a merger which substantially lessened competition. The CCCS imposed fines of SGD 6.4 million (approximately £3.6 million) and SGD 6.6 million (approximately £3.7 million) on Grab and Uber respectively, along with a number of remedial directions. This is the first Infringement Decision issued by the CCCS in respect of a merger; the financial penalty is of particular significance, given that the merger regime in Singapore is voluntary.

As covered in a **previous edition** of the newsletter, Grab and Uber announced on 26 March 2018 that Uber had sold its Southeast Asian business to Grab in return for a 27.5 per cent stake in Grab. The CCCS commenced investigations the next day, suspecting that the transaction infringed section 54 of the Competition Act, which prohibits mergers that will substantially lessen competition in the market.

According to the Infringement Decision, Grab and Uber were the two largest providers of ride-hailing platform services, with a combined post-transaction share of 80-90 per cent for the provision of booked chauffeured point-to-point transport services by ride-hailing platforms in Singapore. The CCCS found that Grab trip fares had increased by between 10-15 per cent after the transaction. It also received numerous complaints from both riders and drivers on the increase in effective fares and commission rates by Grab post-transaction.

The CCCS concluded that the transaction substantially lessened competition in the ride-hailing platform market. In addition to the financial penalty, the CCCS imposed a number of remedies on Grab and Uber consistent with its **proposed infringement decision** on 5 July 2018, including:

- removing Grab's exclusivity clauses from its existing contracts;
- restoring Grab's pre-transaction pricing algorithm and driver commission rates; and
- requiring Uber to sell the vehicles of Lion City Rentals (a subsidiary of Uber that operates a car rental business for private hire vehicles in Singapore) to any competitor on fair market value, and preventing Uber from selling those vehicles to Grab without prior approval from the CCCS.

In calculating the fines imposed, the CCCS took into account the relevant turnover of Grab and Uber and the nature, duration and seriousness of the infringement, as well as aggravating and mitigating factors. The mitigating factors related to the parties' cooperation throughout the investigative process. The aggravating factors included the fact that the parties completed the transaction in an irreversible manner despite the fact that they knew, or ought to have known, that the transaction would infringe the section 54 prohibition.

In China, the main ride-sharing platform, Didi Chuxing, has come under fire from China's Ministry of Transport (MOT). On 27 September 2018 at a **routine press conference** held by the MOT, Wu Chungen, a spokesperson of MOT, accused Didi Chuxing of engaging in monopolistic practices and of failing to resolve safety issues. Wu did not provide details of the accusation, but he told the press that a preliminary investigation report had been completed and would be sent to the enforcement agencies shortly for action.

Antitrust

European Commission opens public consultation on the future regime for liner shipping consortia

The European Commission is inviting comments on the relevance and future of the liner shipping consortia block exemption regulation (BER) (Commission Regulation (EC) 906/2009), which will expire on 25 April 2020. On 27 September 2018 the Commission opened a public consultation inviting stakeholders to submit their responses by 20 December 2018. The consultation will be followed by the Commission publishing an evaluation Staff Working Document in the first half of 2019.

The Treaty on the Functioning of the European Union (TFEU) prohibits agreements between companies that restrict competition. In liner maritime transport, it is common practice for shipping companies to cooperate in the provision of liner shipping services, which are regular, scheduled maritime cargo transport services on a particular route. Such cooperation involves the exchange, sale or cross-chartering of space or slots on vessels, which can improve the productivity, efficiency and quality of liner shipping services. Benefits resulting from these efficiencies can be passed on to users of the shipping services, including better services and better coverage of ports. With this in mind, the BER provides shipping lines with a five year exemption from the prohibition under Article 101(1) TFEU and allows, in accordance with Article 101(3) TFEU, under certain conditions, shipping lines with a combined market share of below 30 per cent to enter into "consortia" agreements to provide these services.

Given the significant changes to the industry landscape since the introduction of the first consortia exemption in 1995, by way of significant consolidation in the market, the Commission published a roadmap in May 2018 outlining its planned evaluation process of the BER. The roadmap sets out five evaluation criteria: effectiveness, efficiency, relevance, coherence and EU added value. (Further details are provided in a previous edition of this newsletter).

In its consultation, the Commission intends to collect views from stakeholders to inform its assessment of the impact and ongoing relevance of the BER. The Commission is considering whether the BER should expire or be extended and, if so, under which conditions. In particular, the Commission is seeking the views of shipping companies, their clients (shippers and freight forwarders), port operators and other

stakeholders and interested parties. The Commission will also consult the competition authorities of the EU Member States.

Canadian competition authority enhances immunity and leniency programs

On 27 September 2018 the Competition Bureau and the Public Prosecution Service of Canada (PPSC) **launched** updated Immunity and Leniency Programs (Programs) to boost Canada's ability to detect, investigate and prosecute unlawful conduct that may contravene the criminal provisions of Canadian competition law. The Programs provide incentives for parties to apply for immunity or leniency in return for their cooperation with the Bureau's investigation, and the PPSC's ensuing prosecution, of others involved in unlawful conduct.[4]

Following two rounds of public consultations, the resulting changes to the Programs clarify the approach of the Bureau and the PPSC with the aim to increase transparency and predictability for potential applicants. Key updates include:

- Removal of automatic coverage for all directors, officers and employees under corporate immunity agreements. Individuals that require immunity will need to demonstrate (i) a willingness to cooperate with the investigation and (ii) their specific knowledge of, or participation in, the unlawful conduct.
- Interim immunity for documentary and testimonial evidence. Final immunity will be provided when the applicant's cooperation and assistance is no longer required.
- Every leniency applicant may now be entitled to a cooperation credit of up to 50 per cent to be applied to the base fine, as well as an additional 10-20 per cent credit for having an established and effective corporate compliance program. Credit will also be based on the value of the applicant's cooperation rather than be provided on a first-come, first-served basis.

The Bureau's Interim Commissioner, Matthew Boswell, stated that the updates would enhance "*enforcement efforts while continuing to offer some of the strongest incentives in the world for coming forward with evidence that might otherwise remain hidden*".

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[4] Immunity provides complete immunity from prosecution, whereas leniency refers to a reduction of the sanctions.