Just five years after it was created, does the CMA already need fundamental reform?

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Lord Tyrie, the Chairman of the CMA, certainly thinks so. The CMA has also published an extensive 'wish-list' of changes designed to safeguard the interests of consumers and to maintain and improve public confidence in markets. The Digital Competition Expert Panel led by Jason Furman has also recommended changes to UK competition policy "*to unlock the opportunities of the digital economy*".

In this article, we provide our views on some of these key proposals and what they might mean for businesses if they make it into the forthcoming BEIS consultation on CMA reform.

A move to mandatory merger notification?

The CMA has reignited the debate on whether the UK should move to a mandatory prior notification regime, at least for larger mergers that are likely to be reviewed by multiple competition agencies globally. The CMA's rationale for the change is to avoid a situation post-Brexit whereby parties focus on notifications in mandatory regimes (such as the EU and US). This could put the CMA at a disadvantage when seeking remedies for UK-specific competition concerns if a global remedy package has already been agreed between the parties and the other agencies.

For smaller mergers the CMA suggests that the system should remain voluntary. The Furman report does not contradict this, but recommends that the largest digital companies with 'strategic market status' should be required to make the CMA aware of all their intended acquisitions, but appears to fall short of a mandatory notification even for these transactions.

The voluntary regime in the UK is thought to work well for businesses since they can avoid the cost of notifying unless their deals raise competition issues, but some variant of these proposals may prove politically difficult to resist as the CMA will be determined not to fall behind on competition enforcement on big deals post-Brexit. The challenge for either the CMA's or Furman's recommendations will be where to set the line. In doing so, the drafters will need to think carefully about what is motivating the change – is it merger size (getting the CMA a seat at the table on the biggest transactions), or is it potential harm to UK consumers? Pursuit of the former might yield more straightforward thresholds but could risk the CMA being forced to use its resources reviewing harmless mega-mergers whilst smaller UK-focussed deals fly under the (voluntary) radar. Adopting both the CMA's and Furman's recommendations would only increase the pool of cases the CMA is required to look at before it can go hunting for potentially problematic deals which the parties chose not to notify.

The practical impact of the changes will therefore clearly depend on the thresholds that are proposed and on the type of simplified notification procedures (if any) that would be available where no substantive competition issues arise.

No more "SLCs"?

The Furman review also proposes changing the substantive test for assessing mergers by introducing a 'balance of harms' approach. This would require the CMA to assess the likelihood and the magnitude of the impact of the merger (both positive and negative), with mergers being prohibited where the harmful effects are expected to outweigh any merger benefits. So, for example, if there were to be a relatively low likelihood of harm but the negative impact would be very large if it did occur, the merger could be prohibited unless the likely benefits outweighed this risk. The proposal follows from the review's conclusion that there has been under-enforcement in UK merger control in the past, especially in digital markets. The CMA is not, however, in favour and has warned about the unintended consequences of introducing such a test. If instituted, the balance of harms approach would appear to shift the burden of proof to merging parties, reversing decades of economic theory about the market efficiency of mergers. Merging companies may also have legitimate cause for pessimism of getting their deals approved – the track record of the CMA (and other competition agencies) in accepting merger efficiencies is a very short read!

Increased focus on consumer protection

In line with its current focus on 'vulnerable consumers', the CMA has proposed a boost to its consumer protection powers. This would include a new overriding 'consumer interest' duty to "*ensure that the economic interests of consumers, and their protection from detriment, are paramount*", in addition to its existing statutory duty to promote competition for the benefit of consumers. The CMA considers that the new duty would support the prioritisation of work designed to address consumer detriment and could encourage the CMA to take interim measures to limit the damage while its investigations continue. The addition of a second statutory duty may result in situations where there is a conflict between the two as it is not yet clear whether the CMA's primary duty would continue to be to promote competition or if the CMA will be re-positioned with equal priority given to both competition and consumer enforcement.

The CMA also proposes a move away from the current prosecutorial model for consumer law infringements so that the CMA can take infringement decisions and interim measures where appropriate. It will be important to ensure that businesses are given sufficient rights of defence and the opportunity to influence the decision-makers before a final decision is taken. The current antitrust procedures could provide a template for this.

A wider markets regime with more teeth?

The UK markets regime has been regarded as a valuable tool to tackle competition issues that do not amount to breaches of law. There is currently a two-stage process with the CMA having a wider remit at the market study stage (where it can look at competition or consumer issues) than at the later market investigation stage (where its remit is limited to consideration of competition concerns). The CMA proposes to correct this imbalance and enable formal second stage investigations also for consumer concerns. This would be an important change since the CMA's powers to impose legally-binding remedies can only be used at the end of a market investigation and so could then be used in relation to consumer issues.

The CMA's proposed introduction of interim measures in market cases is controversial given that the businesses concerned are unlikely to have breached an existing law. Their use will need to be strictly limited to situations where it is clear-cut that substantial consumer detriment would otherwise occur

during the CMA's investigation. The CMA also wants the power to fine companies for breaching undertakings or orders. It is odd that the CMA does not already have such a power, but any fining powers will need to be capped at a proportionate level and businesses should have the right to rectify the situation before fines are imposed.

Antitrust – faster administrative procedures and reduced grounds for appeal?

The CMA has proposed relatively modest changes to the administrative stage of antitrust cases. They propose for all CMA investigations a new duty to conduct its investigations swiftly, whilst respecting rights of defence; increased fines for failing to respond to a request for information; and civil fines (rather than criminal prosecution) for providing false or misleading information. They also note that the access to file process should be changed in line with evidence provision requirements in civil litigation. Whether a duty to act swiftly will result in faster antitrust procedures remains to be seen since these are often complex proceedings with a need to ensure each party's rights of defence are fully respected. Perhaps the CMA thinks it may help on judicial review applications on investigation deadlines following its recent loss before the Competition Appeal Tribunal (CAT) relating to a request by Asda/Sainsbury's to be given more time to respond to CMA information requests in their merger inquiry.

The CMA has focused instead on highlighting deficiencies in the current appeal system. The CMA considers that the current CAT processes are too slow, allow new evidence to be admitted that could have been provided to the CMA before the decision under appeal was taken and place too much reliance on witness evidence. The CMA proposes that these deficiencies should be corrected through new rules of procedure for the CAT. They also recommend that the current 'full merits review' be reduced to avoid giving defendants a 'second bite at the cherry'. The CMA states that this would be compliant with Article 6 ECHR given that the appeal rights from European Commission decisions are similar. The Furman review also suggested broadly similar changes to appeal rights, including for interim measures cases, as well as a change to the constitution of the CMA's Case Decision Groups taking decisions on antitrust cases so that they are composed of panel members or other independent persons (rather than staff members).

Any reduction in a business' ability to defend itself is controversial. Peter Freeman, the Chairman of the CAT, has reacted by defending the CAT's procedures and track record, including the importance of a full merits review given the quasi-criminal nature of antitrust infringement decisions. Indeed, the consequences of an antitrust infringement finding (including hefty fines, damages actions and reputational risks) mean that any attempt to dilute the checks and balances on the authority tasked with investigating such infringements should be considered very carefully.

Increased compliance requirements plus new reporting duty on auditors?

The CMA has proposed a requirement on public companies to appoint a board director with responsibility for competition and consumer law compliance. This reflects the CMA's recommended approach to competition law compliance, but the inclusion of responsibility for compliance with consumer law may be a new area for board attention.

More controversial are the proposed requirements relating to auditors. The CMA proposes that auditors should be required to report to the company on any competition or consumer law compliance risks identified during the course of their work. The company directors would then need to attest in the annual report (or elsewhere) that these risks had been noted and addressed. The CMA also proposes requiring

auditors to report any suspected infringements to the CMA and to the Financial Reporting Council. The CMA suggests that these proposals should be considered by Donald Brydon's review of UK Audit Standards.

The proposals raise a number of questions. Will auditors be well-placed to identify competition and consumer law potential risks and infringements? Will the duty on auditors be a proactive duty to search for risks and infringements or does it only bite if something comes to their attention? Will such requirements change the nature of the relationship between auditors and the companies they audit and, if so, would this be a positive change? If an auditor is proposing to report a suspected infringement to the CMA, should they be required to tell the company first so that it might have the opportunity to apply for leniency if relevant? Will companies be encouraged to self-report suspected infringements too? The detail of this proposal, if developed further, will need considerable analysis.

The CMA is also seeking to increase the maximum amount it may pay a whistleblower for information about cartel activity from the current £100,000.

The death of the criminal cartel offence, but fines for individuals instead and an increased focus on director disqualification?

In contrast to the increased powers sought by the CMA in many areas, it appears to be admitting defeat on criminal cartels. Currently the CMA is the lead prosecutor for the criminal cartel offence but has suggested that responsibility for cartel prosecutions may sit more naturally with an agency that routinely brings criminal prosecution, such as the SFO.

Research has shown that individual penalties, such as the criminal cartel offence, are an important factor in driving compliance with competition law. Perhaps the CMA is recognising that it may be simply too difficult to prove cartel activity to a criminal standard in the UK? If the offence is maintained but investigation is reserved to the SFO, how will this work in practice with a parallel CMA civil investigation? From a prioritisation point of view, the SFO has also noted that any potential offences would need to involve serious or complex fraud and consideration on the actual or intended harm to the public. So criminal prosecutions may become an even rarer occurrence.

The CMA has mooted introducing civil fines for individuals who have been found to be involved in serious competition law infringements and extending the use of director disqualification orders – including for directors who were themselves not involved but whose companies have infringed competition law. The personal civil fines may mitigate somewhat against any loss of deterrence caused by a reduced likelihood of a criminal cartel prosecution but is it right that one individual – just by virtue of being a company director – bears the brunt of another's misdeeds?

Regulatory appeals

The CMA currently has a role as an appeal body for certain decisions by sectoral regulators. The CMA proposes that this role be moved to the courts. In many ways, the regulatory appeal role sat oddly with the CMA, which generally aims to work constructively with the sectoral regulators. It will, however, be important that there continues to be sufficient oversight of the sectoral regulators' decisions including by ensuring that the courts have access to the necessary economic and financial expertise to assess such appeals (which had been the original justification for the CMA to perform this role).

Conclusion

BEIS is due to complete its review of the UK competition regime by end April 2019 and is then expected to publish a consultation document on potential changes. In a recent Parliamentary debate, Lord Young confirmed that this would include the CMA's proposals. So whilst the changes will not be imminently put in place, this will be an important opportunity to comment on the significant points at stake. Whether the UK regime can cope with fundamental reforms at the same time as dealing with Brexit-related increases in the CMA's workload is an open question.

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