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Submitted to Reforming Competition and Consumer Policy
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About you

What is your name?

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Are you happy for your response to be published?

Yes

Would you like to be contacted when the consultation response is published?

Yes

Competition

1 What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?

Please respond here.:

2 Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

Not Answered

Please expand on your answer here.:

3 Should government provide more detailed and regular strategic steers to the CMA?

Not Answered

Please expand on your answer here.:

4 Should the CMA be empowered to impose certain remedies at the end of a market study process?

Not Answered

Please expand on your answer here.:

5 Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

Not Answered

Please expand on your answer here.:

6 Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

Not Answered

Please expand on your answer here.:

7 Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

Not Answered

Please expand on your answer here.:

8 Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

Not Answered

Please expand on your answer here.:

9 What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

Please respond here.:

10 Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

Not Answered

Please expand on your answer here.:

11 Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?

Not Answered

Please expand on your answer here.:

12 What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?

Please respond here.:

13 Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?

Not Answered

Please expand on your answer here.:

14 Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial, and foreseeable effects within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?

Yes

Please expand on your answer here.:

In our view the government's proposal will enhance public and private enforcement of UK competition law to the benefit of businesses and consumers. We therefore agree that the jurisdictional scope of the Chapter I and II prohibitions should be expanded as proposed.

Public enforcement

As the government notes, other prominent jurisdictions have the power to take enforcement action where anticompetitive conduct originates, and is implemented, abroad but nonetheless produces relevant effects domestically. We think this is an important tool for competition regulators as many industries and sectors have become globalised in how they structure their supply chains or execute their marketing strategies. Where these segments of the economy are susceptible to anticompetitive conduct, it will typically affect large geographic territories spanning multiple jurisdictions. Therefore without corresponding powers, the CMA risks lagging behind other leading regulators in protecting consumers and businesses from anticompetitive conduct in a globalised world.

In digital markets in particular there is not always a clear nexus with a single jurisdiction. Therefore the capacity for extra-territorial application of UK competition law to digital markets, where appropriate, is also well aligned with the CMA's strategic pursuit of addressing anticompetitive conduct affecting the digital economy. The proposed amendments to the jurisdictional scope of Chapter I and II will, therefore, complement the creation of a unit within the CMA that is dedicated to digital markets.

Private enforcement

Private cartel damages claims are often cross-border in nature, for example where the underlying conduct takes place abroad but the cartelised product is supplied directly into the UK. However, claims based on UK competition law remain limited by its territorial scope. In the context of cartels, the conduct must have been implemented in the UK; otherwise, even if certain indirect effects are felt in this jurisdiction there may be no basis for a claim under UK competition law.

However, the proposed legislative reform would provide affected businesses and consumers with a broader legal basis to seek compensation through

the courts. By way of illustration, the reform would, in principle, allow for cartel victims to seek compensation for cartelised goods which have been supplied only indirectly to the UK (e.g. via an innocent third party abroad) even where the cartel itself took place elsewhere (see for example the case of *Iiyama* which was allowed proceed in the English courts).

Additionally, private enforcement based on UK competition law with a broader territorial reach could, in principle, allow claimants greater scope to consolidate multi-jurisdictional claims in the English courts (therefore benefitting from procedural efficiencies and lower costs). That, in turn, enhances the attractiveness of the courts in this jurisdiction, particularly among international companies considering it as a forum for their disputes.

In all senses, therefore, the extra-territorial application of UK competition law in appropriate cases embodies the spirit of the government's vision for a "Global Britain".

15 Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?

Not Answered

Please expand on your answer here.:

16 If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to (a) any business which is party to an agreement and which has an annual turnover of less than £10 million or (b) only to agreements to which all the business that are a party have an annual turnover of less than £10 million?

Not Answered

Please expand on your answer here.:

17 Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

No

Please expand on your answer here.:

We agree that a leniency regime providing whistle-blowers with immunity from fines is crucial to effective public enforcement of competition law, particularly to the detection of secret cartels. However, extending the regime to offer full immunity from private damages claims is (1) a potentially extreme interference with cartel victims' rights to compensation; (2) it is not justified by a hypothetical concern that, in the future, leniency applications may be discouraged by the risk of exposure to private damages claims; and (3) introducing such a policy prematurely could actually encourage businesses to engage in anticompetitive conduct. These points are expanded further below.

(1) Granting immunity from private damages claims is a potentially extreme interference with cartel victims' rights to compensation

Cartel victims can already face major obstacles to claiming compensation for losses caused to them by cartelists, for example: the costs of, and resources required for, litigating against well-resourced defendants, information asymmetry (victims are usually unaware they are being targeted by a concealed cartel), and the challenges of locating records/evidence pertaining to historical conduct. The government's proposal for immunity from damages claims would place a further obstacle in the way of victims because it would completely remove their ability to pursue one of the potential defendants (the cartel whistle-blower).

A fundamental part of issuing a cartel damages claim is identifying the most appropriate defendant(s) from a legal, practical and viability perspective. For example, the nationality of a defendant can have a bearing on the jurisdictional scope of the claim (including the scope of losses which can be included). Certain cartelists will have more documentary evidence than others, making them more appropriate defendants (for example if they were the cartel ring-leader or careless with their unlawful communications). Not all cartelists will necessarily have the financial resources to compensate their victims, whether on the basis of joint and several liability or even just towards their own direct and indirect purchasers. And finally, a cartel victim may have made the majority of its purchases from just one of the cartelists. Cartel victims should therefore have the right to sue any or all of those responsible for the cartel, to ensure the best chance of being compensated for harm they have suffered.

However, if the cartel whistle-blower is removed from the pool of possible defendants (i.e., by the government's proposal), there is a significant risk of limiting the viability of a cartel victim's claim. It may even extinguish their right to bring one entirely, for example if the other cartelists have gone bankrupt. Therefore, it is not necessarily the case that a cartel victim can "continue to recoup their losses from the other cartelists, who are not holders of full immunity in the public enforcement process", as the government suggests.

(2) Granting immunity from private damages claims is not justified by a hypothetical concern that the risk of exposure to such claims may discourage leniency applications in the future

The government expects that "[...] the potential exposure to liability for damages may become an increasingly important factor for cartel members in deciding whether to apply for leniency" [emphasis added] (para 1.160). It therefore appears to be a hypothetical concern at present which does not justify the potentially extreme effect of the policy proposal on direct and indirect cartel victims (as outlined above). Without clear and compelling evidence that growth in private damages claims is already disincentivising leniency applications, the policy proposal would appear to be premature.

In this context, to achieve the goal of more effective enforcement of cartels, it is more appropriate to explore alternative, investigative methods of cartel

detection and potentially the reform of the public leniency regime, than to take the extreme step of potentially denying the rights of victims to compensation and effectively rewarding unlawful behaviour of cartelists. Steps to increase awareness of competition law amongst UK businesses is also a more appropriate tool for preventing cartels in the first place.

(3) Cartel conduct may be encouraged

Finally, it is worth noting that the very fact that cartels continue to exist indicates that even with the current risks of (1) regulatory fines (immunity or leniency is not guaranteed in all circumstances); and (2) damages claims, some businesses still decide that it is “worth-it” to form a cartel. If successful immunity applicants are, additionally, relieved of their civil liability for cartel-conduct, as per the policy proposal, the government could in fact make it more attractive to engage in anticompetitive behaviour. That is, the policy might actually have the unintended consequence of encouraging businesses to take the risk of forming a cartel in order to benefit from the often significant (albeit unlawful) financial rewards without the threat of future damages claims or fines. Clearly that outcome does nothing to benefit innocent businesses, consumers and the economy.

18 Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?

Not Answered

Please expand on your answer here.:

19 Will the reforms in paragraphs 1.170 to 1.174 improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms government should be considering?

Not Answered

Please expand on your answer here.:

20 Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?

Not Answered

Please expand on your answer here.:

21 Will government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

Not Answered

Please expand on your answer here.:

22 Will government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?

Not Answered

Please expand on your answer here.:

23 Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?

Not Answered

Please expand on your answer here.:

24 What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

Please respond here.:

25 What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?

Please respond here.:

26 Are there reforms which fall outside the scope of government's recent statutory review of the 2015 amendments to Tribunal's rules which would increase the efficiency of the Tribunal's appeal process for Competition Act investigations?

Not Answered

Please expand on your answer here.:

27 Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

Not Answered

Please expand on your answer here.:

28 Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?

Not Answered

Please expand on your answer here.:

29 What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?

Please respond here.: