ICLA UK Response to the CMA's consultation on Merger and Market remedies – guidance on reporting, investigating and enforcement of potential breaches

Introduction

1. The In-House Competition Lawyers' Association UK ("ICLA UK") is an informal association of in-house competition lawyers in the UK comprising around 100 members. ICLA UK meets usually twice a year to discuss matters of common interest, as well as to share competition law knowledge. ICLA UK does not represent companies but rather is made up of individuals who are as experts in competition law. As such this paper represents the views of the ICLA UK members and not the companies who employ them, and it does not necessarily represent the views of all its members.

2. ICLA UK is part of the wider In-house Competition Lawyers' Association of in-house competition lawyers across Europe and in South East Asia which currently numbers more than 450 members based in different countries around the globe.

3. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward competition law regime that prioritises legal certainty, minimises costs, and does not represent a disproportionate demand on businesses' time and resources.

4. ICLA UK is grateful for the opportunity to feedback on the CMA's draft guidance on the reporting, investigating and enforcement of potential breaches in the merger and market investigation sphere. This is an opportunity to provide clarity for firms operating under such orders and undertakings and much needed consistency in approach between organisations in dialogue with the CMA on such issues.

Consultation

Appropriateness of the proposed guidance generally

5. The draft guidance is not clear on how it will interact with any specific guidelines, enforcement provisions or dispute resolution provisions attached to specific orders or undertakings. It would be helpful if the CMA could clarify whether the specific obligations and guidelines existing within orders and undertakings will take precedence over this new guidance in the event of any conflict or vice versa. ICLA UK's view is that, where specific reporting obligations exist within orders or undertakings made pursuant to the CMA's statutory powers, these, as well as any specific guidelines created in association, ought to take precedence over this proposed guidance in the event of conflict. This is because such reporting obligations will have been tailored to the order or undertakings in question and therefore represent the most appropriate reporting mechanism. ICLA UK expands on this further below.

6. Currently, each order has its own reporting regime. Some of these require annual reports to be submitted, some require breaches to be reported within a certain timeframe, and others do not require any systematic reports to be submitted to the CMA at all. Each of these orders was developed and consulted on as an appropriate response to the individual market investigated by the CMA and each order (including any related specific guidelines) implemented the reporting requirements that were considered appropriate and necessary to address the specific concerns in that market.

7. On occasion the draft guidance appears inconsistent with the individual and measured approach adopted to reporting of breaches in relation to certain specific orders and related specific guidelines. The draft guidance seeks to impose a universal requirement to immediately report any breach, regardless of materiality and regardless of the previous reporting requirements specified within each order (paragraph 3.3).

8. For example, the draft guidance currently provides at paragraph 3.3 that "*It is important for the CMA to find out about all breaches of its undertakings and orders as soon as possible, irrespective of whether such breaches are considered material*,". Similarly, at paragraph 2.6 it states that the CMA considers a breach to arise "*regardless of any effect on competition nor customers.*" At paragraph 3.14 it states, "*all breaches and potential breaches should be reported to the CMA, and it is for the CMA to determine whether an issue represents a breach and whether it considers that to be material*".

9. These statements are inconsistent with existing guidelines, including recently issued supplementary guidance, related to specific orders. For example:

    a. the Retail Banking Market Investigation Order requires that breaches are notified to the CMA within 14 days (Article 56.2) and, supplementary guidance from the CMA earlier this year clarified that, firms need only disclose to the CMA breaches where there has been a significant impact on customers and that this must be done within 28 days of the bank becoming aware (not immediately). All other issues are reported on only within the annual compliance report;

    b. under the Groceries (Supply Chain) Practices Market Investigation Order 2009, designated retailers must submit annual compliance reports to the CMA and the Groceries Code Adjudicator. However, there is no requirement imposed on designated retailers to inform the CMA of breaches outside of the annual compliance report. It is not clear how the CMA considers this additional requirement to self-report immediately aligns with designated retailers' other obligations to the Groceries Code Adjudicator (GCA) and the CMA has given no consideration in its guidance on the interaction and potential inconsistency between reporting expectations to different regulators[1]; and

    c. the Groceries Market Investigation (Controlled Land) Order 2010 does not contain any obligations on Large Grocery Retailers, that are subject to this order, to report breaches to the CMA.

10. In ICLA UK's view amending the reporting threshold in this way introduces additional uncertainty, and a lack of clarity of what is expected, into the established compliance regime for each order. It will also unnecessarily burden both the CMA and the companies who are attempting to comply with what are already significant reporting obligations, with very little benefit, if any, to consumers. ICLA UK would therefore suggest that the guidance make clear that it does not take precedence over the measures established in individual orders, undertakings and related specific guidelines, at least not without a review of the appropriateness of those orders, undertakings or guidelines in question.

[1] This also raises a risk of self-incrimination if the CMA were to pass certain information to the GCA that could lead to a finding of a breach by the GCA under the Groceries Supply Code of Practice.

Does the proposed guidance provide sufficient clarity on the following matters:

(a) What the CMA considers to be breaches of its undertakings and orders

Uncertainty as to what constitutes a breach

11. There is uncertainty as to what the CMA considers to be breaches of its undertakings and orders in situations where there are inconsistencies between the draft guidance and the specific guidelines applying to existing orders or undertakings.

12. ICLA UK recognises that the guidance needs to cover a very wide range of orders and undertakings, some of which may not be capable of being breached inadvertently. However, the guidance should acknowledge that some breaches can arise inadvertently, often due to isolated issues and with insignificant impact, and notwithstanding appropriate control oversight. To suggest that any inadvertent breach, no matter how technical in nature or immaterial its impact, must be due to having inadequate controls (see paragraph 2.4) is to suggest that controls must be structured so that an inadvertent breach is impossible. In ICLA UK's view, that approach is not balanced from a cost/benefit perspective. Overly stringent controls cost more to implement, and those costs are likely to be at levels that significantly outweigh any benefit consumers gain from not being subject to immaterial, inadvertent breaches.

13. Even absent the new guidance, examples of overly stringent controls exist and ICLA UK would encourage the CMA to use the guidance to avoid creating more of these going forward. One example is the overdraft remedy in the Retail Banking Market Investigation. The CMA required providers to implement prompts to alert customers when they are about to use their overdrafts. In practice however, the drafting of the order is such that providers are technically required to notify the CMA any time they experience, for example, a power outage that prevents alerts being sent for 30 seconds or 5 minutes. This clearly is not what was intended by the spirit of the order, particularly when the financial services regulator, the FCA, has requirements for incident reporting which would capture such events. Certain members have found themselves required to notify the CMA (a competition authority) of such power outages or similar incidents that do not even meet the financial services regulator's thresholds for notification. This is not in the CMA's interests in terms of resourcing or impact on competition. If the drafting of an order does entail ambiguity that is only revealed in time, the new guidance should enable the CMA to take a pragmatic approach to what it considers are breaches that require enforcing.

Material breaches

14. Further, whilst Paragraph 3.13 of the draft guidance sets out some examples of what may constitute a material breach, some further clarity could be welcomed.

15. First, there is the suggestion that, if less than 50 customers are impacted, then the CMA will not consider this to be material. ICLA UK would suggest instead that the guidance acknowledges that each breach needs to be judged on its merits and on a case by case basis as it is possible that a breach impacting more than 50 customers may still be immaterial.

16. Second, the reference to compliance reports being "*a few days late*" may cause a consistency issue under some orders and undertakings where firms may be expressly permitted to submit

compliance reports a few days after their due date (e.g. the PPI Order (Article 12.11) allows firms to submit compliance reports within one week of its due day). Flexibility in the guidance to respect the terms of existing orders and undertakings would be welcome.

The approach to future breaches

17. Paragraph 3.4 of the draft guidance concerns how firms should approach breaches which they expect to arise in the future. The reference to firms needing to report instances where they "may" breach is a concern, given firms may identify a potential breach but, on further internal assessment, may conclude no breach will in fact occur. ICLA UK would not support an additional burden on firms to report in such a situation, where it is not yet certain a breach will occur, and would suggest that the guidance is made clearer on this point.

(b) How the CMA investigates potential breaches of its undertakings and orders

How the CMA finds out about breaches

18. Paragraph 3.2 of the draft guidance does not reflect that, currently, the CMA also finds out about breaches by firms self-reporting. ICLA UK suggests that the list in paragraph 3.2 should be amended to include this.

The extent of information required to be provided about a breach as soon possible

19. Paragraph 3.5 of the draft guidance sets out a list of information the CMA expects to be provided with when being notified of a breach. However, in reality it is likely that firms will not have all this information available when seeking, in line with the guidance, to notify the CMA as soon as possible. It is quite possible that firms may therefore need to provide the CMA with an initial notification which would not contain all of the information in 3.5 (e.g. the actual numbers of customers impacted and financial impact may take time to determine and instead initially only approximate volumes may be available) with a need to follow up with all information separately once a full review has been completed. This ought to be reflected in the guidance.

(c) The circumstances in which the CMA will use the informal and formal enforcement tools available to it in response to breaches of its undertakings and orders

20. The CMA recognises in the draft guidance that it has a statutory duty to keep under review undertakings and orders (paragraph 2.2). However, the formal process for seeking a variation of remedies is time-consuming and involves a significant backlog; it is therefore unlikely to be a suitable route for firms to use when they need to act in a fast and dynamic way.

21. An ability for the CMA to implement some form of waiver process, with accompanying guidance, for certain obligations under undertakings and orders, where over time overall consumer benefits or other countervailing considerations have developed, would therefore be welcome in the guidance. This would provide a more nimble review solution, where it is clearly demonstrated that the full extent or broad application of a particular order or undertakings is no longer necessary to prevent competitive harm. Especially where such an order or undertakings may, perversely, be now adversely impacting pro-consumer innovation or investment.

22. Such a process could be included in the guidance in paragraphs 3.4 and 3.5, which require firms to contact the CMA if they consider a breach may occur in order to explore how this can best be mitigated. Currently the guidance fails to recognise that a proposed business activity, whilst it may lead to a breach of an order or undertakings in some way, may also be beneficial for

consumers. This could be amended to include a review process whereby, provided the firm adequately demonstrates a lack of harm and/or overall benefits, the CMA has the power either to waive the specific obligation or take no action against the breach. Such a flexible, discretionary approach by the CMA would avoid the application of a one-size-fits-all approach to new innovative products, which from the outset can deter innovation and investment. Substantive competition law provides for an exemption for overall pro-consumer activities, so it seems anomalous if the CMA's application of ex ante regulation in the form of orders or undertakings does not allow for any discretion to waive compliance with such regulation in these circumstances[2].

23. Equally, the guidance would benefit from some explanation as to how the CMA has used letters of indication of prioritisation when it comes to issues firms have flagged and how the CMA will approach issuing those in the future.

24. In relation to paragraph 4.7 of the draft guidance, ICLA UK would welcome, for the purposes of legal certainty, further guidance of what will constitute persistently failing to comply with a relevant order or undertakings, which could result in the CMA pursuing enforcement action through the courts.

25. Paragraph 4.12 of the draft guidance refers to the accompanying public announcements the CMA will make when issuing directions. In some recent press releases, the CMA has referred to past reported breaches, either by the current firm or by a different firm, relating a similar issue or relating to the same order or undertakings. Referring again to a past breach, where that has already been addressed by the firm in question, seems disproportionate and ICLA UK would request that the CMA considers this in its announcement practice, particularly when the CMA refers to a breach by a different firm not involved in the current breach/directions being announced. In such cases it would be helpful if the CMA could consider ways to consult with that third-party firm, at least to warn it that it will be referred to in a press announcement concerning directions being issued to a different firm.

26. Finally, the CMA should continue to keep under review the ongoing appropriateness of orders, particularly when it continues to enforce these via directions. For example, seven providers have received directions for breaches of the PPI Market Investigation Order. This is despite the fact that very few providers keep this product on sale for new customers, and thus the point of the order – to allow customers to compare PPI premiums and switch – is no longer particularly relevant.

[2] ICLA UK accepts that, where the CMA informally decides to waive or otherwise take no action in respect of a technical breach, this would not rule out a third party bringing civil proceedings in respect of a breach, as this is a statutory right in the Enterprise Act. However, assuming the CMA has reached the view, in giving the waiver, that harm to customers or competitors is unlikely to arise, successful civil proceedings in such circumstances seem unlikely.