GERADIN PARTNERS

COMPETITION SPECIALISTS

Reforming Competition and Consumer Policy: BEIS consultation

Submission by [Company A]

This submission provides comments from [Company A] on the BEIS consultation on reforming competition and consumer policy in the UK, published on 20 July 2021 (the "Consultation").[1]

[Description of Company A redacted].

[Company A] welcomes the opportunity to provide its comments on the Consultation. The UK competition regime is well respected, but [Company A] agrees that it needs updating. This is particularly the case as it moves into a phase whereby it is taking on larger multi-national cases post-Brexit.

This submission deals only with certain competition policy aspects of the White Paper. [Company A] offers no views on the consumer policy aspects, of which it has less experience.

<u>More effective market inquiries</u>

Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process?

The Consultation discusses giving the Competition and Markets Authority ("CMA") the power to impose remedies at the end of a 12-month market study without needing to proceed with a further 18-month (or 24-month) market investigation to do so. This has the potential to complicate an already-complicated process and distract the CMA during its market study. However, it would also give the CMA additional flexibility where certain simple and readily identifiable measures could remedy competition problems in a market, but the CMA is reluctant to launch an expensive and slow market investigation process. In circumstances where the appropriate remedies are obvious at the end of the first stage market study, it may be no longer necessary for the CMA to conduct an additional market investigation.

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf.

The Consultation is right to highlight the issue of who would be the decision-maker in this scenario. Under the current regime, the CMA Board is the decision-maker in a market study (where the decision is essentially whether or not to investigate a market in more detail or not) and a specially convened panel is the decision-maker in a market investigation (where the decision is a more substantive one about what the problems are in a market and how to remedy them). One strength of the market investigation process is the independence of the panel who are involved throughout the case and attend long meetings weekly or fortnightly at which the evidence is discussed in detail. They hold formal hearings with all significant parties, which can sometimes require several weeks of their time. They review and comment on hundreds of pages of working papers and analysis. One cannot expect the CMA Board to devote similar levels of time to a single case. This raises the concern that their understanding of the market will be insufficient to be making such significant interventions in a market. This would be the only type of final decision that the CMA Board would take, so this different type of role should be borne in mind when recruiting Board members in future.

If the existing market study and market investigation process are retained, we support the removal of the six-month deadline for the interim report in a market study (as proposed in paragraph 1.62 of the Consultation). This deadline results in an imbalanced 12-month process whereby all the most important data analysis work takes place in a short timeframe in the first half of the market study. There would be no detriment to the end-to-end timing of a case to simply remove the six-month deadline. One might expect the interim report to be issued in the seventh or eighth month, and this would work well, with plenty of time for consultation before the final report is issued.

Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

The Consultation discusses whether to change from a two-stage process (12-month market study and then 18-month market investigation) to a single 24-month investigation. This is potentially attractive because it reduces the duplication and inefficiency implicit in running sequential processes with separate decision-makers.

However, the Consultation seems to assume that a single stage process still requires a change of decision-maker part-way through the case. This is presumably for the same reasons that the two-stage process was originally designed – to avoid confirmation bias and to satisfy the requirements of public law and human rights law – although there is no discussion of the rationale in the Consultation. This does mean that the perceived benefits of a single stage process will not be as large as assumed. Few decision-makers who are brought in at the final stages to decide on the remedies will be happy to simply adopt the scoping and

analysis that they had no role in designing. The new decision-makers will require a full briefing and will almost certainly disagree with certain elements of what has been done and request further analysis on certain points. In some cases, the new decision-makers will fundamentally disagree with the design of a major piece of analysis (e.g., a large consumer survey where the phrasing of the questionnaires makes a big difference) at a point when there is no time to re-run it, resulting in a failed inquiry.

The CMA adopts a broadly similar process to that being discussed by the Consultation in its investigations under the Competition Act 1998 ("CA98"). This can sometimes be a major complication for the CMA when the Case Decision Group, which is brought in after the Statement of Objections has been issued, disagrees with the case team's analytical approach or scoping of the case. However, in a CA98 case, the lack of a statutory deadline means that analysis can be redone and further information can be sought from the relevant companies if required. The CMA is also less likely to design its own quantitative evidence gathering in those types of cases. The risks would be materially greater in a single stage market inquiry and the Consultation does not seem to have considered these issues.

Q6: Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

The Consultation proposes to give the CMA the power to impose interim measures during a market study or market investigation. This is one aspect of the markets regime that currently differs from the CA98 regime and there may be cases where the CMA reasonably wishes to impose interim measures rather than allowing a damaging situation to persist for up to 2-3 years.

Note, however, that interim measures have only ever been imposed once by the CMA in CA98 cases despite there being no statutory deadline for those cases.[2] In the case of a market study or market investigation with a tight statutory deadline, and the resultant risk that focusing on interim measures would knock the CMA's investigation off course, one might expect interim measures to be even more rare.

The other difference between a market study and a CA98 case is that there is no allegation of illegality in a market study. The justification for imposing interim measures appears therefore weaker.

Overall, given that one would expect interim measures only to be used in exceptional cases where there is an urgent need to use them, there could be a justification for these powers being added to the CMA's toolkit with appropriate safeguards.

[2] This is discussed further below at Q18.

Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

The Consultation proposes to give the CMA the power to accept binding commitments from the companies under investigation during the course of a market study or market investigation, rather than needing to wait until the end of the inquiry. This makes sense and gives the CMA the opportunity to achieve results for consumers more quickly in appropriate cases, at a lower cost for the companies under investigation.

The Consultation is correct to highlight (in paragraph 1.75) the possibility that a company could disrupt the CMA's inquiry by offering commitments. The legislation could perhaps stipulate that a company can only offer commitments once during the course of an inquiry.

Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

The Consultation proposes to increase the CMA's ability to test remedies before they have been imposed and revise remedies after they have been imposed. This is a welcome update to the market inquiry regime and would allow the CMA to take account of insights from behavioural economics in designing its remedies (e.g. testing consumer responses to different prompts before choosing the most effective) and ensure that remedies are proportionate and targeted. It benefits no-one to have in place remedies that could be improved.

The Government should be careful, however, not to over-complicate the legal framework or allow the CMA to revise remedies too frequently. The safeguards proposed by the Consultation in paragraph 1.87 seem sensible in this regard.

A rebalanced merger control regime

Q10. 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?

The Consultation proposes to empower the CMA to investigate mergers in which one of the merging parties has both a 25% share of supply in the UK or a substantial part of the UK, and has a turnover of more than £100 million.

[Company A] understands the rationale behind this change, i.e. that the current jurisdictional tests may not catch a potentially problematic vertical merger because the share of supply test requires there to be a horizontal increment caused by the merger. However, the £100 million turnover threshold being proposed is too low.

The Consultation includes no explanation of how this threshold was chosen. In [Company A]'s view, a jurisdictional threshold that can be satisfied by one of the merging parties alone should be reserved for truly exceptional circumstances because it potentially captures the acquisition of a very small company. The UK merger control process is an expensive process because it involves instructing competition lawyers and paying the relevant filing fees (as well as taking up managers' time within the company). It is inappropriate to impose those costs on deals involving the acquisition of a small company, for which the costs of the merger control process may even outweigh the transaction value, unless it can be safely assumed that the acquiror has such a strategic position in the UK economy that any acquisition, no matter how small, needs to be reviewed by the CMA. A turnover of £100 million is not sufficient to give a company such a position. It should be set at a level much higher than the standard turnover threshold test (which the Consultation proposes also to set at £100 million for the target business). For example, [identifying text redacted].

If the Government is minded to pursue this change, [Company A] suggests a UK turnover threshold of £1 billion.

Stronger enforcement against unlawful anticompetitive conduct

Q14. 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?

[Company A] would support the current law being changed. Under the current provisions in the CA98, for an agreement to be caught by the Chapter I prohibition, it must have been (or been intended to be) *implemented in the UK*, while unilateral conduct may fall within the scope of the Chapter II prohibition only if the undertaking in question holds a dominant position *within the UK* or any part thereof. These provisions seem outdated in the modern world because many companies, particularly in the [identifying

text redacted] sector, organise their businesses on a global basis. Having such jurisdictional limitations as are currently contained in the CA98 add nothing to the substance of the consumer harm being investigated and merely enable global companies to obstruct the CMA's investigations.

However, the Government's proposed changes risk adding unnecessary complexity to the framework and raising the bar for the CMA to prove an infringement. Overseas infringements would be treated more leniently than domestic infringements (even if they inflict the same harm on competition in the UK). There is a clear incentive on infringing companies to implement their agreement or conduct outside the UK if this results in the CMA needing to prove additional elements of an infringement.

For the Chapter I prohibition, section 2(1) CA98 already requires the CMA to prove that an agreement "may affect trade within the United Kingdom". It is not clear why additional requirements in the legislation of "direct, substantial and foreseeable" effects are required. Under the substantive test for assessing breaches of Chapter I prohibition, there is no need for the effects to be direct (indirect effects can breach the Chapter I prohibition) or substantial (merely "appreciable" effects can breach the Chapter I prohibition) or foreseeable (as this concept is not part of the current law, the CMA does not need to prove the effects of a breach were foreseeable), so this new jurisdictional test would be more difficult to meet than the current substantive test for domestic infringements. For agreements implemented outside the UK, the focus of the whole case might therefore be on these three words rather than the usual substantive test for which the law has been developed over decades.

A preferable approach would be to simply delete section 2(3) CA98, which would remove the provision that the Government rightly regards as problematic but without raising the bar for proving an infringement or incentivising parties to implement their infringing agreements abroad.

Similarly, for the Chapter II prohibition, section 18(1) CA98 already requires the abuse to "affect trade within the United Kingdom". Section 18(3) can simply be deleted, and the words "or any part of it" can be added to the end of section 18(1) instead.

These qualified effects concepts are taken from Court of Justice caselaw. To the extent that the Government considers these EU law concepts desirable to incorporate into UK law, this is already achieved by section 60A CA98. However, by drafting them directly into the legislation, this removes the ability of the UK courts to diverge from EU law over time, which surely cuts across the rationale for the UK's exit from the European Union.

Q18. 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?

The CMA often investigates situations where there are companies who are harmed by allegedly infringing conduct, yet it has only once imposed interim measures.[3] This suggests that there is something wrong with the current interim measures framework.

By definition, the imposition of interim measures will be an urgent matter. There is no obvious benefit to the current process by which the company under investigation reviews the CMA's entire file and can therefore slow the process down. A more streamlined approach of requiring the CMA to provide its reasoning for imposing interim measures (but without needing to provide underlying documentation) would enable the company to make any relevant representations without an unnecessary administrative burden on both sides. This approach is used successfully in most other public authority procedures, whereby public law requires the authority to explain its reasoning, and it is also used successfully in the CMA's mergers and markets cases without any detriment to the parties under investigation.

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[3] It has also considered using interim measures in other cases, but did not in the end need to impose them because the companies offered commitments instead. See e.g. https://www.gov.uk/cma-cases/investigation-into-supply-of-lithium-based-medication-for-the-treatment-of-bipolar-disease?=0 and https://www.gov.uk/cma-cases/auction-services-anti-competitive-practices.