Bristows

BEIS CONSULTATION: REFORMING COMPETITION AND CONSUMER POLICY
Response of Bristows LLP

The following document is the response of Bristows LLP to the Department of Business Energy & Industrial Strategy's (**BEIS**) consultation on its Reforming Competition and Consumer Policy consultation published 20 July 2021 (the **Consultation**). The comments set out below are those of Bristows LLP and should not be taken to represent the views of any of our individual clients.

Given the breadth of the consultation, we respond only to the questions relating to competition law, as set out below.

Q1. What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?

No comment.

Q2. Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

We strongly agree that effective competition policy must be evidence driven (Consultation, para 1.36). To the extent that the CMA is to produce regular 'State of Competition' reports, these must be robustly evidence based. However, the burden placed on industry by the CMA's existing compulsory information gathering and investigatory powers are substantial. We would have significant concerns if these burdens were to increase as a result of the CMA obtaining new compulsory powers. Given the extent of publicly available information and the ability to undertake voluntary calls for evidence, it seems doubtful that the benefits from such new powers would outweigh the inevitable costs.

Q3. Should government provide more detailed and regular strategic steers to the CMA?

UK competition law enforcement enjoys a very strong reputation both internationally and domestically.[1] That reputation rests critically on the perceived independence and objectivity of the CMA in its enforcement activity. The proposal that government provide detailed and regular strategic steers to the CMA risks seriously undermining that reputation and, as a result, the CMA's ability to act as an effective advocate for effective competition policy both at home and on the international stage.

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

Any new remedial powers will need to be subject to appropriate due process and sufficient formal safeguards – including appeals, oral representations, access to file and other rights of defence, as well as appropriate third-party consultation procedures. On balance, we believe that integrating the existing market study system into a new single stage market inquiry tool may be the most efficient and effective way to achieve this.

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

See response to Q4 above.

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

Issues of competition policy are inherently complex and fact specific. They typically involve difficult issues of economic assessment and the balancing of pro- and anti-competitive effects. In our view, it

[1] GCR ranks it "very good": https://globalcompetitionreview.com/survey/rating-enforcement/2020/article/star-ratings.

is these factors, rather than any procedural hurdles, that have resulted in the CMA – and other competition authorities such as the European Commission – making limited use of their existing powers to impose interim measures, and appropriately so.

Our experience in the context of the litigation of competition law issues is that the granting or refusal of interim measures will often determine the outcome of a dispute – without the underlying issues being fully assessed. Market inquiries are intended to address structural and typically long-standing issues affecting markets and industry sectors. In this context, the 12- and 24-month timetables for market studies and investigations respectively (Consultation, Figure 2) do not appear to represent unduly long periods of delay before remedies can be imposed. Although the proposed amended timescales for an integrated process may be adjusted slightly, they will still not involve excessive delay.

To the extent that the concern that business is taking action to frustrate the CMA's design and implementation of remedies is a real one – and we note that no examples are given – it seems likely that it can be addressed in a more narrowly focused manner. For example, the CMA might be given powers to apply to the High Court or CAT for an interim injunction in circumstances where it is able to establish a reasonable apprehension that action may be taken to frustrate the CMA's design and implementation of remedies.

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

As stated, market inquiries are intended to address structural, and typically long-standing, issues affecting markets and industry sectors. Typically these are inherently complex and fact specific. They involve difficult issues of economic assessment and the balancing of pro- and anti-competitive effects. In this context, the 12- and 24-month timetables for market studies and investigations do not appear to represent unduly long delays. We are not persuaded of the need to accelerate these timetables through the acceptance of binding commitments at an early stage in an inquiry. Indeed, given the nature of market investigations, we query whether in the majority of cases sufficient market participants would be in a position individually to offer commitments that would address the potential concerns. Moreover, given the risk associated with unnecessary or poorly designed remedies, we would have concerns that the potential costs associated with the use of such powers are likely to outweigh the benefits.

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

No comment.

Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

No comment.

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?

We welcome the government's willingness to review the current jurisdictional thresholds for merger control. However, we regret the decision not to re-examine the appropriateness of the current voluntary and non-suspensory regime. Since the last consultation in 2011, the CMA has greatly expanded its interventions in mergers with limited UK nexus. Examples include *Sabre/Farelogix* in 2020,[2] a case in which the target had no UK revenues, no UK customers, and only one contract with an indirect UK link, and *Roche/Spark Therapeutics* in 2019,[3] where the target had no existing UK product and jurisdiction was based on its development pipeline. At the same time, the CMA has very materially increased its use of suspensory interim enforcement orders (IEOs). In the period 2018 to 2019, the CMA imposed 11 pre-closing IEOs compared with only 3 in preceding 3 years.

[2] https://www.gov.uk/cma-cases/sabre-farelogix-merger-inquiry.
[3] https://www.gov.uk/cma-cases/roche-holdings-inc-spark-therapeutics-inc-merger-inquiry.

As a result, informed commentators have concluded that the UK merger control regime has already become *de facto* compulsory. A former Senior Director, Mergers at the Office of Fair Trading has gone on record to conclude "*[t]he UK regime requires no mandatory filing but is simply not voluntary … no deal involving incumbents in tech, healthcare and other markets should rule out engaging with the CMA*".

With regard to the concrete proposals set out in the Consultation, we welcome the proposal to increase the current turnover-based threshold for the target of a merger from £70 million to £100 million. Considerable time has passed since the figure was originally set at £70 million and an upward adjustment seems appropriate to reflect inflation and other changes.

We also welcome the proposal to create a safe harbour for mergers between smaller businesses. However, the proposal to limit the safe harbour to situations in which the worldwide turnover of each of the merging parties is less than £10 million seems unnecessarily restrictive and unnecessarily complex to assess. A simple safe harbour covering transactions in which the target's turnover **in the UK** is less than £5 million would be simpler to apply, in line with international norms, and would address the concerns arising from the CMA's increasing interventionism in relation to transactions with little or no UK nexus.

As regards the share of supply test, we are concerned that the flexible and uncertain scope of this threshold is a major contributor to the uncertainty created by the current voluntary regime. We are not convinced that it is possible to address these issues through further guidance, however well intentioned. As set out above, we believe a wider re-examination of the current voluntary scheme – of which the share of supply test forms an integral part – would be preferable.

Finally, we have substantial concerns with regard to the proposal to empower the CMA to review mergers in which any party has both:

- a share of supply of at least 25% of a particular category of goods or services supplied or acquired in the UK or a substantial part of the UK; and
- a UK turnover of more than £100 million.

While we recognise the desire to enhance the ability of the CMA to review potentially harmful 'killer acquisitions', particularly in digital markets, this proposal appears both unnecessarily broad in scope and unreasonably uncertain in application. It would, for example, bring within the scope of review **any** acquisition by a major UK supermarket chain, no matter how small the target or how distant the prospect of an actual or potential overlap between the parties. The simple fact that there would be at least one local market (which might encompass no more than a small town) in which the acquirer had a share of supply in excess of 25% would be sufficient to expose the deal to the risk of review, given the size of these businesses, even where the acquisition was in an area entirely unrelated to their core business.

Moreover, given the existing scope of the share of supply test – which the CMA has already applied to both potential future products and theoretical increments[4] – it is unclear that the new threshold is required. In 2014, the European Commission was able to take jurisdiction over Facebook's acquisition of WhatsApp – an acquisition regarded by many as the poster child for killer acquisitions – on the basis that it met the jurisdictional thresholds for merger control in at least three Member States.[5] Given the scope of UK thresholds, it seems likely that this included the UK. What is certain is that, earlier in 2012, the OFT was able to take jurisdiction over Facebook's acquisition of Instagram under the share of supply test.[6]

---

4 See, *supra*, respectively, *Sabre/Farelogix* and *Roche/Spark Therapeutics*.

5 Case M.7217 *Facebook/WhatsApp*, Article 6(1)(b) decision of 3 October 2014, https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

6 Case ME/5525/12 *Anticipated acquisition by Facebook Inc of Instagram Inc*, https://assets.publishing.service.gov.uk/media/555de2e5ed915d7ae200003b/facebook.pdf.

.

Q11. Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?

See our response to Q10 above.

Q12. What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?

In our view there are two key areas in which reform would be desirable. First, the current 4-month deadline under section 24(1) of the Enterprise Act for intervention in relation to a completed merger is too long and poorly designed. As a result, it exposes parties to completed mergers to unnecessary and excessive uncertainty and risk.

The 4-month period exists because the deadline is linked to the CMA's ability to refer a case to phase 2, and not to its ability to open a phase 1 investigation. A better balance would be achieved subjecting the CMA to:

- a 10 working day deadline following a case being brought to its attention (or where material facts have been made public) within which to seek further information; and

- a further 10 working day deadline following receipt of a response to that initial inquiry within which to open a phase 1 investigation.

Second, much of the burden placed on business by the UK merger control regime is the result of the breadth and rigidity of the IEO process adopted by the CMA. These could be substantially reduced if:

- the terms of the standard form IEO were revised to clarify that the prohibitions under IEO apply only in circumstances where there is a material risk of impact on competition; and

- the CMA recognised that purchasers have a legitimate interest in protecting the value of their investment in the acquired company and that derogations from obligations under the IEO may be appropriate in order to allow the purchaser to protect that interest.

The proposal in the Consultation to allow parties to progress directly to phase 2 without making formal concessions on SLC would also appear sensible, although we consider it to be a lesser priority to the above.

Q13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?

The CMA Panel process and the principle that each case should be subject to review by a 'fresh pair of eyes' is one of the crown jewels of the UK competition law enforcement system. We note however a growing perception that the Panel process may becoming less independent and less robust in their oversight of CMA decision making, with a perception of confirmation bias creeping into the procedure. We therefore welcome the proposal to seek improvements to the CMA Panel process while preserving its benefits.

In principle, the proposal to reduce the number of Panel members and increase their individual workloads is unobjectionable. What is essential is that members are properly selected, appropriately skilled and, above all, independent. Our potential concern is that any requirement that work on the CMA Panel be the Panel members' 'primary employment'. In our view there is a real risk that this could create at least the impression that Panel members were not truly independent and are at risk of 'regulatory capture' by what would become, in effect, their employer. A secondary concern is that such a requirement could limit the pool of suitably experienced individuals prepared to act as Panel members.

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?

The current restriction of the Chapter I prohibition to agreements that are or are intended to be implemented in the UK arguably removes agreements with the clear potential to have substantial anti-competitive effects in the UK from its scope. Possible examples include international market sharing cartels under which undertakings resident outside the UK refrain from making sales within the UK, and price fixing cartels affecting intermediate goods that are sold and incorporated outside the UK (see for example the *LCD Panels* cartel[7]). We therefore support an express change to the jurisdictional requirements of the Chapter I prohibition.

In our view, the case for an extension of the jurisdictional requirements in relation to the Chapter II prohibition is less clear-cut, but the extension of the Chapter II prohibition to abuses likely to have, direct, substantial, and foreseeable effects within the UK is unobjectionable.

We also note that the Consultation document refers in the section prior to Q14 to the possibility of a statutory duty of expedition being introduced for CA98 investigations. We agree with the government's position that it currently has no plans to introduce such a duty. Parties to CA98 investigations are already subject to tight timelines with minimal visibility of when each timeline will be imposed (unlike the position in relation to mergers where the statutory timetable is more predictable); if these were to be curtailed further that would be liable to materially affect parties' rights of defence. This is often a particular consideration for smaller companies which may not have in-house legal assistance or the resources to retain a large legal team.

Q15. 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?

No comment.

Q16. 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?

No comment.

Q17. 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?

On balance, the first part of the proposal (to provide additional immunity from private damages claims) is likely to encourage applicants to come forward, particularly where the issue is specific to the UK and no real risk of damages claims in other jurisdictions arises. We are however concerned that, in some cases, the proposal to grant immunity from liability for damages might leave the victims of a cartel without an effective means of redress. A more limited option might therefore be to lift the joint and several liability of the holders of full immunity for the entire loss caused by the cartel, limiting its liability to losses for which it was directly responsible.

We are not persuaded that the proposal regarding whistle blowers is necessary. Very generous financial incentives are already available to whistle-blowers as well as significant protection of their identity. Adding further protections may risk encouraging misleading allegations being made by business rivals or disgruntled former employees (which in our experience is already a reality).

[7] Case 39.309 *LCD (Liquid Crystal Displays)*, decision of 8 December 2010, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3643_4.pdf.

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?

As set out in response to Q6, issues of competition policy are inherently complex and fact specific. They typically involve difficult issues of economic assessment and the balancing of pro- and anti-competitive effects. In our view, these factors, rather than any procedural hurdles, have resulted in the CMA – and other competition authorities such as the European Commission – making limited use of their existing powers to impose interim measures, and appropriately so. In addition, our experience in the context of the litigation of competition law issues is that the granting or refusal of interim measures will often determine the outcome of a dispute, without the underlying issues being fully assessed.

For these reasons, we would oppose any changes to the interim measures tool in Competition Act investigations that weakened the procedural safeguards in relation to the issuing of decisions and, in particular, any softening of the standard of review in appeals against such decisions.

Q19. 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?

We have significant concerns regarding the scope of the proposed new powers.

Wider powers to interview relevant witnesses

The CMA's existing powers to interview witnesses impose very substantial burdens on the individuals involved and the businesses for which they work. Interviews are typically extensive, subject to potential civil penalties and criminal sanctions and, in our experience, require each individual to be available to the CMA for an entire working day or more. These are often senior individuals and their absence can impose substantial cost on the undertakings for which they work, in addition to the costs of legal advice, travel and accommodation. None of these costs are recoverable. Given this, we do not consider it reasonable or proportionate to allow the CMA to compel individuals with no link to undertakings under investigation, and against whom there is therefore no allegation of involvement in wrongdoing, to suffer this cost and inconvenience.

More effective requirements for businesses to preserve evidence

A blanket power to preserve documents where a person "*suspect[s] that an investigation [is] likely to be carried out*" is liable to be completely unworkable. It will raise difficult issues of interpretation and implementation and has a real potential to impose open-ended document preservation obligations on undertakings in circumstances where it is difficult to assess the risk that an investigation might be launched at some, unspecified, point in the future or the scope of that investigation if it is launched.

Any analogy with the position in relation to investigations under the cartel offence is inappropriate. Such investigations are vanishingly rare and involve the most serious, indeed criminal, conduct. Moreover, the cartel offence was specifically designed to apply in a clear-cut manner to strictly defined misconduct. This is far from the case in relation to the Chapter I and II prohibitions, whose scope continues to evolve as case law develops.

Any obligation to preserve documents should be subject to a clear-cut triggering event and to sufficient clarity as to scope. In order to trigger a document preservation obligation, the CMA should be required to contact undertakings individually and specify, at a minimum, the subject matter and date range of documents to be preserved. These are issues that the CMA is already obliged to address in the early stages of its process when exercising its formal investigatory powers. It should not therefore impose a material additional burden. It would, however, substantially limit the risk of extensive and unnecessary obligations and risk being imposed on businesses.

.

More flexible powers of inspection for domestic premises

We are concerned that the extension of the CMA's powers in relation to the inspection of domestic premises by giving it powers to 'seize-and-sift' evidence during inspections of domestic premises under a warrant represents a significant intrusion into the rights of privacy of individuals. Little justification is given for the extension. At a minimum, we believe that the CMA should be able to identify specific instances when its investigations have been materially hampered by the lack of such powers before such a draconian extension is considered.

Q20. 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?

We welcome any effort to streamline the CMA's Competition Act investigation processes, including the proposals to introduce Early Resolution Agreements in relation to complex Chapter II cases. However, we are unclear as to the reasons for adopting separate processes for Chapter I and Chapter II cases. In our view, all the CMA's tools for the early resolution of cases should, in principle, be available across the entire range of its Competition Act cases, unless there are clearly identified issues that would prevent this.

As regards the specific proposals at paragraph 1.178:

- Binding admissions: Provided (as indicated in the footnote) such an admission can be explored on a without prejudice basis, and provided parties are not pressurised into making such admissions as a condition of settlement, this may be a useful tool. Parties making such admissions will run the risk of the admissions being used in follow-on damages claims and/or in director disqualification proceedings, which may be a disincentive to their use.

- Short-form decisions: We agree that this would be a sensible approach in many cases; however, where conduct is novel (including where existing legal principles are applied to new fact patterns), material assistance can be provided to other companies where a full-form settlement decision is adopted.

- Streamlined process: This proposal appears unobjectionable, provided the provisions in relation to penalties in s.9(6) of the CMA Rules are retained.

Q21. 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?

Yes.

Q22. 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?

We strongly support the proposed new arrangements to deliver more efficient use of confidentiality rings in Competition Act investigations. We have direct experience of a reluctance to adopt confidentiality rings increasing the administrative burden involved in Competition Act investigations that resulted in material delays. As well as creating a burdensome and time-consuming need to prepare redacted versions of documents for other parties, the fact that even the external counsel do not gain access to unredacted copies of documents is deeply problematic and contrary to the rights of defence. With the best will in the world, the CMA is not able to put itself in the parties' position to determine what parts of information that one party wishes to redact will be relevant to another party. We have experience of inappropriate redactions having been imposed. Although the matter was ultimately resolved to our satisfaction, this necessitated extensive interaction with the case team and SRO, which was wasteful both of our and the CMA's time. A properly functioning confidentiality ring would have avoided all of these issues.

.

A prescribed legal framework is therefore likely to significantly reduce the complexities currently involved in implementing confidentiality rings. Having said that, some scope for additional protection of the most highly sensitive information may need to be preserved for exceptional cases.

The introduction of civil sanctions for breaches of confidentiality ring obligations is also considered reasonable, at least where the breach is likely to have resulted in material harm to the undertaking to whom the confidential information belongs.

Q23. Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?

No. As set out above in relation to Q13, the principle that cases should be subject to review by a 'fresh pair of eyes' is one of the crown jewels of the UK competition law enforcement system. Although we recognise that the existing rules impose an additional administrative burden on the CMA, we believe that the benefits in terms of objectivity substantially outweigh these costs.

Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

We see no justification for any relaxation in the existing levels of judicial scrutiny. This is a delicate and important issue. As current Chairman of the Competition Appeals Tribunal and former Chairman of the Competition Commission, Peter Freeman said, in 2019:

> "*It is an effective appeals system that provides the glue holding the whole system together and enables the system to work effectively. Weaken it or take it away and the concentration of power in the hands of the competition authorities becomes a serious concern*."[8]

This position directly reflects the intention of Parliament in introducing the Competition Act 1998, when it was emphasised that "*access to full and independent appeal on the merits of the case is essential in ensuring that the new regime is fair and transparent*".[9]

The current situation, involving full merits review by the Tribunal, is working well. Current timetables for Competition Act appeals, at around 6-9 months from application to hearing, seem very reasonable given the complexity of the issues typically involved (see further our response to Q27 below). And, as noted in the Consultation, the CMA already has a strong success rate before the Tribunal, with only one CMA infringement decision having been overturned on appeal to date. This success rate contrasts favourably with jurisdictions which adopt a prosecutorial system (the alternative route to ensuring sufficient and appropriate review of competition authority enforcement). Non-appeals should also not be overlooked. In the past 5 years, a great majority of CMA CA98 infringement decisions have not been appealed at all.[10] The fact that a full merits review is potentially available has not prevented the CMA from successfully closing many investigations without appeal.

As identified in the government's 2013 consultation, Streamlining Regulatory and Competition Appeals Consultation on Options for Reform, and the responses to it, there are a number of compelling reasons for adopting a higher standard of review in Competition Act appeals.[11] These include:

---

8 Appeals in Competition Infringement cases – Keynote Speech by Peter Freeman at the Concurrences Conference – Innovation Economics for Antirust Lawyers 2019, available at https://www.regulation.org.uk/library/2019-Peter_Freeman-Appeals_in_Competition_Infringement_Cases.pdf.

9 Statement of Mr Ian McCartney, MP, during the third reading of the Competition Bill before the House of Commons on 8 July 1998. A number of other similar statements were made during other readings.

10 Based on information on the CMA's and CAT's websites, it is estimated that only 7 out of 28 cases in which an infringement decision was reached between the CMA's foundation and June 2021 have been subject to an appeal to the CAT. (Even among the 7 cases which did go to appeal, in most Chapter I cases only a subset of the parties involved lodged an appeal.)

11 Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform, 19 June 2013, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf and the responses to the consultation available at

- The CMA is responsible for deciding not only whether an infringement has occurred, and what penalties should be imposed, but also for deciding which cases to select. It is therefore particularly susceptible to confirmation bias, underlining the need for full independent review on appeal.

- Fines imposed by the CMA under the Competition Act are quasi-criminal penalties for the purposes of Article 6 ECHR, meaning that appeals must be considered before an independent and impartial tribunal in order to ensure the parties right to a fair trial.

- Infringement findings are binding for the purposes of any follow-on action for damages actions. As a result, weakening the appeals process would create inconsistencies in relation to the private enforcement of competition law.

- Infringement findings under the Competition Act can have very serious consequences over and above significant fines and exposure to private damages actions: such decisions can "*impose far-reaching changes on the way that a business operates*"[12] and have very strong reputational implications.

- In addition to the consequences for the businesses involved, infringement findings form the basis of director disqualification orders, and therefore have implications for the rights of individuals that may not be direct parties to the procedure.

A fully-functioning appeals system is also essential for the proper development of UK competition law, particularly at this moment of its development as its future direction can evolve from the jurisdiction of the CJEU (noting that s.60A(7) CA98 sets out a number of situations where consistency with pre-Brexit case law does not apply, in addition to the ability of the UK Supreme Court and the Court of Appeal to diverge from retained EU case law where it is right to do so).

There are a number of further important considerations:

- Merits appeals in a number of cases have resulted in the clarification of the infringement, compared to the original CMA decision (even where the outcome of the decision is upheld) – recent examples include *Pfizer/Flynn*, *Paroxetine* and *Ping*. A judicial review style appeal system would be much less likely to result in such clarifications, which in turn helps to assist businesses to comply with competition law in the future, to the benefit of the wider economy.

- Companies under investigation in CA98 cases are subject to a number of burden-shifting presumptions. For example, parties to an alleged infringement by object face a presumption of illegality without the need to demonstrate an effect on competition. Conversely, parties bear the burden of proof on a number of significant aspects of their appeals, for example fulfilment of s.9 exception criteria under the Chapter I prohibition, or of the criteria for an objective justification to be made out under Chapter II. The appeal proceedings are the first occasion when an independent tribunal can assess those arguments.

For all these reasons, we strongly oppose any relaxation of the current levels of judicial scrutiny. Reducing the level of judicial scrutiny will also reduce the esteem in which the current system is held internationally.

---

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/252840/regulatory-and-competition-appeals-consultation-responses-a-h.pdf and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/252842/regulatory-and-competition-appeals-consultation-responses-i-z.pdf.

[12] Response of British Sky Broadcasting Limited to the 2013 consulatation at para 7.17, p.18 here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/252840/regulatory-and-competition-appeals-consultation-responses-a-h.pdf.

.

Q25. 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?

Again, we see no justification for any relaxation in the existing levels of judicial scrutiny. Indeed, given the proposals to significantly extend and enhance the CMA's investigative and enforcement powers, we believe that it would be entirely inappropriate to relax the level of judicial scrutiny of the CMA in these areas at this time.

Q26. 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?

As set out at para 1.210 of the Consultation, since 2008, the average time from an appeal being lodged with the Tribunal to a judgment has been 15 months. The average time from an appeal being lodged to trial has, since 2015 at least, been less than 12 months. Indeed, the main source of delay appears to be what happens in the post-trial period. Since 2015 the time taken to write up judgments represents (on average) around one third of the time taken between lodging of an appeal to judgment.

In these circumstances, we believe there is no pressing need to amend the Tribunal's rules in order to increase its efficiency. However, the adoption of a non-binding target of issuing judgments within 60 days of the relevant hearing could have a significant impact on reducing delays between appeal and judgment.

Q27. 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?

No comment.

Q28. 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?

See response to Q12 above.

Q29. What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?

As noted above, responding to competition investigations can be very burdensome for companies. Any powers to assist overseas authorities should therefore be appropriately limited, and subject to judicial oversight.

We hope that BEIS will take the above response into consideration. We are very willing to make ourselves available for a call with you if you would like to discuss our comments in more detail. Please contact sophie.lawrance@bristows.com and stephen.smith@bristows.com in the first instance if this is of interest.

Bristows LLP
1 October 2021

.