kelkoogroup

Reforming Competition and Consumer Policy

Introduction

As a digital business operating in an environment dominated by Google, our views on competition policy more generally are closely related to our views on competition in Digital Markets specifically. We have therefore focussed our responses here on Chapter 1 of the consultation and on those questions where our experience gives us clear views on the proposed changes. Our responses should be considered alongside our responses to the consultation on a pro-competitive regime for digital markets (which is submitted simultaneously).

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?

Digital markets can present challenges when looking at traditional economic indicators for concentration, primarily because digital services are often provided as part of two sided markets where one side receives a product or service for free. We would therefore suggest that the metrics and indicators should, when looking at concentration and competition in digital markets, focus on metrics such as user numbers, time spent using services as well as the number of times a service is used and the prevalence of multi-homing vs single-homing for given services. These metrics can help to provide a broader picture of the competitive landscape which would not be seen when looking at financial metrics.

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?

Yes, we would support the granting of powers to the CMA to obtain evidence for the 'State of Competition' reports. These reports will form an important part of setting competition strategy and it is important that the CMA can access full and accurate information to produce them.

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

In our view, with the right powers in place, the CMA will have strong capability to assess and set strategic priorities in the context of competition policy. We would not consider more regular strategic steers to be harmful, but neither do we think there is a strong necessity for them (in light of the other changes proposed in the consultation).

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

Yes, we believe that the successful implementation of a pro-competitive strategy relies on the potential for early intervention (see also our comments on pro-competitive interventions in the context of digital markets). In our market, Google's decades long abuses have caused long-term permanent damage to the fabric of competition largely because European enforcement action took too long and has resulted in ineffective remedies. If the CMA is to be successful in implementing a pro-competitive policy which avoids similar situations in future, the ability to intervene effectively at an early stage will be crucial.

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

This proposal could be an effective alternative to the proposal discussed in Q4; we consider that either proposal could work, but the focus must be on identifying quickly where action is needed so that the action can be taken early (whether in the form of a pro-competitive intervention, enforcement action or something else). This will also mean that, in many cases, a less significant intervention is needed than would be the case after a longer, slower process: it is far more difficult, and requires more drastic action, to rectify a competition problem which has been in play for a decade than to deal with issues arising more recently.

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

Yes. Interim measures can prevent or limit irreparable or long-lasting damage to markets during investigations and are an important part of the broad toolkit which is necessary for the CMA to act most effectively. It is sometimes said that interim measures are too interventionist, but they can in fact help to limit intervention – by applying the measures earlier in the process, more severe interventions can be avoided later on.

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

Yes, but this should be subject to consultation with affected parties on the commitments themselves, to ensure that they effectively address the harm.

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

Yes, we believe they will. In particular, improved monitoring and the power to vary remedies if they prove to be ineffective is very important. Remedies are arguably the most important part of any inquiry or investigation, and it is therefore vital to ensure that the CMA has full powers to put in place effective remedies even where initial attempts have been ineffective.

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?

Both proposals could help to streamline the interim measures process and make it more effective. In particular, subjecting interim measures to a judicial review standard rather than a full merits review would avoid tying up CMA resources in unnecessary litigation and instead focus the company being investigated on helping to complete the investigation as quickly and efficiently as possible – at which point the interim measures will either be jusitified and remain in place or will be lifted (likely as quickly or more quickly than the conclusion of CAT proceedings).

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 consider that the reforms would be helpful to the CMA in gathering evidence, coupled with an understanding of why affected parties may be reluctant to give evidence. In the early stages of the Google Shopping investigation, many CSSs were reluctant to give evidence against Google for fear of retaliation in the form of further demotions in search results and penalties when bidding on ads. The ability to compel witnesses in such a situation should therefore be accompanied by powers to limit access to the file (as discussed earlier in the consultation) in order to protect against such issues.

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?

Whilst the proposals could help to bring cases to a close more quickly and efficiently, we believe that the proposals do not yet take full account of the role of private damages claims both (i) in allowing business harmed by competition infringement to recover and once again be effective competitors and (ii) in deterrence.

In many cases, even in those with the highest fines, the amount of any fine is dwarfed by the gains made by the infringement. Google's €2.4bn fine in the European Commission's Google Shopping case was the equivalent of approximately 9 days of revenue for Google that year; in the context of a decade or more of abusive behaviour, that does not seem to be a significant deterrent.

In such cases, private damages actions are the only way to create significant deterrent effect. Furthermore, the impact of private damages can be such that harmed firms are able to reinvest their recovered losses and once again provide effective competition. More consideration should therefore be given to the circumstances in which early resolution agreements are considered to be appropriate.

Such agreements may be appropriate in cases where the effect of the infringement is (or would be) short lived, and where the market could return to normal quickly with limited long-lasting effects - in such cases, an early resolution agreement would allow all parties to conclude the investigation quickly and restore the conditions for effective competition. However, where more significant, longer lasting harm to competition has occurred, private damages actions play a more important role (as described above) in both deterrence and the restoration of competition and, as such, we do not consider early resolution agreements to be appropriate in those circumstances.

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?

Protecting documents prepared for a voluntary redress scheme could encourage businesses to take part in such schemes and would not, in our view, be a significant departure from existing protections for documents attracting legal privilege. Provided that the protection only applies to documents created for the redress scheme (and not to pre-existing or separate business documents), then we do not see any significant detriment to potential claimants compared to the current system.

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?

The proposed reforms could help to speed up investigations and could be a positive development, standardising the 'rules of engagement' on disclosure of confidential information. However, the specific terms of the ring must give sufficient clarity to those businesses who are not the subject of

the investigation but who support the investigation by disclosing information to the CMA; such businesses may be more reluctant to assist if they are concerned that their information will be disclosed without further consent. Care is therefore needed both in the drafting of standard confidentiality ring procedures and in the guidance and explanations around them for affected parties.

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

Yes, the government should remove these requirements. It would be sufficient to have in place general principles around decision making, which can then be implemented by the CMA. That implementation could then be more flexible, allowing the safeguards to become more stringent where a case is more complex or difficult, and the process to be made more efficient for simpler cases.

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

It is vital that infringing firms are dis-incentivised from abusing the appeals system to create delays and that an appeals system offers a predictable, fair opportunity for bad decisions to be overturned in a reasonable timeframe. As such, we believe that the judicial review standard is the appropriate standard for review of CMA decision making, both in relation to Competition Act investigations and in other areas (as described in question 25 below).

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?

See question 24.

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?

Yes, we believe that the proposed changes will help to conclude investigations more quickly by providing a stronger disincentive to infringers who may otherwise be tempted to game the system. The previous caps were clearly insignificant to businesses on the scale of Google or Facebook; as such, the penalties proposed would provide a much more significant incentive to comply and we consider them appropriate.

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?

The proposed new caps on enforcement penalties will provide a strong incentive to comply. However, we would suggest that higher caps could be applied where failure to comply is repeated or is more serious (with a sliding scale starting at the proposed 5% cap and rising to 10% or more).