

Response of Berwin Leighton Paisner LLP

Introduction

Berwin Leighton Paisner LLP ("BLP") has extensive experience of representing clients in relation to all aspects of UK and EU competition law and welcomes the opportunity to comment on the consultation launched by the UK Department for Business, Innovation & Skills ("BIS") titled "Options to refine the UK competition regime".

The views expressed herein do not necessarily reflect the views of any of BLP's clients.

Question 1: In light of the fact that the CMA has been in operation for over 2 years, is the government right to consider changes to the way that the CMA panels and decision making processes work?

Yes No Not sure

Question 2: If yes, on which areas considered in this consultation should the government focus its intervention?

Refinements to the existing panel system	<input type="checkbox"/>
Streamlining of inquiry group role	<input type="checkbox"/>
Improving inquiry group accountability to the CMA Board	<input type="checkbox"/>
Improvements to the constitution of panels	<input type="checkbox"/>
Panel size and time commitment	<input type="checkbox"/>
Experience of panel members	<input type="checkbox"/>
Length of appointment	<input type="checkbox"/>

Question 3: Do you have any further comments on the UK's approach to decision making in market and merger investigations?

Comments: No comments.

Question 4: Which, if any, of the options for reducing the end-to-end time taken for market investigations should the government pursue?

Option1 – reduce the statutory timetable from 18 months to 12 months and retain the 6 month permitted extension	<input type="checkbox"/>
Option 2 – retain the current 18 month statutory time limit and remove the right to extend the timescale	<input checked="" type="checkbox"/>
Option 3 – retain the current 18 month statutory time limit and allow the CMA Board to determine the timeline of a market investigation linked to its scope	<input type="checkbox"/>
None of the above	<input type="checkbox"/>

Question 5: Please provide any comments on the current system or government’s proposed approach to amending it.

Comments: We believe that option 2 (retain the current 18 month statutory time limit and remove the right to extend the timescale) is the best option to reduce the end-to-end time taken for market investigations. The main benefit of this option is to provide complete certainty about the length of an investigation. The government has noted that one of the disadvantages of this approach is that it could result in all market investigations taking the full 18 months, even when they could be concluded more quickly. We do not believe that this is a major concern given that the CMA’s focus is very much on investigating large and complex markets of national importance (such as energy and retail banking). The scale and complexity of the markets that the CMA is likely to investigate will mean that it would be extremely unlikely to conclude a market investigation in significantly less than 18 months in any case.

Question 6: Should the government amend the powers of the CMA to allow it to revisit remedies imposed following market investigations where they are shown not to be working?

Yes No Not sure

Comments: Our main concern regarding the proposal to allow the CMA to revisit remedies is the continued uncertainty it could create for businesses that will already have been subject to a significant degree of uncertainty during the CMA’s market investigation. If the government wishes to pursue this proposal, we believe that it should publish and consult on a more detailed proposal setting out the threshold that would need to be met before the CMA could revisit remedies and how long after the conclusion of a market investigation these remedies could be revisited.

Question 7: Is the government right to believe that there is no legislative change required in relation to the CMA’s merger assessment powers?

Yes No Not sure

Comments: We agree that no legislative change is required at this stage. This should be revisited once the CMA has introduced the proposed procedural changes and sufficient time has passed for their effects to be assessed.

Question 8: If no, please set out where you believe that the government should seek to legislate and why.

Comments: N/A

Question 9: Do you agree with the government’s proposal to allow for a parallel fining power on the civil standard of proof for parties who provide false or misleading information?

Yes No Not sure

Comments: We believe that this consultation does not contain sufficient detail to allow us to form a definitive view on whether the government should allow for a parallel fining power on the civil standard of proof for parties who provide false or misleading information. While we are not opposed to the idea in principle, we believe that the government should publish and consult on a more detailed proposal. In particular, we would like to see more information on the powers the government proposes to give to the CMA to allow it to investigate whether it has been misled. We would also like to see more information on the standard that a company would need to meet to establish that it had not knowingly or recklessly misled the CMA.

Question 10: Which, if any, of the options for amending the level of fine that the CMA’s can impose for breaches of requirements in merger and markets investigations should the government pursue?

Option 1 – Increase the maximum penalty that the CMA can award from the current levels of £30,000 for a fixed fine and £15,000 for a daily fine or allow the penalty to be calculated by reference to turnover	<input type="checkbox"/>
Option 2 – allow the CMA to impose a daily penalty by reference to an earlier date – the date it considers a person had no reasonable excuse for not complying with its request.	<input type="checkbox"/>
None of the above	<input checked="" type="checkbox"/>

Question 11: If fines should be increased, what do you think would be an appropriate approach and level?

Comments: N/A

Question 12: Is the government right to seek to designate the CMA as a prosecutor under SOCPA for criminal cartel cases?

Yes No Not sure

Comments: We support the designation of the CMA as a prosecutor under SOCPA for the purposes of allowing the CMA and 'assisting offenders' to benefit from the increased safeguards and transparency offered by SOCPA. We believe it is important that no changes are made to the no-action letter regime, which the government has confirmed.

Question 13: Do you agree that the government should introduce a statutory time limit of two months for appeals against PSR decisions that are heard by the CMA?

Yes No Not sure

Comments: We agree that the government should introduce a statutory time limit for appeals against PSR decisions that are heard by the CMA. We also agree that the limit of two months provides applicants with a meaningful opportunity to assess the PSR decision and prepare an appeal.

Question 14: Do you agree that the Competition Service should be abolished and that the CAT should assume its functions?

Yes No Not sure

Comments: No comments.

Question 15: Do you agree that the jurisdiction of the CAT should be extended to allow it to hear cases (or elements of cases) which relate to breaches of articles 53 and 54 of the EEA agreement as well as breaches of UK competition law and Articles 101 and 102 of TFEU?

Yes No Not sure

Comments: We have not provided a response to this question in the light of the outcome of the EU referendum on 23 June 2016.

Question 16: Is the government right to allow the CAT to hear Judicial Review applications in respect of matters arising in the conduct of ongoing CA98 cases?

Yes No Not sure

Comments: We support the government's proposal to allow the CAT to hear Judicial Review applications in respect of matters arising in the conduct of ongoing CA98 cases. We believe that the CAT has the necessary expertise to hear such applications and that applicants and the CMA will benefit from the faster resolution of complaints.

Question 17: Is the government right to give the CAT a power to give declaratory judgments in private actions for damages?

Yes No Not sure

Comments: We strongly support the government's proposal to give the CAT the power to give declaratory judgments in private actions for damages. Allowing the CAT to give declaratory judgments is likely provide parties with certainty as regards their legal position at an earlier point than if they had to apply to the High Court. This is especially important in situations in which the claimant is not yet able to quantify the damages incurred but seeks certainty as regards their legal position to inform their business practices.

Question 18: Is the government right to seek to amend ERRA to ensure that the government has a comprehensive power to make rules allowing the CAT to exercise judicial supervision of all aspects of warrants in competition investigations?

Yes No Not sure

Comments: No comments.

Do you have any other comments that might aid the consultation process as a whole?

As set out in BLP's response of 9 March 2016 in relation to BIS' consultation on the implementation of the EU Directive on damages for breaches of competition law, we believe it would be helpful for the government to consult on the operation of the Competition Appeal Tribunal Rules 2015 and the Competition Appeal Tribunal Guidance that have been in effect since 1 October 2015. In particular, we believe it is important to address the uncertainty perceived by a large number of commentators as to how Rule 119 of the Competition Appeal Tribunal Rules 2015 should be applied to follow-on, stand-alone and hybrid damages claims that arose before 1 October 2015.

Berwin Leighton Paisner LLP

24 June 2016