JWP Briefing Paper for Incoming Chairman and Chief Executive of the Competition & Markets Authority

JWP

The JWP is the Joint Working Party on Competition Law of the Bar Council and Law Societies of England & Wales, Scotland and Northern Ireland. The JWP comprises lawyers and barristers who specialise in the practice of competition law and who are drawn from a range of practices. Although JWP Membership includes many who largely act for complainants and others for defendants and some for the largest corporates and others for SMEs, we share a common view that the interests of clients, consumers and society are best served by high quality institutions following transparent processes to get to robust, well-reasoned decisions that are subject to efficient merits-based appeals. Our approach to this Briefing and future consultations will be guided by this philosophy.

Purpose of this Paper

The JWP thought it would be useful for the new management of the CMA to have a briefing from practitioners on "live" issues of competition law enforcement. We know there will be formal consultation processes in 2013-2014 on various specific issues and we will respond to those enthusiastically. The purpose of this note, however, is to give you a sense of how one group, containing a cross-section of your stakeholders sees the issues of current and future institutional performance and priority. We do not seek here to reopen any issues settled by the new legislation.

In making these suggestions and comments, the JWP recognises the strengths of the current institutions, as somehow these need to be built upon even as you create a new body with its own ethos, values and strengths. First, the integrity and passion of staff at both institutions are, almost without exception, of a high order. Second, the quality of analysis and decision making of the CC in particular is generally considered to be good. Third, the willingness of both organisations to listen and to adapt their structures and processes in light of feedback and experience is really commendable.

Scope of this Briefing

In the following sections we set out what we believe are the most important issues confronting the CMA in light of experience of OFT, CC, Concurrent Regulators and the Courts to date in relation to:

1. Mergers

2. The market investigations regime

3. Competition Act 1998 enforcement (cartels and abuse of dominance)

4. Concurrency

5. The criminal cartel offence

6. Key considerations for the CMA

7. General observations

1 Mergers

Our principal concerns in relation to the future operation of the merger regime are these:

1.1 Timing and pre-notification

We think the business community in general looks forward to merger control processes with fixed and predictable timetables, while welcoming the retention of the current voluntary pre-notification regime. That said, in practice, they also value the ability to avoid long Phase II processes (causing City Code takeover bids to lapse automatically) either by using time to address OFT concerns or undertakings in lieu (UIL) to avoid references.

Clearly the new regime may facilitate new approaches and solutions. The revised UIL regime may help considerably.

Pre-notification (i.e. before formal timetables are triggered) can be both a blessing and a curse. At EU level many cases are being blighted by very extensive pre-notification processes (running into months). Where these are to ensure due understanding of the issues to facilitate efficient filing and allow Phase II to be avoided they have our support. There are times, though, when they reflect indecisiveness on the part of the case teams, as well as issues surrounding quality control and consistency of staffing on case teams, leading to unduly burdensome information requests and long delays. Members of the JWP are concerned that there are already signs that OFT Mergers Branch staff are, at least in some cases, going too far in pre-notification.

We hope the CMA will police this carefully. Early allocation of high quality case management and early discussion at a senior level about the most efficient way to handle a particular case will be important, together with (to the extent possible) consistent composition of case teams throughout the duration of a case.

1.2 Completed transactions

We recognise the policy imperative of ensuring that problematic transactions are caught and do not become irreversible. It ought not to be the case, however, that non-problematic deals are subject to costly and intrusive hold separate obligations. We flag therefore the continued need for judgment rather than automaticity here. Partly this is a question of ensuring that the 'right' cases are called in, and that inquiry letters are not sent out in relation to deals that are very unlikely to raise competition concerns.

1.3 Phase I v Phase II

Although the Phase I threshold is, rightly, set lower than for appraisal by the CC at Phase II, we think that there is still an important and ongoing debate as to whether, given the number of unconditional clearances at Phase II, the OFT has in practice applied the Phase I threshold too conservatively.

The commercial value of being able to get deals cleared in Phase I, and the willingness historically of the OFT to engage in order to allow this when appropriate, have been much appreciated. We might disagree in individual cases but overall this has been an area of real strength of the UK regime. We would like that to continue.

The tension here is between:

- Full Phase I processes that enable the First Phase decision maker to conclude either that there is no material risk of an SLC or that proffered remedies suffice;

- A full Phase I followed by a full Phase II investigation since that adds time and cost.

What JWP Members would like to avoid is extensive Phase I processes and information requests (particularly where more novel theories of harm are pursued) in cases which either are obviously destined for Phase II or, if overseen earlier by more senior/experienced officials, are obvious clearance cases.

CMA leadership will need to be alive to the need for a robust approach to the Phase I/Phase II balance. The CMA panels will comprise forceful individuals keen to undertaken Phase II reviews. We hope however that this does not lead to undue internal pressure for a lower trigger for Phase II cases.

1.4 Phase II panels and case teams

Efficiency and institutional merger strongly militate in favour of Phase II becoming more of a development of Phase I rather than a "restart". There is a challenge here though to ensure that as the case is explored in more depth and detail in Phase II the case team remains sufficiently open minded to be able to move their own thinking. There is a critical role here to be played by panels and senior case team management or other internal checks and balances to eliminate the risk and the possible perception of confirmation bias.

2 Market Investigations Regime

Although this is a valuable element in the overall UK regime, we are concerned about the practical implementation of the market investigations regime. Companies become involved in them involuntarily (in contrast to mergers) and without the need for any allegation or suspicion that they have engaged in illegal conduct. Market investigation references (MIRs) can have significant consequences. Proper process and high quality analysis are therefore essential to the credibility and legitimacy of the regime. Despite best intentions it is rare for the CC to complete these in less than 18 months. Early attention will therefore need to be given to how the CMA will make these processes work fairly and efficiently within the statutory deadlines, without compromising the quality of the investigation.

It is inevitable that there will need to be reliance on Phase I work in Phase II but, as with our comment above on the merger regime, it will be important to be able to show high quality independent review.

Given the involuntary nature of this regime for companies under investigation, clear and measurable prioritisation principles and early signalling of areas of potential investigation would be welcome.

It has been a feature of MIRs that they have never been abbreviated – even where the early indications have been that there would be a "clean bill of health". It would enhance the credibility of the regime and the support of business if the CMA could throughout the process challenge itself and those involved as to whether there is a real competition risk and/or whether remedies are likely to be available. Where this is not the case, attention should be given to early termination.

3 CA98 Investigations

Members have a number of concerns in this area, both as a matter of policy and of practice.

3.1 Policy balance between criminal, administrative and private enforcement

We do not consider that the policy priorities for enforcement are sufficiently clear. It is important for the CMA to make it clear that CA98 remains primarily an administrative enforcement regime to which civil and criminal liability are complementary elements promoting efficiency and deterrence.

If that is not made clear then there is a risk that one of the central elements of the administrative regime, namely leniency applications, will be undermined by concerns over the knock-on implications for civil or criminal liability.

3.2 Due process

There is a continuing debate on the balance between the procedures for administrative enforcement and for appeals before the Competition Appeal Tribunal. The Tribunal has given guidance in a number of cases as to the evidential requirements of the CA98 regime that should assist the OFT/CMA in developing more robust procedures for evidence gathering and oral hearings.

The decision to retain the two-stage process does not, in our view, undermine the need for a merits-based appeal procedure – the ability of the OFT/CMA to take on board the guidance of the Tribunal will, however, be a very important factor in determining how often it will be necessary to bring such an appeal and how prepared undertakings and firms will be to engage in that process rather than focusing their main efforts on the process of appeal.

There will be a need for procedural safeguards to ensure appropriate separation of evidence obtained by the CMA in a cartel case (for example from an immunity applicant in the case of an alleged two party cartel) from evidence and analysis relating to the review of a merger involving parties concerned by that evidence.

3.3 Procedural Adjudicator

Following its introduction by the OFT two years ago, we would encourage the CMA to maintain and strengthen the role of the Procedural Adjudicator by enhancing its independence and increasing the scope of its authority beyond the present, rather limited, set of issues subject to its review.

3.4 Oversight of administrative enforcement priorities

The OFT's revision of its procedures to increase the involvement of senior management is welcome, particularly if it leads to more focused investigations and better prioritisation of resources.

3.5 Case selection

The OFT/CMA needs to adopt a rigorous case selection policy – there have been far too many long-running and wide-ranging investigations that have not reached any clear conclusion despite being allocated very substantial resources. This is wasteful not only for the UK authorities but for UK industry. We would welcome the provision of information to companies under investigation at an earlier stage than has been the case in OFT

proceedings. The present position, in which companies may have to wait for a period of years for a Statement of Objections which may never ultimately be issued, is unsatisfactory.

It is understandable that the OFT/CMA wishes to pursue novel and aggressive theories of harm but there is a concern that this may have diverted resources from more straightforward enforcement activity. In addition, the focus on very broad sectoral investigations involving large numbers of small alleged infringements is questionable for a national enforcement body with limited resources.

3.6 Abuse cases

It has been a weakness in the recent enforcement activity that very few substantial cases of unilateral abuse have been pursued. Such cases can be of considerable precedent value and it will be important for the CMA to define its policy on such cases.

4 Concurrency

The level of competition enforcement activity by the sectoral regulators has in general been poor (it is our general perception that Ofcom is at least a partial exception to this general criticism). The regulators appear reluctant to take cases under CA98 or (with the exception of ORR) to make sectoral MIRs. It may well be that the reluctance to make MIRs is due to a misalignment of incentives (i.e. they would prefer to try and deal with the issues themselves, rather than hand over the reins to another authority). They have also failed to observe procedural best practice or to provide clear guidance on the circumstances in which they will use their competition law rather than sectoral powers.

There is an obvious concern that these very important sectors of the UK economy are not subject to effective competition law regulation, which also prejudices the OFT/CMA in that they do not in practice develop expertise in areas that have raised significant competition law issues at the EU level.

We recognise the efficiency of not having different bodies considering regulatory and/or competition law based action and solutions to the same set of facts. Nevertheless the need for improved processes in the area of the application of competition law to the “concurrent” sectors is felt strongly by JWP members.

It will also be important for the CMA to define its relationship sectoral regulators operating under new or substantially amended regimes, such as the Financial Conduct Authority, the CAA and Monitor.

5 The Cartel Offence

We recognise Parliament’s determination to support and encourage criminal prosecutions as part of the overall reform of the UK regime. We have three main areas of concern:

- Uncertainty as to how the amendments to the offence, to introduce a number of new defences in replacement for the dishonesty element, will operate in practice. Guidance here should be an early priority.

- The interaction between the administrative and private enforcement regimes and any effect on willingness of some to seek leniency; this should be kept under review. Again, we believe there is a case for revised guidance to give whatever level of reassurance to leniency applicants is considered appropriate under the revised regime in order to minimise conflict between an applicant and individuals who might have committed the cartel offence.
- Concern about resourcing: there has been criticism of the quality and volume of prosecutions undertaken since 2003; if this is addressed as a resourcing priority, there is a risk of an adverse impact on availability of resources for and ability to undertake CA98 cases effectively. The JWP welcomes the deterrent effect that effective enforcement will generate; our concern is with the negative impact on perceptions of UK competition law of enforcement that fails.

6 Key Considerations for the CMA

We would identify the following key priorities and challenges:

- Acquisition and retention of high quality staff given pay differentials with the private sector.
- Reputation management given high profile civil and criminal case failures.
- Involvement of senior management in case selection and enforcement to ensure coherent enforcement prioritisation and optimal use of resources.
- Treatment of evidence, and procedural issues, under CA98 in order to ensure sufficient, high quality, competition enforcement.
- Ability to handle shorter MIR deadlines.
- Maintenance of consistent, high quality case teams.
- Striking a balance between possible efficiency gains and maintenance of independence within the CMA's unitary structure.
- Establishing at an early stage the CMA's independence from political interference.
- Striking the right balance between the CMA's powers and those of the new Financial Conduct Authority – and similarly with the sectoral regulators.
- Provision of guidance on the new regime. In view of the substantial volume of existing guidance which will require updating, we would suggest prioritising those areas of procedure and law in which there are real changes.

7 General Observations

We would emphasise:

- A new, unitary ethos is important.
- Cross over of Phase I and Phase II experiences will be useful provided that independence at Phase II is maintained.
- Quality of staff and active engagement by senior management in cases are important and we support indications that there will be early involvement by senior management.
- The advantages of guidance and transparency for example over the vision for criminal/administrative/private enforcement and the relationship between competition enforcement and consumer protection.
- The importance of sharing expertise with the various sectoral regulators.

We would also welcome the opportunity to expand upon all or any of these points with you and your teams.

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