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UK Government Launches Green Paper on Modernising Consumer Markets

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The shock waves of the UK's vote in June 2016 to leave the European Union continue to reverberate through various public policy areas. Recognising that concerns in certain sections of the British population about globalisation and open markets appear to have contributed towards the leave vote, the government initially responded to the Referendum result with a range of proposals to reassure such voters. These included introducing increased controls over foreign takeovers of British companies and the launch of a national 'Industrial Strategy', which promised a higher degree of government involvement in the economy. At the same time, the looming departure from the EU at least opens up the possibility that the government can take policy in new directions that may not have been possible under EU law.

Pushing in the opposite direction are the need to maintain an open business environment to attract continued foreign inward investment to the UK and the desirability of maintaining close alignment between UK and EU regimes to minimise trade barriers and reduce regulatory duplication.

Government policy currently appears to be taking shape somewhere between these two opposing poles, with competition policy (i.e. antitrust) and consumer protection being a particular focus, as UK law in these areas is currently either completely aligned with the rest of the EU or closely mirrors principles of EU law.

Reflecting this ongoing policy debate, the Department for Business, Energy & Industrial Strategy (BEIS) published a green paper on 11 April, in which it seeks views on a new package of measures designed to meet the "challenges and opportunities" of modern consumer markets, touching both competition law and consumer protection. According to the green paper, the government is basing its policy in this area on three principles:

- competition should be central to the government's approach;
- consumers should benefit from new technology and new business models; and
- consumers should be able to get redress when things go wrong.

While there is relatively little mention in the document of Brexit, its overall tone clearly has the above tensions in mind. By repeatedly stressing the government's commitment to "an open, liberal, modern economy, built on the core principles of competition, free trade and high regulatory standards", the green paper suggests a rejection by the government of what could have become a drift towards protectionism.

Key measures

Review of the UK competition law regime

The UK competition regime is praised in the green paper as being "transparent, rules-based and predictable". As such, the government has stressed in this document and elsewhere that it is committed to preserving the strengths of the current regime and does not plan to make fundamental changes to the legal framework after the UK's departure from the EU.[1] This in itself is welcome.

Nevertheless, the government is required to complete a statutory review of certain aspects of the UK's competition regime under the Enterprise and Regulatory Reform Act 2013 by April 2019. The green paper includes some general questions regarding the performance of the regime, albeit there are also some more pointed questions indicating concerns within government over competition in what it calls the 'digital economy'. Specifically, it asks for "views on how [*not whether*] the regime should be adapted for the digital economy, including how [*not whether*] it should address digital platforms, agglomeration, data algorithms and the consolidation of competitors."

Digital markets that work for consumers

This theme is developed in a separate section of the green paper focusing on digital markets. In this section, the government notes that the UK's Competition and Markets Authority (CMA) is at the forefront of international work in this area, for example through the establishment of a new specialist digital, data and technology team to improve understanding of the issues raised by data and the digital economy. The government will review the use of the UK's powers in the context of digital markets, as part of its wider competition regime review, to ensure the powers are effective in responding to what it refers to as "new digital challenges".

The government also recognises the importance of strong data privacy and data protection laws in digital markets, as well as the importance of data portability between services to secure market efficiency. Data portability is a new right to be introduced in the UK's forthcoming data protection legislation to give consumers the ability to request the movement of personal data between services and suppliers (albeit subject to certain limitations). To take full advantage of this new right, and make data portability a reality for consumers in other markets, the government will launch a 'Smart Data' review. This review will seek to identify those markets where data portability could have the biggest impact and how regulators can be empowered to introduce transformative changes for the benefit of consumers.

Consumer confidence in digital markets

The green paper notes that the UK has one of the world's strongest consumer protection regimes (without acknowledging the fact that this is largely a result of the UK's membership of the EU, which is responsible for broad swathes of the consumer law landscape).[2] The government nevertheless expresses a desire to revise the legal framework to support consumer-to-consumer transactions, especially online.

The green paper also invites views on, and experiences of, personalisation of prices and search results to inform its future work.

In addition, the green paper suggests that the data commonly collected by online companies in exchange for 'free' goods and services means that consumers will need to understand what they have agreed to when accepting a contract or privacy notice. Businesses can therefore expect new guidance to be issued by the government's Behavioural Insights Team on presenting terms and conditions and privacy notices online.

Enforcement of consumer rights

The green paper confirms that the government intends to introduce legislation to give civil courts the power to impose financial penalties on companies for breaches of consumer law. It is proposed that all consumer law enforcers, including the CMA and Trading Standards, will be able to ask the courts to impose fines, either as a standalone remedy or in conjunction with the existing civil remedies, such as injunctive relief, enforcement orders or enhanced consumer measures. The financial penalty would be subject to a total cap of 10% of a firm's worldwide turnover.

To provide consumers with confidence to pursue their complaints, and make it easier and quicker to obtain redress when things go wrong across, the government is consulting on a model for Alternative Dispute Resolution (ADR) that would deliver the best experience for consumers. This includes seeking views on improving consumer awareness and take-up of ADR and raising business participation.

In the field of international consumer policy, the government is seeking to ensure that consumer views and protections are a key part of its negotiations for new Free Trade Agreements with countries outside the EU. The green paper notes that the European Union (Withdrawal) is intended to implement measures to ensure that existing EU consumer protection laws implemented in the UK will be maintained. It equally recognises the importance of the cooperation between UK enforcement authorities and those in the EU following EU exit and commits the government to seeking "to negotiate the best possible deal" for UK consumers on cross-border cooperation on consumer law enforcement.

New strategic steer for CMA

One of the innovations introduced in the run-up to the creation of the CMA in 2014 was the publication by the government of a 'strategic steer'. While the strategic steer is not intended to interfere with the CMA's operational independence, the document is intended to serve as a statement of the government's wider strategic

priorities for the economy during its term and a suggestion of how the work of the CMA can support these. As such, each strategic steer provides an interesting (albeit partial) insight into the economic priorities of the government of the day.

The government has used the opportunity presented by the green paper to consult on a new strategic steer, which would replace the one published by the previous government. The draft strategic steer is so high level that it is unlikely to impinge materially on the CMA's case selection or decision-making. For examples, the government exhorts the CMA to "support the Industrial Strategy", which "aims to boost the earning power of people, places and businesses across the UK", and to "champion consumers".

Potentially more significantly, however, the new strategic steer contains an objective of making "the most of the challenges and opportunities of the digital economy", for which it suggests that unspecified "new approaches" may be needed. Aside from this hint, the steer is rather conventional, requiring the CMA to "take action to tackle anti-competitive behaviour and unfair trading", including by:

- being ambitious in the number and type of cases it carries out and the pace at which it conducts them;
- being a prominent voice for consumers and improve the public understanding of competition and consumer law;
- enforcing competition rules robustly, fairly and effectively; and
- reporting publicly on the CMA's impact of the health of competition across the UK economy, including the steps that the CMA is taking and issues that require government intervention.

Conclusion

The green paper consultation is open until 4 July. Although the document, and the questions asked, are high level and light on specifics, this is nevertheless an opportunity for businesses to lend support to the pro-competition, open market agenda espoused by the green paper.

At the same time as the green paper was published, BEIS made another important signal of the government's intentions by announcing that it would appoint Andrew Tyrie as chair of the CMA. This follows the government's confirmation of economist Andrea Coscelli as CEO last year.

While the CEO has primary responsibility for driving forward the CMA's work, the chair is an important role, as he or she manages the CMA board and is an advocate for the CMA's work across government and with business and the public. The chair is also closely involved in selection of the CEO.

Although this appointment raised some eyebrows initially, since Mr Tyrie was an elected Conservative MP until the last election, his work on various parliamentary committees, which included robust questioning of ministers, indicated a sufficiently independent mind-set to allay concerns that he might act as a voice of government within the CMA. Together with recent confirmation of budget increases for the CMA, the government's appointment of someone who was prepared to take on company executives in hearings further reinforces the message that the government views competition and consumer enforcement as a high priority, both before and after Brexit.

Notes

1. See, in particular, the government response to the House of Lords EU Internal Market Sub-Committee Report on the Impact of Brexit on UK Competition and State Aid (BEIS document), dated 29 March 2018.
2. It is interesting in this context to note that, on the same day as the UK government published the green paper, the European Commission published a package of consumer protection measures, promising a 'New Deal for Consumers' under EU law. According to the Commission, the New Deal will strengthen consumer rights online, give consumers the tools to enforce their rights and get compensation and introduce effective penalties for violations of EU consumer law.

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