Paul | Weiss

CLLS Competition Law Committee Meeting – 4.30PM, 21 November 2024

Minutes

Agenda

1. Discussion with Gavin Lambert and Jess Jones from the Department of Business and Trade ("DBT") on the new Government's approach to competition and consumer policy and regulation, with an opportunity to hear views from committee members on their experience with the operation of the UK's regime and scope for improvement
2. Upcoming events
3. AOB
4. Festive committee drinks

Attendees

In-person

1. Gavin Lambert ("GL"), *(DBT)*
2. Jess Jones ("JJ"), *(DBT)*
3. Nicole Kar ("NK"), Chair *(Paul, Weiss, Rifkind, Wharton & Garrison LLP)*
4. Ian Giles ("IG"), Co-chair *(Norton Rose Fulbright LLP)*
5. Jenine Hulsmann ("JH"), *(Weil Gotshal & Manges LLP)*
6. Ali Wathan, Secretary ("AW"), *(Paul, Weiss, Rifkind, Wharton & Garrison LLP)*
7. Alex Potter ("AP") *(Freshfields LLP)*
8. Beckett McGrath ("BM") *(Euclid Law)*
9. Jonathan Ford ("JF") *(Linklaters LLP)*
10. Sally Evans ("SE") *(Kirkland & Ellis International LLP)*
11. Aurora Luoma ("AL") *(Skadden, Arps, Slate, Meagher & Flom LLP)*
12. Veronica Roberts ("VR") *(Herbert Smith Freehills LLP)*
13. Dominic Long ("DL") *(A&O Shearman LLP)*
14. Isabel Taylor ("IT") *(Slaughter & May)*

15. Mark Jones ("MJ") *(Jones Day)*

Virtual attendees (Zoom)

1. Kevin Hart ("KH") *(CLLS)*
2. Sam Mobley ("JF") *(Baker McKenzie LLP)*
3. Mark Daniels ("MD"), Secretary *(Norton Rose Fulbright LLP)*
4. Angus Coulter ("AC") *(Hogan Lovells International LLP)*
5. Nigel Parr ("NP"), *(Ashurst LLP)*

Apologies

1. Jonathan Parker (Latham & Watkins LLP)
2. Antonio Bavasso (Simpson Thacher & Bartlett LLP)
3. Nelson Jung (Clifford Chance LLP)
4. Robert Bell *(Rosenblatt/Memery Crystal LLP)*

Minutes

Introduction

NK started by saying the committee was delighted to have GL and JJ from the DBT and thanked Skadden for hosting us in their offices. NK noted that today's meeting would be a great opportunity to step through the Committee's views on a couple of key topics, including (1) mergers, (2) digital, (3) consumer and (4) CA98 enforcement.

GL thanked the committee for having himself and JJ to talk. G gave some background on the DBT's relationship with the CMA, noting they work closely with the CMA officials but are ultimately independent. G noted that the DBT will be looking to consult with the committee further next year, building on the feedback received in relation to the Green Paper. From his perspective, GL noted that the DBT's fundamental question is how they can make sure they are driving and unlocking strategic growth in the UK. GL noted that he was particularly interested in any reflections the committee had on Sarah's speech today at Chatham House.

NK invited observations form the committee on Sarah's speech, although many of the committee had not yet had an opportunity to digest its content. NK noted that she thought the tone was different to previous years, with a fairly pointed comment around the fact that if a deal should only be blocked if it was clearly anti-competitive.

Mergers

NK moved the conversation onto to the first of four key topics: mergers. NK noted that the committee had been very involved with the CMA's prior consultation on the Phase 2 reforms.

In particular, NK noted that the committee welcomes the CMA's revised approach to earlier engagement on possible theories of harm being considered and speaking directly with the parties. Overall, the CMA's willingness to reform its procedures has been really welcomed.

GL noted that the DBT have picked up the sentiment that the CMA is not as savvy in its business engagement as it might be. GL asked the committee whether the CMA could be more confident in its engagement with the competition and economics community.

NK replied that she's seen much more proactive outreach from the CMA in recent times. However, in the context of cases themselves, the EC is still much less hedged in their discussions with parties: the case team tends to tell you what they are thinking. In contrast, the CMA clearly feel they've had issues with case team discussions being quoted back to them in judicial proceedings and are therefore much more cautious.

MJ added that the major benefit of the UK Phase 2 process is the independent panel, meaning parties are not relying on case team as there is an independent group of individuals involved. The recent changes are the biggest move forward on a long time.

AP agreed that they will make a helpful impact. Historically, he noted that if you are navigating a case with the CMA and EC, you are getting straight answers with the EC, whereas that is not always the case with the CMA. AP has not yet seen the new Phase 2 reforms play out in practice but is looking forward to seeing this in action.

IT noted that her firm is involved in the second case going through the Phase 2 process and businesses are very happy with the engagement from CMA at start of Phase 2.

IG noted that the downside of front-loading is that it has become very busy in that initial period. When you look at the EC process, it does feel much more pragmatic, whereas the CMA process feels more bureaucratic. IG noted that it has very much been the case that people who have been through Phase 1 cases say we are not doing that again.

AP noted he had seen a dynamic where, for a small group of deals, they do not qualify under formal de minimis thresholds and clients then want to include CPs in transaction documents that the CMA do not open an investigation, as they are not interested in going through a full Phase 1 process.

MJ agreed it is increasingly common to have a CP where the CMA does not open an investigation.

NK echoes the committee's comments and noted that she also looks forward to seeing the Phase 2 reforms in action. In contrast, there is a less throughput of Phase 1 cases, as pre-notification processes can be very long, and much heavier than, for example, the German equivalent. NK noted that that Sarah talked about pace and proportionality at the moment, but the Phase 1 process it is not quick and efficient enough as it stands.

AP added that the CMA is prepared to be fairly robust with briefing papers, but if you do go into a Phase 1, then you get into quite a serious process.

SE added that the IEO and Phase 1 process is really the main interaction between the CMA and the business community. In particular, businesses often interact closely with the CMA through the pain and horror of an IEO, which can bind an entire investment fund's portfolio, and this obviously gives a bad impression of the CMA.

BM also noted that he has just come out of two AI cases where they said in the BP that the CMA does not have jurisdiction, but got tipped into a Phase 1. Then, you go through 6 months of enormous document production and get to the same outcome.

NK noted that this was one of the strange stipulations with the UK jurisdictional test, where the assessment is found at the end of the process (compared to the EC where you can consult on this early on in the process and get a decision).

BM noted that this plays into the point on lack of transparency with the UK process. For the purposes of a Phase 1 review, the CMA also decided when the clock starts running, which can result in very lengthy pre-notification periods with no visibility on when the formal Phase 1 review clock will begin.

NK also noted that the CMA is not organised by sector and so you don't see the same case teams on different transactions in the same sector, which is different at the EC.

VR added that, recently, the CMA asked whether the client would pay to have an expert to understand the sector. VR noted this was so disappointing for the client who had done a presentation on how it works.

MJ summed up that, in the context of cross-border transactions, the impression for the business community of the UK process is bad.

AL added that it's particularly problematic for the smaller deals that have little weight in the UK.

IG noted that it's ultimately a question about how global you want the CMA to be. The CMA is certainly thought about more than Canada or Australia and it has made a mark by its interventionist approach.

MJ noted that the way to square the circle is if the CMA can rely on what other regulators are doing (particularly in global deals involving global markets) rather than doing their own thing.

NK also added that with the DMCC changes we are in a different era again. NK is saying to clients to forget about all the thresholds if you have over GBP 350m of turnover, it is game-on for the CMA. NK was not sure if a strategic steer on policy can address that. The key difficulty is that CMA has no judicial restraint. There is a perception that the FTC will run into trouble on more speculative theories of harm, but the ACCC and CMA have much more success.

JF also noted that it was using up quite a lot of resources for the CMA to be spending to co-ordinate with other authorities.

AP added that people tend to be happy with briefing paper process, so the real question was how to make the Phase 1 more unwieldy, as well as what you do with the smaller deal values that are more in the grey area of complexity. It's quite hard to draw a line.

NP added that key word we heard earlier on is proportionality. He added that he is sure everyone in the committee has seen deals where the cost of Phase 1 equals five years of synergy, so when business folks look at something in those terms, it's an easy decision. NP queried what could be done to resolve this, noting that things did change when we had the IBA case. NP wondered whether we should go back to the position prior to the enterprise act, and whether we should go back to a "more likely than not" test.

CA 98 Enforcement

IG moved the conservation towards the Competition Act 1998, noting that Chapter 1, 2 and market investigations are the tools that have changed the least in the DMCC. Looking again at supporting investment, IG re-iterated that the main point is about proportionality: are these regimes unduly onerous? IG noted that there aren't that many of the smoke-filled rooms hardcore cartels anymore. Another thing that links to this point is parallel cases in other jurisdictions. IG noted that there is a question about where does the CMA see itself in the world. Even though the volume of trade in the UK is a 1/5 or 1/8 as the Commission, IG's experience thus far is that they are shouting a bit louder than Commission.

GL asked whether the CMA's approach was too loud.

IG noted that the client would always want it quieter.

MJ added that there aren't many parallel cases that can be used as an example.

JH added that excessive pricing is a really good example of that: the CMA's approach is out of line with other jurisdictions. The other thing is that the CMA are tough: JH was not sure whether there was any discussion with treasury before those cases were pursued, which there should have been. JH also noted that the main risk for business is the private enforcement: there are now 55 cases, 38 of which are standalone in front of the CAT.

JF added that the CMA had pushed the boat out in terms of its interpretation, but the number of cases brought seems reflective of a resource issue. The CMA hasn't been vindicated in many of the cases. Ultimately, the result was there but the way they enforce it has led to tough law.

G asked what the potential corrective action could be.

JF thought that it could be setting an administrative priority on what cases the CMA are interested in.

JH added that when the Commission took cases, they went out to industry and consulted, recognising this would have an impact on industry. However, there was no consultation by the CMA on excessive pricing in the pharmaceutical cases.

NK agreed that one thing was case selection, but there is also something about resolution. It seems like the CMA are looking more for a headline, rather than e.g. voluntary redress funds.

NK thought we should think more about what is competition policy about: returning money to consumers.

JH agreed that even the CMA giving treasury a heads up on impact would be helpful.

IG added that the UK is by far the leading European jurisdictions in terms of antitrust enforcement activity, but if you have a case investigated in the EU or UK, parties will want to through the UK because process, burden of disclosure and faith in UK judiciary is the strongest.

Digital

BM moved the conversation onto digital, but noted that there was much less to say because the committee is waiting to see the new regime in action. The committee has been supportive of the regime in principle. BM noted that the committee sees it as one of the Brexit benefits: it promises to be a very good flexible and tailored process. There is more scope to be less prescriptive than the EU and for services to be available here when not in the EU.

GL asked whether there were any other authorities that the UK should look to for best practices.

AP noted that Australia is looking to change their regime, but the one that always mystifies him is Germany: they have hundreds of notifications and very few cases go to Phase 2.

BM noted that he was once seconded to the FCO and what he saw on the inside was that it is a very flat structure. Decisions are made by the head of branch, and they tend to be in a branch for a long time, which leads to a certain rigidity of thinking. BM noted that it wasn't very innovative, but it did mean they could churn through cases. They are also not very document heavy.

SE added that one of the key benefits of the German regime is that you get a clear decision, whereas in the UK you get soft comfort. That is quite scary as when the CMA does go back on its soft comfort, it can be catastrophic for financing etc.

AP noted that, from his perspective, the briefing paper process works well.

MJ added that there is not a lot of transparency around the briefing paper process and that there may be more data that can be published. In particular, there is a huge body of precedent guidance that you never see the light of day. AP queried whether there was a way in which some of that information could be incorporated into an annual report.

AP noted that he would hesitate requiring decisions, but instead agreed with IG that they could provide some additional guidance.

Consumer

BM finally turned the conversation to the final topic of consumer, but simply noted that there has been less to say about this than digital.

MJ added that the key question here is around the focus topics for the CMA, but this yet to be seen with the new regime.

Concluding Remarks

Bringing the conversation to an end, GL thanked the committee for the discussion and noted that it had been incredibly helpful. In summary, he heard some glimmers of hope around the Phase 2 reforms, some concerns and questions around prioritising resources where there is less impact on the UK, and many other points that he had noted down. G stated that DBT will definitely engage with the committee again before the CMA's new consultation in the new year.

IG thanked both GL and JJ for attendance and noted that the Committee was very happy to help the DBT in the future.

Upcoming Events and AOB

IG thanked everyone for attending; noting that this was the less event of the year and there was no committee business of note to discuss.

Festive drinks

The committee shortly thereafter departed for the annual festive drinks.