WORKING TOWARDS A SUCCESSFUL SETTLEMENT PROCEDURE IN THE CHANNEL ISLANDS

INTRODUCTION

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Many competition regimes around the world operate a formal settlement procedure. Under a settlement procedure, a company under investigation by a competition authority may choose to admit that it has breached competition law in return for a reduced fine and a quick disposal of the case through a fast track process. Such a process may be considered to be an efficient and rapid way to resolve competition concerns, which can be of direct benefit to businesses, the wider economy and consumers as well as to the competition authority itself.

In her report into the Competition Authority's decision that ATF Fuels had breached Jersey competition law and ATF's subsequent appeal against that decision, Kassie Smith QC noted that Jersey law[1] did not provide for a formal settlement procedure in competition cases. She recommended that, rather than relying on informal, voluntary mediation or discussions: "it would be better for both the [Competition Authority] and for parties to an investigation (and for public confidence in the system) if there were a formal, transparent settlement [..] procedure in Jersey such as that found in the UK or EU".[2]

In this article, we set out our views on Kassie Smith Q.C.'s conclusion on settlement agreements. We explain why we agree with her finding that a formal settlement procedure in which a company admits that it has breached competition law in return for a reduced fine has clear advantages over mediation, set out the benefits that a settlement procedure could be expected to achieve and, finally, consider the factors that those designing a future settlement procedure in the Channel Islands would need to take into account.

FORMAL SETTLEMENT V. MEDIATION

Both Guernsey and Jersey have put in place competition law regimes that operate on the basis of a so-called "administrative" model. In an administrative model, a competition authority combines the roles of investigator, prosecutor and first line adjudicator with regard to breaches of competition law. This is in contrast to the "prosecutorial model", in which the adjudicatory role is carried out by an independent tribunal.

Because in an administrative system the investigatory, prosecutorial and quasi-judicial adjudicatory roles are all carried out by a single authority, the balance between the rights and duties of the investigating authority on the one hand and the rights and duties of the parties under investigation on the other is, necessarily, finely calibrated. For example, issues such as the limits that the privilege against self-incrimination imposes on the right of an authority to require the production of documents and ask questions and how to ensure that the fundamental right to a fair hearing is respected where a single body is investigator, prosecutor and judge are issues that are highly material in the context of an administrative system. For this reason, the question of how procedural fairness can be safeguarded within such a system has been considered extensively[3] by commentators in this area and has been frequently tested and ruled upon by the courts in the jurisdictions that operate the model.

UPDATE ARTICLES:

1 The position under Guernsey law is identical in that it does not have a settlement or commitment procedure.
2 Report of Kassie Smith, Q.C. into the Competition Authority's decision on ATF Fuels (the Report), paragraph 120
3 See, for example: "Competition law enforcement: administrative versus judicial systems", Zimmer, 2014 and the discussion around the compatibility of the administrative law model with Article 6 of the ECHR in "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis"(World Competition: Law and Economics Review, Vol. 27, No. 2, pp. 202-224, 2004)

Inserting a mediation phase into an administrative system would, in our view, pose potentially severe risks to the integrity of the system. This is for three main reasons. First, it would risk undermining the ability of the competition authority to carry out its three functions (investigatory, prosecutorial, quasi-judicial) effectively by requiring it to step outside of the careful balance of competing rights and duties struck by the administrative process to engage in a "peer-to-peer" negotiation with the party it was investigating. Second, it would risk undermining the rights of complainants and third parties. Third, a redefining of the competition authority's role vis-à-vis the party it was investigating as that of a counterparty in a negotiation rather than that of an independent regulator could lead to the rights of defendants being compromised.

As to the first objection, offering a party under investigation the ability to engage in mediation with a competition authority would create a blurring of the role of the competition authority in the investigation process[4]. Currently, a competition authority in an administrative system carries out a quasi-judicial adjudicatory role which requires it to weigh up evidence in an objective fashion and reach a reasoned outcome in each case on the basis of the law. Introducing mediation would fundamentally change the role of the competition authority from one of quasi-judicial investigator to one where it would be effectively negotiating with the business under investigation about how the case could be resolved in a way that was acceptable to that business. This would undermine the competition authority's ability to enforce effectively, since parties under investigation would have little incentive to engage in an investigation process and every incentive to achieve a mediated outcome that would better suit their objectives. When putting its own settlement procedure in place, the European Commission was alive to this danger, stating that:

> "The procedure will not give companies the ability to negotiate with the Commission as to the existence of an infringement of Community law or the appropriate sanction… The Commission will not bargain about evidence or its objections."[5]

On the second point regarding the position of complainants and third parties, introducing the possibility of mediation ignores the fact that a competition investigation is not a purely bilateral process between a competition authority and the business under investigation. Third parties, such as complainants, as well as other businesses, have legitimate interests which must be protected by the process and which could be put at risk in a process of mediation, whether or not they are involved in that process. As noted by Kassie Smith Q.C. in the Report:

> "I also have sympathy with the [Competition Authority's] view that it would not have been appropriate for the JCRA, as an independent public regulator engaged in law enforcement activities, to deal with complaints of unlawful activity in a non-transparent, informal way. Nor would it have been appropriate for the JCRA to seek to compel or to put pressure on parties to engage in discussions, particularly where the allegation of unlawful conduct concerns an abuse of a dominant position: by definition, in such a situation there is an imbalance of bargaining power which may lead complainants to agree to proposals to which they do not wish to agree or which are not in their commercial interests."[6]

Finally, the procedural rights of defence could also be put at risk by a process of mediation. When carrying out an investigation, a competition authority must ensure that defence rights are respected. This includes a right to a fair hearing with a corresponding duty of impartiality for the competition authority. It also includes a privilege against self-incrimination. In a regulatory process, it is for the competition authority to prove to the requisite standard that the law has been broken. A party entering into a process of mediation with a competition authority might itself feel subject to an imbalance of bargaining power such that it might agree to having committed breaches of the law in order to resolve the case. And if the mediation process were to break down, that party would then be placed in a position of continuing in a regulatory enforcement process in respect of which it had already admitted to breaches of the law as part of its attempts to mediate.

4 The Report also recommended the introduction of a commitments procedure. In a commitments procedure, companies give binding commitments to a competition authority to do, or to cease doing, certain things. Commitments do not involve an admission of guilt and, importantly, are generally offered before an investigation has begun. For that reason, we do not consider that the concerns raised by inserting a mediation phase into a competition authority investigation arise where binding commitments are offered and accepted.

5 Commission MEMO/08/458 of 30 June 2008: Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions

6 Report, paragraph 116.

WHAT ARE THE BENEFITS OF A FORMAL SETTLEMENT PROCEDURE?

By contrast with a mediation approach, a formal settlement procedure generates clear, defined benefits for a competition authority, for businesses which are suspected of having breached the law and for the wider public.

The first such benefit is certainty and reduced cost for companies being investigated. Where a company can be reasonably sure that its behaviour has breached competition law and it can also assess the likely level of fine it will face at the end of a full administrative procedure, it can make a reasoned assessment of whether settling the case quickly for a reduced penalty would be more beneficial to it than continuing through a full investigation, taking into account the costs it will incur in defending itself, the management time that will be tied up in dealing with lengthy proceedings and the negative publicity that this might generate. In its comments to the OECD Policy Roundtable, the US Department of Justice explicitly noted these points, stating that:

> "The Division's experience shows that the U.S. system of settling cartel cases through [settlement] agreements is a "win-win" situation for both the Division and settling cartel members [….] For cooperating corporate defendants, there is the obvious benefit of reduced fines [but there are also] numerous non-monetary benefits to settling corporations, such as transparency and certainty as to how a company will be treated if it cooperates, and the opportunity for an expedited disposition that brings finality and allows a company to put the matter behind it."[7]

The second such benefit is procedural efficiency. Where competition authorities are able to resolve straightforward cases without the need to go through a full administrative process, this enables them to reallocate resources to other cases thus maximising deterrence and reducing cost. These benefits were described by the UK's Office of Fair Trading in its comments to the OECD Policy Roundtable, where it commented as follows:

> "The OFT views settlements in an increasingly favourable light and regards them as a valuable addition to its toolkit. By leading to a more effective and efficient use of resources, settlement can enable the OFT to undertake more high-impact projects and increase deterrence."[8]

The third benefit is openness and transparency, which will increase public confidence in how competition law is enforced. Unlike a mediation procedure, formal settlement means that the case will be dealt with publicly and in line with established legal principles.

7 OECD Policy Roundtables: Experience with Direct Settlements in Cartel Cases, observations of the Antitrust Division of the U.S. Department of Justice. Although the US system of plea bargaining has differences with a settlement procedure, we consider that these principles apply equally to both systems.

8 OECD Policy Roundtables: Experience with Direct Settlements in Cartel Cases, observations of the Office of Fair Trading.

WHAT ELEMENTS SHOULD A SUCCESSFUL SETTLEMENT PROCEDURE INCORPORATE?

When considering what a successful settlement procedure in the Channel Islands would look like, the following factors would need to be taken into account.

First, the settlement procedure would need to be open and transparent, so that parties under investigation could assess the benefits of agreeing to settle as well as the risks if they decided not to do so. Ensuring this openness and transparency would be the responsibility both of the body that drafted the settlement procedure and of the Competition Authority, which would be responsible for implementing it.

Second, whether a settlement would require a defendant to admit guilt in every case would need to be considered. Although some jurisdictions take a different approach to this issue, there are strong arguments to support the view that an admission of guilt is an essential part of a settlement procedure. These relate to the necessity to achieve "finality" in a case, protecting the ability of third parties to bring follow-on damages actions and avoiding public perception of a "nuisance settlement", "in which the company can claim that it settled not because it was guilty but because it wanted to avoid the expenses of protracted litigation, buy peace and move on."[9]

Third, the types of case that would qualify for settlement would need to be defined. Given that competition law in the Channel Islands is relatively new and that there is not yet an established body of local jurisprudence, limiting cases to cartels only might be prudent in the first instance.

This would be consistent with the approach of many other jurisdictions[10] around the world.

Fourth, the policy would need to determine whether hybrid settlements (i.e. cases in which some but not all cartelists agree to settle) as well as uniform settlements (i.e. cases in which all cartelists agree to settle) would be permitted.

Fifth, and finally, the relationship between the leniency policy and the settlement procedure would need to be considered. The stage at which settlement is offered and the appropriate level of discount that settlement should attract, taking into account the need to preserve the deterrent effect of financial penalty would be particularly relevant factors here.

9 OECD Policy Roundtables: Experience with Direct Settlements in Cartel Cases, observations of the Secretariat

10 Even jurisdictions that allow for settlements other than in cartel cases note that settlement may only rarely be possible in such cases. Thus, the OFT stated that: "Abuse of dominant position cases may not readily lend themselves to settlement, but, unlike the European Commission, the OFT does not definitively rule out the possibility of settlement in such cases."

CONCLUSION

For the reasons set out in this article, we support the conclusions set out by Kassie Smith Q.C. in her Report on the benefits of a formal settlement procedure in the Channel Islands. We would be keen to explore with the governments in both jurisdictions how a successful settlement policy might best be introduced and remain available to support any future work in this area.

CAN ONE MEETING BE ENOUGH TO BREAK CHANNEL ISLANDS COMPETITION LAW?

In February 2019, the English Court of Appeal upheld a fine imposed by the UK Competition and Markets Authority (CMA) on Balmoral Tanks (Balmoral). The case will be of interest to Channel Islands legal advisers and their clients, as it confirms the established principle that a single exchange of confidential commercial information between competitors is a serious competition law breach and is likely to attract substantial fines.

THE CASE

In July 2012, Balmoral met with a number of its competitors, who invited it to join their existing price-fixing and customer sharing cartel. Balmoral refused -- but did share with the cartel information about the prices it intended to charge for a number of its products. Information about future prices, like that shared by Balmoral, is commercially sensitive and is highly likely to distort competition if exchanged between competitors.

The meeting was secretly recorded by the CMA, which launched an investigation, found that Balmoral's discussions with the cartel breached competition law and imposed a fine. The CMA's decision was confirmed by the Court of Appeal.

HOW DOES THIS APPLY TO CHANNEL ISLANDS BUSINESSES?

The legal principles that applied to this case are identical to those in force in the Channel Islands. This means that Channel Islands businesses need to be aware of how the competition rules apply if they meet their competitors, either formally or socially.

As a general rule, each business should determine its commercial strategy independently and without discussing this with its competitors. Exchanging sensitive commercial information with competitors – including information on future prices, costs or business strategy – puts a company at high risk of breaking competition law, even if there is only a single exchange of information. This type of infringement will usually be a so-called "by object" restriction of competition, meaning that it is very likely to attract significant fines in appropriate cases.

PRACTICAL STEPS FOR COMPLIANCE

There are a number of simple steps that Channel Islands businesses can take to make sure that they stay on the right side of the law.

- First, businesses that are approached to join a cartel or become involved in a meeting with competitors where business secrets are being discussed should never disclose anything that might be commercially sensitive.
- Second, they should make absolutely clear that they do not intend to get involved and should leave the meeting immediately.
- Third, they should document that they have clearly distanced themselves from the illegal behaviour, either by asking for this to be recorded in the minutes of the meeting or by making a record for their own files.
- Fourth, they should report the matter to the Competition Authority. Companies that are the first to report illegal behaviour can qualify for immunity from fines under the Competition Authority's leniency programme.

Further information for businesses can be found on the Competition Authority's website.

CMA BLOCKS SAINSBURY'S / ASDA MERGER

On 25 April 2019, the CMA blocked the merger between Sainsbury's and Asda after finding it would lead to increased prices in stores, online and at a number of petrol stations across the UK. This followed publication of its provisional Phase 2 findings that the merger was expected to give rise to a substantial lessening of competition (SLC) on a number of relevant markets.

This case is likely to be of wider interest both because it confirms the CMA's previous approach of considering very small local markets for grocery retailing and because it suggests that, in markets that are already established and/or concentrated, competition concerns may not be resolved through the offer of a divestment and that the most likely outcome is therefore prohibition of the merger.

THE MERGER

Grocery retailing in the UK was worth an estimated £190 billion in 2018. As in the Channel Islands, it is a sector that is relevant to every household. According to the CMA, food accounts for around 10.5% of typical household expenditure, rising to 14.3% for those on lower incomes.

Although there are a number of grocery retailers in the UK, the so-called "big four" of Tesco, Sainsbury's, Asda and Morrison's are each other's closest rivals, with Sainsbury's and Asda being the second and third largest, respectively.

On 30 April 2018, Sainsbury's and Walmart announced a proposed merger between Sainsbury's and Asda, under which Sainsbury's would acquire Asda from Walmart.

This would have lead not only to the "big four" becoming the "big three" but also created a grocery retailer which, with approximately 29% of the market, would have overtaken current market leader Tesco to become the UK's largest.

The merger was notified to the CMA for assessment and, at the request of the parties, was fast-tracked to Phase 2 for an in-depth assessment. The question for the CMA was whether on the balance of probabilities, the merger could be expected to give rise to an SLC in one or more markets and, if so, how this SLC could be addressed.

THE FINDINGS

In deciding whether a merger will lead to an SLC, the CMA considers what effect the transaction will have on the process of rivalry between businesses, which compete to win customers' trade by offering them a better deal. An SLC occurs: "when rivalry is substantially less intense after a merger than would otherwise have been the case, resulting in a worse outcome for consumers."[1]

Following its previous practice, in assessing the likelihood of an SLC arising, the CMA considered both the national and the local aspects of competition in grocery retailing between Sainsbury's and Asda, examining whether the merger could be expected to result in a worse outcome for consumers through increased prices and/or a decrease in quality, range and service (the so-called "PQRS" factors).

Its assessment of the PQRS factors showed that an SLC could be expected to arise both on a number of national bases (such as the nationwide supply of groceries in supermarkets) but also in a large number of local areas both in relation to the supply of groceries in supermarkets (629 areas where both parties were currently active) and the supply of groceries in convenience stores (65 of the areas where both parties were currently active).

Given that the merger was likely to lead to an SLC, the CMA invited views on potential remedies, with the two most likely being that the merging parties would have to divest part of their businesses or that that the CMA would block the merger. However, the CMA warned that there was a significant risk that divestment would not be an effective remedy, stating that:

> "Given the number of SLCs provisionally found, their interrelated nature, and the need for the divested business to be a multi-channel national retailer able to provide an effective competitive constraint, it is not clear at this stage that a suitable package of assets could be found to provide an effective and comprehensive remedy. In addition, there are further risks associated with implementing such a package and with identifying a suitable single purchaser to operate the divested assets.

In its final report, the CMA confirmed both its provisional findings that the merger would restrict competition and that no suitable remedy could be found to address this, stating that:

"It's our responsibility to protect the millions of people who shop at Sainsbury's and Asda every week. Following our in-depth investigation, we have found this deal would lead to increased prices, reduced quality and choice of products, or a poorer shopping experience for all of their UK shoppers. We have concluded that there is no effective way of addressing our concerns, other than to block the merger."

CONCLUSION

This case demonstrates that, at least in the UK context, grocery retailing takes place on a large number of small, local markets. It also shows that, where a market is already highly concentrated, competition law may step in to prevent further mergers that may ultimately create too great a restriction on consumer choice.

1 Anticipated merger between J Sainbury PLC and Asda Group Ltd, Summary of provisional findings, paragraph 11.

EUROPEAN COMMISSION FINES GOOGLE €1.49 BILLION FOR ABUSIVE PRACTICE IN ONLINE ADVERTISING

On 20 March 2019, the European Commission (the Commission) announced that it had fined Google €1.49 billion for breaking EU competition law. It found that Google had abused its dominant market position by preventing third party websites from displaying advertisements of Google's competitors.

As well as selling advertising on its own highly successful search page, Google also acts as a broker in respect of advertising space on other non-Google websites that include a search box. This brokering service enables website owners to sell advertising space next to search results on their websites.

Google is dominant on the market for the provision of online advertising brokerage, with a market share of approximately 70% across Europe.

The Commission's investigation found that Google had put in place a variety of contractual restrictions in its agreements with websites that used its online advertising brokerage services. These were:

- **Exclusivity provisions**, which prevented certain websites from sourcing search ads from Google's rivals;
- **Premium Placement provisions**, which ensured that Google's search ads occupied the best spots on the website;
- **Approval provisions**, which meant that Google's sign off was required before websites changed the way in which they displayed the search ads of Google's rivals

The Commission found that these restrictions were illegal because they shut Google's competitors out of the market. According to EU Competition Commissioner Vestager: "[t]here was no reason for Google to include these restrictive clauses in its contracts, except to keep its rivals out of the market." By including these restrictions in its agreements, Google illegally: "cemented its dominance in online search adverts and shielded itself from competitive pressure [.....] The misconduct lasted over 10 years and denied other companies the possibility to compete on the merits and to innovate – and consumers the benefits of competition".

This is the third anti-trust investigation carried out by the EU against Google resulting in total fines in excess of €8bn, and the decision highlights the ongoing policy debate among regulators about how to effectively oversee the digital economy, ensure fair competition and whether the penalties meted out are sufficient to create an appropriate response from the industry.

FACTS AND FIGURES

We cleared **5** mergers in the first quarter of 2019 with an average clearance time of 12.6 working days against an administrative target of 25 days.

We opened **1** competition law investigation.

MAKING MARKETS WORK

The Competition Authority is an independent body whose aim is to make markets work. We positively enable, encourage and where necessary compel businesses to behave fairly for the economic benefit of each other and consumers.

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