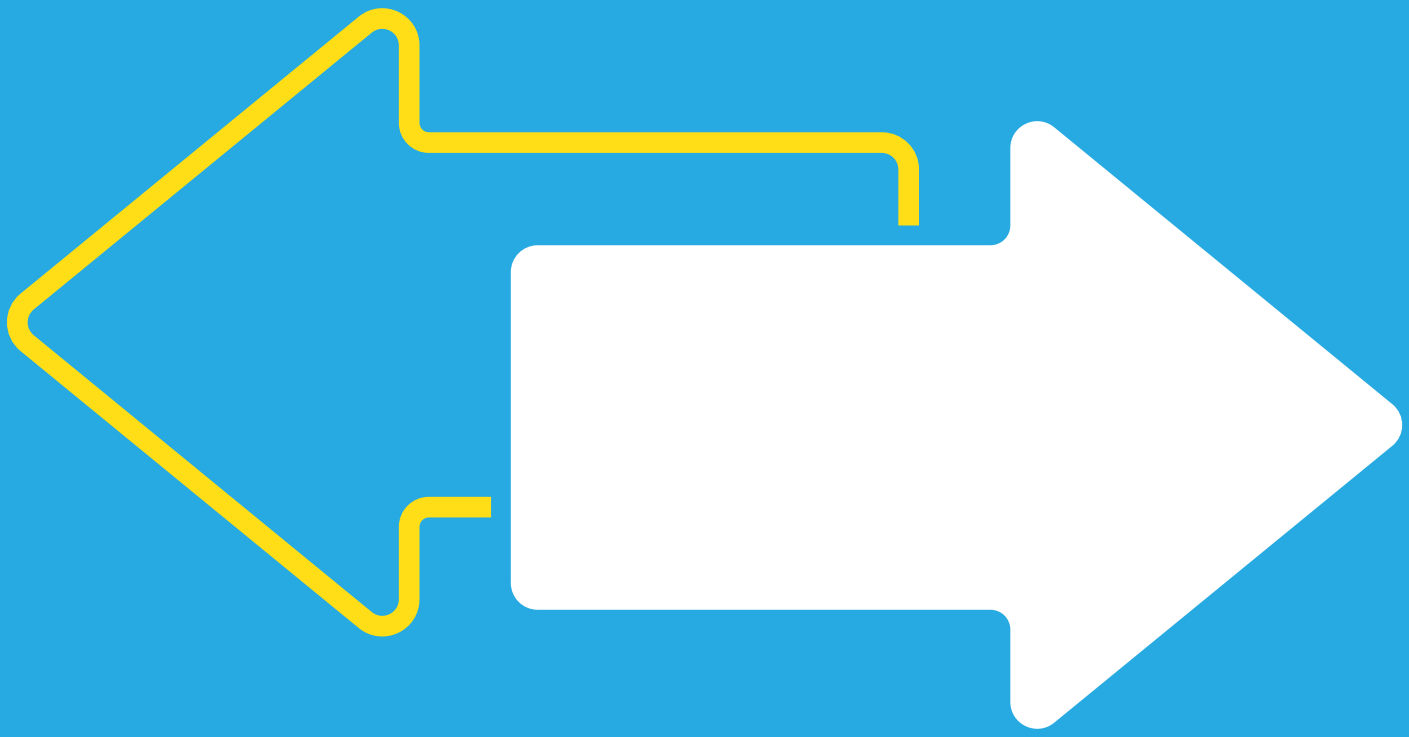
LOOKING BACKWARDS AND FORWARDS: WHAT DOES 25 YEARS OF COMPETITION ENFORCEMENT IN THE UK TELL US ABOUT THE FUTURE?



BY RACHEL BRANDENBURGER, CHRISTOPHER HUTTON & STELIOS CHARITOPOULOS[1]



1 Rachel Brandenburger is a Senior Advisor and Foreign Legal Consultant (admitted in England & Wales) to Hogan Lovells US LLP, and a Visiting Research Fellow, Institute of European and Comparative Law, University of Oxford. Christopher Hutton is a Partner at Hogan Lovells International LLP. Stelios Charitopoulos is an associate at Hogan Lovells International LLP.

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By Rachel Brandenburger, Christopher Hutton & Stelios Charitopoulos

August 2022 marks the 25th anniversary of the publication of the draft Competition Bill in August 1997. Passing into law the following year, what became the Competition Act 1998 introduced into UK law the Chapter I Prohibition against anticompetitive agreements and the Chapter II Prohibition against the abuse of a dominant position. Although there have been significant reforms and institutional changes since 1997, the fundamental building blocks of this framework have remained consistent and the Competition Act 1998 has been a key pillar of the public enforcement of competition law in the UK for nearly 25 years. This article highlights some key developments and reflects on what the past quarter-century of enforcement under the Competition Act 1998 may tell us about the future of competition law enforcement in the UK.

I. INTRODUCTION

As the UK celebrated the 70th anniversary of the accession of Queen Elizabeth II, many within the UK competition community will have been preparing to celebrate another imminent anniversary. August 2022 marks the 25th anniversary of the publication of the draft Competition Bill in August 1997. Passing into law the following year, what became the Competition Act 1998 ("CA98") introduced into UK law prohibitions against anticompetitive agreements ("Chapter I Prohibition") and the abuse of a dominant position ("Chapter II Prohibition", together "Prohibitions"). Amongst the other reforms introduced was the establishment of what later became the Competition Appeal Tribunal ("CAT").

The two Prohibitions were deliberately modelled on Articles 85 and 86 of the Treaty of Rome (now Articles 101 and 102 of the Treaty on the Functioning of the European Union, the "TFEU"), but the nod to Europe did not stop there. The regime for the public enforcement of the Prohibitions was also designed to broadly reflect the European model.

In the subsequent 25 years, the CA98 has remained a key pillar of the public enforcement of competition law in the UK. However, it has not been immune to change. There have been significant reforms, including institutional changes and the introduction of measures to increase individual accountability for breaches of competition law. There was even a short-lived review into whether the regime should move away from an administrative and towards a prosecutorial model of enforcement. Nevertheless, the fundamental building blocks of the Prohibitions and the accompanying public enforcement regime have remained consistent, and there is no expectation of immediate fundamental reform.

In this article, we do not attempt to summarize all of the procedural, institutional and jurisprudential changes that have occurred in the UK over the past quarter-century. Nor do we attempt to describe all of the (many) highs and lows. Instead, we highlight some key developments, and reflect on what the past 25 years of enforcement under the CA98 may tell us about the future of competition law enforcement in the UK.

II. OVERDUE, BUT NOT UNCONTROVERSIAL, REFORM

Before the Prohibitions were introduced by the CA98, restrictive trade agreements were governed by a set of rules (contained within the Restrictive Trade Practices Act 1976) which was widely seen as *"slow, bureaucratic and ineffective."*[2] But even that regime appeared advanced compared to the approach to addressing market power. There was no prohibition, but instead the Fair Trading Act 1973 and the Competition Act 1980 created a complex investigative regime allowing the Monopolies and Markets Commission ("MMC") to intervene at the end of protracted investigations if conduct *"may* [have been] *expected to operate against the public interest."*

By 1997, reform was long overdue, and had been debated for nearly two decades. However, it was not until the reforming zeal of the (then) new Labour Government, which came into power in May 1997, that reforms were finally introduced. Even then, despite the consensus on the need for reform and the extensive consultations undertaken, the substance of the reform remained controversial.

In retrospect, and given the multiplicity of regimes across the globe modelled on the European enforcement regime, it seems inevitable that reform would lead to a UK public enforcement regime that broadly reflected the European model. However, that was not always the plan. The previous Conservative Government had been wary of a wholesale adoption of the European model. Indeed, one of the most prominent criticisms of the Competition Bill was that, by reflecting the European model, the UK gave *"a lot of ground to Brussels. In many important cases the British jurisdiction now just acts as a lobbyist or observer of the European competition authorities."*[3] However, in the end, the Prohibitions, and the public enforcement regime, intentionally replicated in large part the European model.

One of the most significant aspects of the Competition Bill which distinguished it from previous proposed reforms was the inclusion of the Chapter II Prohibition. This was controversial, with poll findings that *"two thirds of economists* [were] *opposed to the Bill's Chapter II Prohibition of abusive conduct, whilst three quarters of competition lawyers support*[ed] *it.*"[4] Prior to the Competition Bill, the intention had been to maintain the investigative regime operated by the MMC. In considering the legacy of the CA98, particularly in light of the proposed regime for addressing alleged market power in digital markets, it is worth recalling that the framework for controlling the use and misuse of market power in the UK could have been very different.

2 See *House of Commons Research Paper 98/53*, April 28, 1998, page 7.

3 "Putting British business at a competitive disadvantage," The Times, February 9, 1998.

4 "Lawyers and economists reject competition bill," Financial Times, April 2, 1998.

III. THE CA98 TRACK RECORD

A. The Public Enforcement Record

The success of any enforcement regime will inevitably be measured against its enforcement record. From March 1, 2000 when the Prohibitions came into force, to the end of June 2022 there have been:

a. 68 decisions that the Chapter I Prohibition has been infringed (7 of which have been wholly or partially overturned on appeal);
b. 13 decisions that the Chapter II Prohibition has been infringed (4 of which have been wholly or partially overturned on appeal with 2 further appeals pending); and
c. Penalties totaling approximately £1.407 billion (although the total is approximately £1.067 billion when overturned or reduced penalties are taken into account).

These figures represent approximately 3.6 infringement findings per year, averaging approximately £17.4 million in fines per infringement. Compared to the equivalent enforcement records of major competition agencies in other jurisdictions, these figures do not suggest a strong enforcement record.[5]

However, figures only ever tell part of the story. The deterrence function of a successful enforcement regime is at least as (if not more) important as its punitive function. Although public enforcement of the CA98 had a slow start, particularly compared to expectations, it was nevertheless a high profile start. The Office of Fair Trading ("OFT") adopted several early decisions prioritizing sectors which were considered to be key to the economy. However, as the boundaries of the enforcement regime were tested, the OFT ran into some early difficulties. For example, it had an early decision sent back to it by the CAT in *Aberdeen Journals I*, and it later had significant and high profile infringement decisions set aside by the CAT in both the *Mastercard* and *Tobacco cases.*

These setbacks appeared to slow the acceleration in public enforcement, and (to many observers) gave the impression that the OFT was not capable of pursuing complex CA98 cases. Whether or not this impression was fair, it contributed to institutional reform in 2013: the OFT and the Competition Commission were merged to form the Competition and Markets Authority ("CMA").

Following these reforms, the CMA has generally had a more active track record (averaging 4.5 infringement decisions per year compared to the OFT's 2.6). The increased activity has also been accompanied by a higher success rate. With the exception of the *Phenytoin* case, which the CAT partially overturned and remitted to the CMA, there has not been a major reversal since the Tobacco case in 2012. The CMA has also not shied away from pursuing multinational companies. Nevertheless, there is still a perception of under-enforcement. As recently as 2019, a Government review found that, while there has been *"some improvement in the speed and number of cases, questions remain about the effectiveness of the UK's competition enforcement regime,"* particularly in relation to the enforcement of the Chapter II Prohibition.[6] However, the position appears to be changing, and, despite the inevitable difficulty in enforcement during the pandemic, enforcement levels appear to be increasing.

B. Growth of Concurrency

The CA98 enforcement record is not the work of just one institution. Concurrent enforcement of competition law was another innovation introduced by the CA98.

In the past 25 years, the primary responsibility for public enforcement has been entrusted to first the Director General of Fair Trading, then the OFT and, since April 1, 2014, the CMA. More significantly, the number of sectoral regulators with "concurrent powers" – i.e. the power to enforce the Prohibitions in specific areas – has expanded over time. There are currently eight such agencies[7], which together form the UK Competition Network.

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5 For example, between January 2000 and December 2021, in cartel cases alone the European Commission imposed over €31 billion in fines (or approximately €28.8 billion when adjusted for judgments of the European Courts).

6 Department for Business Energy and Industrial Strategy, *Competition Law Review: Post Implementation Review of Statutory Changes in the Enterprise and Regulatory Reform Act 2013*, July 2019.

7 The Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Water Services Regulation Authority (Ofwat), the Office of Rail and Road (ORR), the Northern Ireland Authority for Utility Regulation (NIAUR), the Civil Aviation Authority (CAA), the Payment Systems Regulator (PSR), and the Financial Conduct Authority (FCA).

In the early days, sectoral regulators (with some notable exceptions such as Ofcom and Ofgem) were generally reluctant to use their new competition powers, preferring their normal regulatory powers instead. However, calls for clarity and stronger enforcement were quick to arise, and the resulting reforms (which formed part of the wider institutional reforms of 2013) included a ministerial power to make an order removing an agency's concurrent competition powers (the so-called "use it or lose it" power) to encourage concurrent regulators to use their CA98 powers, and (in some circumstances) a duty on agencies to consider using their competition powers before turning to their other powers.

Since the 2013 reforms, sectoral regulators have made more extensive use of their concurrent powers. Almost all agencies have brought significant infringement cases with Ofgem, Ofcom and the FCA being particularly active. On the other end of the spectrum, the CAA and PSR have each adopted only one infringement decision, while NIAUR has not yet opened a CA98 investigation. Some of these cases have also been among the most complex cases brought under the CA98 to date – particularly the abuse of dominance cases brought by Ofcom and Ofwat – and have made a significant contribution to the enforcement of the Prohibitions.

Nevertheless, the overall enforcement figures have remained low. Infringement decisions adopted by sectoral regulators represent approximately 10 percent of overall infringement decisions. The perception remains that some agencies tend to prefer the familiarity of their sector-specific powers (at least partly because they tend to be less resource intensive and time consuming). The Government, which has recently noted the low level of enforcement in regulated sectors, is conscious of that view, although it has put forward an alternative explanation for the low number of cases: that it reflects a *"low underlying level of anti-competitive behaviour in regulated sectors."*[8]

There are no obvious further candidates to join the current network of concurrent regulators. However, as the CMA notes in its latest concurrency report, the broad range of agencies pursuing CA98 investigations indicates the "[t]*he maturing of the concurrency regime that came into effect in 2014.*"[9] It seems that the threat of potentially losing a powerful regulatory tool, coupled with increased transparency relating to its use, have been strong catalysts for this development.

C. Merits Appeal v. Judicial Review

One of the ways in which the UK regime differs from the EU model is that infringement or non-infringement decisions may be appealed to the CAT on a full merits basis, and not (as in the EU) on grounds akin to a judicial review. The CAT has not been shy to exercise its powers in full. While the CAT has upheld the significant majority of the decisions on appeal, it has also:

a. Concluded that certain decisions were based on insufficient analysis and sent them back for further work. Such cases have not been limited to the early days of the regime: it is interesting to draw parallels between one of the first appeals, *Aberdeen Journals I*, which was remitted to the OFT on the basis that the latter had taken too many shortcuts in its market definition analysis, and the more recent *Phenytoin* case, where the CAT sent the case back to the CMA because of perceived shortcuts in its analysis of whether a price increase was excessive.
b. Overturned infringement findings in their entirety (e.g. in the *Mastercard* and *Tobacco* cases), or changed the financial penalties imposed (either by reducing a penalty, or even increasing a penalty as it did in *Umbro*).
c. Made its own infringement findings when overturning non-infringement decisions. For example in *Albion Water*, the CAT dismissed an Ofwat non-infringement decision and made its own infringement finding.

Almost since the first appeal of an infringement decision, calls were raised in some quarters (including from within the OFT and subsequently the CMA) for the merits appeal standard to be replaced with a judicial review standard. This was largely based on the premise that well-resourced companies had the means to outgun the competition agencies. The Government considered this option during the institutional reforms of 2013, but confirmed its commitment to a full merits appeal standard. However, in its latest consultation, the Government has decided to chip away at the appeal standard: although final decisions will still be subject to full merits review, a judicial review standard will be introduced in relation to interim measures decisions imposed in a CA98 investigation.

D Exclusions

Although ministers are still accountable to Parliament for the operation of the CA98 regime, and make senior appointments to the institutions, the CA98 limits the role of ministers in the day-to-day operation of the regime. There is, therefore, no scope for overt political intervention in

8 Department for Business Energy and Industrial Strategy, *Competition Law Review: Post Implementation Review of Statutory Changes in the Enterprise and Regulatory Reform Act 2013*, July 2019.

9 CMA, *Promoting competition in services we rely on - The annual concurrency report 2022*, April 2022.

CA98 investigations. This may be contrasted with, for example, the UK merger control regime where ministers have a discretion to intervene on specified public interest grounds.

However, one potential lever is the ministerial power to exclude specific agreements or types of agreements from the application of competition law under the CA98 where there are *"exceptional and compelling reasons of public policy."* This can be a useful tool in situations where co-ordination between competitors is essential for the public good.

Until 2020, the power was not much used. However, it was dusted down in the early days of the response to the COVID-19 pandemic, when the Government suspended the application of the CA98 to facilitate co-operation between retailers and the suppliers of dairy produce to alleviate supply chain stresses. Since then, exclusion orders have been issued in a number of cases – although the exception has been narrow and time limited in each case. The CMA has also recently suggested that the Government could use exclusion orders to accommodate agreements which could be caught by the Chapter I Prohibition but otherwise generate significant environmental benefits.

The Government's use of exclusion orders has generally been cautious, and there have not been any proposals to otherwise politicize the CA98 regime. However, the CMA can still be subject to less overt political pressure, particularly in terms of case prioritization, including through non-binding strategic steers from the Government on its economic priorities and its expectations of the CMA. With the effects of the COVID-19 pandemic still being felt, and the more recent cost of living crisis, both an increased use of the Government's exclusion order powers and more pressure being applied to the CMA to investigate sectors that attract public attention can be expected.

IV. INDIVIDUAL ACCOUNTABILITY

Two of the biggest changes to the public enforcement of competition law in the UK were introduced by the Enterprise Act 2002 ("EA02"). Both of these changes relate to individual responsibility for breaches of competition law, and were built on the foundations provided by the CA98 and its early enforcement.

A. Criminal Cartel Offense

Under the criminal cartel offense, individuals may be prosecuted for engaging in hard core cartel conduct, with punishment including up to five years' imprisonment and/or unlimited fines. The offense is distinct from the CA98 regime, although criminal and civil investigations are often investigated in parallel, and the scope of the offense is limited to agreements such as direct and indirect price fixing, market sharing, customer sharing, bid rigging and limiting production or supply.

The CMA had limited success in prosecuting criminal cartel cases – although not for want of trying – bringing prosecutions in only four cases, which collectively resulted in five convictions. Also noteworthy is the fact that the CMA has not secured a conviction in a contested case, with high profile (and reputation harming) failures. According to the CMA, this record reflects the fact that, prior to 2013, the prosecution had to establish that an individual acted dishonestly to secure a conviction, which proved to be a very high bar.

The CMA campaigned for the removal of the dishonesty requirement and, in 2013, its wish was granted. However, although there are some live investigations, the removal of the dishonesty requirement has not improved the CMA's record. In fact, the CMA has yet to bring a prosecution where dishonesty does not need to be established, leaving the practical value of this reform as yet untested.

Although the cartel offense remains an important weapon in the CMA's arsenal, the CMA seems no longer to pursue prosecutions with its earlier vigor. There have even been calls from former CMA leaders to leave other agencies to bring prosecutions. These calls have been left unanswered and the Government recently proposed legislative changes which would strengthen the CMA's criminal cartel enforcement by enabling it to issue "no-action" letters to "assisting offenders" (i.e. defendants wishing to assist the CMA). Nevertheless, considering the CMA's current priorities, and the potential for further reputational damage in the event of failure, it seems unlikely that these reforms will lead to a significantly higher prosecution rate.

B. Director Disqualification

The EA02 also created a route for the CMA to apply for individuals to be disqualified from senior management roles for up to 15 years. This sanction is available if a breach of competition law has been committed, and it can be established that the individual's conduct makes him/her unfit to be a company director. It is not necessary for the individual's conduct to have contributed to the competition law breach: it is enough

that the individual had reasonable grounds to suspect (or ought to have known) that the conduct of the company constituted a breach but took no steps to prevent it.

Director disqualification is, therefore, a powerful weapon. It is also a flexible one. Director disqualifications can be obtained either through a court order, or through a disqualification undertaking given to the CMA by the relevant individual. Nevertheless, the CMA waited until 2016 to exercise this power for the first time. Since then, it has used this tool vigorously, securing a total of 25 director disqualifications in a wide variety of industries, including 21 disqualifications secured between 2019 and 2022.

This upward trend is almost certain to continue. The CMA has made it clear that it now assesses whether to seek director disqualifications in all cases where competition law is breached. However, the CMA's focus to date has been on relatively small companies: it has yet to pursue a director of a large company. It remains to be seen how the CMA's current weapon of choice will fare against higher profile targets with deeper pockets.

V. THE FUTURE

This section focuses primarily on three specific areas which present the most interesting questions for the future: (i) proposed reforms of the wider competition regime; (ii) reform proposals in respect of digital markets; and (iii) the scope for post-Brexit divergence.

A. Proposed Reforms

The question of whether the CA98 regime needs root-and-branch reform is perennial. Recently, a former Chair of the CMA suggested that *"despite the relatively recent legislative changes, the UK has an analogue system [. . .] in a digital age,"*[10] and a series of studies (e.g. the *Furman* and *Penrose* reports) resulted in a recent Government consultation for legislative changes. As the first such initiative since the UK exited the European Union, the consultation was widely expected to be a wind gauge for post-Brexit competition law divergence.

It was therefore surprising to some that the Government's proposals do not include any fundamental changes to the CA98 framework, although some of the proposals are significant. In particular, it is proposed to change the prohibitions themselves, by expanding the territorial scope of the Prohibitions to anti-competitive agreements and abusive conduct implemented outside of the UK if they are likely to have *"direct, substantial or foreseeable effects within the UK."* A statutory duty of "expedition" on the CMA (relating to all its competition and consumer protection functions) is also proposed, together with enhancements to the CMA's evidence gathering and fining powers. However, it is currently unclear when, and in exactly what form, these proposals will become law.

It is possible to draw some parallels between the period ahead of the 2013 reforms and today: there are calls for reform, extensive studies, and a lingering sense from the Government that the CMA's track record requires further improvement. The UK's competition law regime is also subject to exogenous pressures which are progressively resembling those experienced following the financial crisis. Nevertheless, the Government's proposals are less fundamental than the institutional changes in 2013, which perhaps reflects a recognition by the Government that enforcement is generally working well, and does not require fundamental reform.

B. Digital Markets

The most intense criticism of the CMA for under- enforcement has focused on the relatively few Chapter II cases it has brought. Meanwhile, during the past decade, digital markets have created a new frontier for competition enforcement with the growth of digital platforms generating difficult questions on the alleged use and misuse of market power. This concern is not unique to the UK, and it is therefore not surprising that, in 2019, the Furman Report highlighted perceived deficiencies of UK competition law enforcement in digital markets and recommended an overhaul of the regime.

In response, the Government announced a new regulatory regime which would include an enforceable Code of Conduct for companies with "Strategic Market Status," a power for pro-competitive interventions (e.g. relating to data, interoperability, access obligations etc.) and a bespoke merger control regime. Once in force, this regime would be overseen by a new dedicated Digital Markets Unit ("DMU") within the CMA.

10 See *Letter from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy*, February 2019.

Although the Government's plans have received a lot of publicity, a draft Bill has yet to be published, and (at the time of writing) seems unlikely to be introduced in the near future. In the meantime, the DMU (which was already launched in April 2021) is using the CMA's current powers – including its CA98 powers. If and when the new regime is introduced, it is likely that a considerable part of UK competition law enforcement relating to market power will be addressed outside of the CA98 framework. Considering the reluctance when the CA98 was introduced to extend domestic competition law to market power for fear of stifling competition, it is interesting that the Chapter II Prohibition is now seen by the Government as insufficient (at least in relation to digital markets) and in need of supplementation.

C. Post-Brexit Divergence

One aspect of the CA98 that was controversial was the inclusion of a provision intended to ensure that the UK substantive competition law was developed and interpreted consistently with EU competition law. Following Brexit, this provision was replaced with a requirement for close conformity with EU law as it stood before December 31, 2020 (i.e. the end of the Implementation Period). The requirement is not absolute, and is subject to a list of exceptions.

Without the requirement for consistency, it seems inevitable that EU and UK competition law will diverge over time, whether through legislative change, judgments or decisional practice. However, the pace of that divergence may not be as fast as some might have expected. For example, when the renewal of the block exemption of certain vertical agreements from the Chapter I Prohibition was being considered, there was widespread expectation that the Government (advised by the CMA) would propose an ambitious overhaul of the rules. Instead, while there is some divergence on specific points, the new block exemption remains broadly aligned with EU rules (including in relation to more controversial topics such as relaxing the approach to online sales bans).

More differences may develop over time, particularly as more difficult questions are considered by the CMA, concurrent regulators, and the courts. However, it currently seems that, unless and until there are fundamental reforms to the CA98, we are unlikely to see wholesale divergence between EU and UK competition law.

VI. CONCLUSION

Despite concerns at the time that the adoption of the European model of enforcement was inappropriate, the regime introduced by the CA98 has been shown to be effective, and the UK seems to be positioned to retain it for the foreseeable future. The CMA also seems set to focus on the robust enforcement of the competition regime, including through the increasing use of its director disqualification powers.

What will happen over the next 25 years? Such predictions are uncertain. However, as of now, it seems safe to predict that there will be further adjustments (rather than wholesale reforms) to the enforcement framework, to make enforcement more effective and to reflect changing economic realities. A continuation of the trend towards individual accountability also seems likely.

A significant change will occur if the proposed digital markets regime is introduced. In that event, we are likely to see a significant amount of enforcement activity relating to market power being undertaken outside of the CA98 framework. That aside, the past 25 years have shown that the UK enforcement regime is effective and there is currently no reason to doubt its future.

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