Overview

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The UK Enforcement Agencies

The Competition and Markets Authority (CMA) is responsible for UK enforcement of general competition law (antitrust) – specifically, the domestic law prohibitions of anticompetitive agreements and abuse of dominance under the Competition Act 1998 (CA98), and articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) – as well as the investigation of mergers and undertaking market-wide competition investigations under the Enterprise Act 2002 (EA02). The CMA is also the primary prosecutor in criminal cartel matters and determines certain regulatory appeals from sectoral regulators.

Most competition law decisions can be appealed to the Competition Appeal Tribunal (CAT), an independent, specialist judicial body. The CAT is able to conduct a full merits review of CA98 and article 101 and 102 TFEU decisions, whereas merger control and market investigation decisions are reviewable on judicial review grounds alone. CAT judgments may be appealed to the Court of Appeal (or, for Scottish cases, the Court of Session) and, ultimately, the Supreme Court. Private actions alleging infringements of CA98 or articles 101 or 102 TFEU can be brought before the High Court or the CAT, which gained enhanced powers to hear private competition law actions in 2015.

Under a system of shared competences known as 'concurrency', the UK's sectoral regulators are able to exercise general competition law powers within their respective sectors: the Financial Conduct Authority (FCA) for financial services; the Payment Systems Regulator (PSR) for payment systems; Ofcom for communications and postal services; Ofwat for water; Ofgem for energy; the Office of Rail and Road (ORR) for rail; the Civil Aviation Authority (CAA) for airport operation and air traffic services; and Monitor (now part of NHS Improvement) for health care. Sectoral regulators must consult closely with the CMA on their enforcement activity and the CMA has the power to take a competition law case away from a sectoral regulator in certain circumstances. To date, this power has not been exercised.

Recent developments

The CMA has consistently expressed a determination to achieve a high level of enforcement activity since its creation in April 2014. While it took some time for this objective to produce tangible results, the case pipeline appears to have finally come on-stream in 2016. The past year saw the opening of 11 new formal antitrust investigations (compared with just six in 2015) and eight infringement decisions were issued (compared with two in 2015). Three of the infringement decision cases concerned restrictions of online pricing and two concerned pharmaceuticals, reflecting the CMA's continued focus on each of these areas.

The first two online pricing decisions, concerning bathroom fittings and commercial catering equipment respectively, involved relatively straightforward vertical resale price maintenance. The third case, which concerned the online sale of posters, was particularly notable, however. This case arose from a relatively straightforward horizontal cartel between two online retailers (one of which was a supplier to the other, as well as a competitor). While the collusion between the parties mainly took the form of phone calls and email exchanges, it was monitored and implemented by the use of automated repricing software, which ensured that the parties did not undercut each other's prices. The role of pricing algorithms in online competition is an emerging issue in competition enforcement. As a result, the fact that this is one of the first cases to consider the use of such software by cartelists is interesting, as is the CMA's follow-up guidance noting that software vendors could infringe competition law if they help their clients use their software to facilitate such illegal agreements. Completing the notable aspects of this case, on 1 December 2016, the CMA announced that the managing director of one of the parties had given a 'disqualification undertaking' not to act as a director of any UK company for five years. This is the first time that the CMA has used its power to disqualify a company director for involvement in a competition infringement, which is a potentially powerful tool for ensuring wider compliance.

The CMA started and ended 2016 by issuing infringement decisions in major pharmaceuticals cases.

In February, it imposed fines totalling £45 million against a number of drug companies for entering into so-called pay-for-delay settlement agreements that delayed the market entry of generic versions of paroxetine. This long-running case, which relates to conduct that took place between 2001 and 2004, has now moved to the CAT, which is hearing the parties' appeals at the time of writing (March 2017).

In December, the CMA issued a groundbreaking infringement decision against pharmaceutical company Pfizer and its UK distributor Flynn Pharma, finding that both companies had abused a dominant position by charging excessive prices for phenytoin sodium capsules. Excessive pricing decisions are extremely rare in competition law. As such cases involve a particularly substantial intervention in market competition, and effectively require a competition authority to substitute its own decision on an appropriate price for the price arrived at by the market, they are approached with caution. The facts of this case are arguably rather unusual, as the parties apparently imposed rapid price rises of up to 2,600 per cent once the drug concerned ceased to be subject to the UK's medicine pricing regime. The fact that the CMA issued a statement of objections in a second excessive pricing case in December, arising from price rises for hydrocortisone tablets in the order of 12,000 per cent, indicates that this decision was not a one-off. Pfizer's fine of £84.2 million is a record for the CMA and one of the highest imposed since the CA98 came into force in March 2000. Unsurprisingly, both parties appealed and the case is now before the CAT.

All three of the CMA's remaining 2016 infringement decisions were also issued in December. An investigation of collusion in the supply of galvanised steel water tanks produced two separate decisions, while the third decision concerned collusion between model agencies. As such, they indicate the wide range of the CMA's enforcement work.

The sectoral regulators also displayed a greater willingness to use their general competition powers in 2016. On 15 December, the CAA issued a rare CA98 infringement decision, finding that East Midlands International Airport Ltd, Manchester Airports Group Plc and Prestige Parking Ltd infringed the Chapter I prohibition by agreeing to fix parking prices at East Midlands International Airport. In November, Ofgem decided to accept formal commitments from SSE to remedy abuse of dominance concerns relating to the electricity connections market in the south of England.

The CMA was less active in the field of criminal cartel enforcement in 2016, with only one public active prosecution underway at the time of writing, concerning suspected cartel activity in the supply of precast concrete drainage products. While seven individuals were reportedly arrested in connection with the investigation, only one person has been charged so far. In March 2016, that individual pleaded guilty to the cartel offence in a pre-trial preparatory hearing and he awaits sentencing at the time of writing.

On the merger control front, the CMA issued 65 Phase I decisions in 2016. This total was roughly in line with the totals for 2015 (69), 2014 (80) and 2013 (73). Eight of these decisions were referrals for a Phase II in-depth investigation, which is again broadly consistent with previous years (except for a dip to only four referrals in 2014). Of the eight transactions that were referred, three were cleared with conditions (*Iron Mountain/Recall*, *Ladbrokes/Coral* and *Arriva Rail North/Northern Rail*), two were cancelled following the referral (*Fenland/Fishers Services' Cleanroom Laundry* and *Clariant/Kilfrost*), one was prohibited (*Intercontinental Exchange/Trayport*), one was cleared unconditionally (*VTech/Leapfrog*) and one remains under investigation at the time of writing (*Diebold/Wincor Nixdorf*).

Turning to market investigations, the CMA published its final report on the retail banking market on 9 August. The CMA and FCA are now in the process of implementing a package of remedies to facilitate switching and reduce barriers to entry in the sector. The CMA also concluded its energy market investigation in 2016 and, assisted by Ofgem, it is now implementing a package of over 30 measures aimed at increasing competition between suppliers, helping energy customers switch to better deals and protect those less able to benefit from competition. Unusually, the remedies in this case included the imposition of a price cap to protect (typically poorer) households on prepayment meters

As noted in *The Handbook of Competition Enforcement Agencies 2016*, implementation of the Consumer Rights Act 2015 introduced a number of significant changes to the UK competition litigation regime, including the introduction of a new procedure for collective proceedings which provides for opt-out class actions in appropriate cases. The first two cases were brought under this regime in 2016. In May, the general secretary of the National Pensioners Convention issued an application for opt-out collective proceedings against Pride Mobility Products Limited on behalf of purchasers of Pride-branded mobility scooters. This follow-on claim is based on an OFT 2014 infringement decision that found that Pride had participated in resale price maintenance for the sale of such scooters. The CAT heard Ms Gibson's application

to commence collective proceedings in December and its judgment on this issue is awaited at the time of writing.

The *Pride Mobility* case was followed in September by a much larger claim against MasterCard. This claim has been brought by Walter Merricks on behalf of the estimated 46 million adults who purchased goods or services from any UK business that accepted MasterCard cards between May 1992 and June 2008. The claim is therefore potentially enormous, as shown by the fact that the claimant's lawyers are reportedly seeking total damages of £14 billion. The hearing of Mr Merricks's application for collective proceedings status was held in January 2017 and the judgment is awaited at the time of writing.

2016 also saw the first-ever UK competition damages award in stand-alone proceedings, with the CAT ordering MasterCard to pay Sainsbury's Supermarkets over £69 million in damages for setting inflated multilateral interchange fees. The CAT rejected MasterCard's application to appeal its judgment to the Court of Appeal in November. At the time of writing, a large number of similar actions by retailers, against both MasterCard and Visa, are underway before the CAT and High Court.

The year ahead

2017 looks set to produce continued high levels of civil enforcement activity, based on the number of pending cases before the CMA. While private litigation is also thriving, the popularity of the new collective proceedings regime rests on the CAT's approach in the *Pride Mobility* and *MasterCard* cases. The CAT's judgments on the preliminary questions of whether these cases are suitable for collective proceedings and, if so, whether they should proceed on an opt-in or opt-out basis, are therefore hotly anticipated. Having concluded two enormous market investigations in 2016, it seems likely that the CMA will prefer to allocate its resources to other areas of activity in 2017, rather than embarking on new, similarly ambitious, investigations.

The new, and rather large, cloud on the horizon for the UK competition regime is the significant uncertainty created by the UK's vote on 23 June to leave the EU (Brexit). Although it appears at the time of writing that Brexit itself will not occur until the end of March 2019, it is already clear that, when it does happen, the impact on the UK's competition regime will be enormous.

The EU and UK competition enforcement regimes are closely integrated. The domestic CA98 prohibitions mirror articles 101 and 102 TFEU and the CMA and sectoral enforcers currently enforce both regimes, as members of an EU-wide European Competition Network of competition authorities. European block exemptions apply equally in domestic law and the CA98 is interpreted in a manner that is consistent with EU case precedent and European Commission guidance. The review of large cross-border mergers that affect UK markets is effectively outsourced to the Commission, with which the CMA works closely. UK private enforcement actions commonly rely on prior Commission infringement decisions, which are binding on UK courts.

Given the UK government's decision to abandon the EU's single market entirely, rather than retain membership of the European Economic Area, it currently seems likely that few or none of these fundamental aspects of the UK system will survive Brexit. At the very least, the CMA will have to take on cross-border enforcement and merger control work that is currently outsourced to the Commission and CMA officials have already indicated that additional resources will be required for this, to ensure that UK consumers are protected. In addition to uncertainty over the future direction of the UK competition regime, including the extent to which the law will diverge over time from EU precedent, Brexit also raises a host of more detailed transitional issues, for example concerning the status of Commission cases that are 'in flight' at the point of Brexit. At the time of writing, any resolution of this uncertainty remains far off.

On a more positive note, relevant parts of government are now preoccupied with identifying the myriad consequences of Brexit, and will shortly be consumed with the complex process of negotiating the terms on which it will happen in two years' time. As a result, following several years of wide-ranging changes to the UK competition regime, new and potentially disruptive legislative reforms appear unlikely in 2017.

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Becket was identified by *Global Competition Review* in May 2008 as one of the top 40 competition lawyers under the age of 40 worldwide. He is recommended in the current edition of the *UK Legal 500* and recognised as a notable practitioner by *Chambers UK*.

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