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Overview

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The UK Enforcement Agencies

The establishment of a new UK competition authority, the Competition and Markets Authority (CMA), was the most significant development of 2014. The CMA combines the competition functions of the old Office of Fair Trading (OFT) and Competition Commission (CC) into a single agency, which became fully operational on 1 April 2014. This development marked the end of the long-standing UK practice of splitting first and second-phase merger and market reviews between two separate bodies.

The CMA is responsible for the enforcement of general competition law – specifically, the prohibition of anti-competitive 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 market-wide competition reviews (market investigations) under the Enterprise Act 2002 (EA02). The CMA has also taken over the OFT's role as prosecutor in criminal cartel matters and the CC's responsibility for determining certain regulatory appeals from sectoral regulators.

Although the CMA has retained some consumer protection powers, the majority of the OFT's functions in this area have been transferred to other bodies, including local Trading Standards departments, Citizens Advice (a charity that provides free advice on a wide range of issues) and the new Financial Conduct Authority (FCA). The decision to strip out most of the OFT's consumer protection functions marks another break with UK enforcement tradition, which had previously favoured combining consumer protection and competition law enforcement within the same body.

Certain 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. CAT judgments may be appealed to the Court of Appeal or, for Scottish cases, the Court of Session. Although proposals to limit the scope of the CAT's powers of review in CA98 and article 101 and

102 decisions remain officially under consideration by the government, the current expectation is that these will be quietly abandoned or at least substantially scaled back. Indeed, the CAT is set to gain enhanced powers to hear private competition law actions during 2015.

Under a system known as 'concurrency', the UK's sectoral regulators are able to exercise general competition law powers within their respective sectors – Ofcom for communications, Ofwat for water, Ofgem for energy, the ORR for rail, the CAA for airport operation and air traffic services, and Monitor for health care. Although the UK government was considering ending this system and concentrating all enforcement within the new CMA, the regulators successfully fought off this threat. Indeed, the FCA gained additional powers to exercise general competition law in the financial services sector on 1 April 2015, as did the new Payment Systems Regulator.

Political concerns over a perceived lack of general competition law enforcement by the sectoral regulators did, however, lead to a potentially significant shift in the balance of power between the sectoral regulators, the CMA and government ministers. Specifically, by adopting a network model familiar at the EU level, sectoral regulators are now required to consult more closely with the CMA on their enforcement activity and the CMA has gained a new power to take a competition law case away from a sectoral regulator in certain circumstances. In addition, the government has acquired a new power to remove a sectoral regulator's general competition law functions altogether. While it is unclear whether the government would be prepared to exercise this 'nuclear option' in practice, these changes already appear to have had an impact on enforcement activity, with the regulated sectors experiencing a marked increase in competition law enforcement. The CMA has also been more vocal than before about competition issues in regulated sectors and has embarked on well-publicised joint projects with sectoral regulators.

Recent developments

After a flurry of activity towards the end of 2013, there was relatively little new competition enforcement activity in the final months of the OFT's life. Activity

picked up again once the CMA gained its new powers in April 2014, with the CMA opening new CA98 investigations in the pharmaceutical, health care, bathroom fitting and commercial catering sectors.

The OFT did wrap up some enforcement cases just before it disappeared. On 20 March 2014, it issued an infringement decision concerning a market-sharing agreement for the sale of medicines to care homes, for which it imposed a fine of just over £370,000. On 27 March 2014, the OFT issued its second infringement decision relating to the sale of mobility aids, finding that a manufacturer of mobility scooters (Pride) and eight of its UK online retailers had entered into illegal vertical agreements that prevented the retailers from advertising products online at less than the manufacturer's recommended retail price. No fines were imposed, due to the size of the parties.

In contrast, in June 2014, the CMA closed an investigation (transferred to it from the OFT) into a manufacturer of sports bras and a number of retailers for alleged resale price maintenance without an infringement finding, on the basis that there were 'no grounds for action'. The CMA has been forced to reopen an OFT investigation into online hotel booking 'best price guarantee' clauses, following a CAT judgment that annulled the OFT's January 2014 commitments decision on an appeal by third-party travel website Skyscanner. The CMA has thereby joined the long list of European competition authorities considering the legality of such arrangements.

On 24 June 2014, the CMA announced that it had decided to accept binding commitments from Certas Energy and DCC to address concerns that Certas may have abused a dominant position in relation to the supply of road fuels to filling stations in the Western Isles. In another commitments case, the CMA accepted undertakings from software company Epyx in September 2014, following an investigation into an alleged abuse of its dominant position in the supply of vehicle service, maintenance and repair platforms in the UK. The CMA pay-for-delay investigation into GSK and three pharmaceuticals generics companies continues, as do investigations into suspected infringements of the CA98 by an association of estate agents and a local newspaper regarding the advertising of property sales and lettings. On 24 June 2014, the CMA announced a further CA98 investigation concerning pharmaceutical supply and, on 17 July 2014, a new investigation concerning 'conduct in the health-care sector', without providing further details of either investigation. In contrast with this focus on health care, the CMA announced in November 2014 that it would

not be progressing its separate interchange fee investigations against MasterCard and Visa. On 16 February 2015, the CMA confirmed that it is continuing its investigations into suspected anti-competitive vertical agreements for the supply of bathroom fittings and commercial catering, albeit on amended timetables.

As noted above, 2014 brought an increase in competition enforcement activity by sectoral regulators. Although the communications regulator Ofcom announced in October 2014 that it had closed its investigation of telecoms company BT for alleged margin squeeze in superfast broadband pricing, earlier that year it opened a new abuse of dominance investigation into Royal Mail concerning access to certain delivery services. This was followed in November 2014 by the opening of an Ofcom investigation into whether the joint selling arrangements of the Football Association Premier League for live coverage of matches infringe the CA98. In April 2014, the water regulator Ofwat confirmed that it was continuing to investigate Anglian Water for a suspected abuse of dominance regarding pricing to a development in Milton Keynes. In May 2014, Ofwat announced a consultation on its intention to accept binding commitments offered by Bristol Water following concerns it may have abused its dominant position. The energy regulator Ofgem's study of competition in energy markets culminated in June 2014 in a referral of the entire UK energy market to the CMA for a full market investigation. Ofgem also announced two new CA98 investigations in early 2015. The first, opened in January, concerns a suspected abuse of dominance in the electricity connections market by electricity distribution company SSE, while the second, opened in February, concerning a suspected anti-competitive agreement between providers of 'supporting services for the energy industry'. An ORR abuse of dominance investigation concerning rail freight also continued during 2014.

There was a marked increase in activity in the field of criminal cartel enforcement in 2014. On 13 January 2014, the OFT announced that an individual had been charged under the criminal cartel offence in relation to the supply of galvanised steel water tanks. Having taken over the prosecution in April 2014, the CMA announced on 17 June that the individual had pleaded guilty to these charges. Notably, this marked the first time that criminal charges have been brought under the cartel offence since the trial of four British Airways executives collapsed in May 2010. In July, the CMA announced that a further two individuals had been charged with involvement in the same cartel. Both individuals entered a 'not guilty' plea on 26 January

2015 and their trial is due to commence at Southwark Crown Court on 1 June 2015. Interestingly, these prosecutions are being brought under the old cartel offence, which required proof of dishonesty on the part of the individual. The CMA is also continuing to investigate a number of individuals for suspected involvement in a cartel concerning the supply of construction materials, which saw seven arrests in March 2013. The fact that the CMA has been able to maintain these investigations, and to collect enough evidence to bring prosecutions and obtain a guilty plea in the *Water Tank* cartel case, rather suggests that the significant expansion in the scope of the offence that came into effect on 1 April 2014 may not have been necessary.

On the merger control front, the OFT and CMA made 80 Phase I merger decisions between them during 2014, taking the total for the year slightly above the total taken by the OFT in 2013 (73). This figure was still significantly down on the preceding two years (94 in 2011 and 100 in 2012), possibly reflecting a decline in the level of UK merger activity. The number of in-depth investigations also decreased dramatically, with just four Phase II referrals by the OFT and CMA in 2014, compared with nine in 2013, 14 in 2012 and 11 in 2011. There appears to have been a shift in activity in the first months of 2015, with the CMA announcing three referrals for in-depth investigations in January 2015 alone. It remains to be seen whether the high level of Phase II referrals will be maintained for the rest of 2015.

Both of the mergers referred by the OFT to the CC in 2014 were subsequently cleared unconditionally by the CMA (*Omnicell/SurgiChem* and *Alliance Medical/IBA Molecular*). Of the two mergers the CMA referred for Phase II investigation in 2014, one was subsequently cancelled when the parties abandoned the transaction (*Pure Gym Limited/The Gym Limited*) and the other remains open at the time of writing (*Xchanging/European operations of Agencyport Software Group*). It is interesting to note that, out of the six final Phase II decisions made by the CC or CMA during 2014, four were unconditional clearances, one was a clearance following divestments and only one was an outright prohibition (*Eurotunnel/SeaFrance*, which was in fact a rerun of a 2013 prohibition decision following an appeal and remittal).

In addition to Ofgem's energy market investigation reference noted above, there was only one other market investigation reference during 2014. Specifically, the CMA referred the supply of retail banking (comprising the supply of personal current accounts and the supply of banking services to SMEs) for an in-depth

review in November. The energy market investigation reference was the first such case since the OFT's decision to refer the payday lending market a year earlier, in June 2013. The length of time taken by market investigations meant that the CC and CMA continued to work through earlier references during 2014, with final reports being issued on aggregates, cement and ready-mix concrete (January – divestment remedies), private health care (April – extensive remedies including divestments) and private motor insurance (September – information remedies and prohibition of certain most-favoured nation clauses). Work on remedies in relation to earlier reports on the statutory audit services was also concluded during 2014. Taken together, these cases show the high likelihood of remedies being imposed on any market that is subject to a market investigation.

Although 2014 continued to see a high level of private litigation in the competition law field, two major High Court damages actions that were due to go to trial in 2014 settled just before or just after the main trial began (*National Grid* and *Cooper Tire*). Two of the longest-running damages actions before the CAT also came to a close in 2014, with the *Emerson* and *Deutsche Bahn* damages actions both being settled. While the fact that these cases were settled indicates that claimants are receiving some compensation for harm suffered at the hands of cartelists, the lack of final judgments is hampering the development of settled case law in this area. The cases that remain active before the High Court (and, to a lesser extent, the CAT) are therefore being closely watched. In particular, two separate stand-alone claims have been brought in the High Court against Google over its alleged abuse of a dominant position. The first of these is listed for trial in November 2015, with the second claim due to go to trial in February 2016. The outcomes of these cases promise to be particularly interesting, given the European Commission's failure to resolve its own investigation of similar issues. Another high-profile cluster of cases before the High Court concerns claims by a large number of retailers against MasterCard and Visa. These claims are based on findings by the European Commission that both credit card companies charged inflated interchange fees, with the earliest trial being listed for January 2016.

Notwithstanding the number of active claims, the UK government proceeded with the implementation of significant reforms to the private competition law regime during 2014. The changes, which are particularly aimed at making it easier for consumers and small and medium-sized businesses to seek redress, include

extending the jurisdiction of the CAT to enable it to hear stand-alone damages actions and to grant injunctions, aligning the CAT rules on limitation with those of the High Court, introducing a new fast-track procedure and, most controversially, introducing a new opt-out collective actions regime for competition claims. Although the government has included safeguards in the legislation to reduce the risk of abusive class actions, this measure still has the potential to have a substantial impact on the level of competition law claims before the UK courts. The Consumer Rights Bill, which will enact these changes, passed through both Houses of Parliament during 2014 without significant amendment to the private damages provisions. At the time of writing, the Bill was in the final 'ping pong' stage, with Royal Assent expected in early 2015 and implementation in October 2015. A consultation on a draft of the new CAT rules, which anticipate implementation of these changes, was launched in February 2015.

Year ahead

Given the substantial institutional changes during 2014, it is to be hoped that 2015 will be a less eventful one for the UK enforcement agencies, notwithstanding the fact that a General Election will take place in May. Although competition in energy and financial markets were identified as politically charged issues during 2014, these have largely been neutralised as electoral issues by the market investigation references noted above. Assuming therefore that the General Election will not lead to radical changes to the UK's competition law architecture, the notable events of 2015 look set to arise from actual enforcement, including the prospect of the first cartel offence convictions since the *Marine Hose* case back in 2008. It will also be interesting to see which of the CMA's various market studies or more wide-ranging research projects, such as its 'fact-finding exercise' concerning the commercial use of consumer data, lead to concrete enforcement action or market investigations in the year ahead.

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Becket McGrath is a partner in in the antitrust and competition practice at Cooley's London office. Becket advises clients on all aspects of EU and UK competition law, with an emphasis on defending companies against agency investigations, behavioural counselling, compliance, competition litigation and merger control. Although he advises clients in a broad range of sectors, he has a particular interest in the media, technology and communications sectors, as well as the interface between intellectual property and competition law. He has experience of enforcing UK and EU competition law at a senior level in the UK's Office of Fair Trading (OFT) – now the Competition and Markets Authority (CMA) – and retains good links with enforcement agencies and regulators in the UK and across the EU. Becket is the author of the 'Private Enforcement' division of *Butterworths Competition Law*, a standard reference work. He is a frequent commentator on TV and radio on competition law developments.

Recent cases include acting for an online retailer on an OFT investigation and acting for main parties and third parties on a number of ongoing investigations by the CMA and European Commission. He is also advising a sports rights body on its commercial strategy.

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*, in which clients note that he 'really understands how competition authorities work both in the UK and in Europe.'



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Jo Love is an associate in in the antitrust and competition practice at Cooley's London office. She qualified into the team in September 2010 and completed the King's College diploma in EU competition law in 2011. Jo assists companies with regulatory investigations and compliance policies, as well as the competition law aspects of supply and distribution agreements. She has spent time on secondment to the legal teams of two clients and has a focus on the online retail, sports and software sectors. Recent matters include acting for parties in various major UK and European Commission investigations.