

**HD** **UK: The Competition and Markets Authority launches operations The new UK competition authority will have additional powers and handle cases differently than before**

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Introduction

On 1 April 2014, the UK's new competition authority, the Competition and Markets Authority (CMA), officially took over the competition and certain consumer functions and powers from the two UK competition authorities in charge until then, the Office of Fair Trading (OFT) and the Competition Commission.

Like its predecessors, the CMA will:

Investigate mergers which may restrict competition;

Study and investigate markets where there may be competition and consumer problems;

Consider possible infringements of the UK and/or EU competition prohibitions on anti-competitive agreements and the abuse of a dominant position;

Prosecute individuals suspected of committing the criminal cartel offence;

Enforce consumer protection legislation;

Cooperate with the various economic sector regulators, including OFGEM, OFWAT, ORR, OFCOM and Monitor, and encourage them to use their concurrent competition law powers in favour of their powers under the relevant regulatory regimes; and

Consider regulatory references and appeals.

However, there will be a number of differences in the way cases are handled by the new competition authority, and the CMA has been granted certain new powers.

The way cases are handled

Until now, the initial assessment of a **transaction** under the UK merger control rules and/or a market under the market investigations regime was carried out by the OFT, with a possible further in-depth investigation being conducted by a separate body, namely the Competition Commission. From now on, however, as a result of a single competition authority replacing the two existing bodies, both stages of any merger or market investigation will be conducted by the CMA.

In order to address possible concerns about "confirmation bias", the CMA has sought to ensure in its structure and procedures that no such procedural unfairness can arise. Within the CMA, there is to be separation between those CMA officials responsible for the initial "Phase 1" decision (with a senior official taking the decision based on the work carried out by the case team) and those responsible for the in-depth "Phase 2" decision; similarly to the Competition Commission's procedures, any Phase 2 decision will be made by a panel of independent individuals with backgrounds in business, law, economics, accountancy, etc.

The CMA has not only put such separation between the case teams in place for merger and market investigations, but has also introduced it for investigations under the competition law prohibitions on anti-competitive agreements and abuse of dominance. Such investigations were previously carried out solely by the OFT, with the Competition Commission having no role. In this type of case, the investigatory phase leading to the point where the CMA forms the provisional view that there has been an infringement - the so-called "Statement of Objections" - will now be conducted by a **group** of CMA officials who are wholly separate from those who take the final decision. The CMA thus hopes to establish a greater separation of powers and more procedural safeguards in order to address previous concerns that the same team of OFT officials was each of "investigator, prosecutor, judge and jury" in competition law investigations.

CMA's new powers

The CMA has been granted certain new powers to assist it in its competition-law-enforcement functions. In particular:

In relation to the UK and/or EU competition prohibitions on anti-competitive agreements<sup>1</sup> and the abuse of a dominant position<sup>2</sup>:

**powers of investigation**The CMA has been given stronger powers where it suspects an infringement of the prohibitions. This will include a new power to require individuals connected to a business under investigation (e.g. directors or employees) to answer questions; and

**powers to order "interim measures"**The CMA will have stronger powers requiring a **company** under investigation for breach of either prohibition to terminate the relevant **commercial** practices pending the outcome of the investigation. Until now, such "interim measures" could only be applied where the continuance of the conduct would cause "serious, irreparable damage" to another business, such as a competitor or supplier, which basically meant that there would only be an interim measures order if it could be shown that it was necessary to prevent another business exiting the market. From now on, the CMA will be able to order interim measures where continuance of the conduct would merely cause "significant damage" to another business. This is a lower threshold, which will be satisfied if, but for the interim measures order, that other business would suffer financial, operational or reputational damage.

It is intended to become easier for the new CMA to bring prosecutions under the UK's criminal cartel offence.

The offence is committed when an individual, e.g. an employee or director of a **company**, is directly involved in horizontal price-fixing, market-sharing, coordinated output reductions or bid-rigging. Over the past ten years, only three prosecutions have been brought and - to date - just one of those successfully; three individuals were convicted and imprisoned in June 2008 for their roles in a cartel relating to the supply of marine hoses and ancillary equipment in the UK<sup>3</sup>. It was argued that the difficulty in bringing prosecutions related to the statutory requirement to show that the accused individual had acted "dishonestly". As of today, the "dishonesty" requirement has been removed and mere participation in the anti-competitive practices is sufficient for committing the offence.

However, to provide some protection against the tougher offence being applied too strictly, there are now a number of exclusions from, and defences against, the offence. Broadly speaking, it is only secret anti-competitive agreements that will give rise to criminal prosecutions. An individual will not be liable under the offence if the anti-competitive agreement has been disclosed in advance to (potential) customers or the CMA, or has otherwise been published.

As regards the merger control regime:

**stronger "hold separate" powers**The CMA has been granted in the case of mergers which are being examined by the CMA but where a clearance decision has not yet been issued. The CMA has been given the power to order a reversal of any integration between the businesses of the merging parties that has already occurred.

**more time to carry out its initial assessment**The CMA has been given a merger. This initial Phase 1 investigation is now subject to a statutory timetable of a maximum 40 working days (i.e. eight weeks plus public holidays), which is longer than the time period for a Phase 1 investigation under the EU merger control regime and many other jurisdictions.

In practice, however, the main timing issue in merger control proceedings is not so much the formal time limit for a Phase 1 investigation, but the amount of time spent on "pre-notification" discussions with the parties before the relevant competition authority is willing to accept the notification and formally "start the clock". The CMA has said that it will take account of any restraints imposed on the merging parties by other regulatory processes, such as the City Code governing public takeovers or other jurisdictions' merger control regimes, when carrying out its review of the **transaction** and that it may try to reach its decision more quickly than the standard statutory timetable, provided that the facts and issues of the particular case and the CMA's existing caseload allow it to do so.

It will be interesting to see how the CMA will apply its new powers and whether the reforms to the UK's competition laws will have the policy makers' desired effect of strengthening their effectiveness.

Footnotes

<sup>1</sup>The UK "Chapter I" prohibition under the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union (TFEU).

<sup>2</sup>The UK "Chapter II" prohibition under the Competition Act 1998 and Article 102 TFEU.

<sup>3</sup>In May 2010, a second criminal cartel prosecution in relation to the British Airways/Virgin Atlantic passenger fuel surcharge cartel collapsed in the early stages of the trial and four British Airways

executives were acquitted of price-fixing charges. A third criminal cartel prosecution is currently before the UK courts; in February this year a former executive pleaded guilty to the criminal cartel offence in respect of the supply of galvanised steel tanks for water storage in the UK. In relation to the same cartel two other former executives were charged in June this year.

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