

Kluwer Competition Law Blog

United Kingdom: CMA consults on draft Annual Plan for 2015/2016

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The Competition and Markets Authority (“CMA”) has recently published its [draft Annual Plan](#) for 2015/2016, its second year of operation after assuming the functions of the Competition Commission and the competition functions of the Office of Fair Trading (“OFT”) on 1 April 2014. Together with a [Strategic Assessment](#) of the risks that consumers and markets face (also published on 27 November 2014), this provides valuable guidance on the CMA’s likely enforcement priorities through to April 2016 and beyond.

Whilst in some areas (notably merger control), the CMA’s work is predominantly responsive to levels of activity in the economy, the CMA has considerable discretion in the cartel, antitrust and markets work that it undertakes. In 2015/2016, it is intending (in accordance with its [Prioritisation Principles](#)) to focus on cases in the following six areas of strategic significance, where it considers there to be greater potential for consumer harm: online and the digital economy; technology and emerging sectors; regulated sectors and infrastructure markets; the provision of public services; sectors that are important to economic growth and recovery; and conduct that leads to consumer exploitation. We can expect a continued focus on the digital economy, energy, financial services, public services and retail sectors and – irrespective of sector – on activities and conduct that particularly harm or exploit disadvantaged consumers.

Whilst the CMA seeks to be more proactive and efficient in conducting its cartel, antitrust and markets work and to further enhance its investigatory capabilities (in particular in undertaking intelligence-led criminal and civil cartel investigations), the draft Annual Plan does not foresee a significant increase in the number of cartel, antitrust and market investigations it undertakes. This is perhaps surprising, given past criticism of its and its predecessors’ limited and often patchy enforcement records, particular in comparison to other leading European competition authorities. However, this reflects both the authority’s resource constraints (despite increased funding) and its intention to focus on a limited number of cases – often raising complex issues and at the cutting-edge of competition law – that it considers may have a wider importance in terms of deterrence, raising awareness and promoting compliance.

The CMA’s functions and present caseload

The CMA is a unitary competition and consumer authority. Its principal functions are in the fields of merger control, cartels and antitrust (including prosecuting individuals suspected of criminal cartel activity) and markets work. It also participates in European and international bodies such as

the European Competition Network (“ECN”) and the International Competition Network (“ICN”).

The CMA’s [stated mission](#) is to make markets work well in the interests of consumers, businesses and the economy. It has set itself the ambition of being one of the world’s leading competition and consumer authorities. To achieve this, it must deliver effective enforcement of the UK’s competition laws, in particular the Enterprise Act 2002 (“EA 2002”, which covers mergers and markets work and the criminal cartel offence) and the Competition Act 1998 (“CA 1998”) which covers civil cartels and antitrust work), by prioritising its resources to deter, detect and punish illegal behaviour, to investigate and prohibit anticompetitive mergers and to reform markets that do not work well in the interests of consumers.

In the mergers field, the CMA has not opened a new Phase II investigation since its formation on 1 April 2014, despite opening 58 new merger investigations since then and inheriting a number of on-going Phase I investigations from the OFT. Indeed, in only two cases – *Immediate Media/Future Publishing* and *Xchanging/Agencyport* – has the CMA considered that there are grounds for opening a Phase II investigation. It is currently consulting on divestment remedies offered by Immediate Media and will open a Phase II investigation in *Xchanging/Agencyport* unless acceptable remedies are offered.

In the cartels and antitrust field, the CMA presently has 11 open civil cases under the CA 1998 which are in the public domain. Four of these cases were opened since 1 April 2014, a dominance investigation in the pharmaceutical sector and three Chapter I investigations in the commercial catering equipment, bathroom fittings and healthcare sectors. The CMA has also recently closed two investigations with commitments, *Epyx* and *Certas Energy*, and closed its *Sports Bras* investigation without a finding of infringement. In *Online Hotel Booking Platforms*, it is reconsidering whether to accept commitments following a successful third party challenge to its initial decision to accept commitments.

The CMA has two on-going criminal cartel investigations under the EA 2002 which are in the public domain, both inherited from the OFT, concerning galvanised steel tanks and products supplied to the construction sector. One individual has already pleaded guilty in the galvanised steel tank case and two others face trial in June 2015. A number of individuals have been arrested, but not charged, in the second case.

The CMA has 11 open markets investigations under the EA 2002, three of which (*Payday Lending*, *Energy* and *Retail Banking*) are Phase II investigations; it has opened five new markets cases since 1 April 2014. *Energy* and *Retail Banking* are notable for the Phase II referrals having been made by concurrent regulators, OFGEM and the FCA respectively. The CMA has not yet itself made a Phase II market referral, but has proposed remedies following Phase I market studies in *Residential Property Management Services* and *Higher Education*. The CMA is also implementing remedies following Phase II investigations in *Aggregates*, *Private Healthcare* and *Private Motor Insurance*.

Risks consumers and competition identified by the CMA in its recent Strategic Assessment

In its Strategic Assessment, the CMA identifies a number of risks to consumer welfare and the efficient functioning of markets in the UK. These reflect the importance of the internet to consumers and technological developments, which can both benefit but also pose risks to consumers, as well as an economic climate characterised by a slow economic recovery and consumers facing continued financial pressures.

The principal risks identified by the CMA include:

- restricted access to, or even exclusion from, markets for some consumers (in particular those that are ‘digitally excluded’, on low incomes, in poverty and/or in debt), leading to higher prices and reduced choice for goods, utilities and credit
- practices that distort or act as a barrier to consumer decision-making in choosing or switching supplier, for example where information is limited, unduly complex, misleading or opaque or which otherwise enable companies to advantage of consumers’ behavioural biases, leading to poor decisions and consumer outcomes
- markets where technology and intermediaries play a key role in consumer decision-making, such as search engines, price comparison websites, peer review sites and ‘trusted trader’ schemes: consumers may make poor decisions if presented with poor, biased or incorrect information or if they make decisions solely on price to the exclusion of other relevant factors
- widespread, endemic or unfair practices that negatively impact consumer choice and decision-making
- other practices in the online or digital economy that harm consumers, including: the creation or exploitation of barriers to entry and network effects by incumbents; resale price maintenance and restrictions in online distribution of goods; the role of online ‘gatekeepers’; the commercial use of personal data; barriers that prevent the development of new business models, including in peer-to-peer, collaborative and other new online markets
- conduct in emerging and technology-based markets, whether or not online markets, including those with disruptive technologies and business models and those in which intellectual property rights are important to competition, including pharmaceuticals
- the structure of and conduct in regulated sectors and infrastructure markets (including energy, banking and wholesale financial services), in which competition can play an important role in reducing prices, enhancing quality and spurring innovation, whilst ensuring investment in and the affordability of essential services
- bid-rigging and overly-complex procurement and commissioning in public services markets (which are being opened up to competitive provision), leading to sub-optimal outcomes for both commissioning authorities and consumers
- potential anti-competitive behaviour and outcomes in other markets that are important to productivity and economic growth, including infrastructure, retail, construction and the creative industries

The CMA’s draft Annual Plan for 2015/2016

The CMA will have a budget of over £71 million for 2015/2016. It intends to continue its existing caseload and to use its powers to meet the challenges identified in its Strategic Assessment in order to deliver its objective of generating at least £10 of benefits for every £1 spent by it. The CMA intends to place consumers at the heart of its work, including by assessing the impact on consumers all of its work and increasing its engagement with consumers and consumer bodies. The CMA intends to invest in enhancing its capabilities in project management and delivery, and the

professional development of its employees, to deliver timely and robust decisions.

Cartels and antitrust

The CMA will continue to devote substantial resources to antitrust enforcement, including its intelligence, investigation and enforcement capabilities. It will progress its open cases under the CA 1998 and continue to pursue a balanced portfolio of cases across different sectors, both large and small. It will continue to make wide use of its new powers (under the Enterprise and Regulatory Reform Act 2013 (“**ERRA 2013**”)), including to conduct compulsory interviews of individuals.

Cartel enforcement will remain a priority, both civil and criminal. The CMA expects to conduct more and quicker investigations, using both new powers and enhanced resources. These include new senior investigators and intelligence staff. Whilst the CMA will continue its leniency programme, it intends that most of its cases be intelligence-led, with the CMA cooperating where appropriate with other criminal enforcement agencies. It will open as many criminal cartel investigations as possible, with at least one leading to prosecution. It will open at least four new investigations under the CA 1998, whether into cartels, abuses of a dominant position or other practices.

The CMA intends to continue working closely with those sectoral regulators which have concurrent powers to apply the CA 1998 within their relevant sectors. The CMA expects such cooperation to enhance competition in the energy, telecoms, financial services and other sectors, including by ensuring and facilitating increased competition enforcement action by the regulators. It will also continue to work with international competition authorities, through its involvement in bodies such as the ECN and the ICN.

Markets work

A significant part of the CMA’s workload will comprise its on-going *Energy* and *Retail Banking* market investigations, which must conclude by December 2015 and May 2016 respectively. These are both large and complex investigation and are being undertaken under the compressed 18 month timetable imposed by the ERRA 2013.

Each of these investigations will impose significant demands on the resources of both the CMA and participants. The CMA will likely also need to implement remedies from its ongoing *Payday Lending* market investigation, which will report in January 2015. Nevertheless, the CMA intends to launch at least four new market studies, calls for information or market investigations. These will focus on the digital economy.

Merger control

As the UK has a voluntary merger control regime, not all mergers falling within the CMA’s jurisdiction are notified to it. However, the CMA will continue to investigate mergers that are not notified to it, where these may be anti-competitive. It will target its resources, so will not necessarily investigate all non-notified mergers of which it becomes aware. Where a merger is notified, the CMA intends to start its Phase I timetable within 20 working days of receiving a substantially complete draft Merger Notice, which will – it is hoped – streamline the pre-notification period. It aims to clear at least 60% of non-complex Phase I mergers within 35 working days, although this remains longer than most comparable jurisdictions worldwide.

On the policy front, the CMA intends to review its merger policies, including: the use of the Merger Notice used to notify mergers to the CMA; Phase I remedies; and the ‘de minimis’ exception to opening Phase II investigations into mergers in small markets. This may lead to public consultation on revised guidance. Internationally, the CMA will continue to participate in bodies such as the EU Merger Working Group and the ICN mergers work programme.

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