

# Kluwer Competition Law Blog

## UNITED KINGDOM: RECENT CARTEL AND ANTITRUST ENFORCEMENT

Matthew O'Regan (St Johns Chambers, United Kingdom) · Friday, February 3rd, 2017

In its recent draft annual plan, the Competition and Markets Authority (“CMA”) committed itself “to further step up the pace, scale and impact of our enforcement against anticompetitive or unfair practices.” It therefore intends to increase, to at least six, the number of new civil investigations it undertakes under Chapter I of the Competition Act 1988 (“CA 1998”) and to do so more efficiently and quickly, without compromising either fairness or rigour. These cases will cover suspected infringements of both national and local scope and significance, and from a range of sectors. The CMA intends to use its powers to disqualify directors of companies found to have infringed UK or EU competition law. Through its on-going cartel intelligence activities, the CMA will also launch criminal investigations under the Enterprise Act 2002 (“EA 2002”) where it is appropriate to do so.

In view of the CMA’s plans for enforcement of both civil and criminal competition law, now is an opportune moment to consider the CMA’s enforcement record in 2016 and the first month of 2017, as well as that of sector regulators, and to consider implications for the coming year.

### Civil enforcement: recently concluded cartel cases

The CMA concluded three civil cartel investigations in 2016 and a further one in January 2017. In *Galvanised steel tanks*, fines of over £2.7 million were imposed for two separate infringements, a cartel (which involved bid-rigging, price-fixing and sharing of customers) and, at a single meeting, a separate exchange of current pricing information and future pricing intentions. In *Online sales of posters and frames*, two companies, Trod and GB eye, had agreed not to undercut each other’s prices for a wide range of posters and other licensed merchandise sold via the Amazon Marketplace website. This agreement was implemented by each party using automated repricing software. Trod admitted the infringement and was fined £163,371. GB eye, which had informed the CMA of the illegal agreement, was granted immunity from fines.

In *Modelling agencies*, fines of £1.5 million were imposed on five agencies and a trade association for exchanging and discussing prices, and agreeing to fix minimum prices and to a common approach to pricing during negotiations of contracts. In *Furniture*, two suppliers of drawer components used in the furniture industry recently admitted that they had infringed the Chapter I prohibition by agreeing not to compete with each other on price and engaging in bid-rigging. This was implemented by price coordination, allocating customers and exchanging commercially sensitive information. Under the CMA’s settlement procedures, they have agreed to pay fines

totalling £2.8 million. A third company, which reported the illegal conduct, has conditional immunity from fines. The CMA has also sent statements of objections to at least two other companies, which have chosen not to settle with the CMA.

### **Civil enforcement: recent non-cartel cases**

The CMA has also taken enforcement action in respect of a number of other infringements of the Chapter I prohibition. In February 2016, the CMA fined GlaxoSmithKline and two generic pharmaceutical manufacturers for ‘pay for delay’ agreements in connection with an anti-depressant drug, paroxetine. GSK, which was also found to have abused a dominant position, contrary to Chapter II of the CA 1998, was fined £37.6 million and the generics manufacturers a total of £7.4 million. Appeals against the CMA’s decision will be heard by the Competition Appeal Tribunal in March 2017.

The *Commercial catering equipment* and *Bathroom fittings* the CMA imposed fines of £2.3 million and £0.7 million respectively on manufacturers for restricting the ability to advertise prices on their websites. In each case, the fine was reduced significantly, both for admitting the infringement and concluding a settlement agreement and for setting up compliance and training programmes. In both cases, the CMA also sent ‘warning letters’ to many other suppliers and dealers which it suspected had engaged in similar restrictions on internet sales or restrictions on advertising prices.

The CMA has also secured, without opening proceedings, changes to BMW UK’s commercial agreements that may have been anti-competitive, as BMW UK agreed to withdraw a policy that prevented its dealers from advertising on new car price comparison websites.

### **Civil enforcement: CMA secures director disqualification for first time**

On 1 December 2016, Daniel Aston, the former managing director of Trod gave a disqualification undertaking not to act as a director of any UK company for five years. Mr Aston had been personally involved in the infringement between Trod and GB eye considered above. This is the first time that the CMA has used this power to disqualify directors of companies involved in cartels and other breaches of UK and/or EU competition law.

### **Civil enforcement: CAA adopts first infringement decision in civil aviation sector**

The Civil Aviation Authority (“CAA”) is the economic regulator for the civil aviation sector and has concurrent powers, with the CMA, to enforce the provisions of the CA 1998 (but not the criminal cartel offence) in that sector. In December 2016, it found that the terms of agreements under which East Midlands International Airport permitted Prestige Parking to operate a car park at the airport infringed the Chapter I prohibition. Prestige was prohibited from selling its car parking below the price charged by EMIA for its own car parks. The CAA concluded that the agreement constituted illegal price-fixing between competitors. EMIA had voluntarily informed the CMA (under its leniency programme) of the agreement; it avoided a fine of £12.5 million. It is notable that EMIA had ignored internal legal advice that the agreements may have been anti-competitive. The CAA would have fined Prestige nearly £1 million, but for it being in liquidation.

### **Criminal cartel enforcement by the CMA**

The CMA has had difficulty in prosecuting individuals under the criminal cartel offence where the conduct took place before 1 April 2014; in such cases, it must prove that an individual acted

‘dishonestly’ when entering into a cartel agreement. However, in March 2016, an individual pleaded guilty to participating between 2006 and 2013 in an illegal cartel concerning the supply of pre-cast concrete drainage products. He has not yet been sentenced, as the CMA’s investigation is on-going. The CMA also has a number of other on-going criminal cartel investigations, details of which are not in the public domain.

### **Civil cartel enforcement: open cases**

The CMA has a number of on-going civil investigations. Some are at an advanced stage, whilst investigations in other cases have only recently been opened. As well as the Furniture case referred to above, the CMA has sent statements of objections in: *Funfairs* (it is alleged that the rules of the Showmen’s Guild of Great Britain prevent members from organising or attending non-Guild fairs and from establishing new fairs, so preventing competition with fairs established by the Guild); *Cleanroom laundry services* (it is alleged that joint venture and trade mark licensing agreements between two suppliers constituted a market sharing agreement); and *Ping* (it is alleged that Ping has breached UK and EU competition law by prohibiting retailers from selling its products online).

The CMA also has open investigations into suspected anti-competitive behaviour in relation to residential estate agency services, light fittings, auction services, solid fuel and charcoal products, pre-cast drainage products and pharmaceuticals. In addition, OFGEM (the energy regulator) has an on-going investigation.

### **Analysis**

The CMA has, in the last 12 months, concluded a number of investigations into suspected cartels and other anti-competitive agreements. It has a number of on-going investigations, both civil and criminal. Concurrent sector regulators have also undertaken investigations.

Whilst the fines imposed by the CMA (other than in *Paroxetine*) have been modest in absolute terms, they were no doubt significant for the companies concerned. In most cases, parties have cooperated with the CMA by admitting that they have infringed competition law, leading to lower fines and the CMA completing its investigation more quickly. For example, in *Online sales of posters and frames*, the entire investigation lasted 10 months, whilst those in *Commercial catering equipment* and *Bathroom fittings* both lasted 21 months. Although *Modelling agencies* did not involve a settlement, the investigation was concluded in 20 months.

The CMA has clearly investigated more cases than it did in the past, even though the number still remains low compared to its peer agencies in other jurisdictions. It has investigated a wide range of cartel behaviour, often in small or obscure sectors, including price-fixing, market-sharing and exchanges of commercially sensitive information. It has also focused on the activities of trade associations and, in several cases, on cartels, restrictions on sales and price advertising and other anti-competitive agreements in online markets, which will remain an important focus for the CMA’s enforcement activities.

It is also interesting to consider the genesis of individual investigations. Some (such as *Furniture*, *Galvanized steel tanks*, *Online sales of posters and frames* and *East Midlands International Airport*) are the result of leniency applications. In others, the CMA has received a complaint (such as in *Commercial catering equipment*, *Bathroom fittings* and *BMW UK*). Perhaps unusually, its investigation in *Cleanroom laundry services* started as the result of information received by the CMA when reviewing mergers involving the parties now under investigation and the information

necessary to commence that in *Residential estate agency services* was obtained as a result of earlier enforcement activity in the sector. Other investigations may be the result of the CMA's own intelligence activities.

## Conclusions

The CMA is committed to undertaking more investigations and concluding them more quickly, both civil and criminal. It is also committed to using its powers to disqualify directors of companies involved in anti-competitive behaviour. The CMA is clearly well on its way to doing so. It is also seeking to encourage compliance by sending 'warning letters' to companies that it expects have infringed the CA 1998, publishing guidance for business and reaching out to the legal and accountancy professions.

So, what should companies do? They should not be complacent and think that a CMA investigation will not happen to them: investigations can start in many different ways, against companies large or small, in any sector and in any part of the United Kingdom. They should:

- ensure that their commercial agreements and practices are compliant with UK and EU competition law. This includes past agreements and practices, which the CMA can also investigate;
- if there is any doubt as to compliance, legal advice should be taken;
- if it is suspected that cartel activity is taking place, or has taken place, consideration should be given to making a leniency application to the CMA;
- if one is not in place already, a competition law compliance programme should be developed and staff should regularly be provided with competition law training; and
- if it is suspected that a competitor, supplier or customer has behaved in an anti-competitive manner, so as to cause damage to the company's business, consideration should be given to making a complaint to the CMA.

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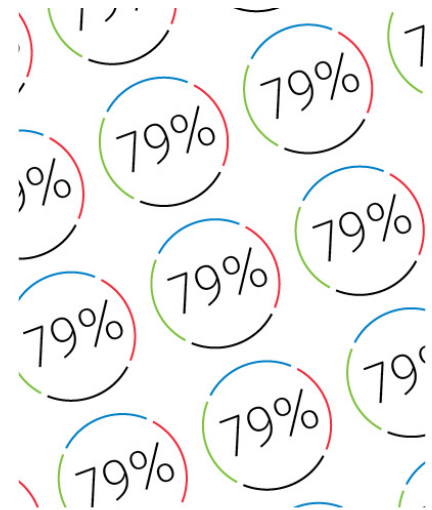
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