

# Changing of the guard

## The UK competition regime takes a new turn

by *Gillian Sproul\**

The new UK Competition and Markets Authority (CMA) was launched on 1 October 2013, marking the first step in the latest reforms to the UK competition regime. It will formally become the UK's main competition enforcer on 1 April 2014. At that point, it will take over the competition and some consumer powers of the Office of Fair Trading (OFT) and the competition and regulatory functions of the Competition Commission (CC).

The CMA's board and senior leadership team has now been appointed. The CMA chair is Lord David Currie, who was the first chair of Ofcom, which was a merger of five separate regulators. The CMA's chief executive is Alex Chisholm, whose experience includes a role as chairperson and commissioner of Ireland's Commission for Communications Regulation.

### The CMA's functions

The CMA's principal functions will be as follows:

■ **Merger control:** investigating mergers that may result in a substantial lessening of competition (SLC), specifying interim measures to prevent integration pending a final decision and imposing remedies where it finds SLC.

■ **Market investigations:** conducting market studies and investigations where markets appear to have competition problems and imposing remedies; and conducting investigations of practices that impact on more than one market.

■ **Antitrust enforcement:** investigating individual undertakings or groups of undertakings suspected of infringing the UK and /or EU prohibitions on anticompetitive agreements and abuse of market dominance.

■ **Cartel offence:** prosecuting individuals for the cartel offence.

■ **Concurrency:** working with the UK sectoral regulators, encouraging them to be more proactive in the use of their concurrent competition powers and allocating cases between itself and the relevant regulator.

■ **Consumer powers:** enforcing a range of consumer protection legislation and bringing criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008.

■ **Regulatory references and appeals:** determining appeals by regulated entities against certain decisions of their regulator.

### Its relationship with government: the steer

The CMA is independent of the UK government and will make its own decisions. However, it is accountable to parliament and required to report annually on its compliance with a performance management framework. It is also required to have regard to the government's strategic (but non-binding) steer, published by the Department of Business, Innovation and Skills (BIS) on 1 October 2013 to coincide with the CMA's launch – and a new feature of the UK competition law landscape.

The purpose of the steer is to highlight how the government sees the UK competition regime fitting with its wider economic priorities. Essentially, it sees competition law

as a means to economic recovery, identifying the CMA's main task to ensure the forces of competition are fully harnessed to support the UK's return to strong and sustained growth.

To this end, the high level priorities it proposes for the CMA are fourfold. First, tackling constraints on competition in markets where competition is not working, including markets in which consumers find it difficult to compare products or face switching costs, and sectors where enhanced competition could contribute to faster growth, mentioning knowledge-intensive sectors, financial services and infrastructure sectors including energy. Second, being a strong defender of competition and enforcing the antitrust rules swiftly, robustly and fairly in a mix of complex and simpler cases, indicating that the UK will not allow breaches of competition law that harm consumers. Third, challenging government where it creates barriers to competition and making recommendations for improving competition – which the government expressly commits to accept, unless there are strong policy reasons for not doing so. And fourth, as the single expert UK-wide competition agency, providing leadership across the economy and partnering with other agencies to deliver positive competition outcomes.

### The CMA's vision, values and strategy

The CMA is consulting on its draft vision, values and strategy, which proposes five main goals to make markets work well for consumers and achieve a position as one of the world's leading competition and consumer agencies.

The first is effective enforcement, including pursuing the "right" cases to deter wrongdoing, managing them with a view to timely and robust decision-making. The second is extending the frontiers of competition, including applying competition law and policy to businesses in the regulated sectors, in conjunction with sectoral regulators such as Ofcom and Ofgem, and to evolving markets and business models. The third is using competition and consumer powers to help markets work well and empower consumers. The fourth is achieving professional excellence, while avoiding unnecessary burdens on business. And the fifth is integration, including using staff from different disciplines and incorporating the practice of the OFT and CC – as can be seen from the consultations on CMA guidance documentation prepared by the CMA transition team.

As regards strategy, the CMA has indicated its focus in its first two years of operation: the regulated sectors, which form a significant proportion of the economy and where many regulated suppliers have market power; new business sectors and business models; themes raised by current economic circumstances; and markets that have developed from public services.

### Consultations

Draft CMA guidance documents prepared by the CMA transition team have been issued for consultation in two

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tranches. These adopt (as a starting point) existing OFT and CC guidance documents, amending them as necessary to reflect changes introduced by the Enterprise and Regulatory Reform Act 2013 (ERRA13), case law, experience and incremental improvements made to policies and procedures.

The following were issued on 15 July with a consultation deadline of 6 September: Mergers – Guidance on the CMA’s jurisdiction and procedure; Market Studies and Market Investigations – Supplemental guidance on the CMA’s approach; Administrative Penalties – Statement of policy on the CMA’s approach; Cost recovery in telecoms price control references – Guidance on the CMA’s approach; Transparency and disclosure – Statement of the CMA’s policy and approach.

Consultation on the second tranche of documents, issued on 17 September, ends on 12 November 2013. These are: Consumer Protection – Guidance on the CMA’s approach to use of its consumer powers; Competition Act 1998 – Guidance on the CMA’s investigation procedures and the CMA’s Competition Act 1998 Rules; Cartel Offence – Prosecution Guidance; Regulated Industries – Guidance on concurrent application of competition law to regulated industries; and Remedies – CMA Guidance on the variation and termination of merger, monopoly and markets undertakings and orders.

BIS is also consulting on amendments to secondary legislation.

### Changes to merger control

ERRA13 does not alter the substantive tests the CMA will apply in establishing whether it has jurisdiction and determining whether a merger gives rise to an SLC. The CMA therefore proposes to adopt the existing joint OFT and CC merger assessment guidance, although it will keep this under review.

The CMA proposes new guidance on merger procedure, since the process of assessing a merger will change under ERRA13, with notification required by merger notice; a 40 working day deadline for all Phase 1 investigations; time limits for the parties’ offer (and the CMA’s acceptance) of undertakings in lieu (UIL) of a reference to a Phase 2 investigation; a deadline for the CMA’s implementation of final remedies of 12 weeks (plus six for special reasons) from the end of the Phase 2 investigation; and suspension of a Phase 2 investigation for up to three weeks if requested by the parties and the CMA considers abandonment of the merger to be a possibility.

Although Phase 1 and Phase 2 mergers will both be investigated by the CMA, Phase 1 decisions will be made by the CMA board. Phase 2 decisions will be made by inquiry groups drawn from the CMA’s panel of independent experts, although in public interest cases the ultimate decision-maker will be the secretary of state.

ERRA13 will also increase the CMA’s investigatory powers over those of the OFT and CC. It will have formal investigation powers throughout the process and can impose penalties for failure to comply. In addition, it will be able to impose interim measures (eg an order to hold acquirer and target separate) in the case of anticipated as well as completed mergers. Failure to comply will attract penalties of up to 5% of turnover.

### Changes to market studies and investigations

Where it identifies a practice that impacts on a number of markets, the CMA will have the power under ERRA13 to make a cross-market reference without referring the whole of

each market concerned. It will also have the power to investigate public interest issues alongside competition issues.

In addition, ERRA13 does four other things. It imposes a deadline for publication of the CMA’s market study report – 12 months of publication of the market study notice. It reduces the period of a market investigation from 24 months to 18 months, and the CMA must implement any remedies within six months from publication of the market investigation report, with extensions to these deadlines only in limited circumstances. It gives the CMA mandatory investigatory powers for market studies as well as market investigations. And it gives the CMA powers to require parties (1) to reverse any action taken before the final report and (2) to publish non-price information as a remedy, without also publishing price information, and (3) to appoint and remunerate independent monitors that can also deal with disputes.

### Other key changes

The CMA will have new powers to interview individuals, requiring them to answer questions about infringements that their employers or ex-employers are suspected of having committed during those individuals’ employment; to publish a notice of investigation, which may name a party or parties to an investigation; and to impose interim measures on satisfaction of a lower threshold – where this is necessary to prevent significant (rather than serious and irreparable) damage.

It can also make rules for delegating its powers, oral hearings, procedural complaints and settlements. It will provide short-form opinions on a trial basis, extending these to horizontal as well as vertical agreements between non-competitors. There will be a separation between the investigation of cases, decision-making in those cases and collective decision-making in respect of an infringement decision.

Punishments for failure to comply with an investigation will be civil rather than criminal, and there will be new factors for the CMA to take into account in determining a final penalty.

One of the most controversial ERRA reforms is the removal of the requirement that the CMA and other prosecutors of the cartel offence must prove the defendant was dishonest. From 1 April, the burden will be on the defendant to prove one of the new exemptions or defences.

### From April 2014 onwards

Meanwhile, the CMA will be shadowing the work of the OFT and CC to ensure a seamless handover of powers on 1 April 2014. After that, there will be increased scrutiny in sectors where consumers find it difficult to compare products or face switching costs, in knowledge-intensive sectors, and in the financial services and infrastructure sectors, including energy. The CMA will also probably focus on cartel offence prosecutions now that the dishonesty requirement has been removed. One area, however, in which there has been little discussion is the power to disqualify directors for competition law breaches. How the CMA will exercise this power remains to be seen. The real test for the CMA though will be how it selects and pursues key cases, how its decisions stand up to appeal and ultimately how it promotes the strength and reputation of the UK competition regime.

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