The CMA in outline

A brief overview of the new UK regulator

*by **Gillian Sproul****

On 1 April 2014, the Competition and Markets Authority (CMA) took over from the Office of Fair Trading and the Competition Commission as the UK's principal competition regulator. While the CMA has adopted many of the policies and processes used by its two predecessors, both of which have ceased to exist, it has also acquired enhanced powers that will change UK competition law enforcement in a number of important ways.

Key changes

Key changes to the UK merger regime will affect the planning and implementation of UK M&A transactions:

- **Deal clearance.** The UK merger regime remains voluntary, in the sense that a deal does not need to be notified and can still be closed without CMA clearance. However, the CMA's new power to impose hold-separate orders at a very early stage are likely to make a buyer think twice before agreeing to acquire a target without making the acquisition conditional on UK merger clearance. This is because, whether or not the CMA has been notified of a deal, and whether or not it has confirmed that it has jurisdiction, it can require the buyer to suspend integration of the target until it has granted clearance and to unravel any integration steps taken before it intervened. The buyer may also be required to appoint a monitoring trustee and hold-separate manager to ensure the order is complied with. The penalty for failure to comply is up to 5% of global group revenues.
- **Process and timetable.** There are also changes to the process and timetable that will impact on planning. If the buyer decides to notify the deal to the CMA, it must use a prescribed-form merger notice, which requires it to provide a significant volume of information. The prenotification discussions with the CMA that must follow are likely to elicit further information requests. Only after a notification completed to the CMA's satisfaction is submitted will the clock start – giving the Competition and Markets Authority a statutory deadline of 40 working days within which to decide to clear the deal or refer it to Phase 2. This fixed deadline is likely to make it more difficult to persuade the CMA to end prenotification discussions.
- **Other changes.** These include a new process for negotiating Phase 1 remedies and new powers for the CMA to compel the deal parties and third parties to provide information even before the 40-day Phase 1 timetable starts, with penalties for failure to comply.

Interviewing powers

New interviewing powers will enhance the CMA's ability to enforce the EU and UK prohibitions on anticompetitive agreements and abuse of market dominance, and make companies look again at their dawn raid defence policies and processes.

The CMA will be able to compel individuals to answer questions relating to infringements by their employers (or ex-employers) of these prohibitions at any stage in its investigation. Individuals are likely to be interviewed with little warning in a dawn raid, and since the CMA has indicated that the company's lawyers do not have an automatic right to be present at the interview, this makes the company particularly vulnerable in these circumstances.

The position would not necessarily be cured by the individual asking for the company's lawyer to be present, as they are likely to have a conflict where there is a risk of cartel offence proceedings. This type of scenario highlights the need for significant advance planning to avoid risks and penalties – for example, guidance for employees being interviewed, a policy on when a company will pay for its employees to have separate legal advice and managing the risk of ex-employees being interviewed.

Cartel prosecutions

The CMA has made it clear that it intends to make considerable use of its power to prosecute individuals for the cartel offence and so it is very likely that there will be a greater number of prosecutions than in the past.

A change in the law will no doubt make this easier for the CMA: a successful prosecution no longer depends on proof that individuals suspected of engaging in hardcore cartel offences – price-fixing, market-sharing, bid-rigging or limiting output – did so dishonestly. Instead, the CMA must prove beyond reasonable doubt only that the individual participated in the cartel activity. It is then for the individual to show that one of the new exemptions or defences applies – for example, that the cartel activity was in fact notified to customers, or otherwise published, or that it was the subject of affirmative legal advice. This is likely to impact on companies' compliance programmes and approval processes and also on individual employees' compliance awareness.

Added pressure on companies

The CMA can now conduct an inquiry into features that have an impact on competition across several markets, as well as those that impact on competition in individual markets. There will be added pressure on companies caught up in these processes as a result of increased information-gathering powers and a shorter timeframe than before – 18 months – in which to conduct these inquiries and (where necessary) decide on appropriate remedies.

All in all, the CMA's increased powers are likely to impose a greater burden on companies' human and financial resources and highlight the need for greater advance planning.

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