



JONES DAY  
**COMMENTARY**

## THE UK'S NEW CIVIL ANTITRUST INVESTIGATIONS REGIME

From April 1, a new regime for civil antitrust investigations applies in the UK with the entry into effect of the new Competition and Markets Authority (“CMA”) (see [Antitrust Alert](#)). The CMA has recently published guidance on how this new regime works. The goals of these revised procedures are quicker and fairer decisions by the CMA than its predecessor, the Office of Fair Trading (“OFT”), in enforcing UK and EU antitrust rules, leading to more decisions.

This *Commentary* is the third in our series addressing the UK's new competition enforcement regime and its implications for businesses.

### MAIN CHANGES

Although some aspects of the new regime were anticipated by the OFT at the end of last year, with the publication of revised procedural guidelines (see [Antitrust Alert](#)), the CMA's procedures for the investigation of civil antitrust violations only took full effect from April 1.

At the outset of each investigation, the CMA is now required to publish a case-specific timetable, to make greater use of state of play meetings, to improve engagement with the parties, and to provide the parties under investigation with a copy of the draft penalty calculation, giving them an opportunity to make representations on the appropriateness of the penalty before it is imposed.

Criminal penalties for failure by an individual to comply with CMA information requests are now replaced with civil penalties. The CMA can obtain a warrant from the Competition Appeal Tribunal (“CAT”) (in addition to the High Court and, in Scotland, the Court of Session) to enter premises by force. The CMA has additional powers to require a person to answer questions similar to those available in criminal proceedings.

The OFT has for many years been authorized to impose interim measures where there is a risk of “serious and irreparable damage” being caused by a suspected antitrust violation. Interim measures allow

the OFT to enjoin conduct pending conclusion of an investigation. However, this tool has hardly been used, because it is hard to prove “serious and irreparable damage.” The evidential bar is now lower for the CMA, since it only has to demonstrate a “perceived need to act for the purposes of preventing significant damage to a particular person or category of person.”

## THE SOURCES OF THE CMA’S INVESTIGATIONS

There are a variety of ways in which information can come to the CMA’s attention, leading the CMA to investigate whether UK and EU antitrust rules may have been breached:

- Research and market intelligence and other work streams, such as the CMA’s merger and markets functions or international cooperation with other antitrust agencies within or outside the EU.
- Leniency applications in relation to alleged or suspected cartels.
- Complaints from suppliers, customers, or competitors, which can be made either formally or informally in the first instance. In considering whether to pursue a complaint, the CMA will take into account not only the merits of the matter but also whether the matter falls within its [published priorities](#).

## OPENING A FORMAL INVESTIGATION

When the CMA opens a formal investigation, the case will be allocated a Team Leader, a Project Director, and a Senior Responsible Officer.

In appropriate cases, the CMA will send the businesses under investigation a case initiation letter that provides contact details for key members of the case team, including the Senior Responsible Officer who will decide whether to press formal charges against the parties under investigation.

The CMA will also publish on its web pages a notice of investigation setting out basic details of the case and a case-specific administrative timetable for the investigation.

An administrative timetable will provide the parties with more certainty as to the duration of the investigation because, unlike merger reviews, there is no statutory timetable for antitrust proceedings. The case opening notice will also provide key contact details for the CMA case team and information about the sector being investigated. Save in exceptional circumstances, the CMA will not publish the names of the parties under investigation. Exceptional circumstances include where a party’s involvement is already in the public domain or where the CMA considers that the potential harm to consumers or other businesses from nondisclosure is sufficient to justify disclosure.

The CMA will grant “Formal Complainant” status, in relation to an investigation, to any person who has submitted a written, reasoned complaint to the CMA, who requests Formal Complainant status, and whose interests are, or are likely to be, materially affected by the subject matter of the complaint. Formal Complainants have the opportunity to become involved at key stages of the CMA’s investigation.

## INVESTIGATIVE POWERS

After a formal investigation has been opened, the CMA has certain powers to obtain information:

- Formal information requests (so-called “section 26” notices) in writing.
- Formal interviews with any individual connected to a business under investigation.
- The right to enter business and domestic premises and require the production of any document, and subject to having obtained a valid warrant, also to search such premises and seize any relevant document (in any format); a warrant can be obtained from the High Court, the Court of Sessions, or the CAT.

The CMA may fine any business or individual who does not comply with its information gathering powers. In addition, it continues to be a criminal offense to obstruct the CMA’s information-gathering process.

However, these wide-reaching powers are not limitless and remain subject to the principles of proportionality, reasonableness, and relevance; the rights to confidentiality and against self-incrimination; and the protection against disclosure of legally privileged communications. UK legal privilege, contrary to investigations conducted by the European Commission, extends to communications with both external and in-house lawyers. In the usual way, the exercise of these powers is subject to judicial review.

## INTERIM MEASURES

The CMA is now able to require a business to comply with temporary directions (interim measures) where the investigation has been started but not yet concluded and the CMA considers it necessary to act urgently either to prevent significant damage to a person or category of persons, or to protect the public interest.

In these circumstances, the CMA can act on its own initiative or in response to a request to do so. Any person who considers that the alleged anticompetitive behavior of another business is causing them significant damage may apply to the CMA to take interim measures. If a person fails to comply with the interim measures without reasonable excuse, the CMA would apply to court for an order to require compliance within a specified time limit.

## INVESTIGATION OUTCOMES

There are a number of decisions that the CMA can take upon conducting an investigation:

- Close its investigation on the grounds of administrative priorities. In these circumstances, the CMA may also write to businesses explaining that, although the CMA is not currently pursuing a formal investigation, it has concerns about their conduct.
- Issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement.
- Accept commitments from a business about its future conduct.

- Issue formal charges (so-called Statement of Objections, or “SO”) where its provisional view is that the conduct under investigation amounts to an infringement.
- Issue a final decision (after issuing an SO and receiving the parties’ representations) that the conduct amounts to an infringement or that it has found insufficient evidence of an antitrust violation (so-called “no grounds for action” decision).
- Enter into a settlement with the businesses under investigation granting a penalty discount in return for their admission of liability. The level of penalty discount varies depending on whether the settlement is entered into pre-statement of objections (capped at 20 percent reduction) or post-statement of objections (capped at 10 percent reduction).

## CASE DECISION GROUP

Where the CMA issues a statement of objections against a company under investigation, an independent three-member Case Decision Group (“CDG”) will be appointed to act as the decision-maker, to decide whether the legal test for establishing an infringement has been met. The CDG will be responsible for taking decisions both on whether to issue an infringement decision (with or without directions) or a “no grounds for action” decision and the appropriate amount of any penalty.

The CDG’s decisions must be formally adopted by the CMA’s Policy Committee before they can be issued by the CMA.

## CHECKS AND BALANCES

The officials in charge of the investigative phase will not be members of the CDG. This is to ensure that the final decision in each case is taken by independent officials who were not involved in the investigation of an alleged violation.

## PENALTY SETTING

In cases where the CMA believes there has been an infringement and a financial penalty will be imposed, the CMA will

provide the parties under investigation with a draft penalty statement. The draft will set out the key aspects relevant to the calculation of the penalty, and the parties will be offered the opportunity to comment on the draft penalty statement in writing and to attend an oral hearing with the CDG. This will allow the parties to argue their case in favor of a penalty reduction before the CMA has made a final decision.

## ORAL HEARING AND “STATE OF PLAY” MEETINGS

The CMA will provide opportunities for hearings between the case team and the parties under investigation and more state of play meetings than have historically been offered, to provide the parties with an opportunity to understand the CMA's progress in an investigation and to clarify any outstanding issues. The state of play meetings are designed to ensure that the investigation remains transparent at all times. The CMA envisages state-of-play meetings at three points during the investigation:

- Once a case has been formally opened, a meeting to cover the anticipated scope of the investigation, next steps, and the proposed timetable.
- Before the SO is issued, to update parties on the CMA's provisional thinking on the case, including the key potential competition concerns identified.
- After the SO is issued, a meeting to be attended by at least one CDG member, to inform the parties of the CMA's preliminary views on how the CMA intends to proceed with the case, in light of the written and oral representations it has received.

The case team will remain the primary point of contact for the parties throughout the investigation and will relay information from the parties to the CDG as necessary. The parties or their representatives therefore cannot contact the CDG directly, other than at the state of play meeting after the SO and at the oral hearing on the issue of penalty.

## PRACTICAL IMPACT

The changes reflect what the CMA says are lessons it has learned from past cases and bring the CMA's enforcement procedures more in line with international best practices. The CMA believes these changes will enhance the robustness and efficiency of its antitrust enforcement action, result in better interaction with parties under investigation, and improve the transparency of its work.

However, the changes fall short of introducing an institutional separation between investigation and decision-making. This could have practical implications on issues relating to burden of proof and due process. The CDG will be called upon to decide a case based only on the documents produced and collected during the investigation phase and put before it by the case team. The parties under investigation will not be permitted to engage in direct communications with the CDG, outside of the state of play meeting following the SO and the oral hearing to discuss the penalty. Written submissions to the case team on issues of liability, therefore, should be prepared mindful of the fact that they will be the parties' sole opportunity to influence the CDG's decision.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

### **Matt Evans**

London  
+44.20.7039.5959  
[mevans@jonesday.com](mailto:mevans@jonesday.com)

### **Vincent Brophy**

London  
+44.20.7039.5192  
[vbrophy@jonesday.com](mailto:vbrophy@jonesday.com)

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