

The UK's New Civil and Criminal Antitrust Enforcement Regime

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Introduction

Since April 1, 2014, a new regime for civil antitrust investigations, market studies and a new cartel offence has applied in the UK with the entry into effect of new competition laws and a new national competition authority: the CMA. The goals of these reforms are two-fold: to enable the CMA to make quicker and fairer decisions than its predecessors, the Office of Fair Trading (OFT) and Competition Commission (CC), and to make it easier for the CMA to bring criminal proceedings against individuals who allegedly have been involved in cartels.

Backed by a £52 million budget for 2014/15 (the largest budget for a competition law authority in the EU), Alex Chisolm, the CMA's chief executive, announced companies "should expect to see a faster agency as well as a more efficient one" in enforcing civil antitrust investigations, conducting market studies and prosecuting individuals who have been involved in cartels.

This article summarises the guidance published by the CMA earlier this year on how the new regime for civil antitrust investigations,¹ market studies and investigations² and the new cartel offence³ will work in practice; and their practical impact on businesses.

Civil antitrust investigations

Although some aspects of the new civil enforcement regime were anticipated by the OFT at the end of last year, following the publication of revised procedural guidelines,⁴ the CMA's procedures for the investigation of civil antitrust violations only took full effect from April 1, 2014.

The legal framework

Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and Chs 1 and 2 of the UK Competition Act 1998 (CA98) prohibit, in certain circumstances, agreements and conduct which prevent, restrict or distort competition, and conduct which constitutes an abuse of a dominant position.⁵ In the UK, these provisions are applied and enforced principally by the CMA.⁶ Under EU legislation,⁷ as a "designated national competition authority", when the CMA applies the CA98 either to agreements which may affect trade between EU Member States or to abuses of a dominant position, the CMA is also required to apply arts 101 and 102 TFEU, respectively.⁸ There are procedural rules that apply when the CMA takes investigative or enforcement action.⁹ In addition, the CMA is required to carry out its investigations and make decisions in a procedurally fair manner according to the standards of administrative law.¹⁰ In exercising its functions, as a public body, the CMA must also ensure that it acts in a manner that is compatible with the Human Rights Act 1998.

Sources of the CMA's investigations: more cases expected

As was the case before April 2014, there is 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;

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¹ Competition and Markets Authority, *Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases* (March 2014), CMA8.

² Competition and Markets Authority, *Guidance on the CMA's Approach on Market Studies and Market Investigations* (January 2014), CMA3.

³ Competition and Markets Authority, *CMA Cartel Offence Prosecution Guidance* (March 2014), CMA9.

⁴ Office of Fair Trading, *A Guide to the OFT's Investigation Procedures in Competition Cases* (October 2012), OFT1263rev.

⁵ More information on the laws on anti-competitive behavior is available in the OFT quick guide *Competing Fairly* (OFT447) and in the more detailed guidance on *Agreements and Concerted Practices* (OFT401) and *Abuse of a Dominant Position* (OFT402).

⁶ However, certain sectoral regulators have concurrent powers with the CMA to apply and enforce the Ch.1 and Ch.2 prohibitions in the CA98 and arts 101 and 102 TFEU within their respective regulated sectors. These sectoral regulators also have concurrent competition law powers in respect of market studies and investigations under Pt 4 of the Enterprise Act 2002. The regulated sectors are, as at April 1, 2014, financial services, communications and postal services, gas, electricity, healthcare services, railways, air traffic and airport operation services, water and sewerage. The list may change from time to time if further sectoral regulators are given concurrent powers.

⁷ Article 3 of Council Regulation (EC) No 1/2003, [2003] OJ L1/1, as amended.

⁸ Further information on the framework for applying arts 101 and 102 TFEU and the interaction with the Ch.1 and Ch.2 Prohibitions in the CA98 is available in the OFT guide *Modernisation* (OFT442).

⁹ The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458 (the CA98 Rules). The CA98 Rules replace the previous procedural rules that applied to OFT investigations under the CA98 (The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 SI 2004/2751).

¹⁰ See in particular *Pernod Ricard SA and Campbell Distillers Limited v Office of Fair Trading* [2004] CAT.

- leniency applications in relation to alleged or suspected cartels or resale price maintenance; and
- 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.

The new agency is expected to take on more cases, for two reasons:

- first, the CMA will have more resources to take on cases which may have been overlooked during the OFT's tenure due to previous budgetary and resources constraints; and
- second, to "deliver effective enforcement" is the first of the five key goals that the CMA has published in its "Vision, values and strategy for the CMA".¹¹ This means, according to CMA chairman David Currie, that the CMA will tackle "high profile cases to be sure, but also more bread-and-butter cases, and ones affecting not just big businesses but also smaller, and UK-wide including the devolved nations".¹²

Formal investigation process: increased transparency, separation of powers and involvement of the parties

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. All in all, the new procedure therefore increases transparency and involvement for the parties.

More transparency at the outset of the investigation

When the CMA opens a formal investigation, the case will be allocated a team leader, a project director and a senior responsible officer.¹³ 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.¹⁴

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.¹⁵ 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 non-disclosure is such as to justify disclosure.¹⁶

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.¹⁷

Separation of powers through independent teams

The new regime provides a clear separation between the initial investigation stage leading up to the issue of a Statement of Objections and the secondary stage where the case will be in the hands of the Case Decision Group (CDG).

A CDG will only be appointed where a Statement of Objections will be issued against a company under investigation. The CDG will be an independent three-member group appointed to act as the decision maker, to decide whether the legal test for establishing an infringement has been met. The CDG will be

¹¹ *Vision, values and strategy for the CMA* (January 2014), CMA13, available at: <https://www.gov.uk/government/publications/vision-values-and-strategy-for-the-cma> [Accessed August 5, 2014].

¹² Speech given by CMA Chairman David Currie to the Beesley Lectures on November 7, 2013, available at: <https://www.gov.uk/government/speeches/the-new-competition-and-markets-authority-how-will-it-promote-competition> [Accessed August 27, 2014].

¹³ *CMA Competition Act Guidance*, para.5.1.

¹⁴ *CMA Competition Act Guidance*, para.5.3.

¹⁵ *CMA Competition Act Guidance*, paras 5.7 and 5.8.

¹⁶ *CMA Competition Act Guidance*, para.5.9.

¹⁷ *CMA Competition Act Guidance*, paras 5.12–5.16.

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.¹⁸ The CDG’s decisions must be formally adopted by the CMA’s Policy Committee before they can be issued by the CMA.¹⁹

The officials in charge of the investigative phase will not be members of the CDG, in order 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.²⁰

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 Statement of Objections and at the oral hearing on the issue of penalty.²¹

More involvement of the parties with oral hearings 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 investigation²²:

- once a case has been formally opened, a meeting to cover the anticipated scope of the investigation, next steps, and the proposed timetable;
- before a Statement of Objections is issued, to update parties on the CMA’s provisional thinking on the case, including the key potential competition concerns identified; and
- after the Statement of Objections 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.

In addition, 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.²³

Investigative powers: stronger powers of investigation and information gathering

The CMA’s investigative powers are made more efficient and widened; and the CMA has made it clear that it intends to use its new powers to enhance the speed and efficiency of its casework.²⁴

Increased information gathering 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 writing²⁵;
- formal interviews with any individual connected to a business under investigation²⁶;
- 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). 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; and
- the CMA now has additional powers to require a person to answer questions similar to those available in criminal proceedings, so-called compulsory interviews. The CMA has indicated that it is more likely to use this tool following (rather than during) an initial evidence-gathering stage, such as a dawn raid, although it may do so also during a dawn raid.²⁷

The CMA may fine any business or individual who does not comply with its information gathering powers. Criminal penalties for failure by an individual to comply with CMA information requests have been replaced by

¹⁸ *CMA Competition Act Guidance*, para.11.30.

¹⁹ *CMA Competition Act Guidance*, para.11.32.

²⁰ *CMA Competition Act Guidance*, para.11.31.

²¹ *CMA Competition Act Guidance*, para.11.34.

²² *CMA Competition Act Guidance*, paras 9.16–9.18.

²³ *CMA Competition Act Guidance*, paras 12.31–12.37.

²⁴ *Vision, values and strategy for the CMA* (January 2014), CMA13 p.8.

²⁵ *CMA Competition Act Guidance*, paras 6.3–6.14.

²⁶ *CMA Competition Act Guidance*, paras 6.18–6.27.

²⁷ *CMA Competition Act Guidance*, paras 6.28–6.39.

civil penalties. In addition, it continues to be a criminal offence to obstruct the CMA's information gathering process.²⁸

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.²⁹

Use of interim measures made easier

The OFT was authorised to impose interim measures where there was a risk of "serious and irreparable damage" being caused by a suspected antitrust violation.³⁰ Interim measures allowed the OFT to enjoin conduct pending conclusion of an investigation. However, this tool was hardly used, because of the difficulty in proving "serious and irreparable damage".³¹ The evidential bar is now lower for the CMA, since it can require a business to comply with interim measures where it "considers it necessary to act urgently either to prevent significant damage to a person or category of persons, or to protect the public interest".³²

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.³³

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 behaviour of another business is causing them significant damage may apply to the CMA to take interim measures.³⁴ 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.³⁵

Investigation outcomes

There are a number of decisions that the CMA may 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 conduct³⁶;
- issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement³⁷;
- accept commitments from a business about its future conduct³⁸;
- issue formal charges (so-called Statement of Objections) where its provisional view is that the conduct under investigation amounts to an infringement³⁹;
- issue a final decision (after issuing a Statement of Objections and receiving the parties' representations) that the conduct amounts to an infringement or that it has found insufficient evidence of an antitrust violation⁴⁰; or
- enter into a settlement with the businesses under investigation granting a discount on fines in return for their admission of liability; the level of discount varies depending on whether the settlement is entered into before (capped at 20 per cent reduction) or after (capped at 10 per cent reduction) the Statement of Objections.⁴¹

The new cartel offence

There is a new test for the criminal cartel offence.⁴² Prior to April 1, 2014, the criminal cartel offence required that an individual must have "dishonestly" agreed with one or more other persons to engage in cartel activities. Under the new regime, this dishonesty element is removed, but new defences are allowed. To establish criminal cartel activity the CMA need only prove intent to enter into an agreement and to operate the arrangement in question. The Government's view is that the inclusion of the dishonesty element in the cartel offence inhibited the successful prosecution of cases (only one cartel offence has been successfully tried since 2003, where three

²⁸ *CMA Competition Act Guidance*, para.6.3.

²⁹ *CMA Competition Act Guidance*, Ch.7.

³⁰ CA98 s.35.

³¹ Interim measures were imposed only once before, in the London Metal Exchange case in February 2006. On February 27, 2006 the OFT notified LME of an interim measures direction pursuant to s.35(2) of the Competition Act 1998. The OFT directed LME not to increase the hours of trading available on its electronic trading platform, LME Select, outside of the hours of 07.00 to 19.00, which were its then current trading hours. The LME appealed against the interim measures on April 26, 2006. At the first case management conference on May 15, 2006 the OFT announced that it had withdrawn the interim measures as it had received significant new information and considered that the public interest no longer favored them.

³² Enterprise and Regulatory Reform Act (ERRA) 2013 s.43, amending s.35 of the Competition Act 1998.

³³ *CMA Competition Act Guidance*, para.8.2.

³⁴ *CMA Competition Act Guidance*, paras 8.6–8.8.

³⁵ *CMA Competition Act Guidance*, para.8.3.

³⁶ *CMA Competition Act Guidance*, paras 10.2–10.11.

³⁷ *CMA Competition Act Guidance*, paras 10.12–10.14.

³⁸ *CMA Competition Act Guidance*, paras 10.15–10.23.

³⁹ *CMA Competition Act Guidance*, Ch.11.

⁴⁰ *CMA Competition Act Guidance*, Ch.13.

⁴¹ *CMA Competition Act Guidance*, Ch.14.

⁴² ERRA 2013 s.47, amending s.188 of the Enterprise Act 2002.

executives were jailed for involvement in a cartel involving marine hoses) and anticipates that the change to the law will improve enforceability and increase deterrence.

The new cartel offence removes the need to prove that:

- the defendant's behavior was dishonest according to the ordinary standards of reasonable and honest people (the objective element); and
- the defendant himself must have realised that his behaviour was by those standards dishonest (the subjective element).

Accordingly, the new cartel offence will allow the CMA to prosecute any individuals involved in an agreement between competitors to fix prices, share markets, rig bids or limit outputs, in addition to pursuing the companies employing these individuals for violation of UK and/or EU laws prohibiting cartels. However, there are a number of exclusions and defences.

Exclusions

The reform of the cartel offence has introduced circumstances where the cartel offence will not have been committed.⁴³ Parties to arrangements that would otherwise fall within the offence may bring the arrangements outside the scope of the offence by ensuring that the arrangements satisfy the requirements of the following exclusions:

- **The notification exclusion** provides that an individual will not commit an offence if under the terms of the arrangement customers are given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service affected. For example, this exclusion might conceivably apply to loan syndication arrangements or to a joint selling agreement between two competitors whereby groups of customers are directed to deal exclusively with either competitor. However, the exclusion will not be satisfied if the arrangement merely provides that customers are provided with a general disclaimer that a supplier's agreements may be subject to price fixing/market sharing arrangements.
- **The bid-rigging notification exclusion** provides that an individual will not commit an offence if, in the case of bid-rigging arrangements, the person requesting bids is given relevant information about the arrangements at or before the time of a bid.

For example, this exclusion might conceivably apply to joint bidding between competitors whereby prices are set jointly.

- **The publication exclusion** provides that an individual will not commit an offence if relevant information about the arrangement is published before the arrangement is implemented, by advertising them once in any of the London Gazette, the Edinburgh Gazette, or the Belfast Gazette.

"Relevant information" for the purpose of the exclusions means:

- the names of the companies to which the arrangements relate;
- a description of the nature of the arrangements sufficient to show why they are or might fall within the scope of the offence;
- the products or services to which they relate; and
- any other information as may be specified in an order made by the Secretary of State.⁴⁴

In addition to the exclusions identified above, an individual will not commit a cartel offence if the agreement is made in order to comply with a law in force in the UK or elsewhere in the European Union, or is imposed directly by the TFEU or the European Economic Area Agreement.

Defences

There are also three new statutory defences to the cartel offence,⁴⁵ only one of which need be proved in any given case, using the balance of probabilities as the standard of proof:

- first, if an individual can show that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply to them of the product or service;
- second, if an individual can show that, at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from the CMA; or
- third, if an individual can show that, before making the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to

⁴³ ERRA 2013 s.47, adding a s.188A to the Enterprise Act 2002. See also *CMA Cartel Offence Prosecution Guidance* (the CMA Cartel Offence Guidance) (March 2014) CMA9, paras 4.11–4.17.

⁴⁴ *CMA Cartel Offence Guidance*, para 4.12.

⁴⁵ ERRA 2013 s.47, adding a s.188B to the Enterprise Act 2002. See also *CMA Cartel Offence Guidance*, paras 4.18–4.24.

professional legal advisers for the purpose of obtaining advice about them before they were made or implemented.

“Professional legal advisers” under the third defence is intended to cover both external and in-house legal advisers qualified in the UK and could also apply to legal advisers qualified in foreign jurisdictions with an equivalent legal qualification. The defence applies where the individual took reasonable steps to seek legal advice about the arrangements in question.⁴⁶

Perhaps surprisingly, these exclusions and defences do not explicitly include arrangements between competitors that are exempt from the civil competition laws prohibiting anticompetitive agreements on the grounds that they give rise to economic efficiencies and consumer benefits. This has led to criticism of the new cartel offence and potential conflicting interests between companies and their employees.

Market studies and investigations

Market studies and investigations are a powerful tool available to UK competition regulators to examine markets they believe may not function sufficiently well—even if there is no evidence of unlawful conduct—and to demand wide-ranging changes to how those markets operate, including requiring companies to divest parts of their businesses. The CMA has published guidance on its approach and changes introduced to the markets regime by the ERRA.⁴⁷

Who will be responsible for market studies and investigations?

Under the previous regime, the OFT (and sectoral regulators) carried out market studies and could refer markets to the CC for a market investigation. During market investigations, which involved a more detailed examination into particular markets, the CC had to decide whether there was an adverse effect on competition in the markets in question and, if so, what remedial action was appropriate.

Under the current regime, the CMA has taken over the OFT’s role in respect of market studies (Phase 1) as well as the CC’s role in respect of market investigations (Phase 2). At the time of writing, twelve markets are currently the subject of review, including:

- private motor insurance;
- energy, residential property management;
- personal current accounts and SHE banking;
- statutory audit services;

- payday lending;
- private health care;
- aggregates/cement and ready-mix concrete;
- consumer protection review of higher education in England;
- competition and regulation of higher education in England;
- short-term consumer car hire across the EU; and
- higher education sector.

Sectoral regulators—such as the FCA (financial services), Ofcom (communications), Ofgem (gas and electricity), and Monitor (health)—will continue to be able to ask the CMA to carry out an in-depth investigation into particular markets.

The new regime has put safeguards in place to take account of the fact that the CMA is responsible for the conduct of both phases. The decision to make a market investigation reference is taken by the CMA Board.⁴⁸ The CMA chair is responsible for constituting the market reference group that will undertake the market investigation.⁴⁹ The market reference group consists of at least three members selected from the CMA panel.⁵⁰ To guard against potential bias during the market investigation, the CMA chair will ensure that any board member who might reasonably be expected to be a member of a market reference group in the event of a referral does not participate in the board’s consideration of whether to refer the matter.⁵¹

New time limits

The new regime introduces new statutory time limits aimed at speeding up market studies and investigations.

Market studies

Under the previous regime, the duration of market studies varied greatly, from a few months to more than a year (for example, the study of private health care). Under the new regime, market studies will have to be commenced by a market study notice,⁵² the issuing of which will trigger the following statutory time limits⁵³:

- the CMA will have six months from the publication of the market study notice to announce its proposed decision whether or not to make a reference and to start a consultation on that proposal; and
- within 12 months from the publication of the market study notice (i.e., within one year of commencing the market study), the CMA will have to publish its market study

⁴⁶ *CMA Cartel Offence Guidance*, para.4.24.

⁴⁷ *Market Studies and Market Investigations: Supplemental guidance on the CMA’s approach* (Market Studies and Investigations Guidance).

⁴⁸ *Market Studies and Investigations Guidance*, para.1.23.

⁴⁹ *Market Studies and Investigations Guidance*, para.1.24.

⁵⁰ *Market Studies and Investigations Guidance*, para.1.25.

⁵¹ *Market Studies and Investigations Guidance*, para.1.24.

⁵² *Market Studies and Investigations Guidance*, para.2.6.

⁵³ *Market Studies and Investigations Guidance*, para.2.9.

report setting out its findings and the action (if any) it proposes to take (make a reference, not make a reference, accept undertakings in lieu of a reference).

Market investigations

Under the new regime, the time limit to conclude a market investigation has been reduced from the current 24 months to 18 months from the date of reference. This will result in a reduction in the length of market investigations since in practice, under the previous regime, the CC tended to use the full 24-month time limit. Although the CMA will be able to extend this 18-month period by up to a further six months if it considers that there are special reasons, it is anticipated that this power will be narrowly interpreted, so that a de facto two-year time limit does not develop in practice.

Following the date of the market investigation report, the CMA will have six months (extendable by an additional four months for special reasons) to either accept final undertakings in lieu or make a final order. This six-month period includes a period of public consultation.

Those new statutory time limits should make market studies and investigations faster and provide greater transparency to parties. However:

- These new time limits are triggered by the issue of a market study notice only. The CMA will not be bound by them for pre-market studies such as “calls for information”. In such cases, and in order to ensure that the pre-market study phases do not undermine the government’s objective of streamlining the markets regime through the introduction of statutory time limits, the CMA has committed to provide an indicative timetable.⁵⁴
- The CMA will have the ability to “stop the clock” if it considers that any person has failed (whether with or without reasonable excuse) to comply with any requirement of a notice issued by the CMA using its statutory investigatory powers (see below).⁵⁵ However, as noted below, to dissuade parties from wilfully delaying proceedings, the CMA will be able to impose significant fines for noncompliance.

The reform introduces two new types of market investigation references: cross market investigations and full public interest references.

(1) Cross market investigations⁵⁶

Under the previous regime, the OFT already had the ability to conduct Phase 1 market studies to investigate anticompetitive features across markets. The new regime gives the CMA the power to make a cross-market reference, that is, to refer a specific feature (or combination of features) existing in more than one market without also having to refer the whole of each market concerned.

(2) Full public interest references⁵⁷

The CMA will now be able to investigate public interest issues alongside competition issues during a Phase 2 investigation, pursuant to a request from the Secretary of State (full public interest reference). The possibility that exists under the previous regime for the Secretary of State to consider public interest issues himself while requesting the CMA to investigate the competition issues remains (so-called “restricted public interest reference”). National security is currently the only specified public interest consideration in relation to the markets regime, but the Secretary of State may introduce new public interest considerations.

Powers of investigations and sanctions

The publication of a market study notice will also trigger the CMA’s ability to exercise statutory investigatory powers.

Investigative powers available at an early stage

The CMA will be able to require any person to give evidence and produce documents. These powers will be available to the CMA as early as the market study stage, after the publication of the market study notice.⁵⁸ Under the previous regime, the OFT could only use such investigative powers when it believed it had the power to make a market investigation reference, i.e. when it had reasonable grounds for suspecting that any feature of a market prevents, restricts, or distorts competition. The CC had similar powers in market investigation references.

Such powers will also be available to the CMA to assist it in monitoring and enforcing compliance with any undertakings in lieu that it has accepted instead of making a reference, during market investigations and during the remedies implementation stage.⁵⁹

⁵⁴ *Market Studies and Investigations Guidance*, para.1.10.

⁵⁵ *Market Studies and Investigations Guidance*, para.4.8.

⁵⁶ *Market Studies and Investigations Guidance*, para.2.31.

⁵⁷ *Market Studies and Investigations Guidance*, para.2.19.

⁵⁸ *Market Studies and Investigations Guidance*, para.2.11.

⁵⁹ *Market Studies and Investigations Guidance*, para.2.12.

Administrative penalties

The CMA will have the power to impose financial penalties if it considers that a person has, without reasonable excuse, failed to comply with any of its requirements or intentionally obstructed or delayed another person in complying. Non-compliance includes failure to attend interviews or meetings with the CMA, failure to provide evidence, and failure to produce documents required by the CMA under its investigative powers. Administrative penalties may be imposed in the form of a fixed amount, by reference to a daily rate, or using a combination of the two. Maximum penalty amounts have been set at £30,000 (in the case of a fixed amount) and £15,000 (in the case of a daily penalty).⁶⁰

Criminal proceedings

In addition to administrative penalties, the CMA will have the power to bring criminal proceedings where a person:

- obstructs the CMA in the exercise of its powers to carry out inspections;
- intentionally or recklessly destroys or otherwise disposes of, falsifies, or conceals a document that he or she has been required to produce; or
- knowingly or recklessly provides false or misleading information to the CMA or another person in connection with the investigation.⁶¹

Where a failure to comply with a request from the CMA consists of both a failure warranting an administrative penalty and a criminal offence, the CMA will have to choose either to impose a financial penalty or to bring criminal proceedings against the person involved; it may not take both steps.⁶²

Interim measures

After the CMA has published its final report but before the reference has been finally determined (by final undertakings being accepted or a final order made), the CMA will have the power to make interim orders to prevent preemptive action that might impede the taking of final action in relation to the investigation. The CMA will be able to require parties to reverse any action that has already occurred before any interim measures have been put in place.⁶³

Transitional arrangements

Two market studies—SME banking and property management services—were still ongoing when the new regime entered into force, and will therefore be completed by the CMA. The new regime applies to those two studies,

except in respect of the statutory time limits and investigative powers, which remain subject to the old regime.

Several market investigations were also ongoing on April 1: payday lending, private motor insurance, privately funded health care, and cement and ready-mix concrete. The new regime applies to them, except for the statutory time limits for completion of the market investigation process and for the completion of the remedies implementation. The revised maximum penalty amounts for noncompliance with investigatory powers will not apply where investigatory powers were exercised prior to April 1.

Practical impact

The changes to the civil antitrust investigation procedures 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 a Statement of Objections and the oral hearing to discuss the penalty. Written submissions to the case team on issues of liability, therefore, should be prepared with an eye to the fact that they will be the parties' sole opportunity to influence the CDG's decision.

The new cartel offence has been branded as the most significant of the reforms to the UK's competition law regime which came into force on April 1. It is likely to make it easier for the CMA to pursue prosecutions against individuals it suspects are involved in price fixing, customer sharing, or market allocation arrangements. An increase in prosecutions should be anticipated.

The impact on businesses is potentially far reaching. For instance, Confederation of British Industry (CBI) has argued that the new cartel offence is unworkable and "risks criminalizing a wide range of standard commercial transactions, in areas such as distribution, mergers and banking". The CBI also considers that the proposed defence of publishing details of a transaction in the London Gazette as unworkable for business and likely to create a chilling effect on normal business activity.

⁶⁰ *Market Studies and Investigations Guidance*, paras 2.13–2.15.

⁶¹ See *CMA Administrative Penalties: Statement of Policy on the CM's approach* (January 2014), CMA4, para.2.3.

⁶² *Market Studies and Investigations Guidance*, para.2.14.

⁶³ *Market Studies and Investigations Guidance*, paras 4.12–4.13.

Although firms are permitted to enter into certain restrictive agreements, such as non-compete arrangements in the context of setting up a joint venture, employees may find themselves uncertain whether such arrangements still expose them to the cartel offence (they ought not to) and as a result may seek publication to protect themselves from possible prosecution. This could create a conflict with their employer who has a legitimate interest in maintaining confidentiality.

In light of this, companies doing business in the UK should consider updating their competition compliance procedures to address their and their employees' potentially divergent interests.

As regards market studies and investigations, the new regime is expected to result in these studies and investigations being concluded more quickly than in the past, although this will depend on the CMA's use of its ability to "stop the clock". One of the first markets to be investigated by the CMA under the new regime is the UK energy market. Upon hearing news of Ofgem's intention to refer that market to the CMA for a new in-depth

investigation (see above), some of the UK's leading energy providers noted that the uncertainty about the outcome of such an investigation (which is likely to last 18 months), in particular as regards whether companies may be forced to restructure or sell off parts of their businesses, may delay projects to build much-needed new electricity generation capacity in the UK. The CMA will therefore be under the spotlight from the outset and under pressure to show that the new regime will provide for a more efficient and effective market investigation process than has sometimes transpired in the past.

It is expected that the CMA will make use of its new investigative enforcement powers, especially since they will now be available as soon as a market study notice is published. Companies under investigation should therefore be mindful to comply with requests from the CMA from the outset of an investigation.

The new rules are unlikely to have a material impact on ongoing studies or investigations, since the main changes brought by the regime—statutory time limits and investigative powers in Phase 1—will not apply.