A new competition law regime in the UK from 1 April 2014

How prepared is your business?

We are in the final stage of the countdown to the long-awaited reform of the UK’s competition law regime with the Competition and Markets Authority (CMA) becoming fully operational on 1 April 2014.

Much is expected of the CMA in terms of increased activity, tougher sanctions against businesses and individuals, and the robustness of its decision-making. The CMA has also been given additional powers of investigation and enforcement. Even more importantly, the CMA will have an increased budget and resources to undertake more investigations each year, and will work closely in conjunction with sector regulators in the UK.

With effect from 1 April 2014 the Competition and Markets Authority (CMA) will combine the Competition Commission with the competition and certain consumer functions of the Office of Fair Trading in one new integrated competition entity. The CMA has been explicitly created in order to ensure that there is more proactive and rigorous enforcement of competition law within the UK. We expect that from 1 April 2014 businesses in the UK will experience an energised and well-resourced CMA, and that the level of competition enforcement in the UK should increase materially. Businesses need to understand how they will be affected by the new competition regime and ensure that they are properly prepared for when the CMA begins to operate.

We set out below the key changes to the UK’s competition law regime your business should be aware of:

1. Strengthened antitrust enforcement
The CMA’s powers of investigation are enhanced and it is expected to be more proactive in its enforcement of the antitrust rules. The CMA has also changed its decision-making processes, with the intention of ensuring that the infringement decisions it adopts will be more legally robust. In particular:

   • It is expected that the CMA will (and will have the necessary resources to) undertake more antitrust investigations, especially more criminal investigations.
   • The threshold for the imposition of interim measures will be lowered: the CMA will be able to issue what are essentially injunctions if they are considered necessary to prevent ‘significant damage’. This is a much lower legal threshold than the current one of needing to prevent ‘serious, irreparable damage’. This may well lead to greater use by the CMA of interim measures, especially against companies that are considered to be in a dominant position.
   • The CMA will have the power to fine companies for breaches of procedural requirements, such as a failure to observe a written request for data or documents, either by failing to comply in full, within a given timescale or by providing inaccurate information.
   • The CMA will have enhanced powers to ask individuals who have a “connection” with a business (including former employees and contractors) questions orally as well as in writing during civil investigations, subject to the privilege against self-incrimination and other safeguards. During civil dawn raids, the CMA may not allow the business’s lawyers to attend interviews of such individuals by the CMA. Businesses should therefore ensure that their dawn raid policies have at least two firms of lawyers on standby; one firm to represent the business, and another firm to represent any individuals who might be interviewed on-the-spot.
   • More information about the CMA’s caseload will be published in order to encourage third parties to assist in the evidence-gathering process.

So, is your business fully prepared for the CMA?

• Dawn raid guidance, competition law compliance guidelines and HR policies should all be refreshed and updated to take account of the changes
  The changes required should reflect the CMA’s enhanced and more intrusive powers of investigation and enforcement, and its increased focus on criminal investigations.

• Re-assess what areas of your business may now come under scrutiny
  The new authority has a refreshed mandate and we expect to see more investigations, more decisions and more fines. More businesses in the UK are likely to encounter the CMA in its enforcement role; it has materially increased resources, has indicated it will not hesitate to take action against SMEs and it also has lower thresholds for intervention in urgent cases.

• Consider the impact of the CMA’s new procedural powers under the merger control regime on deal flexibility
  The CMA will have greater powers to investigate mergers, to prevent parties implementing transactions and even to require completed mergers to be reversed whilst it is conducting its investigations. These enhanced powers will apply to mergers that are publicly announced or which complete in the period between now and 1 April. These changes may affect any deals that you are currently working on.

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2. "Dishonesty" removed from the criminal cartel offence

The criminal cartel offence currently applies where competitors dishonestly agree to fix prices, share customers and markets, or to engage in bid-rigging. From 1 April, the need for "dishonesty" is removed from the criminal cartel offence, which means that arrangements between competitors to, for example, engage in activities such as joint tendering, marketing or selling might be covered by the revised criminal cartel offence.

In light of the controversy this generated, additional exclusions and defences were introduced to mitigate the substantial extension of the offence's scope. First, the cartel offence will not be committed if customers are made aware of the nature of the arrangement by the businesses involved before they purchase goods or services. It will also be a defence to an individual to prove that prior to entering the agreement the businesses involved sought professional legal advice. Interestingly, the latter defence does not require the legal advice to have been followed, but it does clearly emphasise in potentially difficult or uncertain cases the need to seek professional legal advice, given the breadth of the revised criminal cartel offence.

The new formulation of the offence will apply only to cartel activity that occurs after 1 April 2014, which means that any future prosecutions relating to cartel activity that occurred before that date will be made under the old regime.

3. Sector regulators encouraged to use concurrent competition powers

UK sector regulators with concurrent competition powers (such as Ofgem, Ofwat, and Ofcom, but with the exception of Monitor in the health sector) will be strongly encouraged to use them rather than relying on their regulatory powers, with a new explicit duty to consider first whether using their competition law powers is more appropriate.

To ensure there is coordinated (and active) enforcement of the competition laws, a new UK Competition Network of sector regulators has been established under the CMA's leadership. The CMA will have the power to take over a competition case from a sector regulator and investigate itself, and it will have responsibility for publishing regular updates on the extent to which UK sector regulators are using their competition powers. Ultimately, the Secretary of State can remove a regulator's competition powers if it feels that this new concurrency regime is not working properly.

4. More routine pre-notification of mergers

The jurisdictional thresholds for UK merger control remain unchanged and the notification process remains voluntary in principle. The CMA will now conduct both the Phase I and Phase II reviews in merger inquiries.

In a significant change from the current position, during Phase I merger inquiries, the CMA will be able to suspend further integration between the merging parties, both in relation to completed transactions and also potentially, mergers that have not yet completed. The CMA will also be able, during a Phase I merger inquiry, to require the reversal of integration steps that have already taken place. Fines of up to 5% of the combined worldwide turnover of the companies concerned can be imposed for breach of an order preventing or reversing integration. These changes are likely to result in a material shift towards the routine pre-notification of mergers to the CMA.

Phase I decisions will be taken by the CMA within a new statutory timetable of 40 working days, but the existing 24 week timetable for Phase II remains unchanged. In practice, the CMA will require merging parties to provide more data and supporting documents on notification and the 40 working day timetable will not start until the CMA accepts a notification is complete. This will likely mean merging parties need to spend longer in pre-notification discussions with the CMA.

5. Wider, cross-sector market investigations and more robust procedures

The CMA will have the power to conduct cross-market investigations. This could be a powerful tool to review certain behaviours or features that occur in a number of distinct markets, and could well mean that a wider range of businesses are drawn within the scope of market investigations.

In terms of procedure, the CMA will have to complete market studies within 12 months of publication of a market study notice; and where a reference for a market investigation is being considered, the public consultation must take place within six months of the launch of the market study. The timescale for market investigations will also be reduced from 24 to 18 months (subject to a six month extension in special cases). This is likely to mean that market investigations become even more intensive and demanding for the businesses involved, including at the Phase I (market study phase) given the CMA’s new ability legally to require the provision of information at that stage.

6. Administrative penalties for failing to cooperate

The CMA will have the power to impose administrative penalties if a party fails to provide data or documents in full and in a timely and format prescribed by the CMA, or if the data provided should later be found not to be accurate. Fines can be up to £15,000 on a daily basis and/or a one-off fine of £30,000. The CMA’s power to impose administrative penalties applies when it is scrutinising mergers, markets and during antitrust investigations and can be applied against the main party/parties under investigation and also against third parties, such as competitors, customers and suppliers whose views are sought.

In addition, it will remain a criminal offence to knowingly or recklessly provide false or misleading information to the CMA.

Comment

From 1 April, businesses can therefore expect renewed vigour in terms of enforcement activity, including criminal investigations, on the part of the CMA and greater use of its strengthened information gathering powers, especially in its enforcement areas.
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How prepared is your business?

If you wish to discuss how these changes are likely to affect your business, please contact any of the partners in the EU & Competition team:

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