THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Ninth Edition

Editor
Aidan Synnott

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CONTENTS

PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. We also see evolution and refinement of approaches to competition law enforcement in several jurisdictions.

Cartel enforcement remains robust. In the pages that follow, we read of the continued – and, in some cases, revised or expanded – use of leniency programmes in several jurisdictions, including Belgium, Finland, Switzerland and the United States. Developments in Australia include the first ever criminal prosecution of a cartel: a case involving the shipping of vehicles to the country. This past year, Brazilian authorities concluded investigations in cartel cases involving dynamic random access memory (DRAM) and optical disc drives, among others. Elsewhere, French and Italian authorities investigated alleged cartels among model agencies, while Cypriot authorities initiated an investigation into an alleged cement cartel. Other cartel enforcement actions have been quite varied: from bicycles in South Africa, to online sales of posters in the United Kingdom and the United States, to luxury cosmetic retail companies in Greece, to alleged pharmaceutical cartels in China and the United States.

In the areas of restrictive agreements and abuse of dominance, several jurisdictions were quite active in investigating firms in the pharmaceutical industry. The chapters from Argentina, Australia, China, Italy, Sweden, the United Kingdom and the United States describe these enforcement efforts. Several jurisdictions – including Argentina, France and South Africa – conducted investigations concerning alleged predatory pricing in various industries. And several jurisdictions, including Finland, Germany and Sweden, undertook investigations regarding companies' use of user or purchaser data. Of particular note is the report from China, which describes a novel approach to a case there involving loyalty discounts. In that case, the Chinese authorities 'used concepts that were new to the Chinese antitrust enforcement regime'.

Merger review and enforcement activity remains robust, with a noted significant increase in reviews undertaken by Chinese authorities. The chapters that follow note activity in many sectors: ranging from food retail mergers in Germany and Belgium, to telecommunications mergers in France. The merger of AB InBev and SABMiller attracted regulatory scrutiny in several jurisdictions, including Australia, China, South Africa and the United States. We also see several reports of deals that were abandoned after regulatory scrutiny, including proposed mergers in Brazil, Germany and the United States. The report from Argentina indicates that the Antitrust Commission there is speeding its review of mergers, with a significant decrease in the average time that deals spend under review; and in Portugal, the competition authority

has announced an initiative to streamline merger control proceedings. Finally, the reports from Brazil, China and India note enforcement activities arising out of merger process violations, such as the failure properly to report transactions.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2017

Chapter 24

UNITED KINGDOM

Ian Giles, Caroline Thomas and Rebecca Williams[1]

I OVERVIEW

The biggest event of 2016 for UK competition law was one unrelated to competition law itself – the UK referendum result of 23 June, which set in motion the process for the UK to leave the European Union. At the time of writing, this process is expected to formally begin imminently with the UK government giving notice to the European Union in March 2017, and an envisaged two-year timeline thereafter to 'Brexit'. The UK competition regulator, the Competition and Markets Authority (CMA), has only been in existence since 2014, but now faces the impending challenge of the UK having to operate a competition regime independent of the current EU regime under which the largest merger reviews and competition investigations affecting the UK tend to take place in Brussels, rather than in London. While there remains considerable uncertainty as to the form of the UK competition regime post-Brexit, there is a general consensus that there will be substantial extra work for the CMA and a need for further resources. The acting CEO, Andrea Coscelli, recently estimated a 50 per cent increase in the volume of merger filings needing to be reviewed by the CMA as a consequence of Brexit.[2]

A related development has been the UK government's statements about adopting a stronger 'industrial strategy', with suggestions this might involve more interventionist approach in the national interest in merger reviews. Prime Minister Theresa May specifically cited the failed Pfizer bid for AstraZeneca as an example of where the government should have been prepared to intervene on non-competition grounds.[3] In response, the CMA has vigorously defended the economic benefits of a policy of independent and effective competition enforcement to encourage growth, investment and innovation.[4]

While the volume of work and scope of enforcement activity post-Brexit remains uncertain, there is currently no indication that the main elements of the UK's substantive competition law will change. The Competition Act 1998 (CA98) contains a prohibition on

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1 Ian Giles is a partner, Caroline Thomas is an of counsel, and Rebecca Williams is an associate at Norton Rose Fulbright LLP. The authors would like to thank Jack Jeffries and Luke Grimes for their contributions to this chapter.

2 See www.gov.uk/government/speeches/andrea-coscelli-on-the-cmas-role-as-the-uk-exits-the-european-union.

3 'Theresa May – 2016 Speech to Launch Leadership Campaign' delivered by Theresa May on 11 July 2016 and accessible at: www.ukpol.co.uk/theresa-may-2016-speech-to-launch-leadership-campaign/.

4 See, e.g., 'Submission from the Competition and Markets Authority to the Business, Innovation and Skills Committee's inquiry into the Government's industrial strategy' dated 28 September 2016, paragraphs 33 – 37; 'Andrea Coscelli – our work in the regulated sector' delivered by Andrea Coscelli on 18 October 2016.

agreements or concerted practices that prevent, restrict or distort competition (Chapter I prohibition) and a prohibition on the abuse of a dominant position (Chapter II prohibition). The Enterprise Act 2002 (EA02) contains the criminal cartel offence, and provisions regarding mergers and market investigations.

The CMA has the primary responsibility for enforcing competition law in the UK – both the Chapter I and Chapter II prohibitions and, at present, the equivalent Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) – although these provisions may also be enforced by the courts. In addition, a number of sector regulators (such as Ofcom for communications, Ofgem for energy, Ofwat for water and ORR for rail) have concurrent power to enforce the Chapter I and Chapter II prohibitions and Articles 101 and 102 in their sectors. Notably, the Financial Conduct Authority (FCA), as of 1 April 2015, has power to enforce competition rules in the financial sector – and has recruited a significant team in order to do so.

In addition, a relatively unusual feature of the UK regime is that the CMA has the power to investigate whole markets under the EA02 and to impose wide-ranging remedies. Large investigations of the retail banking and energy sectors are now concluded, with limited remedies having been imposed, and there is a sense that the CMA would prefer to focus on infringement investigations than market investigations in the immediate future.

In that vein, the CMA had an active year in 2016 in terms of competition enforcement, with a number of cases progressing and some significant penalties imposed, including the first director disqualification order.[5] As CMA Chairman David Currie said in December, 'We've stepped up our enforcement of competition and consumer law – penalising those who break the law and securing better protections for consumers. This includes issuing over £140 million in fines in 2016, compared with a total of £1.2 million in 2015.'[6] These cases provide a helpful response to criticisms from the National Audit Office in February 2016, which compared the fines imposed by Germany's Federal Cartel Office during the period from 2012 to 2014 unfavourably with those imposed by the UK authorities over the same period.[7]

The CMA's Executive Director of Enforcement, Dr Michael Grenfell, remains committed to continuing to expand the CMA's enforcement activities, and the recent cases include some novelties, including the excessive pricing allegations in two pharmaceutical cases. 2017 will see the CMA's enforcement cases progress – and parallel actions by the FCA in the financial sector are likely – but all of this will take place in the shadow of Brexit negotiations, with the future shape of UK competition enforcement to be strongly affected by the outcome of these broader political negotiations. As mentioned above, the Brexit discussions will have a significant impact on the CMA's resource requirements and priorities, but – given the uncertainties in this respect – we highlight below the more immediate prioritisation, resource and enforcement agendas.

5 This came after the CMA's investigation into online sales of posters and frames: see www.gov.uk/government/news/cma-secures-director-disqualification-for-competition-law-breach.

6 'David Currie on the CMA's progress towards its ambition' delivered by David Currie on 16 December 2016.

7 'Report by the Controller and Auditor General: The UK Competition Regime', National Audit Office, published 4 February 2016, paragraph 15.

i Prioritisation and resource allocation of enforcement authorities

The 2015 Spending Review allocated a budget of £65.94 million to the CMA for 2017/18. This represents a 7 per cent reduction in real terms to the CMA's budget over the four years covered by the Spending Review. Notwithstanding this, the CMA has made clear its intention to increase the volume and pace of competition enforcement.[8]

Moreover, since 1 April 2015 the FCA has had concurrent competition powers enabling it to investigate breaches of the CA98, conduct market studies under the EA02 and make market investigation references in the financial sector. The FCA has yet to reach any enforcement decisions imposing penalties on competition grounds; however, given the ample capital and human resource at its disposal, an increase in enforcement activity is expected in 2017 and beyond.

ii Enforcement agenda

In its draft Annual Plan for 2017/2018, the CMA states that it will seek to carry out a higher volume of enforcement cases.[9] In this vein the CMA commits to the following new enforcement activity in 2017:

a opening new criminal investigations and pursuing prosecutions as appropriate, having regard to (1) its most recent cases, and (2) the change in law in respect of the cartel offence which occurred in April 2014;

b launching a minimum of six new civil competition enforcement investigations;

c initiating a minimum of four consumer protection cases or projects;

d concluding (either by agreement or litigation) the majority of consumer enforcement cases within 18 months of them being publicly opened;

e continuing to improve its processes and challenge its ways of working to decrease the time taken to conclude enforcement investigations against a rolling three-year average benchmark; and

f conducting further research into business' awareness and understanding of the law.[10]

The draft Annual Plan also highlights the sectors and behaviours of particular interest to the CMA (as informed by the CMA's Strategic Assessment published in November 2014[11]). The Annual Plan highlights the importance of the online and digital economy and markets for public services, reflecting the CMA's recent activity and continued focus in these areas.[12] These are also areas in which the CMA's public understanding and enforcement missions

8 See, e.g., 'UK competition enforcement – progress and prospects', speech delivered by Dr Michael Grenfell on 9 November 2016.

9 CMA Annual Plan consultation 2017/18, paragraph 3.5.

10 CMA Annual Plan consultation 2017/18, paragraphs 3.19, 4.21.

11 See www.gov.uk/government/publications/cma-strategic-assessment.

12 See, e.g., 'David Currie on the role of competition in stimulating innovation' delivered by David Currie on 3 February 2017 and 'Michael Grenfell on antitrust in the digital age' delivered by Dr Michael Grenfell on 15 November 2016. The CMA's recent work in the digital sphere has included (1) a fine imposed on a cartel between retailers of posters and frames on Amazon Marketplace; (2) cases involving online resale price maintenance; (3) issuing a statement of objections in respect of an online sales ban for golf clubs; (4) a consumer investigation into online gambling; and (5) launching a market study into digital comparison tools.

come together: a good example of this being the CMA's awareness campaign warning online retailers about price fixing following the infringement decision against online retailers of posters and frames.[13]

In addition to online and digital markets, the CMA has identified a further four areas of focus for 2017: (1) consumers' access to markets and barriers to decision-making; (2) technology and emerging markets; (3) regulated sectors and infrastructure markets; and (4) sectors that are important for economic growth.[14]

II CARTELS

In the UK, cartels may be prosecuted under two routes: the criminal cartel offence for individuals under the EA02 or the Chapter I prohibition contained in the CA98 (corporate civil liability), or both. In many cartel cases, both investigations proceed simultaneously.

The CMA continues to regard cartel enforcement as a major priority as indicated by its stated intention to open new criminal cartel cases in 2017.[15]

i Significant cases

Although 2016 saw little activity in relation to the conclusion of criminal cartel cases, there were some significant fines imposed on companies in respect of cartel conduct. These are described further in Section III, *infra*. However, there were still some significant developments in respect of the criminal cartel offence, and – perhaps significantly – the first instance of the CMA imposing a director disqualification order independent of a criminal prosecution (this is a power the UK competition authorities have had since 2003).

Galvanised steel tanks

The criminal investigation into dishonest bid rigging between rival suppliers of steel water tanks ended in 2015 with acquittals of two directors, and a suspended prison sentence for a third who had pleaded guilty, but the CMA's parallel civil investigation continued into 2016. In December, the CMA issued its final infringement decision imposing fines totalling more than £2.6 million on three of the four members of the bid-rigging cartel.[16] A fourth member of the cartel was granted immunity from fines under the CMA's leniency policy. In a separate infringement decision, the CMA imposed a fine on a fifth company which had refused to participate in the cartel, but had still exchanged commercially sensitive information with its competitors.[17]

13 See www.gov.uk/government/news/cma-warns-online-sellers-about-price-fixing.

14 CMA Annual Plan consultation 2017/18, paragraphs 1.9–1.20.

15 CMA Annual Plan consultation 2017/18, paragraph 3.19.

16 The same three members of the cartel had already agreed to payment of the fine under a settlement agreement with the CMA that was made public in March 2016 (see www.gov.uk/government/news/water-tank-firms-admit-cartel-and-agree-to-pay-26-million-fines).

17 See www.gov.uk/government/news/cma-fines-water-tank-firms-over-27-million. At the time of writing, an appeal has been lodged with the CAT challenging the decision to impose a fine on the fifth company. See www.catribunal.org.uk/files/1277_Balmoral_Notice_240217.pdf.

Construction industry

The CMA's only other ongoing criminal case is also in respect of matters pre-2014, and concerns the construction industry.[18] Seven arrests were made in the Midlands in 2013. On 21 March 2016, one individual pleaded guilty to one criminal cartel count. The CMA brought the charge against the individual under the old 'dishonesty' test.[19] In November 2016, Director of Enforcement Dr Michael Grenfell confirmed that, despite the guilty plea discussed above, the CMA's investigation into a criminal cartel in the construction sector was continuing.[20]

Online sales of posters and frames

In August 2016, the CMA published an infringement decision finding that Trod Ltd and GB eye Ltd had breached Chapter I of the CA98 by agreeing not to undercut each other's prices for posters and frames listed on the Amazon UK website. The parties gave effect to this agreement through use of automated repricing software, configured to ensure neither competed with the other on price. This was a significant case, given the widespread use of such software among online retailers, and similar cases are likely to emerge in the future. This case was also noteworthy because, in addition to imposing a fine on the company of £163,371, the CMA used its director disqualification powers under the Company Directors Disqualification Act 1986 for the first time, securing the disqualification of Trod Ltd's managing director from acting as director of a UK company for five years.

ii Trends, developments and strategies

Following two acquittals in the *Galvanised Steel Tanks* case in June 2015, the CMA reviewed its open criminal cartel cases and decided to close two of the three investigations. As a result, 2016 saw no significant enforcement activity against criminal cartels, and no new cases were opened by the CMA.[21] The next major development remains the opening of the first investigation under the new, post-2014 cartel offence. The 'dishonesty' element has been removed from the criminal cartel offence post-2014 and has, instead, been replaced with a series of exclusions and defences, including that customers are notified of the arrangement or details are published (e.g., in the London Gazette).[22] Despite this change being made in order to make it easier for the CMA to bring prosecutions, no progress towards this milestone appears to have been made. The first case to be brought under the new regime will be crucial to understand the effect of the changes, and the CMA's approach to the new rules in practice.

18 See www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry.

19 See www.gov.uk/government/news/man-charged-in-cma-criminal-cartel-investigation.

20 'Michael Grenfell on the CMA's progress in enforcing competition law', speech delivered by Dr Michael Grenfell on 9 November 2016.

21 At the time of writing, the CMA has just announced that four estate agents based in Somerset have agreed to pay fines totalling over £370,000 following their admission of participating in a price-fixing cartel. A fifth estate agent escaped a fine under the CMA's leniency programme and a sixth estate agent – not party to the settlement agreement with the CMA – remains under investigation. See www.gov.uk/government/news/somerset-estate-agents-admit-to-price-fixing.

22 Enterprise and Regulatory Reform Act 2013, Section 47.

iii Outlook

As noted above, criminal cartels remain an area of priority for the CMA, which noted in its draft annual plan for 2017/2018 that it was 'actively considering the launch of other cases involving cartel activity from April 2014 onwards, on the basis of ongoing intelligence work'.[23]

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The prohibition in Chapter I of the CA98 captures a range of restrictive agreements, including both cartels and those agreements that do not constitute hard-core cartels but nevertheless damage competition. These less restrictive Chapter I cases are outlined below, together with Chapter II cases (dealing with the abuse of dominant positions in UK markets).

i Significant cases

Restrictive agreements under Chapter I

There were several cases of note throughout 2016, although the most interesting – the CMA's 'pay-for-delay' infringement decision – came early in the year.

Pay-for-delay

In February 2016 the CMA imposed significant fines in respect of its *Pay-For-Delay* investigation into the supply of paroxetine (an anti-depressant medicine) in the UK.[24] The relevant events took place in 2001, when a number of pharmaceutical companies were preparing to launch a generic version of paroxetine. GSK challenged these pharmaceutical companies, alleging that their generic products would infringe its patents protecting paroxetine. Before GSK's claim reached trial, the parties decided to settle the litigation on terms that included cash payments from GSK to the generic companies in exchange for the generic manufacturers' agreement to delay their entry on the market.

The CMA found that these 'pay-for-delay' patent settlement agreements infringed Chapter I of CA98 by preventing the generic companies from entering the paroxetine market. The CMA noted that when independent generic entry eventually took place at the end of 2003, average paroxetine prices dropped by over 70 per cent in two years. In addition, the CMA found that GSK's conduct was an abuse of its dominant position. The CMA imposed a fine of £37.6 million on GSK and £45 million on the parties in total.

This is the first UK decision to consider the application of competition law to patent settlement agreements. The parties have been granted permission to appeal the CMA's decision to the Competition Appeal Tribunal (CAT), with a five-week hearing listed for 27 February 2017. The CMA's approach largely follows the approach of the European Commission in its first (*Lundbeck*[25]) and second (*Servier*[26]) patent settlement cases, which are both currently on appeal before the EU courts.

23 CMA Annual Plan consultation 2017/18, paragraph 3.10.

24 See www.gov.uk/government/news/cma-fines-pharma-companies-45-million.

25 Commission decision of 19 June 2013 in Case AT.39226 – *Lundbeck*.

26 Commission decision of 9 July 2014 in Case AT.39612 – *Perindopril (Servier)*.

Conduct in the modelling sector

In December 2016 the CMA imposed fines totalling over £1.5 million on five modelling agencies that had breached Chapter I by colluding on prices charged to customers including high-street chains, online fashion retailers and consumer goods brands.[27] The prohibited behaviour occurred over a two-year period from 2013 to 2015, and included both exchange of sensitive commercial information and agreements to fix minimum prices. The channel for these infringements was the industry trade association, the Association of Model Agents, which was managed by a council composed of representatives from the five agencies. The CMA noted that – although this case concerned the UK only – it had liaised with the French and Italian competition authorities, which had also issued recent penalties in the modelling services sector.

RPM cases

May 2016 saw the completion of two CMA investigations into online retail price maintenance. The first case concerned the bathroom fittings sector, where Ultra Finishing Ltd was fined £786,668 for introducing an online trading policy that sanctioned resellers for retailing its products below a maximum discount to the RRP. The second case concerned the market for commercial refrigerators, in which ITW Ltd was fined £2,298,820 for prohibiting its resellers from selling below a minimum advertised price (MAP), which was calculated by reference to its regional net price plus a mark-up. These cases, together with the *Online Sales of Posters and Frames* case, and an awareness campaign aimed at online retailers which commenced in November 2016, illustrate that online RPM remains an area of interest to the CMA.[28]

Abuse of dominance under Chapter II

The enforcement of Chapter II of the CA98 (abuse of dominance cases) has been limited in recent years, but 2016 saw a notable increase in activity. The CMA's caseload in this area is heavily focused on the pharmaceutical sector – in addition to the cases discussed below, the *Pay-For-Delay* finding against GSK (covered above) was also characterised as a breach of Chapter II.

Phenytoin sodium capsules

In December 2016 the CMA imposed a fine of £84.2 million on pharmaceutical manufacturer Pfizer, together with a £5.2 million fine on its distributer Flynn Pharma for abusing a dominant position by charging excessive and unfair prices for the epilepsy treatment drug phenytoin sodium. The CMA found that the prices charged by Pfizer and Flynn Pharma were excessive having regard to the costs incurred and a reasonable rate of return. The companies were considered to have a dominant position because medical risks mean epilepsy patients who are already taking phenytoin sodium capsules are not usually switched to other products (even to another manufacturer's version of the same product).[29] In September 2012, Pfizer sold the distribution rights to Epanutin, its branded phenytoin sodium capsules, to Flynn Pharma, which de-branded the drug meaning it was no longer subject to price regulation, although Pfizer continued to manufacture the drug. Following the sale of the distribution rights, Pfizer

27 See www.gov.uk/government/news/model-agencies-fined-15-million-for-price-collusion.

28 See www.gov.uk/government/news/cma-warns-online-sellers-about-price-fixing.

29 See www.gov.uk/government/news/cma-fines-pfizer-and-flynn-90-million-for-drug-price-hike-to-nhs.

began selling the drug to Flynn Pharma at prices that were higher than pre-distribution agreement prices, while Flynn Pharma in turn charged the NHS higher prices than those it had previously paid Pfizer. The CMA noted that NHS expenditure on phenytoin sodium increased from about £2 million a year in 2012 to over £50 million in 2013, and that prices charged in the UK were higher than the prices charged in other European countries.

Hydrocortisone tablets

The CMA quickly followed its infringement decision in the *Phenytoin Sodium Capsules* case with a statement of objections alleging similar behaviour in respect of hydrocortisone tablets, used as a replacement therapy for patients with life-threatening adrenal insufficiency. The statement of objections alleged that pharmaceutical company Actavis UK began producing a genericised version of hydrocortisone in 2008, and subsequently raised prices over 12,000 per cent compared to the branded version previously sold by another company. As a result, NHS spend on hydrocortisone tablets rose from £522,000 a year prior to 2008, to £70 million a year by 2015.[30] A final decision is still awaited in this case, but it illustrates that the pharmaceutical sector is currently an area of high interest to the CMA, and that pricing practices are coming under increased scrutiny, despite the challenges to establishing excessive pricing infringements in specialised technical industries.[31]

ii Trends, developments and strategies

In comparison with recent years, 2016 saw increased enforcement activity by the CMA. Having amounted to only £1.1 million in 2015, CMA fines in 2016 totalled over £141.9 million, most of which can be attributed to the *Pay-For-Delay* and *Phenytoin Sodium Capsules* cases. This significant increase may be in part a response to the National Audit Office's criticisms concerning low levels of competition enforcement in its February 2016 report on the UK competition regime.[32] In addition, the CMA's increased activity is likely to be in part attributable to the European Commission's pharmaceutical sector inquiry that was launched in 2008 and the subsequent cases that followed. In fact it was the Commission that brought to the CMA's attention the GSK agreements in respect of which the CMA decided to open an investigation following a preliminary investigation and prioritisation assessment. The increase in activity also suggests that Executive Director of Enforcement Michael Grenfell's stated ambition to 'increase the number and pace of competition enforcement cases' is beginning to be put into practice.[33]

Also worth noting is the CMA's use of the Anatomical Therapeutic Chemical (ATC) classification system (developed and maintained by the European Pharmaceutical Marketing Research Association) when defining markets in pharmaceutical cases. While the CMA

30 See www.gov.uk/government/news/pharmaceutical-company-accused-of-overcharging-nhs.

31 At the time of writing, the CMA has published a separate statement of objections concerning the supply of hydrocortisone tablets. The statement of objections states that the CMA has provisionally found that Actavis UK entered into agreements with another company that incentivised the company not to enter the market for the supply of hydrocortisone tablets in breach of Chapter I and II CA98. See www.gov.uk/government/news/CMAS-alleges-anti-competitive-agreements-for-hydrocortisone-tablets.

32 'Report by the Controller and Auditor General: The UK Competition Regime', National Audit Office, published 4 February 2016, paragraphs 26(f) and 2.11.

33 See www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-approach-to-competition-enforcement.

follows the Commission's lead in taking ATC level 3 as a starting point for defining relevant product markets in merger cases,[34] there is an increasing trend by both the CMA and the European Commission to define relevant product markets at ATC level 4 or even ATC level 5 (i.e., the molecule level) in abuse of dominance cases, such that it is easier to establish dominance.

iii Outlook

As discussed above, the CMA's advances in enforcement against restrictive agreements and abuse of dominance are led by its work in the pharmaceutical sector: 25 per cent of the infringement decisions issued in 2016 and over 30 per cent of the cases open at the end of the year related to this sector. In addition to the above cases, the CMA has three open investigations in the pharmaceutical sector (two abuse of dominance cases[35] and an anticompetitive agreements case[36]), so we can expect the trend for enforcement in this sector to continue in 2017. Outside the pharmaceutical sector, the CMA will hope to advance its 13 open investigations, including the statement of objections issued to the Showmen's Guild of Great Britain (the membership organisation for workers in the travelling fairs industry) regarding its allegedly anticompetitive membership rules.[37]

The *Phenytoin Sodium Capsules* and *Hydrocortisone Tablets* cases also suggest that the CMA has taken a strategic decision to pursue abuse of dominance cases based on excessive pricing. Competition regulators have historically been reluctant to investigate excessive pricing due to the difficulties of establishing the levels at which prices should be considered abusive. This development may be explained by increased pressure on resources at the NHS, but also fits into a trend of increased scrutiny on drug pricing elsewhere in Europe. Referring to investigations in the UK and Italy, Commissioner Vestager has publicly stated that 'there can be times when prices get so high that they just can't be justified' and that 'competition rules need to do their bit to deal with excessive prices'.[38]

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The UK authorities have wide powers to investigate markets that are not working properly and to impose remedies to improve the operation of competition in those markets. This is an unusual feature of the UK system, and one that has led to a series of high-profile investigations. Indeed, it is notable that much of the major enforcement activity in UK markets has been under this regime – a regime that only requires the competition authorities to identify features of the market that have an adverse effect on competition, rather than proving a competition law infringement.

34 'Anticipated acquisition by LEO Pharma A/S of certain assets of Astellas Pharma Inc: Decision on relevant merger situation and substantial lessening of competition' dated 11 March 2016, paragraphs 22–23.

35 See www.gov.uk/cma-cases/pharmaceutical-sector-alleged-discounts-offered-on-a-product and www.gov.uk/cma-cases/pharmaceutical-sector-anti-competitive-conduct.

36 See www.gov.uk/cma-cases/pharmaceutical-sector-anti-competitive-agreements.

37 See www.gov.uk/government/news/funfair-body-alleged-to-have-broken-competition-law.

38 See https://ec.europa.eu/commission/2014-2019/vestager/announcements/protecting-consumers-exploitation_en.

i Significant cases

2016 was another busy year for the CMA in terms of market investigations, with the publication of final reports in respect of two investigations (energy and retail banking), and a number of market studies launched.[39] The year also saw the publication of the CMA's final report[40] on matters remitted back to it by the CAT in relation to certain findings in its original final report in its market investigation into privately funded healthcare.[41]

At the time of writing, the CMA has only two ongoing investigations: *Retail Banking* and *Private Healthcare*; however, as noted above, both are nearing final conclusion.

Retail Banking

In August 2016, the CMA published its long-awaited final report in respect of its investigation into the supply of personal current accounts and banking services to small and medium-sized businesses.[42] The report sets out a package of behavioural remedies designed to promote customer engagement – including, for example, a requirement on banks to prompt customers to consider switching at certain trigger points, such as after an incident of poor service.

The remedies package has a number of interesting features, including an innovative remedy whereby major banks are set to fund the winner of a competition to develop an SME comparison tool, and the fact that a number of remedies essentially amount to further trials and research to be conducted by the FCA and other bodies. Some stakeholders have also noted that the remedies package imposed by the CMA is not wholly dissimilar to the behavioural undertakings in lieu (UIL) of a market investigation reference proposed by the four major retail banks prior to the publication of the CMA's provisional decision in October 2015.[43] This raises the question as to whether the CMA decision to reject the UILs and push forward with a lengthy and burdensome investigation was entirely justified and proportionate.

Energy

This year saw the conclusion of the CMA's high-profile investigation into the supply and acquisition of energy in the UK. The CMA was unable to deliver on its commitment to publish its final report by the end of 2015 (within the target 18-month timescale) and extended the statutory deadline to do so to 25 June 2016. As with *Retail Banking*, a main feature of this investigation was engaging inert customers who would benefit from switching.

On 24 June 2016, the CMA published its final report identifying several features of the market giving rise to an 'adverse effect on competition' (AEC), and also published a notice of remedies to address the AECs identified. The CMA's remedies package included: the establishment of an Ofgem database of customers who have been on a default tariff for more

39 Legal Services (www.gov.uk/cma-cases/legal-services-market-study); Digital Comparison Tools (www.gov.uk/cma-cases/digital-comparison-tools-market-study); and Care Homes (www.gov.uk/cma-cases/care-homes-market-study).

40 'Private healthcare remittal: Final report', Competition and Markets Authority, published 5 September 2016.

41 *AXA PPP Healthcare Limited v. CMA*; *HCA International Limited v. CMA* and *Federation of Independent Practitioner Organisations v. CMA* [2014] CAT 23, judgment of 23 December 2014.

42 'Retail banking market investigation: Final report, Competition and Markets Authority', published 9 August 2016.

43 'HSBC – PCA/SME Banking Market Investigation: Response to the CMA's Provisional Findings Report and Notice of Possible Remedies' dated 23 November 2015, paragraph 1.3.

than three years, to enable rival suppliers to contact them with more competitive offers; a transitional price cap for households with prepayment meters until the introduction of smart meters; and increasing the role played by price comparison websites in helping customers find the best deals.

Following the publication of its remedy package the CMA has faced criticism from a range of stakeholders who argue that the regulator failed to fully 'grasp the nettle' of energy market reform. In particular, critics point to the fact that energy prices have risen since the publication of the CMA's final report and that while the remedies package imposes a price cap on prepayment meters it does not effectively address 'overcharging' associated with standard variable tariffs.

ii Trends, developments and strategies

The CMA may look back on 2016 as something of a pyrrhic victory. While it managed to essentially close out a number of long-running investigations, the CMA has faced criticism of its findings – and remedies packages – in both *Retail Banking* and *Energy*, as well as in relation to its conduct of market investigations more generally. In addition, the CMA was forced to review its finding of an adverse effect on competition in the *Private Healthcare* market investigation, after the CAT found that parts of the final report contained erroneous pricing analysis. Despite this embarrassing reverse, the CMA again reached the conclusion that lack of price competition was harming consumers in London.[44]

In many respects the CMA is stuck between a rock and a hard place given the wide array of stakeholder groups (ranging from business to government to consumers themselves) that have a vested interest in the outcome of any market investigation. The CMA itself seems to recognise this position, noting – in the context of its work on *Retail Banking* and *Energy* – that its solutions are 'not always populist, or necessarily intuitive'.[45] There is also concern among some that market investigations are being used for political ends, where government does not wish to intervene directly, and where competition tools may be ill-suited to dealing with policy problems. In this respect, it is interesting to note that the CMA has recently made a number of discrete comments concerning the importance of its position as an independent regulator and government support of this view.[46]

Concerns continue to remain that the CMA's market investigations are unduly burdensome for parties under investigation, and that – in particular given the scope of investigations and time pressure of statutory timetables – the analysis executed is not sufficiently robust, and the remedies imposed disproportionate in the context of market activity which is not 'illegal', but merely satisfies the more nebulous AEC test.

Timetable slippage, increasingly a feature of the investigatory procedure (perhaps a symptom of the heavy caseload and the new shorter timeline for market investigations), was once again evident in 2016.[47] A consequence of such timetable slippage is that the time for

44 'Private healthcare remittal: Final report', Competition and Markets Authority, published 5 September 2016, Section 11.

45 'Andrea Coscelli – our work in the regulated sectors', speech delivered by Andrea Coscelli on 18 October 2016.

46 See, e.g., 'Andrea Coscelli – our work in the regulated sectors' delivered by Andrea Coscelli on 18 October 2016.

47 On 7 March 2016, the CMA announced it was extending the timeline in the *Retail Banking* market investigation by three months (see https://assets.publishing.service.gov.uk/

parties to respond to requests, working papers and issues statements (and review data-rooms) is squeezed to an extent which it could be argued prejudices both the investigation's conclusions and parties' rights of defence.

In early March 2017, the CMA announced that it was launching a consultation on proposals to change the existing market investigation process which are aimed at streamlining the investigation timetable and strengthening the synergies between market studies and investigations. The launch of the consultation may be, in part, a response to some of the criticism referred to above, in particular those relating to the timetable slippage.[48]

Concurrency and additional competition powers

Since 1 April 2015, the FCA and Payments Services Regulator have had concurrent competition powers in their respective areas. Under concurrent powers the authorities are able to enforce breaches of the prohibitions on anticompetitive behaviour set out in the CA98 and the TFEU and make market investigation references to the CMA under the EA02.

The FCA currently has two market studies open: one in respect of the mortgages market[49] and the other relating to the asset management market.[50] In respect of the latter, the FCA is currently consulting on its provisional decision to make a market investigation reference to the CMA in relation to the investment consultancy sector of the market.[51] In 2016, the FCA published final reports in its *Credit Cards*[52] and *Investment and Corporate Banking* market studies.[53]

Notwithstanding its activity in the realm of market studies, the FCA has not yet used its concurrent powers to bring a case for infringement of competition law. Given the substantial resource that the FCA has gathered for competition law enforcement, such action must be only a matter of time – and seems a relatively safe bet for 2017.

iii Outlook

In addition to the first FCA enforcement decisions using its concurrent competition powers, 2017 will see the CMA make progress on its open market investigations. A final report and recommendations were issued in December 2016 in the *Legal Services* market study, and observers will be interested to see whether the CMA can complete the *Digital Comparison Tools* and *Care Homes* market studies similarly in advance of the statutory deadline.

media/56d9b770e5274a036e000000/Notice_of_extension_of_the_inquiry_statutory_period.pdf). On 21 September 2015, the CMA announced that it was extending the timeline in its *Energy* market investigation by six months from 25 December 2015 to 25 June 2014 (see www.gov.uk/government/news/cma-extends-energy-investigation-timetable).

48 See www.gov.uk/government/news/cma-proposes-market-investigation-changes.

49 See www.fca.org.uk/publications/market-studies/mortgages-market-study.

50 See www.fca.org.uk/news/asset-management-market-study.

51 See www.fca.org.uk/news/investment-and-corporate-banking-market-study.

52 Credit card market study: Final findings report', Financial Conduct Authority, published July 2016.

53 Investment and corporate banking market study: Final report', Financial Conduct Authority, published October 2016.

V MERGER REVIEW

The CMA carries out both Phase I and Phase II merger investigations in the UK. In order to avoid concerns around 'confirmation bias', decisions at Phase II are made by an independent panel. The UK regime is unusual in that merger notifications are voluntary, but the CMA has the ability to call transactions in for consideration and has an active Merger Intelligence Committee that monitors merger and acquisition activity.

i Significant cases

The CMA has now completed a number of high-profile merger reviews under the new regime, with 58 mergers reviewed in 2016. In addition, the CMA has completed its review of 76 structural merger remedies put in place prior to 1 January 2005 which were outlined in March 2015.

Intercontinental Exchange/Trayport

In January 2017, the CMA issued its final order to implement the full divestiture of Trayport (a supplier of software products for traders and clearing houses) by Intercontinental Exchange (ICE) (a global operator of derivatives exchanges and clearinghouses) in order to remedy the adverse effects resulting from the substantial lessening of competition (SLC).[54] ICE completed its purchase of the entire issued share capital of Trayport in December 2015 and was referred for investigation and report by the CMA in May 2016. Shortly after the merger, ICE and Trayport entered into an interface and support agreement, which sought to closely align their business relationship. The CMA, having considered the counterfactual, expressed particular concerns that the merger would lead to higher fees or less advantageous terms for traders and more limited trading opportunities. As a result, ICE's ownership of Trayport would have the effect of foreclosing the clearinghouses market. This merger is notable as being the first time that a UK competition authority has ordered the full divestiture of a vertical merger.

Notwithstanding the CMA's final order, ICE applied to the CAT in late 2016 alleging (among other things) that the CMA's final report is *ultra vires* and that it had acted disproportionately. In a judgment handed down in early March 2017, the CAT upheld the CMA's order that ICE divest Trayport; however, it quashed part of the CMA's final report that required the parties to unwind an ancillary post-transaction agreement on the basis that the CMA's reasoning – as articulated in the report – was too cursory and too conclusory to meet the standards of intelligibility and adequacy required of the regulator. The section of the report pertaining to the ancillary agreement has been remitted to the CMA for reconsideration.[55]

Ladbrokes/Coral

The CMA's approach to Phase II retail mergers is particularly of note. The merger between the (then) second and third largest providers of licensed betting offices (LBOs) was approved by the CMA in October 2016. The CMA's Phase II investigation had concluded that the creation of the relevant merger situation may be expected to result in the SLC within 642 local markets for the supply of gambling products in LBOs. As a result of this finding,

54 See https://assets.publishing.service.gov.uk/media/586e5d4aed915d0aeb000119/ice-trayport-order-2017.pdf.

55 *Intercontinental Exchange, Inc v. Competition and Markets Authority* (1271/4/12/16) and *Intercontinental Exchange, Inc v. Competition and Markets Authority* (1272/4/12/16).

Ladbrokes/Coral undertook to divest between 350 and 400 LBOs to Betfred, StanJames and Bet 21.[56] This perhaps signals that the CMA is particularly concerned with the impact of mergers upon local markets. Similarly in the *Celesio/Sainsbury's Pharmacy* merger, the CMA required that Celesio sell a Lloyds pharmacy in each of the 12 local areas in which it identified a SLC. Both the *Ladbrokes/Coral* and *Celesio/Sainsbury's Pharmacy* mergers stand in contrast to the *Pure Gym/LA Fitness* merger, which – although it had considered both the national and local markets – was not ultimately referred.

The approach of the CMA perhaps echoes the comments of the Prime Minister during the summer of 2016 as regards wider public interest considerations, including (against the backdrop of Kraft's acquisition of Cadbury and Pfizer's failed takeover of AstraZeneca) concerns that local communities, and not just transient shareholders, have a stake in such deals.[57] For the time being, it might be expected that the CMA will place a heavier emphasis upon effects in local geographies (in additional to national markets) in the realm of retail mergers, although the true extent of political intervention in merger control is yet to be seen.

ii Trends, developments and strategies

The CMA's new merger processes have bedded in during the course of 2016, and increased familiarity with the regime has made it easier for parties and advisers to manage. However, certain aspects continue to require refinement. Having published its review regarding the use of its merger notice and initial enforcement orders as part of its reforms to the Phase I merger control procedure, the CMA is alive to areas for improvement – in particular, the streamlining and conduct of handling cases.[58] In this regard, the CMA plans to clarify existing guidance and publish additional guidance on the use of the merger notice and approach to derogations from initial enforcement orders. The CMA has furthermore launched a review of a further 12 structural merger remedies given before 1 January 2006.[59]

iii Outlook

In 2017, the CMA has committed to conduct an internal review of the process and procedure of Phase II investigations, and to continue its review of existing remedies and launch further reviews of three-to-four existing merger (or market) remedies.[60] In addition, the CMA has committed to meet the statutory timetable for the implementation of remedies without the need for an extension in at least 70 per cent of Phase II merger and market cases.[61]

56 'Merger between Ladbrokes Plc and certain businesses of Gala Coral Group Limited: Notice of acceptance Final Undertakings pursuant to sections 41 and 82 of, and Schedule 10 to, the Enterprise Act 2002' dated 11 October 2016.

57 See http://press.conservatives.com/post/147947450370/we-can-make-britain-a-country-that-works-for.

58 'Review of the use of the Merger Notice and Initial Enforcement Orders – Findings and recommendations' published on 21 March 2016.

59 'Decision to launch reviews of 12 merger remedies dating from before 1 January 2006' published in June 2016.

60 CMA Annual Plan consultation 2017/18, paragraphs 4.21.

61 CMA Annual Plan consultation 2017/18, paragraph 4.17.

VI CONCLUSIONS

As highlighted above, 2016 was a year in which the CMA made steady progress, completing two landmark market investigations in energy and banking, and racking up a string of infringement decisions against companies, large and small, in respect of anticompetitive agreements and abuse of dominance. It is to be expected that this trajectory will continue with higher levels of penalties and more investigations of companies by the CMA and other UK regulators, notably the FCA in the financial sector, in the coming year.

In the background, Brexit negotiations will mean uncertainty regarding the shape of the future UK competition regime – but a real likelihood of an increased enforcement burden on the CMA, as cases that affect the UK but are currently reviewed in Brussels become subject to parallel investigations in the UK. The importance of close cooperation between the CMA and the European Commission in such contexts will be paramount to ensure the burden on business remains proportionate, and investigation timelines are aligned to help avoid diverging outcomes wherever possible.

Appendix 1

ABOUT THE AUTHORS

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Ian Giles is an antitrust, competition and regulatory lawyer based in London. He specialises in advising on all aspects of competition law with a particular focus on competition and cartel investigations and merger control.

He has been involved in numerous significant cases in recent years, including major UK and EU cartel investigations, market investigations before the UK Competition Commission and in-depth merger investigations in front of the UK and EU authorities.

He was Assistant Director of Competition Policy at the UK Office of Fair Trading from 2008 to 2009, which gives him particular insights as to its regulatory approach and perspective.

Mr Giles is a frequent speaker and author on competition issues, has been an editor of Butterworth's Competition Law and is an active member of the UK International Chamber of Commerce Competition Group, and the City of London Law Society Competition Section. He is also a regular media commentator, and rated as 'one to watch' in *The Legal 500* assessment of leading competition lawyers.

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Caroline Thomas is a competition lawyer based in London. She advises on all types of contentious and non-contentious competition law issues, including merger control and state aid.

Ms Thomas is regularly involved in all types of cases before the CMA – mergers, cartel investigations and market investigations. She also acts in competition matters at European level. Ms Thomas has considerable experience of competition litigation in the UK (before the English High Court and the Competition Appeal Tribunal) and Europe (including preliminary references and appeals to the European General Court and the Court of Justice).

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