

CMA SERIES

The new CMA: market studies and investigations

The new Competition and Markets Authority (CMA) will have the power to conduct market studies and market investigations, and to require market participants to take specified remedial action (the new regime) (*Enterprise Act 2002 (as amended by the Enterprise and Regulatory Reform Act 2013)*).

The new regime introduces procedural reforms, such as new and shortened time limits at every stage, and wider procedural powers for the CMA than the current powers of the Office of Fair Trading and the Competition Commission. It also creates new types of references and market investigations.

This article, the second in a three-part series on the new UK competition regime and the role of the CMA, outlines the new regime, which will be effective from 1 April 2014 (for the first article in the series, see *"The new CMA: changes to the UK merger control"*, www.practicallaw.com/9-555-5245).

New and shortened time limits

The CMA will have to consult on whether or not to make a market investigation reference (MIR) within six months of launching a market study, and to complete the market study within 12 months (see box *"Market studies and market investigations"*).

The new time limits will only be triggered by the publication of a market study notice. Market studies will end with the publication of a market study report that includes the CMA's findings and its decision on the action it proposes to take; that is, make a reference, not make a reference or accept undertakings in lieu of a reference (UILs).

The CMA will have six months from the date of the market investigation report to either accept final UILs or make a final order. This time limit may be extended by a further four months for special reasons, such as the need for market testing of detailed remedies implementation. The deadline for completing a market investigation will be reduced from 24 months to 18 months, subject to a six-month extension in special cases (for example, complex cases involving multiple parties, issues or markets).

Market studies and market investigations

Market studies are examinations into the causes of why particular markets may not be working well, and are currently conducted by the Office of Fair Trading (OFT). Where the findings of the market study give rise to reasonable grounds for suspecting that a feature (or combination of features) of the market(s) in the UK prevents, restricts or distorts competition, the OFT currently has the power to make a market investigation reference to the Competition Commission, or accept an undertaking in lieu of a reference. Market investigations are more detailed examinations into whether or not there is an adverse effect on competition in the market(s) of products or services referred. Under the new regime, the Competition and Markets Authority will have wider procedural powers, but shortened time limits, when conducting market studies and market investigations.

Extended procedural powers

For market studies, and for monitoring and enforcing compliance with remedies, the CMA will be able to request the attendance of witnesses and the production of information and documents. The CMA may impose financial penalties if a party fails to comply with an information request notice without a reasonable excuse.

Between publication of the final market investigation report and the end of the remedies implementation phase, in order to prevent pre-emptive action that might impede remedies implementation, the CMA will be able to either make an interim order or accept interim undertakings from the parties.

New types of references

The Secretary of State (SoS) may intervene in cases that raise defined public interest issues (limited to national security at this stage). Under the newly introduced full public interest reference, the SoS may ask the CMA to investigate these issues alongside competition issues. Alternatively, the SoS may, as is currently the case, retain the ability to consider them while the CMA investigates the competition issues (the restricted public interest reference). This has led to concerns of politicisation of the new regime. However, the CMA has stated that the SoS is expected to intervene only on extremely rare occasions.

The CMA will be able to investigate and refer a specific feature (or combination of features) that exists in more than one market without having to refer the whole of each

market concerned, provided that the CMA has reasonable grounds to suspect such feature(s) prevents, restricts or distorts competition in connection with the supply of goods or services in the UK or part of the UK.

A faster outcome?

The new regime is intended, among other things, to make market studies and market investigations faster and more efficient. However, as with the new merger control regime, it is questionable whether, despite the statutory time limits, it will lead to shorter proceedings and faster implementation.

For example, there are concerns that the CMA might, before the launch of a formal market study, use "calls for information" under its general review function to delay triggering the new statutory time limit for the completion of market studies. The CMA has responded to these concerns by committing to provide parties with indicative timetables for the "pre-market study" phase and to aim to complete any such phase within six months.

In addition, the CMA may exercise "stop the clock powers" during the implementation of the remedies phase if it considers that there has been a failure (whether with or without a reasonable excuse) to comply with any of its information requests.

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