

A close-up photograph of a tennis ball hitting a net. The ball is bright yellow-green and is positioned on the right side of the frame, partially obscured by the black mesh of the net. The net is supported by a dark brown strap. The background is a soft, out-of-focus sunset or sunrise sky with warm orange and yellow tones. The overall composition is dynamic and focused on the point of impact.

# An overview of the UK competition rules

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## 1. Introduction

1.1 The UK competition rules can be considered under the following broad headings.

### Anti-competitive agreements and cartels

- 1.2 Chapter I of the Competition Act 1998 (the Competition Act) prohibits any agreement or concerted practice which has the object or effect of preventing, restricting or distorting competition unless an exemption from the prohibition applies. Where the agreement or concerted practice affects trade between EU Member States, it may also be prohibited by Article 101 of the Treaty on the Functioning of the European Union (TFEU). Companies and individuals found to have breached the Chapter I prohibition are liable to fines of up to a maximum level of 10% of worldwide turnover for companies and disqualification from serving as a director for a period of up to 15 years for individuals.
- 1.3 Cartels are considered to be the most serious form of anti-competitive agreement. Criminal offences for individuals involved in cartels were introduced in the UK in 2003; participation by an individual in price-fixing, bid-rigging, market sharing or limitation of output or supply may lead to the imposition of a prison sentence of up to five years' duration, unlimited fines, or both.
- 1.4 The Competition and Markets Authority (CMA) is primarily responsible for enforcement of the Chapter I prohibition which may also be invoked in private litigation before UK courts.<sup>1</sup> When applying the Chapter I prohibition to an agreement or concerted practice to which Article 101 also applies, neither the CMA nor the UK courts may prohibit the relevant agreement or concerted practice under UK competition law if it would be permitted under Article 101.
- 1.5 Immunity from both civil penalties and criminal sanctions may be available to cartel whistleblowers under the CMA leniency programme.<sup>2</sup>

### Abuse of market power

- 1.6 Chapter II of the Competition Act prohibits the abuse of a dominant market position in the UK. Such an abuse may also breach Article 102 TFEU to the extent that it affects trade between Member States. The civil sanctions for breach of the Chapter II prohibition are the same as those that apply to breach of the Chapter I prohibition and it can be enforced by the CMA or private litigants in the same way. There are no criminal sanctions for purely unilateral conduct which is deemed to constitute an abuse of market power.
- 1.7 The CMA is primarily responsible for enforcement of the Chapter II prohibition which may also be invoked in litigation before UK courts. In contrast to the position in relation to Article 101, the CMA and UK courts are permitted to apply UK competition law relating to abusive conduct that is stricter than Article 102.

<sup>1</sup> On 1 April 2014, the CMA became the UK's national competition enforcement agency taking over the competition functions previously performed by the Office of Fair Trading (OFT) and Competition Commission (CC).

<sup>2</sup> Applications for leniency and no-action in cartel cases (July 2013, OFT 1495), adopted by the CMA.

## Market investigations

- 1.8 The CMA has wide powers under the Enterprise Act 2002 to investigate markets where there are concerns that competition may not be operating effectively, including by reason of the structure of the relevant market. In the event of an adverse report, a wide range of remedial steps may be taken, including the unwinding of agreements, the imposition of price controls to specific markets and the introduction of other statutory-based controls.

## Merger control

- 1.9 UK merger control provisions are contained in the Enterprise Act. They are considered in a separate Slaughter and May publication *UK Merger Control under the Enterprise Act 2002*. They apply to mergers which do not fall within the exclusive competence of the European Commission under the EU Merger Regulation (see the separate Slaughter and May publication *The EU Merger Regulation*).

## 2. Inter-relationship with EU law

2.1 EU competition law is of critical importance to the interpretation and application of the UK competition rules.

### Competition Act

2.2 The Competition Act prohibitions are modelled upon those contained in Articles 101 and 102 TFEU. To minimise divergence between the application of the respective prohibitions, Section 60 of the Competition Act incorporates into UK law:

- a governing principle that UK law should not diverge in its substantive application from EU law;
- an obligation on national courts and tribunals to ensure consistency of interpretation between the Competition Act, TFEU and established and future jurisprudence of the European courts; and
- a general duty to have regard in determining any matter to any “relevant decision or statement” of the European Commission.

2.3 Section 60 applies whether or not the relevant agreement or conduct affects trade between Member States. In cases where there is an effect on inter-state trade, the obligation to observe consistency with EU law is reinforced by the Modernisation Regulation (see below).

### The governing principle

2.4 The governing principle requires that every substantive provision of the Competition Act must be interpreted against the background of established EU law, and against the need to ensure a harmonious interpretation between the Competition Act and EU competition law.

2.5 However, harmonious interpretation need be achieved only in “so far as is possible (having regard to any relevant differences between the provisions concerned)”. This ‘opt-out’ is significant in a number of respects:

- The Competition Act confers a greater degree of legal professional privilege against production of documents than exists under EU law and is specifically designed to override the EU position and to extend legal professional privilege to documents produced by in-house counsel.
- A key difference between the EU rules and the Competition Act is that, under the Competition Act, there is no requirement of an effect on trade between Member States.

2.6 Furthermore the goal of consistent interpretation applies “in relation to competition”. This begs the question whether the governing principle clause should apply, for example, to procedural matters, or to the general principles of law recognised by the European courts. It is now accepted that Section 60 imports the ‘high-level principles’ as basic procedural safeguards, as well as the specific case law on Articles 101 and 102.<sup>3</sup> Examples of ‘high-level principles’ are equality, legal certainty, legitimate expectations, proportionality and privilege against self-incrimination.

<sup>3</sup> *Napp Pharmaceutical Holdings Ltd v DGFT* [2001] CAT 3.

## Consistency of interpretation

- 2.7 The Competition Act imposes a positive obligation on national courts and tribunals (including the CMA) when determining a question under the Competition Act to ensure that there is no inconsistency between their decision and the relevant principles and decisions of the European courts.
- 2.8 Furthermore Article 267 TFEU allows national courts to request preliminary rulings from the Court of Justice of the European Union (CJEU) on matters of EU law. In relation to particularly difficult cases involving the interpretation of the Competition Act prohibitions on which there is no existing authority at the EU level, the UK government is of the view that a reference to the CJEU under Article 267 TFEU is open to the CMA. The CJEU has itself confirmed that it does have jurisdiction to rule on the interpretation of national law in appropriate cases in so far as the national law directly incorporates or mirrors provisions of EU law.<sup>4</sup>

## Statements of the European Commission

- 2.9 As well as being guided by the European courts, the UK courts are required in addition to have regard to any relevant decision or statement of the Commission. A number of points should be noted in relation to this:
- first, unlike the obligation in relation to court decisions, there is no absolute obligation on UK courts and tribunals to ensure consistency between national decisions and decisions or statements of the Commission. Rather, these will be of persuasive authority only;<sup>5</sup>
  - secondly, the Competition Act is silent in relation to statements by European institutions other than the Commission. A national court could, nonetheless, clearly have regard to minutes of Council meetings or reports of Parliamentary debates if it considered these of relevance to the case at hand; and
  - thirdly, the reference to “statements” of the Commission encompasses, for example, Notices on Interpretation, Competition Policy Reports, Guidance (including that on enforcement priorities)<sup>6</sup> Bulletins and even Press Releases.

## The Modernisation Regulation

- 2.10 The Modernisation Regulation was the cornerstone of a move to re-orientate enforcement of EU competition rules away from the Commission towards the Member States and to minimise conflicts between national and EU competition rules. Since the introduction of the Modernisation Regulation, the CMA and the UK courts have the following powers and responsibilities:
- The CMA and the UK courts are able to apply directly Articles 101 and 102 in full - formerly only the Commission could grant exemptions under Article 101(3).

<sup>4</sup> See, in particular, Case C-7/97, Oscar Bronner v Mediaprint, at paras. 16 to 20.

<sup>5</sup> Subject to the general duty to avoid conflict with the interpretation of Arts. 101 and 102 imposed by the Modernisation Regulation in relation to agreements or conduct that affect inter-state trade.

<sup>6</sup> Guidance on the Commission’s enforcement priorities in applying Art. 82 TFEU to abusive exclusionary conduct by dominant undertakings (OJ 2009 C45/2, 24.2.2009).

- When applying UK competition rules to agreements or conduct ‘affecting inter-state trade’ - a concept which is broadly interpreted - the CMA and the UK courts must also apply Articles 101 and 102.
- When applying Article 101 and the Chapter I prohibition to agreements, the CMA and the UK courts must not prohibit an agreement if it would be permitted under Article 101. However, the Modernisation Regulation does allow for the application of stricter national laws relating to unilateral conduct so that unilateral conduct may be prohibited under the Chapter II prohibition even if it falls short of an abuse of a dominant position under Article 102.

## European Commission proceedings

- 2.11 Should the Commission initiate formal proceedings in relation to an agreement or conduct that affects inter-state trade, this automatically relieves the competence of the CMA and UK courts to apply Article 101 or 102 in that case.
- 2.12 The Modernisation Regulation imposes a specific duty on courts to refrain from taking a decision which may conflict with a decision contemplated by the Commission. This may require the court to stay proceedings or to refer questions for a preliminary ruling to the European Court of Justice (ECJ) under Article 267 TFEU.

## European Competition Network

- 2.13 The European Competition Network (ECN), a network of national competition authorities (NCAs), was established to facilitate the decentralisation objective of the Modernisation Regulation. This network allows for close cooperation between NCAs so as to ensure the harmonised application of EU and national competition laws across Europe.
- 2.14 Members of the ECN are able to exchange information (including confidential information) for the purposes of ensuring full enforcement of the competition rules across the EU and allocating cases affecting more than one Member State to the NCA best placed to conduct the investigation. Information provided by one NCA to another may be used for applying national competition law only in parallel with EU law and only where it does not lead to a different outcome. Use of information provided by NCAs in prosecuting cartel offences is more restricted (see [Chapter 4](#) below).
- 2.15 The Modernisation Regulation also provides for NCAs to carry out inspections and other fact-finding measures, either on behalf of another NCA or on behalf of the Commission where necessary to establish whether or not there has been an infringement of Article 101 or 102. For these purposes, the CMA has all those powers available to it for the purposes of its own investigations under the Chapter I and II prohibitions.

### 3. Anti-competitive agreements (including cartels)

#### The Chapter I prohibition

- 3.1 The Chapter I prohibition applies to anti-competitive agreements and practices between undertakings. It is based on Article 101 TFEU and comprises four elements, each of which must be satisfied in order for the prohibition to be infringed. There must be:
- an agreement, decision or concerted practice;
  - between undertakings;
  - which may affect trade within the UK; and
  - which has as its object or effect, the prevention, restriction or distortion of competition within the UK.
- 3.2 The CMA is primarily responsible for enforcement of the Chapter I prohibition, but certain sectoral regulators have concurrent jurisdiction to enforce the prohibition within their regulated sectors.<sup>7</sup> The sectoral regulators are required to consider whether the use of their competition law powers is more appropriate than using their sector-specific regulatory powers before taking enforcement action.
- 3.3 The Chapter I prohibition may also be raised in private litigation, for example as a defence to an action to enforce a contractual restriction or as the basis for a claim for damages to recover loss suffered as a result of a competition law infringement (see further the [Damages actions](#) section below).

#### Agreements, decisions and concerted practices

- 3.4 The Chapter I prohibition covers not only formal written agreements between undertakings, but also ‘gentlemen’s agreements’ and other kinds of informal arrangements or understandings, whether oral or in writing and whether or not intended to be legally enforceable. It also extends to decisions of trade associations. These are deemed to constitute agreements between the members of the trade association.<sup>8</sup> The prohibition also applies to trade association rules and regulations that may limit members’ commercial freedom of action.<sup>9</sup>
- 3.5 Concerted practices sometimes found in oligopolistic markets where few undertakings are present are also caught by the Chapter I prohibition. For example, a system of advance price announcements, where there is an underlying understanding that other market players will amend their own pricing accordingly, may be prohibited.
- 3.6 In this publication, references to “agreements” should be understood as including concerted practices and decisions of associations.

<sup>7</sup> Namely, the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Water Services Regulation Authority (Ofwat), the Northern Ireland Authority for Utility Regulation (NIAUR), the Civil Aviation Authority (CAA), the Office of Rail and Road (ORR), Monitor, the Financial Conduct Authority (FCA) and the Payment Services Regulator (PSR).

<sup>8</sup> Trade associations, professions and self-regulating bodies (December 2004, OFT 408), adopted by the CMA. See also for example, Northern Ireland Livestock and Auctioneers Trade Association (3 February 2003).

<sup>9</sup> See Association of British Insurers’ General Terms of Agreement (22 April 2004).

## Undertakings

- 3.7 The term “undertaking” is broadly interpreted to include any natural or legal person engaged in economic activity, irrespective of its legal status and the way in which it is financed. Public sector bodies engaging in economic activities can be undertakings for these purposes.<sup>10</sup>
- 3.8 A parent company and its subsidiary, or two companies having the same parent, will normally be regarded as a single undertaking where they function as an economic whole, with agreements between them regarded as the mere allocation of functions within a single group. In *Anaesthetists’ Groups* (15 April 2003), the OFT found that a group of anaesthetists operated as a single undertaking for the purposes of competition law and therefore a price-fixing agreement between the individual members of the group was not capable of falling within the Chapter I prohibition. It based this conclusion on the fact that the individuals did not engage in activities other than through the group and the group itself was clearly engaged in an economic activity.

## Restrict, distort or prevent competition

- 3.9 Whether a given agreement restricts, distorts, or prevents competition will depend on a careful analysis of the facts of each individual case, including market structure and characteristics. The following are some examples of the types of agreements considered by the CMA to breach the Chapter I prohibition:
- price-fixing;
  - collusive tendering;
  - resale price maintenance;
  - exchange of price information;
  - market sharing;
  - anti-competitive trade association rules and recommendations; and
  - anti-competitive rules of sporting bodies governing entry criteria.
- 3.10 The Chapter I prohibition refers to agreements that have “the object or effect” of adversely affecting competition. Where an agreement has the object of preventing, restricting or distorting competition within the UK, no analysis into the effects of the agreement is necessary. The Competition Act includes a non-exhaustive list of examples of the type of agreements that will generally be considered by the CMA to have the object of preventing, restricting or distorting competition: agreements to fix prices, limit production, share markets, discriminate between customers and tie-in other supplementary obligations or products.

<sup>10</sup> Cf. *BetterCare Group Limited v DGFT* [2002] CAT 7, but also Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, AOK Bundesverband & Others, judgment of 16 March 2004, and T-319/99, *FENIN v Commission*, judgment of 4 March 2003.

## Appreciability

- 3.11 The Chapter I prohibition will apply where an agreement has the object of preventing, restricting or distorting competition within the UK or an appreciable effect on competition within the UK. In determining whether an agreement has an appreciable effect on competition (i.e. in cases where no anti-competitive object is found), the CMA will have regard to the Commission's approach as set out in its Notice on agreements of minor importance.<sup>11</sup>
- 3.12 The Notice specifies that an agreement between competing undertakings will not have an appreciable effect on competition if their combined share of the relevant market does not exceed 10%. The relevant threshold for agreements between non-competing undertakings is 15%. In both cases, these thresholds are reduced to 5% where parallel networks of similar agreements cumulatively result in foreclosure of the relevant market. However, even where the thresholds are met, the CMA may still find that the effect on competition is not appreciable. This will depend on factors such as the structure and characteristics of the market affected.

## Exclusions

- 3.13 The Competition Act provides for three broad categories of exclusions from the Chapter I prohibition, as considered below. The Act allows the Secretary of State to add additional exclusions or remove existing ones.

## Mergers and concentrations

- 3.14 The Chapter I or II prohibitions do not apply to mergers under the Enterprise Act nor to concentrations in respect of which the Commission has exclusive jurisdiction under the EC Merger Regulation. This exclusion is discussed in further detail in the Slaughter and May publication *UK Merger Control under the Enterprise Act 2002*.

## Competition scrutiny under other legislation

- 3.15 The Act excludes from the ambit of the Chapter I prohibition agreements that are subject to competition scrutiny under the Broadcasting Act 1990 or the Communications Act 2003.

## General exclusions

- 3.16 The most important of the general exclusions from the scope of the Chapter I or II prohibitions are as follows:
- Services of general economic interest: the Chapter I or II prohibitions do not apply to an undertaking "entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular task assigned to that undertaking". This exclusion is based on Article 106(2) TFEU.

<sup>11</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Art. 101(1) of the Treaty on the Functioning of the European Union (*De Minimis*) (OJ 2014 C291, 30.8.2014).

- Compliance with legal requirements: the Chapter I or II prohibitions do not apply to an agreement or contract to the extent to which it is made or engaged in to comply with a legal requirement. For this purpose, a legal requirement is one imposed by or under: (i) any enactment in force in the UK; (ii) the TFEU or the EEA Agreement and having legal effect in the UK without further enactment; or (iii) the law in force in another Member State and having legal effect in the UK. In *Vodafone/Pre-pay Mobile Phone Vouchers* (5 April 2002), it was accepted that, to the extent that Vodafone was required by its operating licence to publish prices, that could not form the basis of any allegation of infringement of the Chapter I prohibition by reason of resale price maintenance.
- Avoidance of conflict with international obligations: the Secretary of State has power to make an order to exclude the application of the Chapter I or II prohibitions to an agreement or contract where this would be appropriate in order to avoid a conflict between provisions of the Competition Act and an international obligation of the UK.
- Public policy: the Secretary of State may, by order, exclude the application of the Chapter I or II prohibitions to an agreement or contract where there are “exceptional and compelling reasons of public policy” for doing so.

## Exemption from the Chapter I prohibition

3.17 The Competition Act provides that an agreement is exempt from the Chapter I prohibition if it satisfies certain criteria - broadly, that the competitive disadvantages to which the agreement gives rise are outweighed by other economic benefits. Such benefits should accrue to customers and the agreement should use the least restrictive means of achieving the relevant benefits. An agreement is unlikely to be exempt if parties cannot show that there will continue to be effective competition in the market for the goods or services concerned. An agreement which falls within the Chapter I prohibition but which satisfies the exemption criteria is not prohibited and no prior decision to that effect is required. Such an agreement is valid and enforceable from the moment the exemption criteria are satisfied and for as long as that remains the case.

## Self-assessment

3.18 It is not possible to notify an agreement to the CMA for exemption; instead parties are expected to “self-assess” whether or not an exemption is likely to be available. It may, however, be possible to request that the CMA provide a short form opinion or informal advice on the application of the Chapter I prohibition (see further below). Individual assessment of whether an agreement satisfies the exemption criteria may be unnecessary where the agreement benefits from a block or parallel exemption.

## Block exemption

3.19 A block exemption covers particular categories of agreements that satisfy the exemption criteria. The Secretary of State may adopt block exemptions, acting upon a recommendation from the CMA. Only one block exemption has been adopted to date - for public transport ticketing schemes.<sup>12</sup>

<sup>12</sup> Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001, SI 2001/319, as amended by the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption)(Amendment) Order 2005, SI 2005/3347.

## Parallel exemption

3.20 The parallel exemption applies to:

- agreements that benefit from an EU block exemption, a finding of inapplicability by the Commission, or an individual exemption granted prior to 1 May 2004 under the EU competition rules;<sup>13</sup> and
- agreements which fall within the scope of a block exemption at EU level, but which are not subject to the EU competition rules because they do not affect inter-state trade.

3.21 The CMA may impose, vary or remove conditions and obligations subject to which a parallel exemption is to have effect, or even cancel a parallel exemption. The CMA has indicated that a decision to withdraw the benefit of a block exemption may form the subject of a market investigation reference under the Enterprise Act (see [Chapter 7](#) below).

## Advice

3.22 The CMA may be willing to provide confidential, informal advice to undertakings on the application of the Competition Act prohibitions to particular agreements and conduct. The CMA may also issue non-binding written Opinions to this effect. The CMA has adopted a ‘short-form’ opinion procedure on a trial basis whereby undertakings can apply for guidance on how the law applies to prospective horizontal agreements with competitors, as well as prospective vertical agreements between parties operating at different levels of the supply chain.<sup>14</sup>

3.23 These procedures fall under the CMA’s general ‘Opinions’ process. The CMA has indicated that the circumstances in which it will issue Opinions are narrowly confined to cases which present genuinely novel or unresolved questions and where there is an interest in issuing clarification for the benefit of a wider audience. Undertakings seeking guidance are encouraged to provide a complete statement of facts in order to maximise the relevance of any resulting CMA guidance. Moreover, Opinions are not conclusive as to the application of competition law.

3.24 Subject to the possibilities for seeking informal advice or a written Opinion, the intention is that parties (in consultation with their legal advisers and taking into account guidance published by the CMA) should be able to form their own views as to the compatibility of their agreement or conduct with the relevant prohibitions.

## Sanctions

3.25 Companies found to have breached the Chapter I prohibition may face fines up to a maximum of 10% of their worldwide turnover. Individuals within a company associated with the infringement may be disqualified from serving as a director of a UK company for a period of up to 15 years (and potentially liable for criminal penalties - see [Chapter 4](#) below). Civil enforcement and procedure relating to the Chapter I prohibition are considered in [Chapter 6](#) below.

<sup>13</sup> The EU block exemptions are considered in the Slaughter and May publications on vertical agreements, horizontal agreements and intellectual property licensing.

<sup>14</sup> See Guidance on the CMA’s approach to Short-form Opinions (4 April 2014, CMA 27). See also P&H/Makro Joint Purchasing Agreement - Short-form Opinion of the Office of Fair Trading - guidance to facilitate self-assessment under the Chapter I prohibition of the Competition Act 1998 and/or Art. 101 TFEU, 27 April 2010.

## 4. The cartel offence

- 4.1 Under the Enterprise Act, participation by an individual in a cartel is a criminal offence<sup>15</sup>. A cartel for this purpose is an arrangement between at least two persons that undertakings will engage in price-fixing, limiting supply or production, market sharing or bid-rigging. Vertical agreements such as resale price maintenance (RPM) do not fall within the scope of the offence.
- 4.2 The ERRA introduced new exclusions and defences:
- The exclusions include where customers are notified of the potentially anti-competitive arrangements before they enter into supply agreements for the affected products or services and where relevant information about the arrangements is published in the London Gazette before they are implemented.
  - The defences include where the undertaking can show that it had no intention to conceal the arrangements from customers or the CMA or that it took reasonable steps to ensure that the nature of the arrangements were disclosed to legal advisers for the purposes of obtaining advice about them before they were concluded.
- 4.3 The cartel offence may be punished on conviction on indictment by up to five years' imprisonment or to an unlimited fine, or both. On summary conviction, the cartel offence is punishable by imprisonment for a maximum term of six months, or to a fine not exceeding the statutory maximum (currently set as unlimited).
- 4.4 It is possible for individuals to be prosecuted for attempts to commit the cartel offence, or for conspiracy to commit the cartel offence.
- 4.5 The CMA's powers of investigation and prosecution in respect of the criminal cartel offence under the Enterprise Act are shared with the Serious Fraud Office (SFO). The SFO is the intended prosecutor for this criminal offence in England, Wales and Northern Ireland in cases that involve serious or complex fraud. In Scotland, the Lord Advocate is responsible for all prosecutions and exercises the same powers as the SFO through the National Casework Division (NCD) of the Crown Office and Procurator Fiscal Service (COPFS). The CMA and COPFS cooperate to investigate and prosecute criminal cartel cases in Scotland.<sup>16</sup>

<sup>15</sup> The Enterprise Act was amended by the Enterprise and Regulatory Reform Act 2013 (ERRA), which came fully into force on 1 April 2014. The ERRA removed the requirement in the original cartel offence for individuals to have acted "dishonestly". Arrangements or agreements made before the new cartel offence came into force remain subject to the previous version of the offence.

<sup>16</sup> See Memorandum of Understanding between the CMA and the COPFS, July 2014.

- 4.6 The first ever convictions for cartel offences under the Enterprise Act were made in June 2008 in relation to the global marine hose cartel. Three company directors were sentenced to imprisonment for between two and a half and three years. The defendants had pleaded guilty to agreeing dishonestly to allocate markets and customers, restrict supplies, fix prices and rig bids relating to the supply of marine hoses and ancillary equipment in the UK. All three were also disqualified from acting as directors for periods of between five and seven years.
- 4.7 The cartel offence, attempts to commit the offence and conspiracy to commit the offence are crimes in relation to which an individual may be extradited to the UK under the European Convention on Extradition, provided that the extraditing country has a similar provision which is punishable by at least 12 months' imprisonment. Only a limited number of EU countries presently have such criminal liability for competition law infringements. The extradition of suspected offenders to and from the US is dealt with under the Extradition Treaty signed with the US in 2003 (which came into force in April 2007). Whilst that Treaty also incorporates a 'dual criminality' requirement, the US has had criminal liability for antitrust violations for many years.
- 4.8 An individual who has participated in a cartel may also be guilty of money laundering under the Proceeds of Crime Act 2002. This is a criminal offence punishable by a prison sentence of up to 14 years' duration, unlimited fines, or both.

## 5. Abuse of market power

### The Chapter II prohibition

5.1 The Chapter II prohibition targets anti-competitive conduct by undertakings exercising significant market power. It is based on Article 102 and prohibits:

- abusive conduct;
- by one or more undertakings which, either singly or collectively, hold a dominant position in a market; and
- which may affect trade within the UK.

### Dominance

5.2 A determination that an undertaking enjoys such a position of economic strength that it can be considered dominant may depend crucially on how the relevant market is defined. This must be carefully considered through an assessment of:

- the goods or services which form part of the market (the relevant product market); and
- the geographic extent of the market (the relevant geographic market).

5.3 Dominance within a market will depend on a close examination of the conditions of competition within the relevant market, including factors such as market shares, the position of competitors, barriers to entry and the bargaining strength of customers. A company may generally be considered dominant if it is able to behave to an appreciable extent independently of its competitors, customers and ultimately consumers, thereby preventing effective competition on the relevant market. As a rule of thumb, dominance will not generally be considered to exist below a market share of 40%. Above 50%, however, a rebuttable presumption of dominance exists (see *Napp Pharmaceuticals*, 30 March 2001).

5.4 Dominance can be held either singly or, where sufficient economic or structural links exist between market players, jointly (also known as “collective dominance”). Cases of collective dominance are more likely to be considered under Enterprise Act provisions that allow for investigations of markets (see [Chapter 6](#) below) rather than under the Chapter II prohibition.

### Abuse

5.5 The concept of abuse is broad: any conduct by a dominant company which allows it to enhance or exploit its market position to the detriment of competitors or consumers may be considered abusive. Most of the cases considered by the OFT/CMA to date have related to conduct alleged to have excluded competitors from a market. The forms of conduct that have been reviewed by the UK competition authorities for their potential exclusionary effects include:

- refusal to supply so as to prevent effective competition;
- the conclusion of exclusive purchasing, supply or distribution agreements so as to create a barrier to entry;

- tying or leveraging so as to extend a position of dominance from one market to another;
- pricing with exclusionary effects; and
- applying discriminatory standards to independent parties compared to those applied to affiliate companies.

5.6 Cases in which conduct has been alleged to exploit customers have been fewer in number and most have related to excessive pricing. However, concerns have also been raised by the UK competition authorities in relation to conduct that discriminated between customers.

### Effect on trade within the UK

5.7 There is no requirement that the abuse occurs in a UK market. It is sufficient that the undertaking committing the abuse is dominant in relation to a UK market, and that the conduct complained of may produce effects on trade in the UK or part of the UK.

### Exclusions

5.8 The Competition Act sets out a number of specific exclusions from the Chapter II prohibition, namely:

- mergers and concentrations (see [paragraph 3.14](#) above); and
- general exclusions (see [paragraph 3.16](#) above).

### Sanctions

5.9 Companies found to have breached the Chapter II prohibition may face fines up to a maximum level of 10% of worldwide turnover. Individuals within a company associated with the infringement may be disqualified from serving as a director of a UK company for a period of up to 15 years.

5.10 Civil enforcement and procedure relating to the Chapter II prohibition are considered in [Chapter 6](#) below.

## 6. CMA investigation and enforcement

### Prioritisation principles

6.1 When assessing which cases to investigate, or to continue investigating, the CMA takes into account a range of factors as set out in the “CMA Prioritisation Principles”.<sup>17</sup> Work is generally prioritised according to its impact on consumers and strategic significance and these are balanced against the resources available.<sup>18</sup> This reflects an attempt by the CMA to encourage private enforcement as an alternative to public authority intervention so as to alleviate the regulatory burden on public resources.

### Powers of investigation

6.2 Where the CMA does decide to investigate, it may do so following a complaint by a third party, a tip-off from parties to the arrangement or cartel (see the *Leniency programme* section below), on the basis of information supplied by other government departments or public authorities (including the Commission and other national competition authorities) or on its own initiative based on its research and market intelligence.

6.3 The CMA has the power to use several forms of investigation for breaches of the Chapter I and II prohibitions, which it may use where it has “reasonable grounds for suspecting” that either of the prohibitions has been infringed. These powers are also available to the CMA when acting under Articles 101 and 102:

- written requests for information;
- compulsory interview power;
- entry without a warrant; and
- entry with a warrant.

### Written requests for information

6.4 The CMA may request any undertaking by notice in writing (a Section 26 Notice) to provide any document or information that it considers to be relevant to the investigation. The CMA is not limited to approaching the undertakings alleged to have infringed one of the prohibitions. For example, the notice may be addressed to third parties such as complainants, suppliers, customers and competitors. The notice must state the subject matter and purpose of the investigation, the nature of the offences involved, the documents and/or information requested. The CMA will also normally set a deadline by which the information must be provided.

6.5 The CMA may ask for an explanation of any documents produced in response to the notice and, for documents not produced, may enquire as to the whereabouts of those documents. The CMA can fine any undertaking that fails, without reasonable excuse, to comply with a Section 26 Notice. It is a defence if the recipient can prove that (i) it does not have the documents sought in its possession or control and (ii) it is not reasonably practicable for it to comply with the notice. There are also criminal sanctions, as described further below.

<sup>17</sup> Prioritisation principles for the CMA (April 2014, CMA16).

<sup>18</sup> Similar prioritisation principles are applied by the sectoral regulators in relation to their competition powers.

## Compulsory interview power

- 6.6 The ERRA introduced a formal power for the CMA to require any individual, who has a connection with a business which is a party to the investigation, to answer questions on any matter relevant to the investigation. This could include current or former directors, persons exercising management functions, temporary or permanent employees, professional advisers (subject to privilege) and controlling shareholders.
- 6.7 The CMA will provide the person with a formal notice requiring them to answer questions at a specified place and time, or immediately on receipt of the notice. The notice will state the purpose of the investigation, details of when and where the interview will be conducted and the penalties for non-compliance.
- 6.8 Any person who is formally questioned in this way by the CMA is entitled to ask for their legal adviser to be present. Questioning may be delayed for a reasonable time to allow counsel to attend. In some cases, an individual may choose to be represented by the same legal adviser who is acting for the undertaking concerned. It is the CMA's view that generally it will be inappropriate for a legal adviser who only acts for the undertaking under investigation to be present at the interview.
- 6.9 The CMA can fine any person who fails, without reasonable excuse, to comply with a formal notice to answer the CMA's questions. There are also criminal sanctions, as described further below.
- 6.10 Statements obtained from a person under compulsion in the course of civil investigations (for example, during such an interview) are not admissible in evidence against that person in a prosecution for the criminal cartel offence, except in certain limited circumstances (see further the [Privilege against self-incrimination](#) section below).

## Entry without a warrant

- 6.11 Any CMA officer authorised in writing has the right to enter any business premises in connection with an investigation. The power to carry out inspections without a warrant is limited to business premises, which are defined in the Competition Act as any premises, or part of premises, not used as a dwelling.<sup>19</sup> Where entry is without a warrant, force may not be used, either to enter premises or while on the premises.
- 6.12 The investigating officer has broad powers to take away equipment, require the production and explanation of documents, copy documents and require emails and other electronically held information to be printed and produced for inspection. The investigating officer also has the power to take any other steps necessary in order to preserve any relevant documents or prevent interference with them. This includes requiring that the premises (or any part of the premises, including offices, files and cupboards) be sealed for such time as is reasonably necessary to enable the inspection to be completed. The investigating officer can only request the production of documents that are relevant to the investigation (i.e. they cannot mount a "fishing expedition").
- 6.13 The power to require an explanation of documents is subject to the right against self-incrimination. Thus, the CMA may not ask for explanations that might involve admissions of an infringement and should instead limit questioning to matters of fact. The distinction will not always be clear-cut.

<sup>19</sup> S. 27(6) Competition Act.

## Entry with a warrant

6.14 In addition to the powers listed above, a court warrant allows the CMA to use reasonable force to enter any premises specified in the warrant and to search for and take possession of documents relevant to an investigation. The High Court or Competition Appeals Tribunal (CAT) may issue a warrant to the CMA where the following conditions are met:

- there are reasonable grounds for suspecting that a document sought by a Section 26 Notice or in the course of an “on-the-spot” investigation without warrant, which has not been produced, is on the premises;
- there are reasonable grounds for suspecting that a document that the CMA could obtain by Section 26 notice is on the premises, but would be concealed or interfered with if its production were to be required; or
- entry without a warrant for the purposes of investigation has been impossible and there are reasonable grounds for suspecting that documents are on the premises that could have been acquired if entry had been obtained.

6.15 Entry to domestic premises must be authorised by warrant. Domestic premises are defined by the Competition Act as premises, or any part of premises, used as a dwelling and also used in connection with the affairs of an undertaking or where documents relating to the affairs of an undertaking are kept.<sup>20</sup>

## Access to legal advice

6.16 The occupier may ask legal advisers to be present during an inspection, whether conducted with or without a warrant. If the occupier has not been given notice of the visit, and there is no in-house lawyer on the premises, CMA officers may wait a reasonable time for legal advisers to arrive. During this time, the CMA may take necessary measures to prevent the occupier or others tampering with evidence or warning other businesses about the investigation.

## Legal professional privilege

6.17 The requirement to produce documents, whether by written notice or at an on-site investigation, does not extend to documents protected by legal professional privilege. There are two main types of legal professional privilege:

- legal advice privilege which applies to confidential communications between a client and his or her lawyer made for the dominant purpose of obtaining or giving legal advice; and
- litigation privilege which applies to confidential communications between a client and his or her lawyer or between a client or lawyer and certain other third parties, such as a witness, made for the dominant purpose of obtaining or giving legal advice or collecting evidence for current or contemplated litigation.

<sup>20</sup> S. 28A(9) Competition Act.

- 6.18 For UK purposes, in-house lawyers are included in the definition of “lawyer” and communications with foreign lawyers can also attract legal professional privilege. The scope of legal professional privilege allowed for in investigations of breaches of UK competition law is wider than that allowed under EU law where privilege does not extend to in-house lawyers, and independent professional lawyers must be qualified in a Member State.
- 6.19 In the case of a dispute over whether documents are privileged or not, the investigating officer will attempt to resolve the dispute by way of a discussion. If this is not possible, the documents will be placed in a sealed envelope signed across the flap and held by the CMA until the dispute can be resolved. The undertaking claiming legal privilege should put its claims for particular documents in writing to the CMA as soon as possible.

## Confidentiality

- 6.20 The CMA can request documents which contain commercially sensitive information or contain details of an individual’s private affairs, whose disclosure may seriously damage a party’s interest. In such a scenario, the affected party should provide such documents separately in an annex which is clearly marked as confidential, accompanied by a written explanation as to why such documents should be considered confidential. The CMA will then decide whether such documents will need to be disclosed. If the CMA decides that such documents will need to be disclosed, the CMA will generally give prior notice to the affected party and allow a reasonable opportunity for the affected party to make its views known.<sup>21</sup>

## Offences

- 6.21 There are civil and criminal sanctions for non-compliance with powers of investigation under the Competition Act. The relevant offences fall into four main categories:
- failing to comply with the requirements imposed by a notice, or at an on-site investigation;
  - intentionally obstructing an officer investigating with or without a warrant;
  - intentionally or recklessly destroying, disposing of, falsifying or concealing documents or causing or permitting those things to happen; and
  - knowingly or recklessly supplying information which is false or misleading either directly to the CMA or to anyone else knowing it is for the purpose of providing information to the CMA.

## Penalties for non-compliance

- 6.22 The penalties for non-compliance with an investigation can be substantial. Usually the penalties are financial, but in the case of any obstruction of investigators with a warrant, destruction of documents or provision of false or misleading information, imprisonment for up to two years is possible.

<sup>21</sup> Transparency and Disclosure: Statement of the CMA’s policy and approach (January 2014, CMA6).

## Enforcement by the CMA

6.23 The CMA's enforcement powers are:

- to give interim measures directions during the course of an investigation;
- to accept binding commitments offered to it;
- to give a direction to the undertaking concerned to modify or terminate the agreement, or to modify or cease the abusive conduct;
- to impose a financial penalty on the undertaking concerned; and
- to apply for a disqualification order to be made against a company director for a period of up to 15 years.

6.24 The burden of proving an infringement lies with the CMA. The burden of proving that exemption from the Chapter I prohibition is available lies upon the party making that claim.<sup>22</sup> A decision by the CMA that a person has infringed the Chapter I and/or Chapter II prohibitions must be based on strong and compelling evidence.<sup>23</sup> However, this standard of proof does not inevitably require documentary or written evidence - the CMA may rely on oral witness statements where it is satisfied on the basis of the surrounding circumstances that the statements can be taken as reliable.<sup>24</sup>

### Interim measures

6.25 The CMA may, before completing its assessment of an agreement or conduct, give interim measures directions where the following conditions are met:

- it has a "reasonable suspicion" that an infringement has occurred and is in the process of investigating the suspected infringement; and
- it considers it necessary to act as a matter of urgency for the purpose either:
  - of preventing significant damage to a particular person or business; or
  - of protecting the public interest.

6.26 The CMA may not impose interim measures where a party to the agreement has produced evidence that, on the balance of probabilities, the agreement satisfies the conditions for exemption from the Chapter I prohibition.

6.27 The "reasonable suspicion" standard for ordering interim measures applies when the CMA is applying the EU prohibitions, notwithstanding the fact that the Commission has the power to order interim measures only where it is satisfied that there is a *prima facie* case of infringement, a much higher standard.

<sup>22</sup> S. 9(2) Competition Act.

<sup>23</sup> *Napp Pharmaceuticals v DGFT* [2002] CAT 1.

<sup>24</sup> *Claymore/Express Dairies v DGFT*, Order of CAT dated 2 September 2003.

- 6.28 Damage will be “significant” where a person (or category of persons) is or is likely to be restricted in their ability to compete effectively, such that this causes significant damage to their commercial position. The damage can be temporary or permanent and can include actual or potential financial loss, ability to obtain supplies and/or access to customers and damage to goodwill or reputation.
- 6.29 The CMA can impose interim measures on its own initiative or in response to an application to do so by a person who considers that the alleged anti-competitive behaviour is causing them significant damage. Before imposing interim measures, the CMA must give written notice to the business concerned and give it an opportunity to make representations.

## Commitments

- 6.30 The CMA has the formal power to accept binding commitments offered by the parties under investigation where it is satisfied that these commitments meet its competition concerns.
- 6.31 Commitments can only be accepted after the CMA has begun an investigation and before it has issued a formal decision. The CMA has complete discretion as to whether or not to accept commitments. The CMA is only likely to accept commitments where the competition concerns are readily identifiable, fully addressed by the commitments offered and can be implemented effectively within a short period of time. The CMA is unlikely to accept commitments in cases involving serious competition infringements or if it would be difficult to monitor compliance with the commitments and their effectiveness.
- 6.32 Once accepted, binding commitments are published and the CMA may not continue an investigation, make an infringement decision or give interim measures directions in respect of the alleged infringement addressed by the commitments unless it has reasonable grounds for:
- believing that there has been a material change of circumstances since the commitments were accepted;
  - suspecting that a person has failed to adhere to one or more terms of the binding commitments; or
  - suspecting that information which led it to accept the binding commitments was incomplete, false or misleading in a material particular.
- 6.33 Binding commitments are generally adopted for a specified period of time. Whilst they are in force, the CMA may review their effectiveness from time to time and take such action as regards their variation or release as it deems appropriate. Commitments can be enforced by court order. Sufficiently interested parties may appeal to the CAT against the CMA’s decision to accept, vary or release (or not to release) commitments.
- 6.34 The acceptance of commitments by the CMA does not preclude third parties from bringing private actions before the High Court or the CAT for damages suffered as a result of the alleged anti-competitive behaviour, but they would not be entitled to bring a “follow-on” action before the CAT (see further the [Damages actions](#) section below).

## Findings of infringement and directions

- 6.35 If the CMA considers that it is likely that an agreement or conduct does infringe competition law and proposes to make a final infringement decision, it will send the party or parties a written Statement of Objections (SO) setting out the matters to which it has taken objection, the action it proposes to take and the reasons for it. The SO should set out all the allegations and facts upon which the CMA proposes to base its final decision.<sup>25</sup>
- 6.36 The CMA must give the party or parties an opportunity to make written representations in response to the SO. The CMA must offer all addressees of a statement of objections the opportunity to attend an oral hearing, during which oral representations may be made to elaborate on the written representations already submitted. The oral hearing (if requested) will be attended by the Case Decision Group, members of the case team and a CMA economist and lawyer. The meeting will be chaired by the Procedural Officer, who will subsequently report to the Case Decision Group on the fairness of the oral hearing procedure.
- 6.37 Where requested, the party or parties must also be given a reasonable opportunity to inspect the CMA's file relating to the proposed decision. The CMA may refuse access to documents to the extent that they contain confidential information or are the CMA's internal documents.
- 6.38 In the case of an infringement decision, the CMA may give "to such person or persons as it considers appropriate, such directions as it considers appropriate to bring the infringement to an end". Whilst the powers of the CMA to issue directions are sufficiently broad to allow it to require divestitures or structural remedies, these are more likely to flow from a market investigation reference under the Enterprise Act (see [Chapter 7](#) below). It is more usual for directions under the Competition Act to require agreements or conduct to be terminated or modified.
- 6.39 If a person fails to comply with a direction without reasonable excuse, the CMA may apply to the court for an order requiring the default to be made good. Breach of such an order would be a contempt of court.

## Voidness

- 6.40 On its face, the Chapter I prohibition, following Article 101(2) TFEU, renders void and unenforceable any agreement falling within its terms.
- 6.41 Nonetheless, when applying the Chapter I prohibition, it may be possible to sever from an agreement the offending elements, leaving the remainder of the agreement intact. This follows the common practice as established by the CJEU in Luxembourg.
- 6.42 The Chapter I prohibition is a dynamic instrument and the position of an agreement under the prohibition must be assessed in the light of all relevant economic facts and circumstances. Voidness under the prohibition is not for all time, and an agreement can move in and out of the scope of the prohibition as economic and market conditions develop.<sup>26</sup>

<sup>25</sup> *Argos and Littlewoods v OFT* [2003] CAT 16.

<sup>26</sup> *Passmore v Morland* [1999] 3 All ER 1005.

6.43 Whilst the Chapter II prohibition does not expressly render void contractual provisions that constitute an abuse of a dominant position, this result flows automatically from the illegality of the conduct constituting the abuse.

## Fines

6.44 On making a decision that an undertaking has infringed Article 101/Chapter I or Article 102/Chapter II, the CMA may impose a fine up to a maximum of 10% of the worldwide turnover of the undertaking concerned in the previous business year, provided it is satisfied that the infringement has been committed either intentionally or negligently.<sup>27</sup>

6.45 The CMA has adopted the guidance published by the OFT as to the appropriate amount of a penalty.<sup>28</sup> Factors to be taken into account in determining the level of a fine include the seriousness and duration of the infringement and the economic strength of the companies involved. Market sharing, price-fixing (including resale price maintenance) and predatory pricing will be regarded as particularly serious infringements.<sup>29</sup>

6.46 Adjustments to the level of the fine may also be made for aggravating and mitigating factors such as cooperation with or obstruction of the CMA's investigation, leading or reactive role in the infringement, involvement of directors or senior management, repeat infringements and the intentional or negligent nature of the infringement.

6.47 When setting the amount of a fine, the CMA will also have regard to factors such as the object of deterring future infringements (either by the undertaking concerned or other undertakings generally), ensuring that the penalty is not disproportionate or excessive overall, whether a penalty has been imposed by the Commission or in another Member State (see further below) and whether the undertaking has a leniency agreement or has reached settlement with the CMA.

6.48 When dealing with an infringement of Article 101/Chapter I or Article 102/Chapter II that also has effects in another Member State, the CMA may, with the consent of the relevant Member State, take into account the effects of the infringement in that Member State in calculating the appropriate level of penalty. In imposing penalties under the Competition Act or when acting under Articles 101 and 102, the CMA must take account of fines imposed by the Commission or national competition authorities in relation to the same conduct or agreement. No account need be taken of fines imposed by competition authorities outside the EU.

6.49 An undertaking may appeal to the CAT against either the imposition of the penalty itself or the amount of the penalty, or both.

<sup>27</sup> S. 36(3) Competition Act provides that the CMA may impose a penalty on an undertaking only if it is satisfied that the infringement has been committed intentionally or negligently. It does not, for the purposes of crossing that threshold, have to determine specifically which it was. See *Napp Pharmaceutical Holdings Limited v DGFT* [2002] CAT 1 and *Aberdeen Journals Limited v OFT* [2003] CAT 11.

<sup>28</sup> Guidance as to the appropriate amount of a penalty (September 2012, OFT423), adopted by the CMA.

<sup>29</sup> See *Hasbro/Argos/Littlewoods* CA98/8/2003, *Replica Football Kits* CA98/06/2003, and *Napp Pharmaceuticals* CA98/2D/2001.

## Limitation periods

6.50 When acting under the Competition Act or Articles 101 and 102, the CMA's powers to impose penalties and enforce payment of penalties are arguably subject to the six-year limitation period for tortious actions as set out in the Limitation Act 1980. However this theory has yet to be tested in the courts.

## Disqualification of directors for competition infringements

- 6.51 Finally, the CMA may apply to court for disqualification of a director of a company in the event of competition law infringements. The CMA will not generally apply for a disqualification order unless there has been a prior finding of infringement of competition law by the relevant company. However, exceptionally, it may do so where an infringement decision or judgment has not yet been made; in the context of cases where no fine has been imposed; where the relevant directors have resigned or have been removed from office as a result of their conduct in connection with the breach; or where the relevant directors failed to keep themselves properly informed of the company's conduct even though they were not involved directly in the breach.<sup>30</sup>
- 6.52 If there has been a prior finding of infringement but leniency (see below) was granted to the relevant company, the CMA is unlikely to apply for an order in relation to the cartel activity to which the grant of leniency relates.
- 6.53 Courts may make disqualification orders for up to 15 years against a director of a company that commits a breach of the competition rules. The court must make such an order if it considers that the director's conduct was such as to render him unfit to be concerned in the management of a company. A director can be considered unfit for these purposes either because of direct participation in the infringement or on the basis of having turned a blind eye to breaches of the competition rules.
- 6.54 The effect of a disqualification order is to prevent an individual being involved (directly or indirectly) in the management of a UK company without leave from a court. Breach of a disqualification order is a criminal offence and may lead to imprisonment for up to two years and a fine of up to £5,000. Any person involved in management of a company in breach of a disqualification order is personally liable for all the relevant debts of the company.
- 6.55 The CMA has power to accept undertakings in lieu of disqualification orders. Such undertakings may be for periods of up to 15 years and have broadly the same effect as orders.

<sup>30</sup> Director disqualification orders in competition cases (2010, OFT510), adopted by the CMA.

## Competition litigation

### Appeals

6.56 Addressees of a decision of the CMA have a right of appeal to the CAT. A decision of the CMA for these purposes includes not only a finding of infringement, but also a decision to impose penalties, a decision to accept, vary or release commitments, and a decision in relation to interim measures.

6.57 Whether the response of the CMA to a complaint against its decision to close an investigation without reaching a formal infringement or non-infringement decision can form the subject of an appeal to the CAT has been the subject of significant litigation under the Competition Act. The CAT has clarified the position as follows:

- Where the CMA does not reach a view as to the merits of the case and closes its investigation for some reason genuinely independent of the merits of the case, for example in exercise of its administrative discretion as to how to deploy its resources, no “decision” is involved and the complainant’s only right of recourse will be an application for judicial review.<sup>31</sup>
- In contrast, where the CMA closes its file on a complaint or elects not to pursue a complaint on the basis that there is no evidence of an infringement or if it considers that it will not be able to establish an infringement, it has reached a decision which is capable of appeal.<sup>32</sup>

6.58 The CAT will determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal (for example, that the CMA erred on points of law, made factual errors or exercised its discretion wrongly) and may:

- adopt interim measures;<sup>33</sup>
- confirm or set aside all or part of the decision;<sup>34</sup>
- remit the matter to the CMA or relevant sectoral regulator;<sup>35</sup>
- impose, revoke or vary the amount of any penalty;<sup>36</sup> and
- give any direction, take any steps or make any other decisions which the CMA (or sectoral regulator) could have given, taken or made.<sup>37</sup>

6.59 The decisions of the CAT must be reasoned and published. There is a further right of appeal from decisions of the CAT, either on a point of law or as to the amount of any penalty to the Court of Appeal (or Court of Session in Scotland). Further appeal lies to the Supreme Court on a point of law under the normal rules.

<sup>31</sup> See *Aquavitae v Director General for Water Services* [2003] CAT 17.

<sup>32</sup> See *Claymore Dairies Limited and Express Dairies plc v DGFT* [2003] CAT 3; *Freeserve.com PLC v DGT* [2002] CAT 8; *BetterCare v DGFT*, 26 March 2002.

<sup>33</sup> See *Albion Water Limited v Water Services Regulation Authority* [2009] CAT 12

<sup>34</sup> See *MasterCard UK, MasterCard International and Royal Bank of Scotland v OFT* [2006] CAT 14.

<sup>35</sup> See *Floe Telecom Limited v Office of Communications* [2004] CAT 18.

<sup>36</sup> See *Albion Water Limited v Water Services Regulation Authority*, op. cit.

<sup>37</sup> See *Albion Water Limited v Water Services Regulation Authority*, op. cit.

6.60 A third party or a representative body showing a sufficient interest in a decision of the CMA under the Competition Act may also appeal that decision to the CAT. The CAT determines the question of “sufficient interest”. A third party with a sufficient interest may further appeal the decision of the CAT to the Court of Appeal, but only on a point of law.<sup>38</sup>

6.61 Appeals, whether by addressees of the CMA decision or by interested third parties, must be made within two months of the notification or publication of the decision, whichever is the earlier.

### Damages actions<sup>39</sup>

6.62 There is a well established principle that breaches of competition law give rise to claims for private damages actions and other relief in the English courts. Actions can be brought in the High Court or in the CAT as a stand-alone claim or as a claim following on from an infringement decision.

6.63 Previously, such cases were not common and often resulted in out-of-court settlements. However, since the introduction of the Enterprise Act and a shift in competition policy focus, private enforcement of competition law in the UK has become a credible alternative to public enforcement by the competition regulators. Moreover, the UK and EU authorities are seeking to encourage further the private enforcement of competition law through the national courts:

- The UK Consumer Rights Act 2015 has provided the CAT with the power to hear stand-alone actions in addition to follow-on claims. It also introduced new procedures for collective proceedings, including both opt-in and opt-out proceedings, collective settlements and voluntary redress schemes.
- The European Parliament adopted a directive on certain rules governing actions for damages under national law for infringements of competition law in November 2014 (the Damages Directive).<sup>40</sup> The Damages Directive contains provisions relating to disclosure of evidence, including absolute protection of corporate leniency statements and submissions. It also provides that infringement decisions by national competition authorities should be binding on national courts and sets out the minimum limitation periods for bringing damages actions. It also sets out certain rules relating to joint and several liability for damages (providing some protection for immunity recipients) and provides for a “passing-on” defence. It also contains provisions about quantification of harm and the role of consensual dispute resolution.

6.64 There have recently been several cases where third parties claiming to have suffered damage as a result of an agreement or conduct which infringes Article 101/Chapter I or Article 102/Chapter II have brought civil actions before the English courts.<sup>41</sup>

<sup>38</sup> For example, in *Office of Communications & Anor v Floe Telecom Ltd* [2009] EWCA Civ 47, T-Mobile (which had intervened in *Floe Telecom Limited v Office of Communications* op. cit) was given leave to appeal the CAT’s judgment on whether or not Vodafone and T-Mobile had abused their dominant position in refusing to supply GSM gateway service to Floe Telecom. (This case was however exceptional in that the appellant was essentially the successful party in the previous appeal and it was not strictly speaking on a point of law. The Court Appeal agreed to hear the case only because it was of significant public interest.) The only exception to the rule that third parties with sufficient interest can only appeal decisions of the CAT to the Court of Appeal on a point of law is if they are appealing the amount of any sum awarded.

<sup>39</sup> This subject is considered in greater detail in a separate Slaughter and May publication *Private enforcement of competition law in the UK*.

<sup>40</sup> Directive 2014/104 (OJ 2014 L349/1).

<sup>41</sup> Examples of recent cases brought before the CAT include *NCRQ Ltd v Institution of Occupational Safety and Health; Sainsbury’s Supermarkets Ltd v Mastercard Inc and others* (transferred from the High Court); and *The Ministry of Defence v British Airways plc*.

## Specific aspects of investigation and enforcement relating to cartels

### Burden of proof

6.65 The criminal burden of proof (beyond reasonable doubt) applies to all prosecutions of the cartel offence.

### CMA investigatory powers

6.66 The powers of the CMA to conduct a criminal investigation arise where there are reasonable grounds to suspect that a cartel offence has been committed, which is an objective test.<sup>42</sup>

6.67 Whether the results of a CMA investigation into a potentially anti-competitive agreement will support criminal proceedings for breach of the cartel offence or civil proceedings for infringement of the Chapter I prohibition may not be apparent at the outset of an inquiry. To support a criminal prosecution, the investigation must be conducted to criminal standards, taking into account in particular the privilege against self-incrimination and the need to caution individuals before taking any voluntary statement of admission.<sup>43</sup> To minimise the risk that information gathered by the CMA is excluded from consideration in any criminal prosecution, the CMA has stated that it will, as a matter of course, conduct its civil investigations and inquiries to a criminal standard.

6.68 In addition to those powers that are available to it in the context of a civil investigation (see above), in the criminal context the CMA also has power to engage in covert surveillance and use informants.<sup>44</sup>

6.69 The CMA may record interviews of those suspected of having committed a criminal offence with a view to obtaining an admission. These interviews must be conducted in accordance with those Codes of Practice that have been developed under the Police and Criminal Evidence Act 1984. These require that an interviewee should be offered independent legal advice and that a caution should be given at the start of an interview.

6.70 The Regulation of Investigatory Powers (Communications Data) Order 2003<sup>45</sup> allows the CMA to intercept post and access telephone lines. The powers do not allow the CMA to obtain details about the content of the communications, but only details of the time, duration and recipients. Use of the powers must be pre-authorised by the CMA's Director of Cartel Investigations in writing (except in urgent cases where it may be given orally if necessary) and the Home Office Codes of Practice must be observed in their exercise. In addition to the powers granted under the Order, the CMA may plant bugging devices in homes or vehicles, provided that this is authorised in advance by the CMA Chairman and the Office of Surveillance Commissioners.

6.71 Under the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003 the CMA can observe the movements of individuals with a view to gathering a detailed picture of their activities and associations. Only authorised officers of the CMA may use

<sup>42</sup> *Fox, Campbell and Hartley v United Kingdom* [1990] ECHR 157.

<sup>43</sup> Cf. the collapsed trial against former BA executives on evidential grounds (*R v Martin George and others* (Southwark Crown Court)) in May 2010.

<sup>44</sup> The powers of the SFO derive from the Criminal Justice Act 1987, and those of the CMA from S. 199 to 200 Enterprise Act.

<sup>45</sup> SI 2003/3172, as amended by the Regulation of Investigatory Powers (Communications Data) (Amendment) Order 2005, SI 2005/1083 and the Regulation of Investigatory Powers (Communications Data) (Additional Functions and Amendment) Order 2006, SI 2006/1878.

these powers and the powers will be authorised for only a limited duration. Authorisation involves an application to the CMA's Director of Cartel Investigations.

## Privilege against self-incrimination

6.72 In relation to self-incrimination, statements made by a person in response to a requirement imposed by the CMA using criminal powers of investigation may only be used as evidence in criminal proceedings against that person in two circumstances:

- where that person has knowingly or recklessly made a false or misleading statement in response to that requirement and is then prosecuted for an offence of knowingly or recklessly making a false or misleading statement; and
- where that person is being prosecuted for some other offence and he or she makes a statement that is inconsistent with it and if evidence relating to it is adduced or a question relating to it is asked by that person or on their behalf.

## Appeals

6.73 A conviction of the cartel offence by the Crown Court may be appealed to the Criminal Division of the Court of Appeal. Leave is required from either the trial judge or the Court of Appeal except in cases where the appeal relates to a point of law. The decision of the Court of Appeal may also be appealed, with leave, to the Supreme Court where the case raises a point of law of public importance. A notice of appeal or an application for leave to appeal must be given within 28 days of the conviction, verdict or finding contested.

## Leniency programme

6.74 In relation to cartel activity, the CMA is prepared to offer lenient treatment to undertakings that come forward with information. The Enterprise Act gives the CMA power to grant leniency to individuals who would otherwise face prosecution, but who inform the CMA of the cartel and fully cooperate with its investigation. The policy applies not only to horizontal arrangements, but also to vertical resale price maintenance (not a criminal cartel offence). The OFT's guidance on applications for leniency and no-action in cartel cases, published in July 2013 (adopted by the CMA),<sup>46</sup> lists the following categories of immunity and leniency as available under the Enterprise Act, namely:

- Type A immunity: where an undertaking is the first to apply for leniency (reporting and providing evidence of a cartel), there is no pre-existing criminal or civil investigation and the CMA does not otherwise have sufficient information to establish the existence of the reported cartel activity, it may qualify for automatic civil immunity and its employees and directors who cooperate with the CMA may qualify for automatic criminal immunity and protection from director disqualification.
- Type B immunity/leniency: where an undertaking is the first to apply for leniency but there is a pre-existing civil or criminal investigation into the relevant cartel activity, it may qualify for discretionary immunity from penalties or a reduction (up to 100%), discretionary criminal

<sup>46</sup> Applications for leniency and no-action in cartel cases (July 2013, OFT1495), adopted by the CMA.

immunity (this may be on a blanket basis or only be on an individual basis), and protection from director disqualification. Whether the CMA exercises its discretion to grant immunity or a reduction in penalties will depend on the CMA's assessment of where the public interest lies in the particular case (on the basis of a balancing exercise).

- Type C leniency: where the undertaking is not the first to apply for leniency or where the applicant has coerced another undertaking to participate in the cartel activity, it may qualify for a discretionary reduction of up to 50% of the level of financial penalty imposed under the Competition Act and/or discretionary criminal immunity for specific individuals, and protection from director disqualification (if a reduction in corporate penalty is granted). Blanket criminal immunity is not available. Whether or not individual immunity will be granted will depend on an assessment of the overall public interest. Type C leniency can be granted regardless of whether there is a pre-existing civil or criminal investigation. In order to qualify for any type of leniency the undertaking must first ensure that there is a "concrete basis" for suspicion of cartel activity and it must have a "genuine intention to confess". In addition, the undertaking must satisfy certain conditions (e.g. it must admit that it participated in a cartel activity, provide the CMA with all relevant non-legally privileged information, documents and evidence available to it, cooperate throughout the investigation and, in order for all current and former employees/directors to be granted criminal immunity, it must not have coerced others to take part in the cartel activity).

## Settlement

- 6.75 In some cases, the CMA may agree to settle with one or more of the parties involved in a cartel prior to issuing an infringement decision. A party may opt to settle its case where it is prepared to admit liability for the infringements alleged by the CMA and accept that a streamlined administrative process will govern the rest of the CMA's investigation. Settlement discussions can be initiated before or after a statement of objections is issued, as long as the CMA considers the evidential standard for giving notice of a proposed infringement decision is met. In return for its admission and cooperation, the CMA will reduce the fine that would have been imposed had the investigation continued and an infringement decision later been made (reductions are capped at a level of 20%).

## 7. Market studies and investigations

- 7.1 The Chapter I and Chapter II prohibitions exist alongside powers for the CMA and the sectoral regulators to investigate markets where there is a concern that competition is not working effectively and where action under the Competition Act is considered unlikely to be effective to address the problem.

### Market studies

- 7.2 In fulfilling its responsibility proactively to investigate markets that do not appear to be functioning effectively, the CMA can carry out market studies to determine whether there are reasonable grounds for suspecting that any feature of a market prevents, restricts or distorts competition; if so, the CMA may refer all or part of that market for further investigation. Market features for this purpose include the structure of the market and the conduct of suppliers and customers. It should be noted that market studies can be used for a number of different competition and consumer protection-related purposes and are not used solely to assess the circumstances for a potential market investigation reference.
- 7.3 Under Section 5 of the Enterprise Act, the CMA has the general function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions. Its investigatory powers for these purposes extend to requiring the production of documents, the provision of information, or for persons to appear before the CMA. Failure to comply with these requirements can result in large fines, and intentionally suppressing and altering information constitutes a criminal offence. Information gathered by the CMA in the context of a Competition Act investigation (where its investigatory powers are broader) may be used in the context of a subsequent market study.
- 7.4 The sectoral regulators also have the power to conduct market studies (similar to those of the CMA). They have concurrent powers with the CMA to make market investigation references within their regulated sectors. There is the potential for overlap between markets investigated by the CMA and markets covered by the sectoral regulators. Where this occurs, the OFT's Guidance (which has been adopted by the CMA)<sup>47</sup> states that it will try to work in conjunction with the regulator concerned to avoid any duplication.
- 7.5 Market studies can take up to 12 months to complete. The potential outcomes of a market study, aside from making a market investigation reference or accepting undertakings in lieu, include: publishing information to help consumers; encouraging firms to take voluntary action; making recommendations to the government or sectoral regulators; infringement proceedings against companies suspected of breaching competition law; and recommending a consumer code of practice. The CMA also has the power to make a cross-market reference, i.e. 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.<sup>48</sup>
- 7.6 If a CMA market study results in a market investigation reference (or action under the Competition Act), the overall review period for the companies concerned may extend over several years.

<sup>47</sup> Market studies: Guidance on the OFT approach (June 2010, OFT 519), adopted by the CMA.

<sup>48</sup> S. 131(2A) Enterprise Act.

7.7 The CMA and the sectoral regulators may opt not to make a market investigation reference, even if there are reasonable grounds to suspect that features of a market are adversely affecting competition, in circumstances which include the following:

- Where it would be more appropriate to deal with the issues under the Competition Act on the basis that the problems arise from agreements or behaviour that infringe the Chapter I or II prohibitions.
- Where undertakings in lieu of a reference may adequately address the problems identified (see below).
- Where the CMA or the sectoral regulator considers that the adverse effects on competition of the relevant market features are not significant. In making this assessment, the size of the relevant market, the proportion of the market affected by the features at issue and the persistence of the relevant features will be taken into account. These factors will be balanced against the costs of a market investigation reference on the relevant companies and the public purse.
- Where it is considered that remedies are unlikely to be available at the conclusion of such a reference. This may be the case if the markets are global in scope so that any remedy relating to the UK will have only a limited impact on its operation, or if the adverse effects on competition derive principally from legislation or government policy, in which case a direct recommendation to the relevant government department or regulator for changes in legislation or policy would be more effective.
- Where the CMA or the sectoral regulator considers that it has sufficient powers to take effective enforcement action. For example, the CMA has a dual role as a competition and consumer enforcement body. Therefore, it may consider that where the problem is due to lack of consumer awareness, campaigns to educate consumers may be the best way to remedy the problem.
- Where the CMA considers that the market is in a state of flux, making any short-term recommendations difficult.

## Conduct of market studies

7.8 CMA market studies follow strict procedural steps and time limits:

- Once the CMA has decided to begin a market study, a ‘market study notice’ must be published which describes the scope and timescales of the market study.
- Within six months of the publication of the market study notice, the CMA must publish notice of its proposed decision. It can propose to make a reference or propose not to make a reference. The CMA will provide the companies concerned with a statement of its reasons for the proposed decision, which will form the basis of consultation with those parties.
- Within 12 months of the publication of the market study notice, the CMA Board must publish its market study report, which sets out its findings and its final decision (i.e. to make a reference, accept undertakings in lieu or make no reference), providing a statement of reasons.
- If a decision to make a market reference is reached, the reference must be made on the same day as the market study report’s publication.

## Market investigation references

7.9 Companies active in markets susceptible to tacit collusion are those most exposed to market investigations. Market investigations relating to the conduct of a single firm will be exceptional (although they do occur where a firm's dominance results from structural market features or customer conduct, e.g. the BAA airports market investigation<sup>49</sup>). Investigations will usually relate to the conduct of several companies, or industry-wide market features such as those identified in the Energy inquiry.<sup>50</sup> However, a market investigation reference may be used to impose a structural remedy in respect of an infringement of the Chapter II prohibition which, whilst possible under the Competition Act powers, would more usually be dealt with by means of directions to stop the infringing conduct. Market investigations do not generally relate to agreements entered into by a single firm, but the cumulative effect upon a market of a network of agreements may be the subject of such an investigation.

## Undertakings in lieu of a reference

7.10 The CMA or a sectoral regulator may accept undertakings in lieu of a reference where it believes that it has the power to make a market investigation reference. In other words, the CMA must already be satisfied that it has reasonable grounds for suspecting that any feature of a market prevents, restricts or distorts competition.

7.11 This procedure is most likely to be used where the reference deals with, and the adverse effect on competition arises from, single firm dominance or a small number of firms, or where a market has already been the subject of a detailed investigation (by the CMA or its predecessors). In other cases, the CMA, as opposed to the sectoral regulators who are closely acquainted with the markets they regulate, is unlikely to have a sufficient understanding of the market and the issues raised to be able to conclude within a reasonable period of time that the case is a suitable candidate for undertakings in lieu. The OFT Guidance (which the CMA has adopted)<sup>51</sup> states that undertakings in lieu of a market investigation reference will be rare. To date, undertakings in lieu have been accepted in only two cases (*Postal franking machines*, 17 June 2005 and *Domestic Electrical Goods*, 27 June 2012) and by Ofcom in one further case (*Telecommunications*, 22 September 2005). The effect of undertakings in lieu is to prevent another market investigation in relation to the same market for a minimum period of 12 months from the acceptance of the undertakings, unless the undertakings are breached or were based upon false or misleading information.

## Proportionality

7.12 Market investigation references should be appropriate and proportionate, due to the great expense which is usually involved. Although no statutory proportionality duty exists, the CMA's Guidance states that a reference is less likely in relation to small markets, short-lived anti-competitive effects and market features which produce customer benefits.<sup>52</sup>

<sup>49</sup> See BAA airports market investigation: a report on the supply of airport services by BAA in the UK (19 March 2009).

<sup>50</sup> Energy market investigation (referred 26 June 2014).

<sup>51</sup> Market Investigation References (March 2006, OFT511), adopted by the CMA.

<sup>52</sup> Market Investigation References (March 2006, OFT511), adopted by the CMA.

## Remedies

7.13 The availability of more extensive remedies is a significant motivation for a market investigation reference. The CMA may impose, *inter alia*, structural remedies (such as divestment of businesses and assets, or the licensing of intellectual property rights); behavioural remedies (which either restrict firms' behaviour, such as price caps, or require certain behaviour, such as measures on the display of terms and conditions); monitoring remedies (such as a requirement to provide regular information); and recommendations for other Governmental departments or industrial bodies to take action.

## Ministerial intervention

7.14 The Secretary of State also has powers to make both ordinary and cross-market investigation references itself, but only in two circumstances:

- When he or she is not satisfied with the CMA's decision not to refer a market for investigation; or
- When he or she has brought to the CMA information relevant to a reference decision, but is not satisfied that the reference decision will be made within a reasonable time.

7.15 In addition, the Secretary of State has powers to intervene in pre-existing references which raise defined public interest issues. Currently only national security (which includes public security) exists as a defined public interest issue for the purposes of market investigations (although the Secretary of State can create more by order). To date, no public intervention notices have been issued in relation to market investigations (although the Secretary of State was called upon by a Parliamentary Committee to do so in relation to the public houses market).

7.16 There are two types of public interest intervention available to the Secretary of State: namely, interventions leading to a 'restricted' CMA reference (where the CMA investigates the competition issues, whilst the Secretary of State examines the public interest issues) and interventions which maintain a 'full' CMA reference (where the CMA must examine the public interest issues itself alongside the competition issues).

7.17 Finally, in cases that raise public interest issues, the Secretary of State may intervene by blocking any undertakings in lieu of reference that might be proposed by the CMA.

7.18 To begin any of these interventions, the Secretary of State must issue an intervention notice between the date of publication of the market study notice and the date of the CMA's decision (i.e. to make a reference, not to make a reference or to accept undertakings in lieu). Alternatively, the CMA itself may trigger the intervention; when considering whether to make a reference, the CMA is always required to bring to the attention of the Secretary of State any defined public interest issues to which the reference may give rise. Once the intervention has been made, if a public interest issue is found by the CMA (full reference) or left for the Secretary of State to decide upon (restricted reference), the CMA must decide what action should be taken by the Secretary of State to remedy the adverse effect on competition. Only if the CMA finds no public interest issue on a full reference will it retain full responsibility for remedial action following intervention.

## Conduct of market investigations

- 7.19 On a market investigation reference, the CMA is required to decide whether features of the market are having an adverse effect on competition and, if so, whether remedial action would be appropriate to address the adverse effect on competition or any detrimental effects on consumers resulting from that adverse effect.
- 7.20 The CMA's approach to the issue of whether there is an adverse effect on competition is set out in more detail in the Market Investigation Guidelines.<sup>53</sup> Having defined the relevant market (or feature, in the context of cross-market references), the CMA will conduct a competition assessment. This assessment will focus, first, on how the process of rivalry between companies operates in the relevant market (or markets) and, secondly, on the effects upon that process of the market features giving rise to the reference. These features are divided in the Guidelines into structural features (market shares, concentration levels, buyer power, entry barriers, information asymmetries and government regulations) and conduct features (the behaviour of buyers and sellers in the market); only conduct features are relevant to cross-market references. The Guidelines make it clear that, for ordinary references, the CMA will review all those features that may contribute to an adverse effect on competition.

## Procedure

- 7.21 CMA market investigations are conducted by a CMA inquiry group, which is appointed by the CMA Chair and contains at least three (and typically no more than six) specialist CMA members. The decision-makers in this inquiry group will not have participated in the market study which preceded the investigation; nevertheless, operational staff may be retained to enhance continuity and efficiency.
- 7.22 There is a statutory maximum of 18 months to conclude CMA investigations. This statutory maximum can be extended once by a further six months if the CMA can point to special reasons requiring them to do so. An administrative timetable for each inquiry is drawn up and posted on the CMA website. The main stages of a market investigation reference are typically:
- The information-gathering phase (months 1-4), when the CMA collects and seeks to verify information. This is typically done by means of factual questionnaires to the companies active within the market under investigation, in addition to site visits, surveys and hearings. The companies subject to the investigation will typically at this early stage file a submission, setting out their views on the fundamental issues raised by the reference.
  - The issues phase (months 5-9), when the CMA prepares a statement of issues and releases it to those subject to the investigation for their comments. An issues hearing will typically be held with those companies at this stage in the inquiry.
  - The findings phase (months 10-15), when the CMA publishes its provisional findings and notifies them to the parties for their comments. The provisional findings may also include proposals for remedies. Further hearings may take place at this phase. A final decision is then published (months 16-18.)

<sup>53</sup> Market Investigation References: Competition Commission Guidelines (April 2013, CC3), adopted by the CMA.

- The remedies phase (months 18-24), when the CMA, taking into account the response of the parties to the provisional decision on remedies, reaches a final decision on the remedies it considers may be appropriate.

- 7.23 A market investigation reference represents a significant burden on resources, especially for companies subject to investigation. Submissions need to be drafted, extensive information needs to be provided on an ongoing basis to the CMA and senior management need to be prepared for hearings before the CMA. The issue of remedies needs to be considered by the companies subject to the investigation from the very outset of the inquiry.
- 7.24 Hearings are generally held in private, but may be held with more than one company at a time and may, at the discretion of the investigation group, be held in public.
- 7.25 The CMA has extensive powers to require information to be provided and for documents to be produced. It may also compel witnesses to appear in person before it. Failure to comply with such directions from the CMA may lead to the imposition of a fixed penalty of up to £30,000, a daily penalty of up to £15,000, or a combination of both. Intentionally altering, destroying or suppressing information required to be produced constitutes a criminal offence that may be punished by up to two years' imprisonment. Information that is submitted late may be ignored by the CMA in its deliberations.
- 7.26 The CMA's final report is published, subject to redactions for information that the CMA recognises to be confidential. Non-determinative parts of the draft report will be 'put-back' to the parties so that they may verify the accuracy of the contents. In general, a high and increasing degree of transparency is associated with market investigation inquiries, so that the administrative timetable for the inquiry, the statement of provisional findings, key background information provided in the course of an inquiry and final orders and undertakings can be expected to be published.

## Enforcement

- 7.27 Following a reference for a market investigation, if the CMA identifies an adverse effect on competition, it must consider remedial action. The CMA's powers in this respect are wide - it has power to order divestment of assets or businesses, compulsory licensing, prohibition of certain types of behaviour, price caps or obligations periodically to report on aspects of behaviour to the CMA. However, the CMA has no powers to impose penalties in the event that it reaches an adverse conclusion. If the proposed remedial action risks jeopardising customer benefits, the CMA may decide to take lesser action, or no action at all.
- 7.28 Although the Enterprise Act requires the CMA to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable, structural remedies as the outcome of a market investigation are likely to be the exception rather than the rule. Remedies must be proportionate to the adverse effects identified. The CMA's own actions may be combined with recommendations to others to act; for example, the CMA might not only decide to impose price controls, but may recommend that the Government change legislation that limits market entry. The Government has given a commitment to respond to CMA recommendations within 90 days.
- 7.29 The CMA has no powers to order the parties to refrain in the course of an inquiry from taking action that might pre-empt or undermine its final conclusions. However, once it has published its report and while the market investigation reference is not finally determined, it may take steps to ensure that the efficacy of any remedial action it proposes is not undermined by action taken by the parties.

## Appeals

- 7.30 Decisions of the CMA, sectoral regulators and the Secretary of State in relation to market investigations (other than decisions of the CMA to impose penalties for failing to produce information or for obstructing the copying of documents) may be appealed to the CAT. A decision for this purpose should be interpreted broadly - the Enterprise Act specifically provides that it includes a failure to act in connection with a reference or possible reference - and Competition Act precedents may be relevant (see above).
- 7.31 In determining the appeal, the CAT applies the judicial review standard so that grounds for appeal will include procedural impropriety, irrationality or unlawfulness, but will not extend to review of the substantive basis for the decision.
- 7.32 The right of appeal extends to “any person aggrieved by a decision” made under the market investigation provisions of the Act. Appeals must be lodged within two months of publication or notification of the decision. An appeal does not have a suspensory effect. With leave of the CAT or the Court of Appeal, an appeal against a decision of the CAT on points of law only may be made to the Court of Appeal, with a right of further appeal to the Supreme Court under normal rules.

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