



## Competition Law Association

British Group of the  
Ligue Internationale du Droit de la Concurrence  
(International League for Competition Law)

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### **The CMA: a more effective competition authority?**

**Speakers: Sarah Cardell (General Counsel, CMA) ("SC"),  
Manish Das (Head of Competition Law, Lloyds Banking Group) ("MD") and  
Simon Pritchard (Partner, Competition/Antitrust, Linklaters LLP) ("SP")**

**Date: 16 June 2016**

**Venue: Competition Appeal Tribunal**

#### **1. SARAH CARDELL**

1.1 SC explained that the CMA's priority is to work with speed, fairness and rigour. High expectations were set for the CMA when it was formed to work in a timely fashion but with no compromise on quality.

#### **Enforcement**

1.2 SC explained that the challenge for the CMA has been the sharpest in enforcement. The National Audit Office Report released in February 2016 focused on the significant steps that the CMA had already taken, but highlighted the need for further work to be done on raising awareness and on the throughput of cases.

1.3 SC explained that investigations in the estate agents and ophthalmology sectors had been concluded fairly quickly in 2015.

1.4 She highlighted the recent fines in relation to the supply of paroxetine, which was particularly important given the scale and the significant legal issues involved. She also highlighted recent cases on resale price maintenance in the catering and bathroom fittings sectors.

1.5 SC noted that three Statements of Objections had been sent in recent months, in the model agency, galvanised steel and golf equipment sectors. 10 cases have been launched since December 2015 and there are 14 civil cases ongoing. The portfolio is diverse, including both Chapter 1 and Chapter 2 cases.

1.6 Warning letters and compliance work remains an important part of the CMA's activity.

1.7 The Case Decision Groups have been working well as a 'fresh pair of eyes', ensuring separation of decision making between those who undertake the investigation and those who make the final decision.



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1.8 At the CMA roundtable in September 2014 they considered when cases will be appropriate for commitments. The advantage of commitments is the potential speed, and therefore certainty which can result, but they have the disadvantage of lost opportunities to set precedents as there is no final infringement decision. The CMA will need to base their decisions to accept commitments on strong evidence, and they will not be used in serious abuse or cartel cases. Commitments must be clear and timely.

1.9 SC emphasised the important role that the CMA plays in testing commitments with third parties. It should not be expected, therefore, that commitment decisions should be completed too swiftly, as they must not compromise on process for the sake of speed.

### **Mergers**

1.10 The CMA have invested in more senior expertise to work on mergers, and there are now three Phase 1 directors of mergers.

1.11 The fast track notification procedure to Phase 2 is working well, and has been used in the BT and Ladbrokes cases.

### **Markets**

1.12 There is a focus on market investigations being completed in a timely fashion.

1.13 The banking and energy market investigations have proven to be a challenge in terms of timing, and once these are complete it will be appropriate to review the market investigation process.

### **Litigation**

1.14 SC briefly summarised the importance of judicial oversight of the CMA. This creates a 'virtuous circle' which improves the CMA's activities.

### **Looking ahead**

1.15 The CMA is looking to increase the number of cases which they take on.

1.16 They will review their process of conducting market investigations and make improvements where possible.

1.17 Shifting personnel at the senior levels is a challenge, but the staff work well together and there is a good mix of skills within the CMA.



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### 2. **MANISH DAS**

- 2.1 MD endorsed SC's comments on the need for speed, fairness, rigour and quality.
- 2.2 Enforcement must be a key priority. MD supported the growth in pipeline cases. It is important that there are some straightforward cases as well as those more complex, as these provide recent examples for businesses and can assist with compliance.
- 2.3 MD emphasised the importance of ongoing compliance. CMA engagement with lawyers in the North of the UK in recent weeks is useful and necessary. The ongoing compliance infrastructure must be considered to ensure that this drive continues, and does not peter out.
- 2.4 The CMA was handed a difficult task on market investigations with the banking (which could have been split into two investigations on Personal Current Accounts and Business Current Accounts) and energy market investigations. He questioned whether it was right to take all three areas on at one time, and whether resource could have been used more proactively, or perhaps the CMA had no other options.
- 2.5 MD suggested it would be valuable for the CMA to review their processes to make market investigations more targeted. The remedies could be more well connected, and there could be more early interaction with the remedies teams. In the banking market investigation many of the remedies rely on other government bodies 'picking up the baton' from the CMA, perhaps the CMA should try harder to ensure that they can deal with more of these themselves.

### 3. **SIMON PRITCHARD**

- 3.1 SP argued that the key issue with the CMA is that they are doing best to deliver quality quickly, but quality suffers as employees at the FCA and other regulators are paid significantly more than those at the CMA. This public pay parity needs to be addressed.
- 3.2 SP ran through in brief the portfolio of recent CMA cases. The CMA had put a lot of thought into their portfolio, and they had a good spread of cases. There are still errors which occur but there have been many improvements. He suggested that this might be an issue of coherence, with many decision makers in the CMA inconsistencies arise.
- 3.3 While others have suggested that the timeline for market investigations should be shortened, in SP's view 24 months for a complex market investigation is not too long, and may be necessary to ensure that there is no compromise on quality.



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### 4. **QUESTION AND ANSWER SESSION**

- 4.1 We are seeing a lot more smaller investigations recently, has there been a conscious shift away from the old prioritisation criteria which focused on the size of the market and the size of potential fines?

SC responded that the CMA has sought to embrace smaller cases as a reminder to businesses, for example if the CMA thinks that the problems in the sector may be widespread. They have consciously decided to make the maximum impact from decisions by using follow up compliance work. There is clearly a worryingly high level of non-awareness of competition law.

- 4.2 Interim measures appear to have fallen into disuse, has the CMA consciously decided not to use them?

SC responded that the CMA is aware of this, and interim measures are on their radar for if the right cases arise.

- 4.3 The Better Markets Bill suggests that there needs to be better control over Phase 2 of investigations, why is this?

SC responded that this does not reflect the internal feeling within the CMA. However, the CMA is mindful of the need for consistency across cases.