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UK Cartel – Hot Topics: maintaining the balance between effective enforcement and fair procedure

Speakers: Ros Kellaway and Jessica Radke

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Jessica Radke – procedural fairness and effective enforcement are co-operative features

It is relatively easy to maintain a balance between procedural fairness and effective enforcement, because the two aspects go hand in hand. As a concept, procedural fairness can be assessed both objectively and subjectively. There are various objective tests which set the standard for procedural fairness, including the ECHR, common law rules such as privilege, and the Competition Act 1998. However, the subjective tests for fairness mean that the CMA has a duty to ensure that those they are investigating feel that they have been investigated fairly. In cases where this is not achieved, there are processes in place as a last resort to ensure fairness is accomplished, such as intervention by the procedural officer or, in the most extreme cases, judicial review.

As the CMA embarks on more investigations than ever, new kinds of cases and approaches to enforcement materialise, with an example being the recent director disqualifications. In these more novel situations, the CMA cannot rely on underlying experience of undertaking and individuals to determine whether it is behaving fairly or not. Nevertheless, there may be processes within the CMA's enforcement powers which feel unfair to those subject to them, but which actually ensure greater fairness. For example, the use of compulsory interview powers under Section 26A of the Competition Act arguably provide a greater level of procedural fairness than the alternative of voluntary interviews although individuals may not experience them that way. Another example is the CMA's use of independent counsel, as is often used following dawn raids. This process takes time for everyone to understand how to use it to their best advantage.

Concordia's challenges to CMA warrants

The onus is on the CMA to convince the other party that it is behaving fairly, which can be a burden for the CMA but if it can't then the costs are quite high. This was made clear through Concordia's challenges to the CMA's warrant. Concordia challenged a warrant granted to the CMA under the Competition Act 1998, under which the CMA had raided their premises in October 2017. This led to a number of disputes surrounding the disclosure of material that had been withheld from Concordia by the CMA on the grounds of public interest immunity (PII).

The High Court initially ruled that the court must determine Concordia's application to discharge the warrant without relying upon any of the PII material. However, the CMA successfully appealed this, which led to a "closed hearing" on this matter before the High Court. Upon review of the material on



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which PII was claimed, the judge agreed with all but one of the CMA's claims, dismissed Concordia's application and approved the warrant. The entire process took almost eighteen months.

This is a good example (albeit on an extremely large scale) of how time-consuming and costly it can be for the CMA to go to such lengths to prove that it is acting in a fair manner, when the other side is convinced that it is not.

Ros Kellaway – concerns with the CMA's approach to enforcement in practice

Access to CMA's file – new streamlined process

Rather than granting access to the entire file, the CMA's preferred process is now to provide parties with the so-called 'Key Documents', being documents which are referred to in the Statement of Objections (SO), along with a schedule of the other documents on the file, redacted for confidentiality.

However, this can lead to the problem of potentially exculpatory documents being left on the file and not provided to legal advisers for review. Seeing just a redacted schedule of all documents on the file is unsatisfactory in terms of rights of defence. Full access often needs to take place within a confidentiality ring, and the CMA is now using this approach. It is hoped that the CMA would also permit an extension of time to respond to an SO if the parties requested to review the entire file.

Claiming legal privilege

The process for claiming legal privilege in a CMA investigation generally works, but it is important to understand why it sometimes does not. First, it is difficult to identify privilege in documents when one does not know the theories of harm in the case. Second, it is hard to identify how much detail needs to be given when providing reasons for privilege claims. If the reasons given are not detailed enough and the documents are sent to the CMA's independent counsel, this counsel will have the final decision on whether a document is legally privileged or not.

Sectoral regulators – cross-disclosure of evidence

There is efficiency in the idea that evidence gathered for a regulatory investigation can be used in competition investigations, and vice versa. The weakness of this approach is where there is a mismatch in the concurrency of the two parallel investigations, and thus the provision of evidence from one side to another happens at an inopportune time.

Seize and sift/compulsory interview powers

There is an interplay between the seize and sift powers under Section 50 of the Criminal Justice and Police Act 2001, and the powers granted by warrant to the CMA under Section 28(2) of the Competition Act 1998. It is noted that officers who take possession of documents must also return any documents that privilege is being claimed on.



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As for compulsory interviews, although interviewees should be able to see the documents relied on by the CMA, these are in practice often provided only very shortly before the interview. Additionally, the presence of a legal adviser, although disliked by the CMA for fear of prejudicing the investigation, can be important as this helps to reduce the risk of an individual incriminating themselves.

Future enforcement powers of the CMA

Looking ahead, it is unclear exactly how the CMA's powers will continue to evolve. Andrew Tyrie's recent letter to the Secretary of State has made a number of proposals including the introduction of turnover-based fines, increased scope for personal sanctions, protection for whistle-blowers and restriction of the CAT's review of CMA decisions, but the timing and likelihood of all of these being implemented is not known.