

# CMA SERIES

## The new CMA: antitrust investigations and criminal cartels

The new Competition and Markets Authority (CMA) will have the power to carry out investigations into suspected anti-competitive agreements and abuses of dominance, and to prosecute individuals for alleged criminal cartel conduct (the new regime). The new regime includes wider procedural powers for the CMA than are currently available to the Office of Fair Trading (OFT), and also introduces substantial changes to the criminal cartel offence.

This article, the third in a three-part series on the new UK competition regime and the role of the CMA, outlines the new regime, which will be effective from 1 April 2014 (for the first and second articles in the series, see [www.practicallaw.com/9-555-5245](http://www.practicallaw.com/9-555-5245) and [www.practicallaw.com/8-558-8166](http://www.practicallaw.com/8-558-8166)).

### Antitrust investigations

The CMA will have the power to investigate suspected breaches of the civil antitrust prohibitions against anti-competitive agreements and abuse of dominance. The CMA proposes to keep separate its investigation and decision-making functions, with decisions being taken by an independent case decision group.

The CMA will have new powers for compulsory interviews of current and former employees and management at any stage of civil and criminal competition investigations (see box "Uncertainties and concerns"). Compulsory interviews may be carried out on the spot (for example, during a dawn raid) and, for former employees and managers, they may take place without notice to the former employer.

The CMA will be able to fine parties for non-compliance with its orders, in place of the (unused) criminal penalties presently in force.

The criteria for the imposition of interim measures (that is, temporary directions either to prevent damage to persons, or to protect the public interest) will be relaxed as the CMA will only have to show that these measures are necessary to prevent "significant damage", whereas the current requirement is for "serious, irreparable damage". The CMA also intends to introduce a formal settlement

### Uncertainties and concerns

A number of questions and concerns have been raised in relation to the new regime. In the context of compulsory interviews conducted by the Competition and Markets Authority (CMA) during an antitrust investigation, it remains unclear whether individuals will be permitted to refuse to answer questions; for example, because of the possibility of incriminating themselves or their employer. Moreover, the CMA's guidance on investigation procedures in Competition Act 1998 cases, published in March 2014, indicates that the CMA will consider it generally inappropriate to allow lawyers acting for the company under investigation to attend the interview, and that it would also reduce incentives for individuals being questioned to be open and honest in their accounts.

Regarding the criminal cartel offence, despite the new defences, there are concerns that the removal of the dishonesty requirement could lead to the prosecution of employees for something that they may not have recognised as wrongful behaviour. The imprecise wording of the Enterprise and Regulatory Reform Act 2013 means that the offence could be construed to catch quite a broad range of conduct, including benign agreements that are legally exempted from the civil competition law prohibitions if the parties' market shares are below certain thresholds. However, the CMA's cartel offence prosecution guidance published in March 2014 says that the CMA would only prosecute cases where the harmful nature of the individual's behaviour is obvious without the need for any detailed assessment. Ultimately, the courts may need to adopt a practical and purposive interpretation of the criminal cartel offence and defences.

procedure with caps for settlement discounts (20% or 10% depending on when settlement is reached).

### Criminal cartel offence

Under the new regime, the CMA will have the power to prosecute individuals for alleged criminal cartel offences. Controversially, the requirement for dishonesty will be removed from the definition of the criminal cartel offence. So an individual who knowingly participates in one of the categories of a criminal cartel agreement (that is, price fixing, output restrictions, market sharing or bid-rigging) may be found guilty of the offence, resulting in up to five years' imprisonment and/or an unlimited fine.

The offence excludes information exchange and disclosure where there is no agreement between the parties as to what they would do with the information exchanged or disclosed. There is also an exclusion from the offence if the agreement provides for customers to be given information about the nature of the agreement before it is entered into or implemented, or if such information is to be published in any one of the London,

Edinburgh or Belfast Gazettes. Three new defences have also been introduced, where the individual prosecuted for a criminal cartel offence can show that he either:

- Did not, at the time of the making of the agreement, intend the nature of the arrangements to be concealed from customers.
- Did not, at the time of the making of the agreement, intend the nature of the arrangements to be concealed from the CMA.
- Took reasonable steps, before the agreement was made, to ensure that its nature would be disclosed to legal advisers for the purposes of obtaining advice before its implementation.

It will be for the prosecution to show that an exclusion does not apply, while the defendant will need to prove that a defence applies.

*Alex Noury is a partner, Chris Worrall is a senior associate, and Chandralekha Ghosh is an associate, at Clifford Chance LLP.*