Skadden

UK Competition Law 2020

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On 27 February 2020, Skadden antitrust/competition partner **Bill Batchelor** chaired an InformaConnect conference in London exploring evolving Competition and Markets Authority (CMA) enforcement practices, concurrent regulation, the implications of Brexit and topical collective action cases. Attendees heard from practitioners, including Skadden international litigation and arbitration partner **Bruce Macaulay**, and enforcers, including a keynote address by CMA general counsel Sarah Cardell and panels with CMA directors in Merger Control and Sector Regulation and representatives of the Financial Conduct Authority, the Office of Gas and Electricity Markets (OFGEM), and the Payment Systems Regulator, alongside other presenters.

The key takeaways included insights regarding:

- the CMA's recent more-intrusive merger control investigations;
- incoming and ongoing regulatory reforms, including the anticipated introduction of a mandatory notification scheme in merger control and the increased use of disqualification orders in public enforcement actions;
- methods of coordination between the CMA and its nine concurrent regulatory partners;
- the forward focus of the regulators on digital markets;
- the continuing uncertainty regarding the threshold for grant of a collective proceedings order in the private enforcement context; and
- the opportunities and uncertainties posed by Brexit to regulators and practitioners alike.

Mergers

The Lear report, a review of past merger decisions in the digital sector released in May 2019 by the economic consultancy Lear, recommended that competition authorities should 'test the legal tests and constraints' of merger control. In its recent matters, the CMA can be seen as taking a more intrusive approach to merger investigations.

- On jurisdiction, the CMA has become inventive in calling in deals of interest: In *Roche/Spark* the CMA found that there was a U.K. 25% share of supply despite zero revenues of the target in the U.K. It calculated the 25% share using numbers of U.K. employees or patients enrolled in U.K. R&D trials. In *Sabre/Farelogix*, a Phase 1 decision was based on the 25% share of a single customer, with doubts raised at Phase 2 as to whether the target had any U.K. customers at all.

- More competitive counterfactuals (*i.e.*, what would have happened without the merger) are being applied. Rather than comparing the merger to the *status quo*, the CMA has instead considered whether the target would have become a *stronger* competitor to the acquirer had the deal not occurred — for example, asking whether the target could have raised alternate funds or found a new investor to remain in business and strengthen its position (in *PayPal/IZettle*, *Illumina/PacBio* and *Roche/Spark*).
- Traditional tools of market definition and market share have in some cases been less important to the analysis, replaced by more qualitative assessments of how markets will develop in the future. For example, in *Roche/Spark* the Phase 1 decision predicted that Roche's hemophilia product, currently with 6% share, would rise to 60% market share in five years.

The CMA has signaled online commerce merger control as a particular focus, with the recent decisions in *TopCashback/Quidco*, *Experian/Clearscore* and *PayPal/IZettle*. An update to the Merger Assessment Guidelines is forthcoming in light of the Furman report on the state of competition in digital markets, with the possibility of the introduction of a digital markets unit, as the CMA is committed to investigating future digital market mergers, particularly in consumer-facing markets.

Other recent highlights from the CMA perspective include interventions in concentrated markets, including decisions in *Sainsbury's/Asda*, *Tobii/Smartbox*, *Ecolab/Holchem* and *Illumina/PacBio*. Looking ahead, the CMA's reform agenda includes the introduction of mandatory notifications above a certain threshold accompanied by a 'standstill obligation' designed to prevent parties from proceeding with the transaction prior to the CMA's approval, and higher or full-cost recovery from merging parties (the CMA currently recovers around half the cost of its merger inquiries).

Enforcement and Regulation

Pharma investigations remain a major part of the CMA's enforcement portfolio, with the recent European Court of Justice preliminary ruling on pay-for-delay in *Paroxetine*; the awaited judgment on unfair pricing from the Court of Appeal in *Phenytoin*; and the securing of an £8 million pay-out to the NHS by drug-makers of Fludrocortisone. Looking ahead, as in the merger control context, the CMA is committed to tackling antitrust enforcement in digital markets, including the potential for investigations against tech giants and a focus on vulnerable consumers in online advertising and data privacy contexts.

A reform of consumer law enforcement is under consideration with a proposal to move away from a prosecutorial model to an enforcement model, with a toolbox including competition disqualification orders (CDOs) and interim measures. CDOs already are being considered in all cases where competition law has been broken; in 2019 alone, the CMA secured nine disqualifications of directors, and the first of 2020 is expected shortly.

Coordination between the CMA and its nine concurrent regulatory partners has been ongoing since the enhanced concurrency arrangements were introduced in 2014. With the sectors regulated representing 25% of U.K. GDP across a range of essential services, there is considerable public concern about the effectiveness of competition and a key challenge for the sectoral regulators is case selection in view of the necessarily finite, albeit recently expanded, resources. The regulators are sharing information and resources, with allocation simply the starting point of the dialogue in enforcement and the cooperation extending to include markets, mergers and policy work.

Litigation

In the private enforcement context, the threshold for granting a collective proceedings order (CPO) remains a key unknown as the Supreme Court's decision in *Merricks v Mastercard* (due to be heard in May 2020) is awaited to resolve the divergence between the CAT and Court of Appeal regarding the appropriate level of merits assessment at the certification stage. Meanwhile, collective actions continue to be initiated in the CAT to test the limits of the nascent regime, with three other CPO applications currently on hold pending the *Merricks* judgment:

- the two *Trucks* actions, which can be expected to test the approach to heterogeneity within a class and have been the subject of recent rulings demonstrating the CAT's appetite to delve into the details to determine the adequacy of third-party funding;
- the two *Forex* actions, which raise novel case-management challenges, due to competing class representatives, and are the first instance of a collective action in the U.K. connected with financial markets; and
- the *Railfares* action, which will test whether a *sui generis* consumer claim can be accommodated in the collective action regime.

With the use of CPOs in competition law intended as a testing ground that could be expanded into other fields, there will be much attention on how the current crop of actions unfold.

Key Takeaways
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Brexit

The CMA views the U.K.'s withdrawal from the European Union as a series of opportunities, including to make decisions on the CMA's jurisdiction. The regulator has received a funding boost and added 150 staff with a view to avoiding any 'enforcement gap' following withdrawal. It will seek to maintain and build its relationships with EU and global counterparts, sharing information and expertise. Under the Withdrawal Agreement, there will remain a period of jurisdictional overlap, with the European Commission retaining its role through the transition period and, in certain respects, including investigations formally initiated prior to the end of transition and state aid grants, for years thereafter.

There remain areas of uncertainty for the CMA. It has a role to play supporting the U.K. government in the conclusion of international trade agreements, but is not directly involved in the government's competition policy objectives in the trade negotiations, which can be expected to evolve. It predicts, however, that a gradual evolution in post-Brexit jurisprudence is likely, rather than wholesale change from current principles that largely have been derived from EU law.