

# Competition Seminar

30 June 2016 at Linklaters



## Introduction

The National Audit Office (NAO) would like to express its gratitude for the excellent speeches given by Alex Chisholm (Chief Executive of the Competition and Market's Authority (CMA) at the time the seminar was held) and the panel of distinguished speakers and discussants, and the many worthwhile contributions from the audience. We would also like to take the opportunity to record our thanks to Linklaters for offering to host the seminar at their offices.

The seminar was intended to follow up two of the key areas highlighted in the NAO's report; the sessions covered:

- Competition enforcement – where does the regime need to be by 2020? and;
- The implications for the competition system of the Energy Market Investigation Referral.

The keynote speech was given by Alex Chisholm and reflected on the functioning of the UK's competition regime following the publication of the NAO's report.

## Competition enforcement – where does the regime need to be by 2020?

Twenty years ago when accountability of public institutions was discussed, the NAO's name was not mentioned; it is now. External scrutiny from the NAO's report is to be welcomed as the NAO has an important role in the accountability process in holding the CMA and the wider competition regime to account for their performance.

The CMA has generally been seen as having put considerable effort into improving the rigour of its competition enforcement work since its inception. The CMA's leadership, however, agreed with the NAO report's focus on the need to increase its competition enforcement case flow. The CMA wishes to increase the flow because it is hugely important to put an end to anti-competitive practices which harm consumers and the economy generally, and also because it frees up resources more quickly to take on new cases.

By 2020, in the regulated sectors where sector regulators like Ofcom, Ofwat, the FCA etc have concurrent powers, in the context of the Enterprise and Regulatory Reform Act 2013 and its provision on the 'primacy' of general competition law, expressly requiring sector regulators to consider whether the use of their competition law powers is more appropriate than sector-specific powers, it is to be expected that the regime will produce a greater number of competition enforcement decisions in future. However, it was noted that the initial 'uptick' in enforcement cases by the sectoral regulators following the 2013 Act appeared to have tailed off.

In addition by 2020, there should be a clearer picture of the extent to which the new scope for the Competition Appeal Tribunal to hear stand-alone actions and the new collective redress route have been successful in providing alternative routes to the use of competition law by private parties.

Other potential opportunities and risks considered worth keeping under review include:

- ensuring CMA has the right balance between policy work and competition enforcement;
- ensuring an appropriate balance of competition enforcement cases: hard-core infringements and also more innovative or 'cutting-edge' application of competition law where anti-competitive conduct is thought to be harmful; large, high-impact cases and also cases involving smaller or local markets to make clear that small businesses are also subject to competition law (and consumers in local markets enjoy the protection of competition law); online markets and also markets where more vulnerable consumers who are not online need protection; an appropriate geographical spread including in the devolved nations of the UK;
- continued engagement with the CMA's counterparts in other national competition authorities, such as France, Germany, the US, etc, to explore and understand better how they 'do' their cartel enforcement work at working level (perhaps organising 'away days'); and
- the sharing of CMA panel members with the regulators to help increase their decision-making capacity on competition cases, provided that this avoids conflicts of interest in regulatory appeals.

Whilst Brexit was not the focus of the seminar, it was agreed that uncertainty surrounds the eventual form it will take. Nevertheless, it was thought likely that, depending on the arrangements eventually agreed, it may affect the CMA in terms of the volume of cases it takes on, the sharing of data etc. between the CMA and the European Commission and European Competition Network members, and the extent to which the UK regime will be constrained by judgments of the EU Courts, and decisions of the European Commission, in future. For this reason the path to 2020 is likely to be full of challenges for the CMA.

Comments from the audience included:

- Procedurally, the CMA has come on "in leaps and bounds" since its inception, in particular the use of decision makers and the use of case decision groups. Could some sector regulators benefit from the same with CMA sharing panel members with them?
- Should not lose sight of the fact that sector-specific powers can be more effective at dealing with certain types of problem in a regulated market;
- The CAT's new power to hear stand-alone cases is potentially a useful new route as cases could be heard there which wouldn't necessarily have passed the threshold to meet CMA's prioritisation principles.

## Implications for the competition system of the Energy Market Investigation Referral

The CMA sets the tone – how it undertakes its market investigations matters as they can have a huge impact on the industry in question. In the case of energy, not only is it a major UK market in its own right, but it is consumed by all industries and is a key component on the cost base of UK industry.

The MIR is a powerful tool and as such the process for selecting cases, the process and standards of review, the thresholds for intervention and the quality of decision-making are all important for the credibility of the regime (and the CMA as a whole). It should have come as little surprise to anyone that with the scope of the Energy MIR taking in wholesale and downstream, domestic and microbusiness and having no other limitation it was unlikely (without whole areas of analysis being scoped out from the outset) that it would take at least 18 months (if not 2 years) to complete.

An analysis of wider lessons for the markets referral system suggests:

- there are implications for institutional relationships, and
- it can help answer old debates and start new ones.

In terms of institutional relationships, whilst the CMA report did make critical remarks about Ofgem and some of its interventions (such as the four tariff rule), in fact overall the CMA is supportive of the regulator and hands it a significant role in remedy implementation. This feels like a step change from where things stood when NAO reported in 2010 on regulators' perceived disincentives to refer their markets. It also made recommendations to improve the independence of Ofgem from DECC; an interesting addition to the debate on the relationship between sectoral regulators and their relevant sponsor departments. Similarly the report raises a number of interesting issues concerning Ofgem's relationship with government such as the absence of a mechanism to address tensions and disagreements on policy.

In terms of helping to answer old debates, the detailed analysis undertaken by the CMA in the early part of its investigation led it to conclude that wholesale energy markets were broadly working well, and that issues such as: vertical integration, liquidity, and price coordination in the retail market did not need pursuing further. The CMA chose instead to look in further detail at certain areas where they did find adverse effects on competition. Where things have been investigated and have been found not to be a problem are very important findings in terms of helping allay fears of competition problems.

*(Please note that the views expressed on the energy market investigation are not necessarily shared by the CMA).*