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# CMA revises its procedures amid a clamp down on cartels

The Competition and Markets Authority announced in its draft Annual Plan for 2022 to 2023 that it will "*clamp down on cartels and other collusive behaviour which seek to keep prices up*". In December 2021 the CMA finalised revisions to two sets of procedural guidance documents that will support its fight against cartels. Further changes to the UK cartels and leniency regime may be forthcoming in 2022.

## CHANGES TO THE CALCULATION OF PENALTIES

The CMA may impose financial penalties on companies which participate in cartels in breach of the Competition Act 1998 (CA 1998). The CMA is obliged to publish guidance as to the appropriate amount of any such penalty. In July 2021 the CMA launched a consultation proposing certain changes to the existing guidance, noting that the changes were intended to ensure that cartel fines continue to provide an effective deterrence. The CMA explained that this is particularly important post-Brexit as it expects to take on an increased caseload and that the parties under investigation may be large multi-national companies.

On 16 December 2021 the CMA published its updated guidance as to the appropriate amount of a penalty. The revisions build on the CMA's experience from past CA 1998 cases and aim to ensure that penalties are calculated in a fair, predictable and transparent manner, convey the seriousness of offences and achieve deterrence.

Several of the changes have been made to ensure that the guidance is 'Brexit-compliant' (e.g. by removing references to EU legislation). The more substantive changes include the inclusion of a note explaining that the CMA may adopt a different approach to calculating the relevant turnover of a party in situations where the affected product or geographic market is wider than the relevant product market in the UK. The CMA may adopt this approach when the turnover generated in the UK does not fully reflect the role of a party in the infringement.

Another substantive change is the removal of "*adequate steps having been taken with a view to ensuring compliance*" from the list of mitigating factors that may be taken into account by the CMA in order to reduce the fine. The CMA noted that it received significant pushback against this proposed change in the public consultation. Nevertheless, the CMA considers that the risks of being subject to a cartel investigation (with all the negative consequences that entails) means there are already sufficient incentives for businesses to adopt compliance programmes, without this also being a mitigating factor warranting a reduction in penalty in the event of a finding of infringement.

The CMA has also introduced changes to clarify that it will generally take into account worldwide turnover as the primary indicator of the size and economic power of an

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undertaking when assessing whether a fine should be increased in order to provide a specific deterrence. The revised guidance also explains that in order to be an effective deterrent, a penalty should materially exceed an undertaking's likely gains from the infringement, not merely neutralise them.

As noted in the CMA's July consultation document, these changes combined with the likely profile of the cases that the CMA may be investigating post-Brexit are expected to result in an overall increase in the level of cartel penalties imposed by the CMA.

### NO RIGHTS TO APPEAL FOR SETTLING PARTIES

In August 2021 the CMA issued a consultation to revise the settlement procedure. Under the original system, a settling party that appealed against the settlement decision would lose the benefit of the settlement discount. The CMA proposed to amend the settlement process so that any settlement entered into between the CMA and a party is considered a final and binding agreement, so a settling party would no longer be able to challenge or appeal the infringement decision to the Competition Appeal Tribunal. On 10 December 2021 the CMA formalised this change and published a new version of its guidance on its investigation procedures in CA 1998 cases.

The impetus for the change arose from an appeal brought by a settling party against a CMA decision following the settlement procedure (as covered in our previous newsletter). The CMA believes that the new policy will increase the prospects of any settlement yielding procedural efficiencies and resource savings (which is the principal benefit of settlement for the CMA), by ensuring finality of the settlement process.

### MORE CHANGES ON THE HORIZON?

In July 2021 the UK Government published a consultation on reforming competition and consumer policy. It was the first major review of the UK competition landscape since 2014 and set out a large number of detailed proposals. As part of the measures under consideration, the Government asked for views on the merits of providing holders of full immunity in the public enforcement process (e.g. immunity granted by the CMA), with additional immunity from liability for private claims for damages caused by the cartel. The Government also sought views on whether improvements could be made to the current legal framework to give greater certainty over the handling of whistle-blowers' identity across the enforcement process. The consultation document explains that these policy changes may result in more effective enforcement against cartels. The public consultation closed in October 2021. It remains to be seen whether the Government will introduce any changes to the regime in 2022.

## OTHER DEVELOPMENTS

## ANTITRUST

## EUROPEAN COMMISSION INVITES COMMENTS ON THE DRAFT GUIDELINES ON THE APPLICATION OF EU COMPETITION LAW TO COLLECTIVE AGREEMENTS REGARDING THE WORKING CONDITIONS OF SOLO SELF-EMPLOYED PERSONS

On 9 December 2021 the European Commission launched a consultation on draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons. The draft Guidelines are part of a package that includes a proposal for a Directive on improving working conditions in platform work and a Communication on harnessing the full benefits of digitalisation.

According to EU competition rules, self-employed workers are considered "*undertakings*" and therefore, if they bargain collectively, they are at risk of breaching antitrust rules that prohibit price-fixing.

The draft Guidelines seek to bring legal certainty to self-employed workers who are looking to bargain collectively in order to achieve better working conditions, without breaching the EU competition rules. As emphasised by the Commission's Executive Vice-President Margrethe Vestager, the draft Guidelines aim to make clear "*when competition law does not stand in the way of these people's efforts to negotiate collectively for a better deal*".

The draft Guidelines clarify that collective bargaining involving self-employed persons who are considered "*comparable to workers*" fall outside the scope of Article 101 TFEU. The draft Guidelines subsequently identify three categories of such self-employed persons: economically dependent solo self-employed persons, solo self-employed persons working "*side-by-side*" with workers, and solo self-employed persons providing their services to or through a digital labour platform (mirroring the increasing trend of national jurisprudence and newly introduced laws recognising the economic dependence of these solo self-employed on digital labour platforms).

The draft Guidelines further provide guidance on where the Commission commits not to intervene. In this context, the draft Guidelines refer to bargaining by individuals who are unable to significantly influence their working conditions because they have a "*weak bargaining position*" in negotiations with their counterparty. The Commission also commits not to intervene in circumstances where EU countries grant the right of collective bargaining or encourage it by excluding such agreements from antitrust rules.

The Commission is inviting comments by 24 February 2021. A final version of the guidelines is expected to be published in spring 2022.

### HONG KONG COMPETITION COMMISSION BRINGS PROCEEDINGS AGAINST ALLEGED CLEANING CARTEL AND CLAIMS OBSTRUCTION OF INVESTIGATION FOR THE FIRST TIME

On 14 December 2021 the Hong Kong Competition Commission (HKCC) brought a case against Hong Kong Commercial Cleaning Services Limited and Man Shun Hong Kong & Kln Cleaning Company Limited to the Competition Tribunal. Directors of the companies are also named as a separate respondents in these proceedings.

The HKCC alleges that, between May 2016 and August 2018, the two companies engaged in price-fixing in tenders submitted to the Hong Kong Housing Authority (HA) for the procurement of cleansing services for public housing estates. It alleges the companies exchanged competitively sensitive information in various tenders where the companies were bidding for the same HA cleaning service contract, in violation of Hong Kong's First Conduct Rule.

The HKCC also says it has reason to believe the firms attempted to delete a large number of relevant documents. This is the first time the HKCC has alleged its search was obstructed and the HKCC has referred this to the police for criminal investigation, sending a strong message that the HKCC takes the criminal provisions of Hong Kong's Competition Ordinance seriously. The case is in line with the Commission's enforcement focus of taking action against attempts to undermine the benefits of competition in public procurement and anticompetitive conduct that it considers impacts people's livelihoods.

## REGULATORY

### UK BUSINESS, ENERGY AND INDUSTRIAL STRATEGY COMMITTEE LAUNCHES AN INQUIRY ON ENERGY PRICING AND THE FUTURE OF THE ENERGY MARKET

On 8 December 2021 the UK's House of Commons Business, Energy and Industrial Strategy Committee (the BEIS Committee) launched an inquiry on energy pricing and the future of the UK energy market. This inquiry follows an evidence session with the Secretary of State for BEIS on 22 September regarding UK Government measures to support the energy industry and protect consumers and following the recent unprecedented surges in wholesale energy prices since the summer, which resulted in a number of firms going out of business and over 3.8m UK households being affected.

The BEIS Committee announced that its inquiry will examine the extent to which the policy and regulatory environment has contributed to the current issues affecting the energy market, the impact on consumers of rising energy prices, and the operation of the energy price cap.

The Chair of the BEIS Committee highlighted the Committee's focus on the viability of the energy price cap, whether a more interventionist approach from the regulator would be required, and the impact of tougher barriers on firms wishing

to enter the energy market. He addressed his call for submissions to "*energy bosses, consumers, the Government and Ofgem*".

The Committee welcomes evidence submissions on the terms of reference outlined below:

- The regulatory requirements companies must meet in order to trade as a regulated entity in the retail energy market;
- The mandate, role and performance of Ofgem in setting regulation and supervising regulated entities;
- The performance of previous policies introduced to stimulate effective competition within the retail energy market, and an assessment of the impact on competition of proposed future regulatory frameworks;
- The functioning and performance of the 'energy price cap' and an assessment of its use in the future, and an assessment of the role of auto-switching;
- The future of Bulb and the recovery of public funds and the cost to consumers of other energy supplier failures;
- The role of retail market reform in the context of the UK's net zero transition and domestic energy security requirements; and
- The comparison of UK wholesale prices and additional costs with the wholesale prices and additional costs across Europe.

The closing date for submissions is 31 January 2022. Evidence sessions for this inquiry are likely to begin shortly after. For further details on how to submit evidence, please see this page.

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