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Competition: raising the anti

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Competition policy and enforcement are changing rapidly, with antitrust watchdogs under pressure to get results. Grania Langdon-Down reports on what this means for lawyers.

Cartels, class actions, damages, compliance, merger control, state aid and tax are just some of the issues on the agenda for competition lawyers in 2016. A crystal ball might also be handy to predict what could happen to national competition policy if Britain leaves the EU.

The competition focus is not only external – the spotlight over the next year is also on the legal sector itself as the Competition and Markets Authority (CMA) investigates how the market is operating for individual consumers and small and medium-sized enterprises (see box below).

The CMA study comes after the authority was told to improve its performance by public spending watchdog the National Audit Office, which noted that fines in the UK were running at a fraction of those in Germany.

A week after that warning the CMA announced that it was fining Glaxo-SmithKline £37m for market abuse, with a further £8m in penalties imposed on the other drug companies involved. GSK is considering grounds for appeal.

The CMA was created nearly two years ago with the merger of the Office of Fair Trading and the Competition Commission. So far it has received mixed reviews, and the NAO recommends that its powers are enhanced. According to NAO head Amyas Morse, the authority has tackled previous failings, resulting in a more coherent competition regime, but there are still too few successful enforcement cases. Business awareness of competition law could also be improved.

Peter Willis, co-head of Bird & Bird's competition & EU law practice group, points out that in comparison the French competition authority issues 30-40 decisions a year, so there is scope for the CMA to gear up its investigations significantly. 'It is doing a decent job building on the two legacy authorities and creating a new culture,' he says, 'and now it needs to do some more enforcement.'

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It is still early days, says Vicky Sandry, Sky UK's director of legal – competition, corporate and regulatory. With Sky operating in broadcasting and telecoms – both heavily regulated sectors – she and her team of 24 cover merger filings, CMA references, competition investigations and information requests, as well as advising the business on compliance.

'Competition law is always in the forefront of our minds,' she says. 'As a leader in our sectors, everyone has an opinion on Sky. We generally have one investigation or another on at any one time and have done since I joined 16 years ago.

'Our most recent interaction with the CMA was on the BT EE merger, where we were an interested third party and received lots of information requests.'

These requests are very challenging, she says, because they often come with 'unbelievably short deadlines', which is a burden on the business. 'If you believe a merger is going to be bad for competition you have to put your case forward,' she says. 'The authorities always look at the submissions with a degree of cynicism, so the challenge is to make sure your concerns are backed up in competition theory and economics.'

Marc Israel, who heads Macfarlanes' competition/EU group, says the CMA had an 'embarrassing' defeat last year in the galvanized steel tanks case, where one person pleaded guilty but the other two defendants were acquitted by a jury. 'This highlights the importance of the rule changes in 2014,' he says, 'which mean prosecutors will no longer have to prove dishonesty but just show the alleged conspirators agreed. This will make it much easier to bring successful cases.'

Stephen Blake, CMA cartels and criminal group head, acknowledged that the verdicts prompted the authority to drop two criminal investigations. But he stresses the 'old offence is not dead', and the authority is still investigating suspected cartel activity in the supply of construction industry products, where there have been seven arrests but as yet no charges.

For Andrew Levy, general counsel at Stagecoach, the CMA's outreach programme, which looks at regional businesses and how familiar they are with competition law, is a 'good use of resources'. He highlights a recent case where the authority fined an association of estate and lettings agents in Hampshire, three of its members and a newspaper publisher £735,000 for infringing competition law.

New this year will be the EU directive on damages. Designed to make it easier for businesses and individuals to claim compensation, this directive has to be implemented by the end of 2016.

The UK is taking a low-key approach on the basis that national policy already 'ticks the boxes', with the government running a short consultation on how it should implement the directive.

But Willis says there is a key change in disclosure rules which could have a significant impact on the attraction of our courts. Claimants looking to bring competition damages claims choose English courts, he says, because our extensive disclosure regime is 'complete anathema' in many continental legal systems, adding: 'But that edge may go once the directive levels the playing field.'

One area where the UK is leading the way on private enforcement of damages claims is in introducing an opt-out class action under the Consumer Rights Act 2015.

Claimants will be allowed to bring standalone or follow-on claims from a competition decision. However, transition provisions mean follow-on claims can only be brought against post-October 2015 cartels.

Willis says the new jurisdictional rules will give the Competition Appeal Tribunal a new lease of life. 'A couple of firms are looking to bring the first class action under the new provision,' he says, 'but there are a lot of practical difficulties to overcome first, and firms have had their fingers burnt before over this type of claim when they haven't been set up properly.'

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The gateway for bringing a claim will be superintended by a judge, says competition specialist David Greene, senior partner of London commercial practice Edwin Coe. 'One of the primary questions will be can you fund this case through to trial? With opt-in actions you don't have to lay bare the way you plan to fund and organise it.'

Leading costs barrister Roger Mallalieu, of 4 New Square Chambers, says the new opt-out provision appears well suited to financial services-type consumer compensation claims.

'However, there are problems with funding and costs, primarily due to lack of clarity and experience,' he says. Contingency fee arrangements are prohibited, so the assumption appears to be that these claims will be brought by a suitable institutional representative of a 'class', and that the institutional representative, a third-party funder or the legal representatives, through a conventional CFA, will either bear or share the cost burden.

While campaigning and consumer rights organisations may be tempted to bring a claim, Mallalieu says the incentive for many institutional representatives will be limited, given the potentially substantial adverse costs exposure.

Within the European Commission (EC) itself, the focus for 2016 is strongly on the digital single market and 'geo-blocking', where access to internet content is restricted based on the user's geographical location.

The EC has ignored online markets for years, Willis says, leaving them to national competition authorities. But, he adds: 'Its e-commerce sector inquiry has now kicked off with questionnaires and, if previous inquiries are anything to go by, we will see a spate of individual investigations, so any company doing a lot of online business should be under no illusions that this isn't going to have important implications on what they can and cannot do.'

The digital single market is a real focus for Sky, Sandry says. Last summer, the commission sent a Statement of Objections to Sky UK and six Hollywood studios alleging that certain clauses in content licensing agreements between them would restrict the cross-border provision of pay TV services and are in breach of EU competition law. This is now waiting on the outcome of the oral hearing held in January.

At the same time, Sky is working closely with the commission on its separate portability proposals, which would introduce a new right for consumers to travel with content that they have paid for in their home territory. There are also reviews of the telecoms framework directive and the audio-visual media services directive – 'pragmatically, one of our biggest concerns is managing the workload', Sandry says.

Macfarlanes' Israel flags up other antitrust challenges by the EC which include Google's internet search services, which favour its own comparison shopping product; Google's mobile operating system Android (in a statement on its official blog, Google has denied it is harming competition); and Amazon's e-book distribution and relationship with publishers (Amazon said it 'is confident that our agreements with publishers are legal and in the best interests of readers. We look forward to demonstrating this to the commission as we cooperate fully during this process').

The Gazprom case also rumbles on, with the Russian state-controlled company seeking to appease the commission by promising to change its behaviour.

Clementi revisited?

Solicitors may see their clients through the best and worst of times, but the profession rarely tops popularity polls. But lawyers will need to sing their own praises during the CMA study into the legal market (see tinyurl.com/zzak5ew), or risk giving ground to those with different agendas.

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As one competition partner with experience of CMA studies warns: 'It is possible to sleepwalk into disaster. If the CMA only hears from those with gripes, it will be hard to dislodge that impression. This is already a fiercely competitive market.'

The CMA says its study is driven by issues around affordability and access to legal services, which is why it is focusing on the experiences of individual consumers and SMEs. An interim report is due in July and any reference for a full-scale market investigation has to be made within a year of launching the initial study.

The CMA plans to examine three key issues: whether customers can drive effective competition by making informed purchasing decisions of legal services; whether customers are adequately protected from potential harm and can obtain satisfactory redress if legal services should go wrong; and how regulation and the regulatory framework of the sector impacts on competition for the supply of legal services.

The authority is still working on the scope of the study but it expects case studies to include will-writing and probate, employment law and possibly commercial law. The Bar Standards Board has raised concerns that this will not generate much insight into advocacy services, particularly in relation to family law, where cuts have left clients particularly vulnerable.

'It's about transparency and the ability of the consumer to compare services and prices,' says David Greene, former president of the London Solicitors Litigation Association. His concern is that the underlying dynamic of competition inquiries tends to be about price.

'Price is only one element of the service provided,' says Greene, senior partner of London commercial practice Edwin Coe, who specialises in competition issues. 'You have to look at the quality of the service, its efficiency and the end result because a lot of factors come into play.

'The potential danger for the profession is a further chipping away at the reserved services. There is a move, again driven by price, for de-skilling and de-professionalising. But the consumer doesn't necessarily gain an advantage from that because quality can go down.'

So far the number of responses to the CMA's request for submissions is 'in the tens', according to Rachel Merelie, the CMA's senior director of delivery. She accepts it will be a challenge to get the provider perspective: 'It is a fragmented market, so we will work through representative bodies. We want to speak to both regulated and unregulated firms and new entrants.'

A big focus will be on the regulatory framework, which is already under review by the Ministry of Justice. The Legal Services Board weighed in early, telling the CMA that the current system of regulation is unsound.

In its initial response to the CMA study, the Law Society stressed the market was not fair as solicitors, who are heavily regulated, have to compete with unregulated providers and argued regulation should be applied equally to all providers.

Chancery Lane chief executive Catherine Dixon enlarged on this in an article for last week's Gazette, calling for 'holistic' reform and the introduction of a single regulator (see tinyurl.com/znm7o6h).

So is the commission favouring the carrot or the stick? 'That is the million-dollar question,' says Johan Ysewyn, head of Covington & Burling's EU competition group. 'The commission likes its fines, but I think it takes a balanced view that it also likes companies changing their trading behaviour.'

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What is worrying business is the changing nature of anti-cartel enforcement, he says. 'A cartel is no longer people sitting in a smoke-filled room agreeing prices. Now there are triangular cartels – or hub and spoke – where you hear from a customer that your competitor is doing something and you react. But I know the fee rates of every law firm because my clients tell me – does that mean I am in a cartel?

He adds: 'Then there is "signalling" – a new toy of the competition authorities – where a company issues a unilateral announcement that it is going to close a plant or increase prices and its competitors react. There are some big signalling cases at a European level which are close to settlement, with the parties saying they will no longer issue press releases. But is that really a cartel?'

In another development, European commissioner Margrethe Vestager has suggested that the cartel leniency programme could be extended to non-cartel cases, so a company that admitted liability would get a 10% discount on the fine.

Dorothy Livingston, former competition partner and now consultant with Herbert Smith Freehills, says this could be helpful where it is not clear if the case involves a cartel or some other horizontal behaviour.

'If you take an abuse of dominance case or a purely vertical case between, say, a wholesaler and retailer,' she says, 'they are often one-off issues and it may be that those involved will take their chance on the commission not being able to prove the breach.'

However, extending the programme is within the commission's own competence, she says, and if it does, national authorities will follow suit.

Sandry says the problem with abuse of dominant position cases is that it is a very nebulous concept. 'We have been alleged to have a dominant position in pay TV,' she says. 'But what counts as abuse is a really interesting question. These types of case may not be as susceptible to a leniency approach as a hardcore cartel because they are not clear-cut.'

At the same time, the authorities and commission are being criticised for not giving enough credit during investigations to companies' compliance programmes.

'As a business lawyer, I would say the authorities should give credit,' says Ysewyn, 'but, objectively, it's extremely difficult for a competition authority to judge whether a compliance programme is "good" or "bad" – that isn't their job.'

With regular bids for rail franchises needing CMA merger clearance, Levy says: 'Competition compliance is always on [Stagecoach's] agenda because the implications of getting it wrong are severe. So the key is embedding it within the company culture and then constantly reminding and updating staff.'

The area of mergers is certainly critical in competition terms. With M&A activity last year at record levels, competition authorities have had to respond to more aggressive and strategic deals. More than €60bn of deals – 20 transactions – were prohibited or abandoned on antitrust grounds, according to an Allen & Overy briefing paper on global trends in merger control enforcement, with a further 92 cases subject to interference in the form of remedies.

Also making headlines are battles over tax as multinationals shift taxable profits to states with beneficial tax regimes. The commission proposed measures last year to tackle this 'aggressive' form of tax planning.

Yet it remains unclear when tax breaks become state aid – and these issues are going to be to the fore this year, Livingston says. 'What is evident is that tax law hasn't kept pace with companies' ability to move money around.'

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Hovering over all this competition activity is the question of what would happen if Britain leaves the EU.

Isabel Taylor, competition partner at Slaughter and May, is chair of the Law Society's 500-strong Competition Section. 'It is hard to know exactly what the impact will be until we know what the exit model may be. On one level, leaving may not mean much change but, on a more extreme scenario, it could mean a big repatriation of work to the UK.'

The Competition Section contributed to the Society's October briefing paper on the EU and the legal sector, which says the competition regime is recognised as 'one of the major successes' of the EU. While Brexit is unlikely to change substantive antitrust rules in the short-term, because the UK and EU systems are so similar, it would allow the UK to introduce new national policies, though it would lose any influence over the content of EU regulations which will still affect UK business.

Livingston is helping advise clients on the possible implications of Brexit: 'If we leave and, because of the immigration element, we don't retain close ties, for instance by joining the European Economic Area or having a Swiss-style agreement, there would be no ceding of jurisdiction in competition matters to the EC, as happens now.'

This would mean M&A deals that trigger merger controls would have to be regulated twice and the UK's process is at least as expensive as the commission's, she says. The UK could also end up running parallel investigations into international cartels and other breaches of competition law.

'We would have more flexibility on state aid, but we would still be members of the World Trade Organisation so we would be bound by its rules on state subsidies,' she says.'It would also be possible to look again at whether competition law offences should be civil or criminal, and whether we should align the treatment of individuals with the treatment of their companies.'

Speaking from Brussels, Ysewyn says: 'You would expect people here to be constantly talking about it but they aren't – people expect Britain to do the "sensible" thing and stay in. If it does leave, the parallel investigations would add time, cost and complexity to the process which is why the current one-stop shop is a very attractive tool.'

With so much going on, it is not surprising that competition law is attracting young blood to the area, according to Taylor.

The Competition Section runs an annual £1,000 Horsfall Turner essay prize for trainee solicitors and paralegals. Last year the topic was 'Brexit: what would it mean for the UK competition law landscape?'

When the section comes to choose the topic for 2016, it will be spoilt for choice.

- *For more information about The Law Society Competition Section, see the website*

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http://www.lawgazette.co.uk/analysis/features/competition-raising-the-anti/5053760.article