
Competition and Markets Authority – Annual Report and Accounts 2017/18

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On 24 July 2018, the Competition and Markets Authority (“CMA”) released its Annual Report and Accounts for the year ended 31 March 2018 (the “2017/18 Report”). As part of its overall objective in promoting competition for the benefit of consumers, the CMA not only examines and supervises markets and the wider economy but also, crucially, takes an active part in the enforcement of competition laws against anti-competitive and unfair practices. Three key points of note can be drawn out of the 2017/18 Report: the CMA’s enforcement appetite generally; the powers available to it, and how they are used; and the possible effects of Brexit on competition enforcement.

The CMA has continued its commitment to taking forward a higher number of enforcement actions while attempting to investigate and resolve cases more quickly. It opened 10 new competition enforcement investigations in 2017/18, which matches the numbers of 2016/17 and represents a 60% increase as against the 2010-2015 annual average. These numbers are driven by concerns that both the number and speed of enforcement investigations have, in previous years, been too low. While both of these issues clearly need to be addressed, it is perhaps too ambitious to tackle both at once while preserving the integrity of the investigations themselves. In a similar vein to the Financial Conduct Authority, which has recently promised an uptick in investigations without a corresponding increase in budget, it will likely be difficult for the CMA to conduct larger numbers of fast-paced, fair and rigorous investigations resulting in justified and effective enforcement action. Something will have to give.

The overall efficiency and effectiveness of enforcement investigations naturally leads into a more granular examination of how the CMA uses its powers. The 2017/18 Report highlights the CMA’s increased focus on using its powers flexibly, tailoring its infringement decisions to the particular conduct in question and attempting to balance the need for a rigorous investigation with the desire to operate cost-effectively. It particularly emphasises the use of settlements and commitments to bring investigations to a quicker end. By way of example, in 2017/18 the CMA secured commitments in two major investigations – online auctions and Showmen’s Guild. A commitment is a legally binding agreement which imposes a change in behaviour that addresses the CMA’s concerns. However, it is neither an admission of guilt nor does it result in fines.

While it is laudable for any authority to seek to conclude investigations swiftly, bearing in mind not only the effect on those under investigation but also the costs involved in long-running cases, it must also be remembered that speed is not everything. The CMA must carefully consider the need for a thorough investigation, which inevitably takes time, while also taking into account the deterrent effect (or lack thereof) of the sanctions imposed. An outcome where no wrongdoing is admitted and no fine imposed does not necessarily give the impression of an effective regulator.

A final area of discussion – not directly addressed in the CMA's enforcement overview but inevitably referred to at other points throughout the 2017/18 Report – is the ever-present shadow of Brexit. Brexit poses a two-pronged problem to the CMA. Firstly, as is the case with many other regulators, the CMA is currently dealing with the time and cost involved in streamlining or redrafting areas of law, policy or procedure where the withdrawal of EU regulation may leave gaps. It is important to ensure not only that these gaps are filled, but that developments sit coherently with existing practices, and do not result in duplication or overcomplication of issues. These activities are necessarily expensive and time consuming, drawing resources away from enforcement.

The second prong is one much more particular to the CMA: with the loss of enforcement activity of the European Commission, it will become the only competition regulator in the UK. The Commission has recently been flexing its muscles, handing out record fines to large multinational companies acting anti-competitively within the EU. It is seen to be one of the most active and hard-line anti-trust regulators in the world – a description which simply cannot be applied to the CMA. The CMA will have to step up to the plate, rigorously and assertively investigating and enforcing competition laws, if it is to become a relevant and effective deterrent to anti-competitive practices in the UK.