



**Baker
McKenzie.**

UK Competition and Consumer Protection Law Investigations

JANUARY 2021

UK Competition and Markets Authority: A Champion for UK Competition and Consumers

The UK Competition and Markets Authority (CMA) is set to take on increasing responsibility for larger and more complex cartel and competition law enforcement cases post-Brexit, where previously such cases were handled by the European Commission (EC). In addition to receiving additional funding and resources to boost its enforcement efforts, the CMA will continue to share its competition law enforcement powers with the UK concurrent sectoral regulators. Whilst the CMA has always been a respected global antitrust regulator heavily involved in driving global policy initiatives, businesses will now need to recognise it as a robust enforcer of UK competition law.

"As of 1 January 2021, the Competition and Markets Authority (CMA) will take on responsibility for merger, cartel and competition enforcement cases that were previously reserved to the European Commission; typically, those are the larger and more complex cases. The CMA is ready for this challenge; it has committed the necessary resources to ensure that it has the people, skills and infrastructure in place to deal with these investigations."

– CMA, 1 December 2020

The CMA also has stated ambitions to increase consumer protection enforcement. In a post-Brexit landscape, we expect to see the CMA take on new responsibilities and a more proactive enforcement stance in the protection of consumer rights, including through increased sanctions for consumer law breaches, and a focus on transparency in digital markets, protection of vulnerable consumers and on redress rights.

"The year ahead will be one of profound change for the country. The CMA has been planning extensively for the UK's departure from the EU, and we are ready to assume our new responsibilities at the end of the transition period. As we take on a more active role in global cases from January 2021, we are determined to be a robust champion for competition and for UK consumers."

– Andrea Coscelli, CMA Chief Executive

CMA enforcement on the rise

15

company director disqualifications in 2019-2020

17

infringement decisions in 2019-2020



Bid-rigging digital screening tool launched in 2017



New resale price maintenance detection software launched in 2020



CMA fined a retailer for the first time for engaging in resale price maintenance (alongside record fines imposed on suppliers)



Currently 14 open consumer enforcement cases, with 6 launched in 2020

7

market studies ongoing: EV charging, Digital markets, Misleading environmental claims, Funerals, Scottish, E&W legal services, Online platforms/digital advertising

Risks of non-compliance

In the case of a suspected infringement of UK competition law, the CMA may gather evidence through unannounced inspections ("dawn raids"), requests for information, or the use of surveillance powers. Information on misconduct is frequently provided to the CMA through complaints (e.g., from customers, disgruntled distributors, suppliers or employees), whistleblowers (up to GBP 100,000 is available for individuals providing information on a cartel), or through self-reporting by companies submitting immunity or leniency applications.

Such investigations may ultimately lead to an infringement decision, with significant financial penalties being imposed on the infringing businesses. In addition to the risk of follow-on damages litigation in the UK Courts, the CMA may also secure compensation for victims who suffered loss as a result of the infringement.

Infringements of UK competition law can also lead to director disqualifications for up to 15 years. Separate criminal prosecution against individuals involved in serious cartel conduct can lead to imprisonment for up to five years, as well as unlimited financial penalties.

The CMA's approach to conducting investigations, whether in relation to cartel conduct, vertical restrictions or abuse of dominance, is involved, sophisticated and at times very complex. The CMA expects the same approach to be applied by companies conducting risk assessments, internal audits or investigations. This translates into very specific procedural steps that companies need to take when conducting such internal investigations. There is an expectation that "care and precision" is applied to all investigatory steps ranging from evidence preservation and review, to interviewing of witnesses and record keeping. Therefore, conducting an investigation in compliance with CMA requirements is particularly important where the conduct has any nexus to the UK. This applies even where the CMA may assume jurisdiction in parallel to the EC, US Department of Justice, or other antitrust authorities.

Preparing your business for increased CMA scrutiny and enforcement

Businesses must take steps to manage the risk of UK investigations by developing a proactive defence strategy. In addition, companies should be prepared for joint competition and consumer law scrutiny, following recent trends observed in the CMA's handling of market studies and throughout the COVID-19 crisis.

"Business leaders have a special, personal responsibility to be well informed about what is happening within the companies they manage"

–CMA, September 2020

The CMA has issued specific guidance making it clear that accountability for compliance rests with senior management, especially the board, and sets out a step-by-step process to manage risk, with guidance/checklists for risk identification, as well as analysis, evaluation and management of risks.

It is therefore imperative for companies and their leadership to remain on the front foot and maintain an ongoing focus on reviewing competition and consumer law compliance policies and procedures that can withstand scrutiny from the CMA, EC and other antitrust and consumer enforcement agencies.

How we can help

We have extensive experience assisting companies to design and implement competition law compliance programmes, audits and health checks. We also regularly provide advice and training on dawn raid preparedness, and our 'Dawn Raid Stress Test' offers an opportunity to check whether your dawn raid policies and procedures can withstand a visit from CMA officials.

We regularly handle large scale and complex investigations, managing every stage in our clients' best interests – from data preservation, to evidence collection and review, interviews and subsequent interaction with the CMA. We specialise in developing defence strategies for contested and settlement procedures, and our extensive experience in handling both CMA and EC investigations means we can coordinate seamlessly across jurisdictions. We are uniquely placed to advise on antitrust and consumer matters that intersect with cross-sectoral regulatory frameworks. For example in front of the Financial Conduct Authority and the Office of Communications.

CMA competition law decisions can be challenged through the Competition Appeal Tribunal (CAT) and be followed by private damages claims. Our long track-record of dealing with regulatory appeals and private damages claims allows us to provide a one-stop shop service addressing litigation risks from the very start of an antitrust investigation. We assist clients in private damages claims and all other forms of antitrust litigation in front of the UK and other European Courts.

Our experience

- » Represented manufacturer of musical instruments in CMA dawn raids in 2018, and on resulting investigations into resale price maintenance in the UK and other EU Member States. The supplier received partial immunity from fines and a leniency discount, as well as a discount for introducing a robust competition compliance programme.
- » Advised a UK plc in relation to an investigation by the CMA into anti-competitive arrangements in the design, construction and fit-out services sector. The client did not receive any fines due to its status as an immunity applicant.
- » Represented manufacturers of fast moving consumer products in the UK "hub & spoke" investigations in the grocery sector.
- » Represented a multinational in the UK investigation into hub and spoke and resale restriction allegations in respect of the supply of tobacco products, as well as a successful appeal to the CAT which resulted in the quashing of the infringement decision and the associated fines.
- » Advised a client in the entertainment and creative sector regarding a CMA investigation, including handling a dawn raid and cooperating with the CMA to avoid a fine and any negative publicity for our client.
- » Representing a reseller in the CMA's investigation into resale price maintenance issues in the catering equipment sector.
- » Provided complex strategic advice to a number of clients in relation to the interplay between competition law and sectoral regulations in front of Ofgem and Ofcom.
- » Advised a major financial institution on its Principle 11 reporting obligations to the FCA in cases involving suspicions of competition law breaches, as well as in cases involving the FCA's exercise of its concurrent competition law powers.
- » Advised a number of global corporates involved in some of the EC's largest antitrust enforcement cases (e.g., in car parts, financial services, media and freight forwarding sectors) in respect of their possible exposure to parallel investigations in the UK and exposure to the UK cartel offence, including advising on and making a number of fail-safe leniency applications in the UK.
- » Advised a leading online platform and fast-food retailer in the Online Platforms and Digital Advertising Market Study.
- » Acted for Willis Towers Watson in the CMA's Market Investigation in relation to Investment Consultancy and Fiduciary Management Services.
- » Acted for EDF Energy in the CMA Market Investigation into the UK Energy Market.
- » Represented a multinational tech company on consumer protection undertakings relating to cloud storage contracts.
- » Defended a multi-million pound High Court claim brought against our client L'Oréal and the challenge to its selective distribution system by an online supplier Beauty Bay.
- » Defending civil claims against a major financial institution, resulting from alleged attempts to manipulate spot foreign exchange benchmarks. This includes defence of two applications for collective proceedings orders made in the Competition Appeal Tribunal.

Additional value adds and services

We help clients manage different legal issues through a wide array of products and services. As part of our clients' teams, we frequently provide competition law training and compliance guidance to a wide range of multinational companies, including several Fortune 500 and FTSE 100 listed companies.

Global products and tools

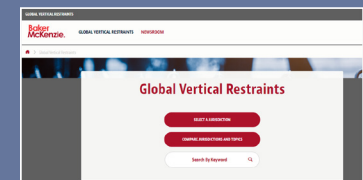
Global Dawn Raid App – A mobile application that, across 44 countries, provides clients experiencing a raid with real-time step-by-step guidance on their rights and obligations, as well as instant access to Baker McKenzie antitrust lawyers.

Dawn Raid Stress Test – An invaluable tool to help your key employees (e.g. Legal, reception, IT, corporate communications, HR, senior management) prepare for a dawn raid. As part of this exercise we identify any issues which need to be rectified or can be improved in order to be fully prepared for a dawn raid.

Investigations Academies – We offer tailored, in-depth "Investigations Academies" that serve to train and educate our clients in all aspects of dealing with investigations in a highly practical and interactive format. Our Investigations Academies are generally run over two days, and are targeted at increasing awareness within the broader business leadership group including Commercial, HR, Finance and IT in addition to Compliance and Legal.

Global Vertical Restraints Portal – An online, interactive website which provides an 'at a glance' assessment of the most relevant and common vertical restraints under the national laws of over 20 jurisdictions. It also includes partner contacts and details of recent enforcement, updated regularly.

Global Guide to Competition Litigation – Competition litigation is a fast growing and complex area of commercial litigation that often requires coordination of strategy across jurisdictions. This guide gives a multi-jurisdictional perspective on the core issues arising when bringing or defending a private claim for damages resulting from a breach of competition law.



KEY CONTACTS

COMPETITION INVESTIGATIONS AND LITIGATION



James Robinson
Partner, London
+44 20 7919 1631
james.robinson
@bakermckenzie.com



Luis Gomez
Partner, London
+44 20 7919 1766
luis.gomez
@bakermckenzie.com



Keith Jones
Partner, London
+44 20 7919 1573
keith.jones
@bakermckenzie.com



Samantha Mobley
Partner, London
+44 20 7919 1956
samantha.mobley
@bakermckenzie.com



Francesca Richmond
Partner, London
+44 20 7919 1621
francesca.richmond
@bakermckenzie.com



Mara Ghiorghies
Senior Associate, London
+44 20 7919 1516
mara.ghiorghies
@bakermckenzie.com

CONSUMER INVESTIGATIONS



Helen Brown
Partner, London
+44 20 7919 1876
helen.brown
@bakermckenzie.com



Julia Hemmings
Partner, London
+44 20 7919 1619
julia.hemmings
@bakermckenzie.com

WHAT OTHERS SAY

Client Testimonials

'A team of excellent professionals with a highly business-focused and pragmatic attitude.'

'The integrated practice can draw on the skills of specialists across the world. Very practical and great to work with.'

'Extremely dedicated to client relationships, very proactive, with unique global coverage and outstanding global knowledge management.'

#1 for Cartels and Top 3 Global Elite Firm
GCR Global Elite (2021)

Baker McKenzie is renowned for its expertise in investigations
Legal 500, EU & Competition (2020)

Baker McKenzie helps clients overcome the challenges of competing in the global economy.

We solve complex legal problems across borders and practice areas. Our unique culture, developed over 70 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients.

bakermckenzie.com

© 2021 Baker McKenzie. All rights reserved. Baker & McKenzie International is a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner or equivalent in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.