

## COMPETITION: WHAT TO EXPECT IN 2012

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### REFORM OF THE UK'S COMPETITION REGIME

The Government's response to proposals for reform of the UK's competition regime is due shortly. These include merging the OFT and Competition Commission into a single Competition and Markets Authority (CMA). If this went ahead it would result in the biggest shake-up in this area since the Competition Act came into force in 2000. Although any changes are not expected to be implemented for some time, the Government's response is keenly awaited as it is likely to have far-reaching implications for the way competition law is enforced in the UK.

In addition to the creation of the CMA, two possible changes are particularly noteworthy:

- ◆ the proposal to move to a prosecutorial model of enforcement (as for example in the US) whereby the authorities would have to bring cases before a court or tribunal which would decide whether an infringement of competition law had occurred. This compares to the current system where the authorities take such decisions (which can then be appealed); and
- ◆ the suggestion to remove the "dishonesty" element from the criminal cartel offence. Following some recent high-profile setbacks for the OFT in this area this proposal should mean that criminal convictions are easier to secure.

### MORE "MARKET STUDIES"

Continuing the trend seen in 2011, we predict a greater number of "market studies" in which market structures, rather than individual firm conduct, are investigated. This is a powerful policy tool and does not require the OFT to suspect any unlawful conduct to have occurred - rather a belief that the structure of the market is not as conducive to competition as it could be.

The investigation into UK airports, which has led to BAA having to sell Gatwick, Stansted and Edinburgh, demonstrates the impact that these studies can have. Recent market investigations include those into the audit, private healthcare and motor insurance markets. Whilst the study into motor insurance has only just begun, the audit market is now the subject of a two-year probe by the Competition Commission - and the OFT has announced its intention to refer the private healthcare market to the Competition Commission for a similar review.

### MORE "SUPER-COMPLAINTS"

Businesses whose customers are the general public can be on the receiving end of "super-complaints" - these require the OFT to respond within 90 days. A "super-complaint" can only be brought by designated consumer bodies, in cases where they consider that a feature, or combination of features, of a market significantly harms the interests of consumers.

The outcome in such cases can have significant repercussions for businesses. For example, following a super-complaint, in December 2011, many banks and travel money providers agreed to alter the charges levied on individuals for purchasing foreign currency and for using credit and debit cards abroad, which together earned financial institutions over £1bn a year. They have also agreed to significantly improve the information provided on options available to consumers purchasing foreign currency in the UK or using their credit and debit cards abroad.

### A GREATER FOCUS ON CONDUCT BY DOMINANT FIRMS

Those firms fortunate enough to enjoy strong market positions should ensure they, and their employees, are clear of what conduct is permissible and what may fall on the wrong side of the line. Even if a company is vindicated following an investigation, the time, cost and diversion of management focus of dealing with an inquiry should not be under-estimated. Far better to secure that companies ensure their, and their employees, conduct mitigates the risk of an investigation rather than succeed in defending an investigation.

### MORE PRIVATE ACTIONS FOR DAMAGES

Competition authorities have been seeking for some time to facilitate private actions for damages to enable those who have suffered as a result of competition law infringements to seek redress. Following the European Commission's recent draft guidance on quantifying harm in actions for damages based on breaches of the EU antitrust rules, more cases of this kind are expected. The English courts are generally seen as an attractive forum for such litigation, even against companies domiciled outside the UK and in respect of conduct that may have taken place in other Member States.

### CONTACT DETAILS

If you would like further information or specific advice please contact:

**MARC ISRAEL - named in The Lawyer as one of the UK's "Hot 100 lawyers"**

DD: +44 (0)20 7849 2332

[marc.israel@macfarlanes.com](mailto:marc.israel@macfarlanes.com)

### MACFARLANES LLP

20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane [www.macfarlanes.com](http://www.macfarlanes.com)

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