

COMPETITION AND MARKETS AUTHORITY
Minutes of the Board
30 April 2014

Present:

David Currie (Chairman)
Alex Chisholm (CEO)
Sonya Branch
Andrea Coscelli
Carolyn Fairbairn (items 10-15 only)
Alan Giles
Roland Green
Bill Kovacic
Philip Lowe
Jill May
Annetje Ottow
Mike Walker
Erik Wilson (joined the meeting part way through item 3)
Roger Witcomb

CMA and Transition staff:

Paul Latham (items 4-7 and 10 only)
Colin Sharples (items 11-13 only)

Executive Office:

Sean Cornall
Tim Jarvis
Rebecca Lyon (Minutes)

Introduction

1 Introduction

The Chairman introduced the meeting, welcoming Sean Cornall (covering Kate Bridge's maternity leave) to his first Board meeting.

Declaration of conflicts / Recusals

It was noted that Sonya Branch is recused on Tobacco and would leave the meeting for that part of the litigation agenda item. Rebecca Lyon is conflicted on Private Healthcare and would leave the meeting for that agenda item, which Sean Cornall would minute.

2 Review and approval of draft public and private minutes of the March Board meeting

The Board approved both sets of minutes with no changes.

3 Chief Executive's oral update

The Chief Executive updated the Board on key developments and highlights from the past month:

- **CMA launch:** feedback on the staff event was generally positive and there was good media coverage.
- **International:** the Chairman spoke at a European Consumer event in Brussels at the start of the month and attended ICN in Marrakech from 22-25 April.
- **Delivery:** Private Healthcare was the biggest output in April.
- **Litigation:** judgments were received in Akzo Nobel/Metlac, Tobacco and Ryanair.
- **Governance:** Committees are up and running; XCo, CPC, PRC and OpCo have all had their first meetings.

- **SCS recruitment:** good progress being made, with high calibre internal and external applications for Legal Director and Project/Inquiry Director vacancies.

The Chief Executive also updated the Board on key developments in each directorate.

Core updates

Markets and Mergers

4 Mergers portfolio: overview and strategic themes

(Andrea Coscelli, Sheldon Mills, Nelson Jung)

The team presented the paper, providing an overview of the current Mergers portfolio and strategic themes:

- **Caseload:** historically the OFT has made approximately 100 merger decisions each year, with a reference rate of between 8 and 10 per cent. The caseload for 2013/14 was smaller than average, with 65 decisions made – 65 per cent were cleared (including one with commitments); 18 per cent were found not to qualify; 5 per cent met the de minimis exception; and 12 per cent were referred to Phase 2.
- **Industry sectors:** the CMA is currently considering mergers in a wide range of markets, which provides a deterrence effect to industries across the economy.
- **Interim measures powers:** the CMA's powers at Phase 1 were strengthened as a result of legislative change which came into effect on 1 April. The CMA has made its first ('freezing') interim order.
- **Transition of staff between Phase 1 and Phase 2:** the team is keen to take advantage of synergies between Phase 1 and Phase 2 while ensuring that risks are mitigated. Guidelines are being prepared for any staff transferring between the two phases.
- **De minimis exception:** where markets are of 'insufficient importance' the CMA has discretion to apply a 'de minimis' exception instead of referring the merger to Phase 2. Current guidance sets out relevant considerations to cost/benefit analysis. This includes a £10m threshold, above which the exception would not be applied, and a £3 million threshold below which discretion would generally be applied.
- **Merger Notice Form:** the Merger Notice Form is a new feature of the regime; during consultation on the use of the form, stakeholders expressed concerns that it may significantly increase the pre-notification period. The CMA has accepted its first form – the full process, from informal engagement to acceptance of the form, took four weeks.
- **Litigation risks:** an appeal has been received from A.C. Nielson in relation to the OFT's clearance decision in IRI/Aztec.
- **EU mergers:** many of the largest mergers in Europe are dealt with by the EU due to their broad-ranging impact; procedures are in place for mergers to be referred from the EU to a Member State where the effects of the merger will be felt only or very largely in that Member State. The CMA engages with the EC on EU cases with a significant UK component.

5 Healthcare mergers

(Andrea Coscelli, Sheldon Mills, Nelson Jung, Sophie Perrussel)

The team introduced the paper, providing an update on mergers healthcare work including work to develop two pieces of guidance: i) CMA guidance on the application of merger control to the healthcare sector aimed at advisors; and ii) joint guidance with Monitor on the merger regime and interaction with Monitor's other regulatory functions for NHS providers.

The Board discussed the regime, noting that the CMA has an important role to further increase the understanding of the regime, what the CMA does and how it is of benefit to patients and taxpayers. In terms of the proposed guidance, the Board welcomed the idea of engaging with the sector, and stressed the importance of doing so in language that providers and advisors will understand. The Board agreed that guidance for advisors should be published for consultation given the prior commitment and to provide certainty to stakeholders.

The Board made a number of suggestions to improve the guidance. Subject to these comments being reflected, it was agreed that the guidance for advisors should be published for consultation for a six-week period. The Board thanked the team for its work.

6 Update on the Markets portfolio

(Andrea Coscelli, Daniel Gordon, Rachel Merelie)

The team presented the paper, providing an overview of recent and current Markets work, including:

- **Shape of the portfolio:** five reports have been published in 2014 across Phase 1 and Phase 2, the majority of which have some ongoing follow-up work associated with them, including litigation and remedies implementation. The current portfolio consists of two Market Studies and two Market Investigations.
- **Pipeline:** the team is actively considering its portfolio and pipeline with a view to starting new work and a number of potential future cases and research projects have been identified.

The Board thanked the team for its work.

Office of the General Counsel

7 Litigation update

(Roland Green, Simon Jones, Chantal Encavey)

The team introduced the paper, providing an overview of the litigation cases which have been transferred to the CMA from the OFT and CC, as well as new litigation arising in the CMA:

- **Akzo Nobel/Metlac:** on 14 April, the Court of Appeal dismissed an appeal brought by Akzo Nobel against a judgment of the CAT that upheld the CC's decision to prohibit the acquisition by Akzo Nobel of sole control of Metlac.
- **Ryanair:** on 7 March, the CAT handed down judgment dismissing Ryanair's appeal against the CC's decisions in its report into the acquisition by Ryanair of a shareholding in Aer Lingus. Ryanair has been given leave to appeal this decision to the Court of Appeal on two points of law.
- **Hotel Online Booking:** an appeal has been brought by Skyscanner to the CAT against the OFT decision of 31 January to accept commitments to remove certain discounting restrictions for Online Travel Agents. The CMA's defence is due on 12 May.
- **IRI/Aztec:** an appeal has been brought by A.C. Nielsen in relation to the OFT's clearance decision in IRI/Aztec.
- **Construction restitution:** a hearing of the claims brought by Lindum, Interserve and Willmott Dixon in relation to the OFT's decision of 21 September 2009 took place between 11-13 March. The CMA awaits judgment.
- **Tobacco¹:** on 7 April, the Court of Appeal allowed the OFT's appeal against a judgment made by the CAT that granted Gallaher and Somerfield extensions of time to appeal against the OFT's 2010 Tobacco decision.

The Board thanked the team for its work.

Organisational management and Thematic reviews

Governance

7A Board member visit: Carolyn Fairbairn and Annetje Ottow

(Annetje Ottow)

Carolyn Fairbairn and Annetje Ottow had met case teams and individuals with experience of a range of issues and interests on 29 April. Annetje reported that the visit had been extremely helpful and there was a desire from teams and individuals for more insight of the Board's risk appetite. It was noted that a paper is being prepared to inform a discussion at the June Board, relating to both financial/performance risks and project risks.

8 Role of the Chair of the CMA Panel in making references to Phase 2 investigations

(Roland Green, Tim Jarvis)

The Board agreed that the Chair of the CMA Panel would not take part in Board decisions concerning a market study where a market investigation was under consideration as a likely outcome to the study. This was in addition to the already agreed practice that panel members who are CMA Board members may not take part in decisions to make market investigation references for any investigation on which it was anticipated they might sit on the Panel.

¹ Sonya Branch recused herself from this item.

Markets and Mergers

9 Private Healthcare Market Investigation – update²

(Roger Witcomb)

Roger Witcomb provided an overview of the Private Healthcare Market Investigation, summarising the findings; the processes and methodologies employed; the remedies identified by the Group; and the litigation during the investigation on disclosure. An appeal was likely.

Office of the Chief Economic Advisor

9A Office of the Chief Economic Advisor update

(Mike Walker)

The Chief Economic Advisor updated the Board on a number of thematic issues identified to be considered by the OCEA, following a recent seminar at the University of East Anglia:

- **Retail Price Maintenance/Most Favoured Nations:** these issues are topical and have been considered in a number of recent cases and OFT research but further consideration is needed.
- **Evaluating the effects of policy:** although the indirect impacts of the CMA's work will not be taken into account in assessing the 10:1 benefit to cost ratio, it would be useful to measure the wider impact of the CMA's work.
- **Inactive consumers:** this would consider the effect on competition of regulation to protect inactive consumers, the impact of inactive consumers on competition, and how consumers might be incentivised to engage.
- **Efficient use of econometrics:** consideration is needed on how to make the most effective and efficient use of econometrics in the CMA's work.
- **Market Inquiries:** to consider what a well-functioning market looks like, in order to develop the counterfactual in Market Inquiries.
- **CA98 Chapter II cases:** lawyers and economists will often differ in their understanding of basic issues, such as what an abuse of dominance is; it would be useful to have a shared CMA understanding of such issues. The Board noted that it would also be useful to share the CMA's thinking on these issues more widely, including internationally.
- **Pass through of cost changes:** the OFT recently undertook some research into the implications, including for consumers, of cost pass through, which will be of relevance to the CMA's work.
- **Intellectual Property:** due to size of the companies involved, Intellectual Property issues are primarily a matter for the EU, though the CMA will engage with the EU on such issues.

Strategy, Communications and Devolved Nations

10 Compliance Strategy

(Paul Latham, Judith Frame, Emma Withers, Simon Constantine, Steve Preece)

The team introduced the paper, providing an overview of a proposed compliance strategy and initial programme of compliance work to build on previous work and meet the relevant Annual Plan commitment. It noted its intention to create a dedicated compliance team to deliver this work, accompanied by an internal steering group, as well as an external advisory panel.

The Board welcomed the proposals, highlighting the importance of building a compliance culture and helping businesses to understand what the law means for them and to comply. It noted that having a dedicated compliance team will allow the CMA to keep compliance as a priority and build on the OFT's previous work by extending its reach to parts of the business community that do not yet comply or use the OFT's compliance tools.

The Board considered the team's proposed research, highlighting the importance of the team continuing to communicate its compliance messages in parallel to the research being undertaken; it also noted the

² Rebecca Lyon recused herself from this item; Sean Cornall took the minutes in her absence.

importance of linking up messages on the importance of compliance with those on the benefits of competition.

The Board made a number of further suggestions for the team to consider in its work and highlighted the importance of joining up with others where appropriate, to ensure complementary messaging. The Board thanked the team for its work.

HR

11 Professionalism and Parity project

(Carmel Flatley, Rosalind Bergemann)

The Board was updated on the professionalism and parity project, noting that good progress is being made. There are two core strands to the consultants' review: i) meetings with staff to gather feedback on current reward and career arrangements; and ii) an external survey to benchmark reward packages and career management against other regulatory bodies and professional service firms. In addition the research will also take account of feedback from exit interviews and candidates for recent recruitment campaigns. The research phase will conclude shortly and initial analysis will be provided to the May Board and Remuneration Committee, with a further draft report presented to the June Board.

Finance

12 Budget allocation 2014/15

(Erik Wilson, Rebecca Lawrence, Alasdair Corfield, John Crilly)

The team introduced the paper, providing an overview of the allocation of the CMA's budget for 2014/15 across the directorates. The team proposed to split the available budget broadly in proportion to the OFT's and CC's 2013/14 spend and, taking into account the CMA's project based approach, to allocate the majority of it to PRG.

The Board discussed the proposed allocation, focussing on spend on IT and professional and consultancy services. It was agreed that XCo would further consider these issues and report back to the Board.

Transition

13 Transition programme: final report and lessons learned

(Alex Chisholm, Colin Sharples)

The Board was provided with a final update on progress, focussing on lessons learned from the transition programme, which will feed into a wider review to be undertaken by BIS. The Board thanked Colin Sharples for all his work, noting that he had led the transition programme very well.

AOB

14 Minutes of Committees

The Board noted the minutes of the Audit and Risk Assurance Committee (18 March), Executive Committee (9 April) and Case and Policy Committee (9 April).

15 AOB

Future agendas

The Board asked for plans for the June meeting, to be held in Edinburgh, to be shared with it as they are developed.

Reading room papers

The Board noted the Reading room papers provided for this meeting.