Implications of UK competition law on the insurance sector

by *Vincent Brophy*, Partner, *Rosanna Connolly*, Counsel, and *Bethany Wise*, Associate, Sidley Austin LLP

Practice notes | **Maintained** | United Kingdom

This note considers the scope and application of UK competition law to the insurance sector.

Scope of this note

To ensure compliance with UK competition law, businesses need to understand how the regime applies to their particular activities. This practice note is designed to help insurance businesses by providing an overview of the applicable legal and regulatory framework, and explaining the application of the regime in practice.

This note includes summaries of insurance-related market studies and enforcement action to provide examples of competition regulation in the insurance sector in the UK. It also sets out practical considerations to help insurance businesses prepare for, and mitigate, competition risks.

This note does not consider the application of EU competition law to the insurance sector. However, for information on this, see *Practice Note, Application of EU competition law to insurance*.

Overview of UK competition law

Key legislation

The main provisions of the UK competition regime are contained in the *Competition Act 1998* (Competition Act) and the *Enterprise Act 2002* (as amended by the *Enterprise and Regulatory Reform Act 2013* (ERRA)) (Enterprise Act).

The *Digital Markets, Competition and Consumer Bill* (DMCC Bill) was introduced into the House of Commons on 25 April 2023. Once enacted, several aspects of the current competition regime will be reformed, including the Chapter I prohibition (see *Legal update, Digital Markets, Competition and Consumer Bill introduced into Parliament: digital markets and competition aspects*). The precise timing of the DMCC Bill depends on the parliamentary timetable, but it is currently expected to receive Royal Assent and enter into force by Autumn 2024.

Anti-competitive conduct

The *Competition Act* contains two prohibitions on anti-competitive conduct that are analogous to the EU prohibitions under Articles 101 and 102 of the *Treaty on the Functioning of the European Union* (TFEU):

- The Chapter I prohibition prohibits agreements between undertakings (that is, entities engaged in economic activities), decisions by associations of undertakings or concerted practices that may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless an exclusion or exemption applies (*section 2, Competition Act*). For more information on Chapter I, see *Anti-competitive conduct*.
- The Chapter II prohibition prohibits the abuse of a dominant market position that has or is capable of having an effect on trade within the UK (*section 18, Competition Act*). For more information on Chapter 2, see *Abuse of a dominant position*.

The *Enterprise Act* also provides that it is a criminal offence for individuals to enter into certain hard-core cartel arrangements, such as price fixing, customer allocation, market sharing and bid rigging (*section 188, Enterprise Act*).

For more information, see *Practice Note, Overview: UK competition law*.

Private enforcement

Third-party companies and individuals can bring private standalone and follow-on actions for damages for loss suffered as a result of breach of UK competition rules.

In addition to single damages actions, it is also possible for a certified class representative to bring a collective damages action (that is, a standalone or follow-on action) for loss suffered as a result of breach of UK competition rules.

Collective damages actions can be on an opt-in basis (where each class member notifies the class representative that their claim should be included in the collective proceedings) or on an opt-out basis (where the action is brought on behalf of each class member except for those who notify the class representative that their claim should not be included in the collective proceedings, and any class member who is not domiciled in the UK at a specified time and does not opt in to the collective proceedings).

It is also possible for the Competition Appeal Tribunal (CAT) to combine claims (single or collective actions) or certain aspects of those claims to determine together common issues between those claims.

For more information, see *Practice Note, Damages actions in the Competition Appeal Tribunal*.

Merger control

"Merger control" refers to the process by which competition authorities review corporate transactions for any adverse effect on competition in the markets affected. In many jurisdictions, a proposed transaction that meets the applicable statutory thresholds may only be completed after the relevant competition authority has been notified of a proposed transaction and granted clearance. The UK operates a voluntary, rather than mandatory, notification process, and transactions may proceed to closing without prior notification or approval. However, the Competition and Markets Authority (CMA) retains the ability to investigate transactions, including post-completion in certain circumstances, and has powers to halt integration and, where the CMA finds that the transaction results in a substantial lessening of competition, unwind a completed transaction.

As the UK has left the European Union (EU), the CMA has jurisdiction to review concentrations with UK aspects that would have previously fallen under the remit of the European Commission as part of the EU merger control. This includes insurance concentrations, which were often captured by EU merger control thresholds.

The *Enterprise Act* enables the CMA to investigate "relevant merger situations" where both of the following conditions are met:

- Two or more enterprises cease to be distinct.
- The target's UK turnover exceeds £70 million or the transaction creates or enhances a UK share of supply of goods or services of 25% or more.

(*Section 23, Enterprise Act*.)

Note that the share of supply test can be met by either the supply or the acquisition of goods or services.

"Enterprise" is defined as the activities, or part of the activities, of a business (*section 129(1), Enterprise Act*). Enterprises "cease to be distinct" where they are brought under common ownership or common control (*section 26, Enterprise Act*). Common ownership and control of an entity includes obtaining "material influence", "de facto control" or a "controlling interest".

The CMA can investigate both anticipated and completed mergers (the latter within a four-month period of material facts about the transaction becoming public). Following its investigation, if the CMA identifies competition concerns, it is able to prohibit or unwind the transaction, or accept or impose remedies.

For more information, see *Country Q&A, Competition Law in the United Kingdom: Overview: Merger Control*.

The proposed *DMCC Bill* intends to revise the UK merger control thresholds. For more information, see *Legal Update, Digital Markets, Competition and Consumer Bill introduced into Parliament: digital markets and competition aspects: mergers*.

Market studies and market investigations

The *Enterprise Act* and the *Financial Services and Markets Act 2000* (FSMA) enable the CMA and the Financial Conduct Authority (FCA) to conduct market studies to identify any competition problems and establish whether the markets are working well for consumers (*section 5, Enterprise Act and section 234I, FSMA*).

The CMA and the FCA are able to refer a UK market for in-depth investigation where there are reasonable grounds to suspect that a feature (or combination of features) of the market prevents, restricts or distorts competition (*section 131, Enterprise Act and section 234I, FSMA*). The CMA will conduct this more in-depth market investigation, following which it has wide discretion to implement remedies to address any identified competition concerns.

For more information, see *Practice Notes, Competition regime: Market investigations under the Enterprise Act 2022* and *FCA competition role and powers*.

Consumer protection

Under the *ERRA*, the CMA's primary statutory duty is to "promote competition, both within and outside the UK, for the benefit of consumers" through competition law enforcement, market investigations and merger control (*section 25, ERRA*).

The *Enterprise Act* also enables the CMA to enforce UK consumer laws under the *Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277)* (CPRs) and the *Consumer Rights Act 2015* (CRA), though its enforcement powers are currently less direct in relation to consumer law than competition law (*section 215, Enterprise Act*).

For more information, see *Practice Note, Competition and Markets Authority: Overview (United Kingdom): Consumer Law Enforcement*.

The proposed *DMCC Bill* intends to provide the CMA with significant powers to enforce consumer laws directly for the first time. For more information, see *Legal Update, Digital Markets, Competition and Consumers Bill introduced into Parliament (consumer law aspects)*.

Competition regulators in the insurance sector

The provision of insurance services is heavily regulated under both financial services regulation and competition law. The sections below identify the key regulators with competition powers applicable to insurance businesses and explain how the regulators work together.

Overview of main regulators

The CMA is the primary competition regulator in the UK. In addition to the CMA, eight sectoral regulators have concurrent competition enforcement powers related to enforcing the Chapter I and Chapter II prohibitions in the *Competition Act* (see *Anti-competitive conduct*), as well as certain market investigation powers under the *Enterprise Act* (see *Market studies and market investigations*). However, only the CMA is empowered to investigate relevant merger situations under the Enterprise

Act (see *Merger control*). For more information, see *Practice note, Concurrency rules under the Enterprise and Regulatory Reform Act 2013*.

The most relevant concurrent regulator for the insurance industry is the FCA, which was formally established on 1 April 2013 following amendments to *FSMA* made by the Financial Services Act 2012 (FS Act 2012). On that date, the majority of the powers and functions of the Financial Services Authority (FSA) were transferred to the FCA and the Prudential Regulation Authority (PRA).

The FCA is the UK financial services regulator that regulates the conduct of all firms authorised under *FSMA*. The PRA is responsible for the prudential regulation of certain authorised firms, including insurers. These firms are referred to as "dual-regulated" because they are supervised by the PRA for prudential purposes and regulated by the FCA for conduct purposes. Other authorised firms, including insurance intermediaries, are regulated and supervised solely by the FCA, and are referred to as "solo-regulated". For more information, see *Sector note, Insurers and reinsurers: regulatory overview: Dual regulation: PRA and FCA* and *Solo-regulated firms*.

The PRA does not have competition enforcement powers, although it has a secondary objective to facilitate effective competition in the markets for services provided by PRA authorised persons in carrying out regulated activities (*section 2H, FSMA*). Since 2015, the PRA has published an Annual Competition Report that sets out how it is delivering against the competition objective (see the PRA's *secondary objectives webpage*).

FCA competition mandate

Under *FSMA*, the FCA has a strategic objective to ensure that the "relevant markets" function "well" (*section 1B(2), FSMA*). "Relevant markets" comprise regulated financial services, including regulated insurance services (for example, effecting and carrying out contracts of insurance (*section 1F, FSMA and article 10, Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (RAO)*).

The FCA also has three operational objectives of consumer protection, the integrity of the UK financial system and competition (*section 1B(3), FSMA*). Among others, the competition objective applies to the market for regulated financial services (*section 1E(1), FSMA*).

In addition, the FCA must discharge its general functions:

- In a way that promotes effective competition in the interests of consumers (*section 1B(4), FSMA*).
- So far as reasonably possible, in a way which, as a secondary objective and subject to relevant international standards, advances the international competitiveness of the UK economy and its growth in the medium to long term (section 1B(4A), FSMA, which was added by the *Financial Services and Markets Act 2023* (FSMA 2023) as part of the post-Brexit regulatory reforms).

The FCA forms part of the *UK Competition Network* (UKCN), an alliance between the CMA and the UK sectoral regulators with concurrent competition law powers, each of which have a duty to promote competition in the interests of consumers.

For more information on the FCA's competition role and powers, see *Practice note, FCA competition role and powers*.

CMA and FCA concurrent powers

Under *FSMA*, the FCA has concurrent powers with the CMA in relation to financial services in the UK (which in the FCA's view extends beyond financial services that are regulated under FSMA) and the provision of claims management services in Great Britain. These powers enable the FCA to:

- Apply and enforce the Chapter I and Chapter II prohibitions under the *Competition Act* (*section 234J(2)(a) and (b), FSMA*) (see *Anti-competitive conduct*).
- Carry out market studies, make market investigation references to the CMA, agree undertakings in lieu of a market investigation reference and make recommendations to the UK government under the *Enterprise Act* (*section 234I(2), FSMA*) (see *Market studies and market investigations*).

However, the FCA does not have the power to investigate relevant merger situations under the *Enterprise Act* (see *Merger control*). The FCA's general duties (under *section 1B* of FSMA) do not apply when the FCA is carrying out its concurrent competition functions. However, the FCA may have regard to any matters in respect of its general duties if it is a matter to which the CMA is entitled to have regard when carrying out these functions (*section 234N, FSMA*). According to the *explanatory notes* for the Financial Services (Banking Reform) Act 2013 (FSBRA) (at paragraph 293), this means that the FCA is able to exercise its competition functions without being bound by general duties to which the CMA would not itself be subject when exercising those functions.

The FCA has issued guidance on its powers and procedures in this context. See:

- *Finalised guidance: FG15/8: The FCA's concurrent competition enforcement powers for the provision of financial services*.
- *Finalised guidance: FG15/9: Market studies and market investigation references*.
- *FCA Mission: Approach to Competition*.

In addition, the FCA Handbook provides that supervised firms must deal with regulators in an open and co-operative way and must also disclose to the FCA anything relating to the firm of which the FCA would reasonably expect notice (*Principle 11, FCA's Principles for Businesses*). In particular, supervised firms must notify the FCA if they have, or may have, committed a significant competition law infringement (*FCA Supervision manual (SUP) 15.3.32R-15.3.35G*). These notifications are independent of leniency applications and will not count in themselves as a leniency application. (Under the CMA's leniency programme, a business that has participated in cartel activity may receive lenient treatment from the CMA where that business notifies the CMA of such activity and co-operates with the CMA's subsequent investigation.) Separate leniency applications need to be made directly to the CMA. For more information, see *Practice note, CMA leniency policy*.

Unrelated to competition law related disclosures, the FCA has previously cancelled the Part 4A FSMA permissions of insurance companies (that is, it has cancelled their authorisation to lawfully carry on regulated insurance-related activities) for failure to comply with *Principle 11* and pay an overdue balance (for examples, see the FCA final notices issued to *Auto Claims (UK) Ltd* and *Horse Insurance Services (Kerry Smith trading as*)). For information on enforcement action the FCA has taken against other firms in the insurance sector, see *Sector note, Insurance: FCA and PRA enforcement action tracker*.

Although outside of the insurance sector, in addition to imposing competition law fines on three *asset management firms* for breaching competition law, the FCA issued a separate *financial penalty* under FSMA on one of the individuals involved for failure to comply with Statements of Principle 2 and 3 (issued under *section 64A(1)(a)* of FSMA) though his conduct related to the same facts in the competition law infringement (for more information, see *Asset management firms information exchange case tracker*).

CMA and FCA co-ordination

As a result of concurrency, both the CMA and the FCA are able to exercise their respective functions in relation to insurance services. However, only one regulator may exercise its functions for a given case at any one time. The CMA has a co-ordination and leadership role in relation to concurrent law application and enforcement.

The allocation of cases between the CMA and sectoral regulators with concurrent powers (such as the FCA) is governed by the *Competition Act 1998 (Concurrency) Regulations 2014 (SI 2014/536)*. The general guiding principle is that where more than one regulator is able to act, they should consult each other and agree which one will do so on the basis of which is better placed. Specific factors considered for allocation include:

- Whether the case affects more than one regulated sector or non-regulated sectors not subject to concurrent competition law.
- Previous contacts between the parties or complainants and each regulator.
- Experience in dealing with any of the undertakings or similar issues which may be involved in the proceedings.

For more information, see *Practice note, Concurrency rules under the Enterprise and Regulatory Reform Act 2013*.

Where leniency applications are made in the context of concurrent competition law, these applications should be made directly to the CMA, who will then co-ordinate with the FCA in respect of insurance services.

See the government guidance *Regulated industries: Guidance on concurrent application of competition law to regulated industries* (*paragraphs 3.21-3.22*) and the *Memorandum of understanding between the CMA and the FCA - concurrent competition powers* (*paragraphs 25-26*).

Application of competition law to the insurance sector

Anti-competitive conduct

Insurers interact and co-operate between themselves as well as with numerous other market players, including insurance brokers, providers of claims management services and digital platforms. Given this scope for co-operation, market participants should be mindful of the risks of entering into arrangements that could be deemed anti-competitive.

Chapter I prohibition

The Chapter I prohibition (*section 2*, *Competition Act*) bans agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition in the UK and may affect trade in the UK. Most agreements within the same corporate group will fall outside the scope of this prohibition because the parties are part of one undertaking (therefore forming a single economic entity). Anti-competitive agreements include (but are not limited to) the unlawful co-ordination of commercial strategy and the exchange of competitively sensitive information.

If no exclusion or exemption applies and the parties are found to have infringed the Chapter I prohibition:

- The agreement is void and unenforceable. If it is possible to sever the anti-competitive restrictions from the rest of the agreement, then only the restrictions at issue will be deemed void and unenforceable (and not the entire agreement) (*section 2(4), Competition Act*).
- The parties may be ordered to cease or modify the agreement (*section 32, Competition Act*).
- The parties may be fined up to 10% of worldwide turnover (*section 36, Competition Act*).
- Third parties may bring an action for damages or, in appropriate cases, an injunction in the civil courts.

In the UK it is also a criminal offence for individuals to enter into certain "hard-core" cartel arrangements (known as the "cartel offence"). The Organisation for Economic Co-operation and Development (OECD) has defined the essence of a "hard-core" cartel as being "an anti-competitive agreement, anti-competitive concerted practice or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce" (see *Competition White Paper - Productivity and Enterprise, A world class competition regime, July 2001*, by which the UK government consulted on the proposed reforms which led to the *Enterprise Act*). For more information, see *Practice Note, Competition regime: The Enterprise Act 2002 cartel offence*.

In addition, directors of companies that infringe competition law face potential disqualification as a director (see *Practice Note, Competition disqualification orders and undertakings*).

For more information, see *Practice Note, Competition regime: Chapter I prohibition*.

Appreciable effect

To fall within the Chapter I prohibition an agreement must have an "appreciable effect" on competition within the UK and affect trade within the UK (or part of it). In this regard, the CMA has adopted the European Commission's *Notice on Agreements of Minor Importance* (also known as the "De Minimis Notice"). That Notice indicates that, provided an agreement does not restrict competition by object or contain "hard-core" restrictions of competition, the agreement will be considered to not appreciably restrict competition if either:

- The aggregate market share held by the parties to the agreement between actual competitors or potential competitors does not exceed 10% on any of the relevant markets affected by the agreement.
- The aggregate market share held by the parties to the agreement between non-competitors does not exceed 15% on any of the relevant markets affected by the agreement.

For more information, see *Practice Note, Competition regime: Chapter I prohibition*.

Exclusions from Chapter I prohibition

Section 3 of the Competition Act excludes specific types of agreement from the scope of the Chapter I prohibition (see *Schedules 1 to 3* of the Competition Act) and allows the Secretary of State to add or amend the exclusions in certain circumstances. Excluded agreements include mergers and joint ventures falling within the *Enterprise Act* and any ancillary restraints as a result of these transactions, though they may be subject to "clawback provisions" in the Competition Act under which the CMA may direct that the exclusion does not apply to a particular agreement (*Schedule 1, Competition Act*).

For more information, see *Practice Note, Competition regime: Chapter I prohibition*.

Exemption from Chapter I prohibition

An agreement that infringes the Chapter I prohibition may nonetheless be permissible if all the criteria set out in *section 9* of the Competition Act are met. Parties must assess for themselves whether section 9 applies to their agreement.

Section 9 states that an agreement is exempt from the Chapter I prohibition if it meets the following conditions:

- The agreement contributes to:
    - improving production or distribution; or
    - promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and
- The agreement does not:
    - impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
    - afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(*Section 9(1), Competition Act.*)

The burden of proving that the above conditions are satisfied lies with the parties claiming the benefits (*section 9(2), Competition Act*).

Block exemptions orders

A block exemption order provides that a particular category of agreement satisfies the criteria for exemption from the Chapter I prohibition under *section 9* of the *Competition Act*.

Block exemptions minimise the burden on parties of assessing competition law compliance. If an agreement meets the conditions specified in a particular block exemption order, the agreement is deemed legal under the Chapter I prohibition without the need to self-assess individually each of the criteria set out in section 9. However, if the conditions of the block exemption are not met, individual self-assessment is required (see *Exemption from Chapter I prohibition*).

There are a number of block exemption orders in force, including the following:

- The *Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022 (SI 2022/1272)* (SABEO). For more information, see *Practice note, Transactions and practices: UK collaborative agreements: specialisation UK block exemption order*.
- The *Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022/516)* (VABEO). For more information, see *Practice note, UK vertical agreements: Vertical agreements covered by the VABEO*.
- The EU *Technology Transfer Block Exemption Regulation (Regulation 316/2014)* (TTBER), which will apply in the UK until 30 April 2026 pursuant to the *Competition (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/93)* (as amended by the *Competition (Amendment etc) (EU Exit) Regulations 2020 (SI 2020/1343)*). For more information, see *Practice note, Flowchart guides: Technology transfer block exemption*.

The CMA's *Guidance on Horizontal Agreements* provides guidance to assist with the competition law assessment of typical horizontal agreements, including on the application of the SABEO. The CMA has separate *Guidance on the Vertical Agreements Block Exemption Order* that provides guidance in relation to vertical agreements, including on the application of the VABEO.

Until 31 March 2017, the EU Insurance Block Exemption Regulation (*Regulation 267/2010*) (IBER) provided an automatic exemption from the Chapter I prohibition for certain types of insurance co-operation agreements. When in force, the IBER (subject to specified conditions) applied to:

- Joint compilations, calculations, tables and studies of risks (for example, the establishment of common risk-premiums tariffs based on collective statistics ascertained on the number of claims).
- The common coverage of certain types of risks (co-insurance pools) (that is, where a group of insurers share respective premiums and losses).

For more information, see *Practice Note, Application of EU competition law to insurance*.

The IBER has now expired and was not renewed as part of the UK's post-Brexit transitional arrangements. However, the expiry of the IBER does not mean that the forms of co-operation permitted under the EU legislation have become unlawful in the UK. Rather, co-operation arrangements are now subject to normal UK competition rules and insurance businesses must self-assess on a case-by-case basis to ensure compliance (see *Exemption from Chapter I prohibition*).

Abuse of a dominant position

Where a company is deemed to be dominant in a particular market (that is, the company is deemed to have the power to behave independently of competitive pressures), it is subject to stricter competition rules under the Chapter II prohibition.

Chapter II prohibition

The Chapter II prohibition prohibits the abuse of a dominant position in a market if it may affect trade in the UK (*section 18*, *Competition Act*).

Dominant companies must not engage in the following conduct:

- Imposing unfair purchase or selling prices or other unfair trading conditions (for example, excessively high or low pricing practices).
- Limiting production, markets or technical developments to the prejudice of consumers (for example, output restrictions or refusals to deal).
- Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (for example, discriminatory pricing practices or the imposition of other contractual terms that favour certain customers over others).
- Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts (for example, tying obligations).

Companies should assess whether there is a risk that they would be viewed as dominant in any potential relevant market, particularly where they have an estimated market share higher than 25%.

For more information, see *Practice Note, Competition regime: Chapter II prohibition*.

Merger control

Market definition plays a central role in competition analysis, including in merger control review. Defining the relevant market is a necessary first step that provides a competition authority with an objective conceptual framework to assess competition within that market.

Parties should be particularly mindful of issues relating to market definition in the insurance sector as the CMA's past decisional practice indicates that it is prone to considering narrow markets, which may increase the likelihood of the parties being deemed to have significant market power. For instance, in *ME/6882/20 Ardonagh/Bennetts*, the CMA assessed the impact of the concentration on the national market for the distribution of motorcycle insurance to private (non-commercial) consumers.

For more information, see *Country Q&A, Competition Law in the United Kingdom: Overview: Merger Control*.

Investigations and enforcement in the insurance sector

Set out below are summaries of insurance-related market studies and enforcement action in the UK, which shows that there has been some activity by competition regulators in the period from 2007 to 2022.

Regulatory enforcement

As a consequence of Brexit, the CMA now has jurisdiction to review competition and consumer protection cases with UK aspects that would have previously fallen under the remit of the European Commission.

For more information, see *Practice note, Competition regime: UK procedure, negotiation and enforcement*.

Digital comparison tools

In 2020, the CMA *fined* Compare the Market £17.9 million for breaching the Chapter I prohibition (and Article 101 of the TFEU) for the use of "most favoured nation" (MFN) clauses. These clauses prevented home insurers that used the Compare the Market platform from offering lower prices through other similar price comparison websites.

In MFN clauses, suppliers agree to give their counterparty as favourable a price as that supplier grants to any other counterparty in its other agreements. In this case, the home insurers agreed to provide Compare the Market with rates for their insurance products that were equal to or less than those rates offered both on their own websites and through other similar price comparison websites. The CMA was particularly concerned with the clauses that prevented home insurers from offering lower rates on one price comparison site than on another price comparison site (known as "wide MFNs").

The CMA found that the use of wide MFNs had the effect of:

- Reducing price competition between the price comparison websites.
- Reducing price competition between the home insurers using these platforms to sell their insurance products.
- Restricting the ability of Compare the Market's rivals to expand and challenge Compare the Market.

However, in 2022 the CAT set aside the CMA's infringement decision (see the CAT's *webpage: BLG (Holdings) Ltd & others v Competition and Markets Authority*). It found that the CMA had used a materially wrong market definition and had failed to establish that the wide MFNs actually had the anti-competitive effects described in its decision.

Home insurance

In 2018, Citizens Advice made a super-complaint to the CMA in relation to loyalty pricing in five markets including home insurance (see the CMA's *webpage: The "loyalty penalty" super-complaint*). The super-complaint alleged that longstanding consumers were paying more than new consumers (a so-called "loyalty penalty").

The CMA found that the loyalty penalty was a significant problem because it included damaging practices that were alleged to have exploited customers (such as annual "stealth" price rises, costly exit fees, difficult processes to cancel or switch contracts and auto-renewal processes without advance warning). It set out a package of reforms that included recommendations to Ofcom and the FCA.

The FCA introduced measures in its Handbook to address the loyalty penalty in response to its market study into general insurance pricing practices (see *Market studies*). In particular, the FCA amended its *Insurance: Conduct of Business sourcebook* (ICOBS) and *chapter 4* of its Product Intervention and Product Governance sourcebook (PROD 4). For more information on the FCA's work in this area, see *Practice note, Insurance distribution regulation: FCA areas of focus: Loyalty penalty remedies*.

For more information, see *Practice Note, Competition regime: Complaints under UK competition law*.

Looking forward, the proposed *DMCC Bill* aims to strengthen the CMA's consumer protection powers. It includes a package of measures intended to tackle "subscription traps", which is where a contract automatically rolls over or renews. These new measures would require businesses to remind consumers before a contract rolls over and put in place straightforward contractual termination mechanisms.

Aviation insurance brokers

In 2017, the FCA launched a competition investigation into claims of the unlawful exchange of competitively sensitive information between aviation insurance brokers (see the government's *Guidance: Competition Act 1998 cases in the regulated sectors: Financial services*).

The European Commission then took over the investigation, moving the focus of it from the UK alone to EU-wide. However, this investigation was never concluded as the European Commission exercised its discretion to set priorities in relation to its enforcement activities, and *closed* its investigation in late 2017, citing "priority reasons" (see the European Commission's *decision: Case AT. 40501 - Zepplin*). This means the investigation was left unresolved without the European Commission making any conclusions (preliminary or final) on the legality (or otherwise) of the conduct.

Private motor insurance

From 2010 to 2011, the Office of Fair Trading (OFT) (the CMA's predecessor) conducted an investigation into the exchange of highly individualised, commercially sensitive, disaggregated and non-public broker pricing information (including future pricing intentions), between insurers constituting a substantial part of the private motor sector (see the OFT's *webpage: Private motor insurance: exchange of data*). The investigation revealed an increased risk of price co-ordination among motor insurers, as the exchange enabled insurers to adjust their own prices based on the intended pricing structures of their competitors.

To address these competition concerns, the OFT accepted commitments from six insurers and two IT software and service providers to ensure that they would exchange pricing information only if that information met certain principles agreed with the OFT. For instance, where the pricing information was required for a specific and legitimate reason, such as to enable peripheral market brokers to provide more accurate information on the insurance products being offered to consumers. The commitments

remained in force for five years. Formal acceptance of commitments meant that the OFT terminated its investigation without a finding as to the legality (or otherwise) of the conduct investigated.

Private enforcement

Digital comparison tools

In November 2021, the Home Insurance Consumer Action applied for certification of an opt-out consumer claim on behalf of 20 million customers following the CMA's infringement decision against Compare the Market for breaching the Chapter I prohibition through its use of wide MFN clauses (see *Digital Comparison Tools*). The Home Insurance Consumer Action later withdrew the claim once the CAT overturned the CMA's findings.

Market studies

General insurance pricing practices

From 2018 to 2020, the FCA carried out a market study into general insurance pricing practices (see the FCA's *webpage: PS21/11: General insurance pricing practices - amendments*). The FCA found evidence of "price walking". Insurers were using complex and opaque pricing practices that enabled them to:

- Increase the price of general insurance for consumers who renewed with them year on year.
- Discourage consumers from shopping around (for instance, by making it difficult for consumers to stop their insurance policy from automatically renewing).

This behaviour was considered to distort competition and lead to higher overall prices for customers. The FCA introduced remedies to improve the nature and intensity of competition in the market and ensure delivery of fair value to customers. They included the following rules and requirements:

- Where an insurer offers a renewal price to an existing customer, the renewal price should be no greater than the equivalent price for a new customer (*ICOBS 6B.2*).
- Insurers should offer a range of accessible and easy options for consumers who would like to cancel the auto-renewal provisions in their respective contracts (*ICOBS 6A.6*).

In December 2022, the FCA published its multi-firm review of general insurers pricing attestations (see the FCA's *Report*: General insurance pricing attestation multi-firm review). The FCA found that most insurers had taken appropriate action to comply with its new pricing rules (implemented following the market study). However, the FCA confirmed that it would continue to actively review and scrutinise firms to ensure that they are meeting the requirements of the pricing rules. In addition, where firms fail to meet their regulatory obligations, the FCA confirmed that it would use its full range of regulatory tools to enforce any such failures.

For more information, see *Practice note, Insurance distribution regulation: FCA areas of focus: Loyalty penalty remedies*.

Wholesale insurance brokers

From 2017 to 2019, the FCA carried out a market study into the market for wholesale insurance brokers (see the FCA's *Report: Wholesale Insurance Broker Market Study (MS17/2*)). The FCA concluded that it could not find clear evidence of significant

levels of harm to competition that merited the introduction of intrusive remedies. However, the FCA did note that, given the dynamic nature of the market, it would continue to monitor developments in broker business models and the effectiveness of competition.

Digital comparison tools

In 2016 to 2017, the CMA carried out a market study into digital comparison tools which focused on car insurance, home insurance and travel insurance (see the CMA's *webpage: Digital comparison tools market survey*). As a result of the market study, the CMA opened an investigation into agreements between Compare the Market and home insurers, looking in particular at wide "price parity" or MFN contractual clauses that prevented home insurers from offering lower prices through other price comparison websites similar to Compare the Market (see the CMA's *webpage: Price comparison website: use of most favoured nation clauses*) (see also *Digital Comparison Tools*).

The CMA also recommended that all regulators, but in particular the FCA consider:

- How home insurers and digital comparison tools capture consumer preferences on excesses.
- How this is used to generate quotes for consumers.
- How this is subsequently presented to consumers.
- How this may ultimately affect consumers' choice of home insurance products.

General insurance add-ons

From 2013 to 2014, the FCA carried out a market study into the market for the sale of general insurance add-ons (see the FCA's *Report: General insurance add-ons market study*). It identified that competition in general insurance add-on markets was not effective and resulted in consumers paying too much when purchasing these products. The bundling of the primary insurance product and add-on product meant that there was little competitive pressure on insurers to offer good value when providing the add-on product. This was partly due to a general lack of transparency and comparability in the market, which meant that consumers were unlikely to "shop around".

To remedy the market issues identified, the FCA introduced new rules and guidance including:

- A ban on selling "optional additional products" on an opt-out basis (*ICOBS 6A.2*).
- A requirement for insurance businesses to provide consumers with prescribed information to help the consumer shop around the market and be more engaged when making decisions about purchasing the relevant insurance product (*ICOBS 6A.1.4R*).
- New rules for insurance businesses to report and publish data on value measures (for example, data on claims frequencies, claims acceptance rates, average claim pay-outs and claims complaints as a percentage of claims) (*SUP 16.27*).

For more information, see *Practice notes, Insurance conduct of business regulation: ICOBS overview*, *Product governance: insurance (PROD 4)* and *FCA evaluation of GAP insurance intervention*.

Market investigations

Private motor insurance

From 2012 to 2014, the CMA carried out a market investigation into private motor insurance (see the CMA's *webpage: Private motor insurance market investigation*). It identified the following shortcomings in the market:

- Information asymmetries between private motor insurers and consumers in relation to the sale of no-claims bonus protection insurance.
- Wide MFN clauses in the contracts between the private motor insurers and price comparison websites that prevented insurers from offering lower prices on other online platforms. The CMA found that this had the effect of restricting competition in the market and led to higher car insurance premiums overall.

To remedy the adverse effects on competition and reduce costs to consumers, the CMA introduced the *Private Motor Investigation Order 2015*, which:

- Obliges insurers and brokers to provide information to consumers on the costs and benefits of no-claims bonus protection.
- Bans wide MFNs and prohibits any behaviours by large price comparison websites that seek to replicate the anti-competitive effects of wide MFNs.

Payment protection insurance

From 2007 to 2009, the Competition Commission (CC) (the CMA's predecessor) carried out a market investigation into payment protection insurance (PPI) (see the CC's *webpage: Payment protection insurance (PPI) market investigation*). The CC concluded that companies offering PPI alongside credit products (for example, a loan or credit card) faced little or no competition when selling PPI to consumers.

To remedy the competition issues identified, the CC imposed various rules based around a point-of-sale prohibition for all forms of PPI (apart from retail PPI), which prohibit the sale of PPI during the sale of an associated credit product (see the *Payment Protections Insurance Market Investigation Order 2011*) (2011 Order).

In 2009, the CAT upheld the CC's findings, though ruled that the CC had to consider further that a point-of-sale prohibition might inconvenience consumers (see the CAT's *webpage: Barclays Bank PLC v Competition Commission*). Following the UK transposition of the *Insurance Distribution Directive ((EU) 2016/97)* (IDD) in 2018, the 2011 Order has since been varied by the *Payment Protection Insurance Market Investigation Order 2011 Variation Order 2018*.

Preparing for competition risks in the insurance sector

As demonstrated above, the UK competition regime is complex and has significant implications for insurance businesses. As such, it is prudent for businesses to review and mitigate competition risks in their day-to-day practice.

Assessing competition risks

The market context, as well as the positions of the parties on the relevant market, and the terms of any arrangement with a third party should be reviewed closely to ensure that it cannot infringe competition rules (for example, by leading to unlawful co-ordinated commercial behaviour). It is particularly important that there is no potential for the alignment of premiums or the foreclosure of competitors.

For more information, see *Checklists, Assessing the application of the Chapter I prohibition*, and *Assessing the application of the Chapter II prohibition*.

In addition, more detail on potential competition risks in typical insurance arrangements is set out below.

Information exchange

While the sharing of information may give rise to certain efficiencies, participants should be careful that any exchange does not infringe the Chapter I prohibition. Any exchange of competitively sensitive information must be limited to that which is strictly necessary for the specific purpose of the arrangement. For example:

- **Joint compilations and studies of risks.** Insurers and others may jointly compile and distribute certain information to calculate the average cost of covering a specified risk in the past or to carry out studies related to risk. The CMA's *Guidance on Horizontal Agreements* recognises that the exchange of consumer data between undertakings in markets with asymmetric information about consumers can give rise to efficiencies (including in the insurance sector), which is characterised by frequent exchanges of information about risk characteristics. Information exchange in this context may reduce consumer lock in, inducing stronger competition (*paragraph 8.104 of the Guidance*). However, each arrangement should be assessed on a case-by-case basis to ensure that participants are not sharing competitively sensitive information that could lead to co-ordinated commercial behaviour.
- **Subscription arrangements.** Subscription arrangements and the delegation of claims handling to a single lead or co-lead insurer may give rise to a number of efficiency gains. However, insurers should independently analyse and decide whether or not to insure specific risks and the terms on which they contract with customers.

For more information, see *Practice Note, Information exchange and UK competition law*.

Standard terms

Standard terms are those set out by trade associations or directly by competitors that establish standard conditions for sales to third-party customers or supply by third-party suppliers (rather than conditions for sales or purchases between competitors).

Standard terms can generate efficiencies such as cost savings, increasing legal certainty for contracting parties and assisting in product and service comparison. However, the use of standard terms may limit choice and innovation and may lead to anti-competitive foreclosure if their use becomes required in a market.

The CMA's *Guidance on Horizontal Agreements* recognises that standard terms play an important role in the insurance sector and provides guidance on standard terms, including an example of standard terms facilitating the comparison of different insurance policies (*Part 10 of the Guidance, including example 3*).

Joint production agreements

Risk pooling arrangements involving multiple insurers are often used for the coverage of large or exceptional risks (for example, aviation and environmental risks), where individual insurers would be reluctant or unable to insure the entire risk alone. However, the use of joint production agreements creates risks of anti-competitive collusion or the sharing of commercially sensitive information, in addition to enhancing the risk of anti-competitive horizontal unilateral effects.

The European Commission acknowledged in its *IBER Impact Assessment* that risk pooling arrangements are a form of joint production that in some cases may enhance efficiency (*paragraphs 23-27*). Co-operation agreements between insurers (co-insurance groups) and between insurers and reinsurers (co-reinsurance) to insure or reinsure a specific category of risk were

permitted under the IBER provided they met the necessary conditions. Although the automatic protection provided by the IBER is no longer in place, it may be possible to justify such agreements on the basis that they do not restrict competition or are able to benefit from an exemption (either through another block exemption or on an individual basis).

While each case should be assessed on the facts, the *SABEO* may apply to such arrangements as a form of joint production agreement, providing an automatic exemption from the Chapter I prohibition where:

- The parties' combined market share does not exceed 20% throughout the duration of the agreement.
- The arrangements do not contain hardcore restrictions of competition.
- The other conditions of the SABEO are met.

Parties should be careful to define the market accurately for the purposes of calculating market shares.

For more information, see *Legal Update, Specialisation and Research and Development Agreements Block Exemption Orders 2022 published* and *Block exemptions orders*.

Use of intermediaries

Examples of the use of intermediaries include delegated underwriting authorities, line slips, broker facilities, and consortia. These arrangements could potentially lead to co-ordinated commercial behaviour, the exchange of competitively sensitive information and anticompetitive foreclosure. In particular, exclusivity clauses and MFN clauses could raise competition concerns and should be limited in scope.

These arrangements may fall within the scope of block exemptions (such as the *SABEO* or *VABEO*) where the parties' combined market share does not exceed the relevant thresholds and the other conditions of the block exemption are met (see *Block exemptions orders*).

Sustainability initiatives

Companies are increasingly seeking to co-operate on environmental, sustainability and governance (ESG) issues, including in the insurance sector. For instance, Lloyd's of London, in its *guidance for managing agents*, has set out a requirement for managing agents to proactively incorporate ESG and sustainability issues into any new investment mandates.

Further, on 12 October 2023, the CMA published *guidance* on the application of the Chapter I prohibition to environmental sustainability agreements.

For more information, see *Legal update, CMA publishes new Green Agreements Guidance*.

Trade associations

Members of market committees, trade associations and technical working groups (such as the *Lloyd's Market Association* (LMA), the *Association of British Insurers* (ABI) and the *Chartered Insurance Institute* (CII)) should be aware of the risks of sharing competitively sensitive information between competitors, whether in a formal or a social context, that could infringe competition rules.

Companies should put in place a competition compliance policy and provide regular training that covers interactions with competitors.

In addition, the group itself should have a code of conduct that covers competition law compliance, as well as rules of membership or industry standards that are applied in a uniform and non-discriminatory manner and do not unfairly exclude competitors.

For more information, see *Practice note, Trade associations and competition risk*.

Mitigating competition risks

Relevant personnel should be aware of competition risks arising in their day-to-day practice. Insurance businesses should maintain competition compliance policies and run periodic training sessions for the board and employees, as well implementing procedures for reporting any potential infringements.

If an insurance business has reason to believe that it has infringed competition rules, it should:

- Immediately inform in-house legal counsel.
- Consider obtaining external legal advice from competition specialists.
- Promptly action any regulatory notification obligations. For instance, businesses supervised by the FCA are under an obligation to notify the FCA if they have, or may have, committed a significant competition law infringement (*SUP 15.3.32R-SUP 15.3.35G*).
- Consider any leniency applications.

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