

UK competition law reform

What does it mean for business?



March 2012

The Government has announced the changes it plans to make to UK competition law. As expected, these include replacing the Office of Fair Trading (OFT) and the Competition Commission with a single Competition and Markets Authority (CMA). A number of other reforms, including changes to the UK merger control regime and the cartel offence, are also worth noting.

A single regulator

The Government has confirmed its intention to create a single competition regulator, to be known as the Competition and Markets Authority (CMA), replacing the Office of Fair Trading (OFT) and the Competition Commission (CC). This powerful new body will be responsible for merger control, market studies, market investigations, Competition Act investigations (into cartels and abuses of dominance, for example) and prosecutions of the criminal cartel offence. It will remain independent of Ministerial control.

What difference will a single regulator make?

At present, responsibility for mergers and market investigations is shared, with the OFT undertaking the "first phase" investigation but referring mergers or markets considered to require more in-depth scrutiny to the CC for a detailed "second phase" investigation.

The new CMA, by contrast, will undertake both the first and second phase investigations, with a view to streamlining the UK competition regime and making more efficient use of staff and resources.

A risk of confirmation bias?

Many commentators were concerned that a merger of the OFT and the CC could lead to a greater likelihood of so-called "confirmation bias" – a tendency for competition enforcers to conduct the

second phase investigation through the "prism" of their first phase concerns, predisposing the final outcome towards confirming those initial concerns. However, the announced reforms should preserve many of the features which enabled the CC to act as a "fresh pair of eyes" on mergers and market investigations:

Safeguards against confirmation bias

- Decisions after second phase investigations by the CMA will be taken by different individuals from those involved in the first phase.
- Those decision-makers will also be independent panellists drawn from a pool of experts (as happens at present with the CC).

Nevertheless, the process of creating the CMA is likely to be quite disruptive and may, for example, affect the type and number of cases taken on during the transitional period.

Completed mergers: new powers

At present (in contrast to most other regimes internationally), the UK merger control regime allows a purchaser to complete an acquisition without notifying the OFT and without having to wait for prior clearance. In its consultation, the Government floated the idea of a mandatory system of merger control, which would have removed this option for transactions meeting certain jurisdictional thresholds (to alleviate the difficulties highlighted in particular by the CC in "unscrambling" completed mergers). It has now decided not to pursue that option.

However, where it investigates a merger, the CMA will be given clearer powers to order parties to suspend integration or even to reverse certain steps which they have already taken, pending the conclusion of the investigation. Parties which fail to comply will face fines of up to 5% of aggregate group worldwide turnover.

In cases which involve substantive competition issues, the arguments as to whether a voluntary notification should be made prior to completion are already finely balanced. For some purchasers, these clearer powers may be sufficient to tip the balance in favour of seeking prior clearance.

Statutory timetable for merger control

The Government has also decided to introduce a statutory timetable for merger investigations. Although this may appear to create greater certainty for business, our experience of competition authorities which operate on fixed timetables (such as the European Commission) is that such deadlines can sometimes be counterproductive at the first phase.

In particular, they tend to increase the period of pre-notification discussions and create pressures for more information to be provided before a filing is formally made (so that the competition authority can ensure that it will definitely be able to take its first phase decision on time). As such, it is quite possible that these fixed timetables will lead to an overall lengthier and more involved first phase merger process before the CMA.

Merger fees to increase

Fees payable for mergers subject to scrutiny under the UK regime will also increase substantially:

- At present, fees range from £30,000 to £90,000;
- From 6 October 2012 the lowest fee will be £40,000 and the highest £160,000.

Competition Act investigations

A number of changes are proposed to address perceived weaknesses in the OFT's conduct of investigations into cartels and other serious anti-competitive conduct, which has been much criticised. This is arguably the area where reform is most needed in order to improve case management and the robustness of decision-making.

One approach floated in the Government's consultation was to incorporate some of the CC's processes from mergers and market investigations, such as mandating the involvement of panel members as a "fresh pair of eyes" once an investigation had got beyond the preliminary stage (see above under "A risk of confirmation bias?"). However, the Government has decided not to legislate to require this or other, more radical options. Instead, the OFT is being asked to enhance its existing internal procedures (which may yet lead to some involvement of panel members). The OFT is expected to consult on these measures shortly.



Market investigations

At present, following an initial study, the OFT can refer particular sectors to the CC for a detailed market investigation. The CMA will take over both roles but, as outlined above, once a decision has been taken to conduct a detailed "second phase" inquiry, a different set of decision-makers will be introduced to take the final decision.

The Government has outlined a number of procedural reforms designed to ensure that these investigations are conducted on a shorter timescale, as they can often last for a number of years, giving rise to considerable

uncertainty for the sectors involved. The scope of market investigations will also be expanded to allow:

- scrutiny of practices which may be prevalent across different markets (not just the same market); and
- consideration of public interest as well as competition issues (but only where specifically requested by the relevant Minister).

Market investigations: what difference will the reforms make?

There are likely to be a number of broader, cross-sectoral market investigations focussing on a particular practice, such as switching costs or below cost selling.

Ministers are also likely to come under increased pressure to add public interest criteria to certain investigations (for example, any future investigation of major supermarkets would be quite likely to attract lobbying on this point).

Criminal cartel offence

The requirement for "dishonesty" in relation to the criminal cartel offence will be removed. Instead, the focus will shift to whether the cartel agreement was made openly or not. The Government's view is that this change will make it easier for regulators to bring successful criminal prosecutions against individuals.

In our view, it is premature to be reforming the cartel offence – especially as the OFT has only brought one contested prosecution so far, which failed due to problems with the OFT's handling of the evidence, not the requirement to prove dishonesty.

There is also a concern that this change will lead to a wider range of practices potentially being caught by the cartel offence. However, although the change creates undesirable uncertainty for business, in practice, the CMA is likely to continue to focus on bringing prosecutions on the so-called "hard core cartels (which the offence was always designed to target).

Other sanctions

The CMA will also gain new powers to impose civil fines on businesses which fail to comply with information provision and other obligations during a Competition Act investigation. At present, the main sanctions available are criminal offences, many of which are unlikely to be used in practice. With the new powers in place, the CMA is likely to be more willing to impose sanctions where a business is perceived as having been uncooperative during an investigation.

Sectoral regulators

Sectoral regulators such as Ofgem or Ofcom will retain their powers to apply UK competition law in their particular sectors (alongside the CMA). However, they have been criticised for relying too heavily on their sector-specific powers, when they could have made use of competition law.

Sectoral regulators are to be placed under a new duty to first consider whether their competition powers represent a more appropriate enforcement mechanism. This is likely to result in sectoral regulators taking on more competition cases in future, although we would not expect to see a dramatic increase. The CMA will also have the power to take competition cases away from sectoral regulators where it considers that it is better placed to deal with the case.

Timing

The Government is looking to have the CMA up and running by April 2014, but some of the reforms may be implemented before then.

Conclusion

Although we have reservations about some of the reforms, the Government is to be praised for taking account of responses to its consultation and in particular for rejecting some of the more strongly opposed options, such as mandatory merger control.

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