

UK Competition Reform: Enhanced Cartel Powers for New Regulator

The UK Government has announced its plans for reform of the UK competition regime. The biggest change will be the merger of the Office of Fair Trading (OFT) and the Competition Commission to create a new, powerful single competition authority. In addition, it will no longer be necessary to prove dishonesty to secure a criminal conviction for individuals involved in a cartel. Given that the OFT has not yet brought a single case before a jury, that amounts to widening the goalposts before there has been a single shot on goal.

The final say

On 15 March 2012, the Department of Business, Innovation and Skills ("BIS") announced its final plans for reform of the UK competition regime.

The most far-reaching reform will be the merger of the OFT and the Competition Commission into a new, powerful regulator: the "Competition and Markets Authority" (CMA). However, that move was widely expected and, indeed, had seemingly been decided even before the BIS consultation in March 2011.

Of the other options for reform, the government has, in most cases eschewed the most extreme proposals that were contained in its consultation, with one exception: it will no longer be necessary to prove dishonesty in order to secure an individual's conviction, and imprisonment, for cartel conduct.

A New, Single Regulator

The CMA will have jurisdiction to carry out all reviews under UK merger control laws and all market



investigations. It will also be the primary enforcer of both civil and criminal competition laws (although the scope of its role in pure consumer protection issues is yet to be decided).

For businesses, this should mean faster and/or less costly merger reviews and market investigations. In particular, if a detailed "Phase 2" investigation is launched, they will no longer need to spend time re-explaining their business and the issues to a new case team, as they do at present.

The big question, however, is whether this will make it more difficult to change the mind of the case team, given the considerable time they will have already invested in a Phase 1 investigation (so called "confirmation bias"). While there will be certain checks and balances to mitigate this –

such as independent final decision makers - their effectiveness remains to be seen.

Mergers and acquisitions

Transactions will not become subject to mandatory filing and standstill obligations. Respondents to the government's consultation were widely opposed to that proposal and broadly supportive of the current voluntary model. Instead, the CMA will have broader powers to require merging businesses to be operated independently during the CMA's review process.

Binding deadlines and information gathering powers will be introduced at Phase 1 which should ensure faster reviews. Parties will be afforded a statutory window of 50-90 working days from the announcement of a decision to open a Phase 2 investigation, within which to offer, negotiate and finalise remedies to avoid that fate.

In Phase 2, there will be a 12 week statutory time limit from date of the final report - which can be extended

by 6 weeks - for the CMA to implement remedies.

Filing fees are to rise dramatically, to as much as £160,000 for deals involving targets with turnover of over £120 million.

Anticompetitive agreements and abuses of dominance

Breaches of the (non-criminal) competition laws will not be prosecuted before the courts. Instead, objective and efficient decision-making will be served by the separation of investigation and decision making functions within the CMA. The details of how this will work are to be developed by the Government and the OFT, but could include the use of panels of the type deployed in Phase 2 merger and market investigations.

There will be more robust administrative timetables, with a power for the Government to impose statutory deadlines, if reductions in the time cases take are not forthcoming.

There will also be new powers for compulsory interviews during competition investigations and relaxed criteria for the imposition of interim measures.

If a company is found to have breached the competition rules, it will not have to contribute to the cost of the CMA's investigation. If cases are appealed, however, parties may be required to contribute to the costs of the Competition Appeal Tribunal.

Criminal cartel offence

The requirement for dishonesty will be removed from the criminal cartel offence. It will be enough for prosecutors to show an individual's

participation in one of the categories of criminal cartel agreement (price fixing, market sharing, output restrictions and bid-rigging) and that the parties did not agree to publish the relevant agreement before its implementation.

Market investigations

Binding deadlines and wider information gathering powers will be introduced for Phase 1 market investigations, and the Phase 2 deadline will be shortened, with a further deadline introduced for implementation of remedies. The CMA will also have enhanced powers to impose remedies and to conduct investigations into practices spanning a number of different markets.

The Secretary of State will be able to ask the CMA to investigate public interest issues alongside competition issues, but small businesses will not be given powers to trigger automatic investigations of issues that concern them.

Sector Regulators

The sector regulators will retain their concurrent competition powers, but the CMA will be granted powers to take over competition investigations commenced by sector regulators, in certain circumstances. The CMA will not, however, be required to undertake regular reviews in the regulated sectors.

Implementing the Reforms

The reforms are subject to Parliamentary timing and approval. BIS has stated that its aim is to have the CMA operational by April 2014, so it is likely that BIS intends to introduce a new competition bill to Parliament in the next session (around May this year).

Comment

While there should be some efficiencies for businesses in the merger of the OFT and the Competition Commission, it remains to be seen whether the checks and balances to be put in place will be sufficient, and in particular whether the current "fresh pair of eyes" of the Competition Commission can be replicated within a single institution.

In the short-term, the institutional upheaval involved in the merger creates, in itself, a significant risk that the volume and quality of decision making will be adversely impacted. Some of the more radical reforms under consideration would have greatly exacerbated that risk and in this respect the final reforms are to be welcomed.

The removal of the dishonesty criterion from the cartel offence is more controversial. It amounts to widening the goal posts in the hope that the regulator's scoring record in criminal cases will improve. That does not seem quite right when the OFT has not yet brought a single case before a jury. What justifies widening the goalposts before there has been a single shot on goal?

The concern is that employees could go to jail for something that they may not recognise as wrongful behaviour. While it is widely recognised that fixing prices in smoke-filled rooms can lead to a prison sentence, this reform will make less blatant conduct more easily prosecuted. As a result, it will become even more important that employees at risk are carefully trained in what they can and cannot do when it comes to communications with competitors.

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