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Briefing note April 2013

# Enterprise and Regulatory Reform Act 2013: The UK Competition Reforms

The Enterprise and Regulatory Reform Act received Royal Assent on 25 April 2013. The competition provisions are likely to come into force in April 2014. 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. Other reforms include binding deadlines and information gathering powers for Phase 1 merger reviews, greater consideration of public interest issues in market investigations, compulsory interviews during competition investigations and relaxed criteria for the imposition of interim measures.

## Not made in error

**The Enterprise and Regulatory Reform Act (ERRA) implements the reforms to the regime for the enforcement of UK competition law that were announced by the Government in March 2012.**

The reforms touch on all areas of competition law, with the exception of competition litigation, which will be the subject of separate, forthcoming legislation (see our January 2013 briefing for details of the announced proposals for reform in this area).

### A New, Single Regulator

The new Competition and Markets Authority (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 Serious Fraud Office will retain its concurrent power to bring criminal proceedings. In addition, many of the OFT's existing consumer protection powers are to be transferred to other bodies, such as Trading Standards authorities.

For businesses, having a single authority should mean faster and less costly merger reviews and market investigations. In particular, if a detailed "Phase 2" investigation is launched, it is likely that at least some of the Phase 1 case team members will continue to work on the matter.

That would mean that companies under investigation would no longer need to spend time re-explaining their business and the issues to a new case team, as they do at present. A potential drawback would be that it might become 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"). However, there will be certain checks and balances to mitigate this. In particular, final decisions in merger and market investigations will continue to be taken by "panel" members, who are drawn from business, legal and academic backgrounds and who, under the current system, have a good track record of independent and impartial decision-making.

For antitrust investigations, the CMA may adopt the decision-making mechanisms recently introduced by

## Key issues

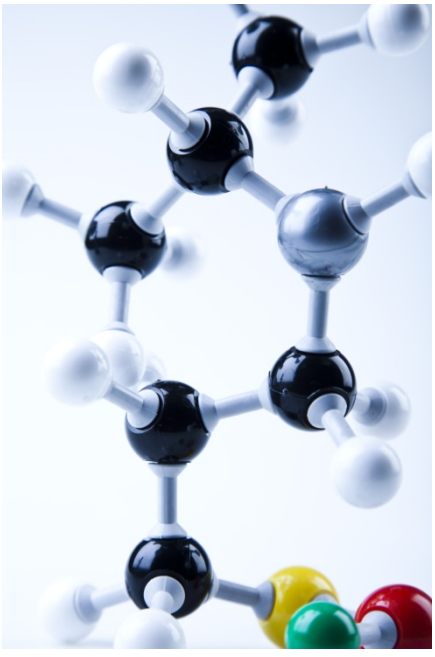
- How will the enforcement of competition law in the UK change?
- When will the reforms come into force?
- How should businesses plan for the changes?

the OFT, whereby decisions on infringements, penalties and settlements are made by officials who are not involved in carrying out the investigation, and who are not panel members. Alternatively, the ERRA allows for antitrust decision-making to be conferred on panel members, so the CMA may decide to adopt that model instead.

## Mergers and acquisitions

The merger control regime will remain voluntary and non-suspensory in nature. However, the CMA will have broader powers to require merging businesses to be operated independently during the CMA's review process, backed up by powers to impose heavy penalties for breach. This is likely to increase costs for mergers that raise potential competition concerns and which close without having first received merger control clearance.

Binding deadlines and information gathering powers will be introduced at Phase I 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 the date of the final report - which can be extended by 6 weeks - for the CMA to implement remedies.

## Anticompetitive agreements and abuses of dominance

The ERRA will introduce:

- new powers for compulsory interviews during competition investigations;
- relaxed criteria for the imposition of interim measures;
- civil fines for non-compliance with the CMA's investigative powers, in place of the (as yet unused) criminal penalties that apply at present; and
- protection for the CMA from defamation claims in respect of public notices of its investigations that identify the parties it is pursuing.

## Criminal cartel offence

The requirement for dishonesty will be removed from the criminal cartel offence. For conduct taking place after the ERRA comes into force, it will be enough for prosecutors to show that an individual knowingly participated in one of the categories of criminal cartel agreement (price fixing, market sharing, output restrictions and bid-rigging) and that relevant information about the arrangements was not to be given to customers, or published, before its implementation.

In response to concerns raised by business and practitioners, the Government introduced three new defences to the cartel offence. These will be available where the individual in question can show that he or she:

- did not, at the time of the making of the agreement, intend the nature of the arrangements to be concealed from customers or (as a separate defence) from the CMA; or
- took reasonable steps, before the agreement was made, to ensure that its nature would be disclosed to legal advisers for the purposes of obtaining advice on it, before its implementation.

The CMA will publish prosecutorial guidance explaining its intended approach to enforcement of the revised offence.

## 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, so aligning the treatment of public interest issues in market investigations with that in merger reviews.

## Sector Regulators

The sector regulators will retain their concurrent competition powers, but the ERRA gives the Secretary of State the power to remove the competition powers of a sectoral regulator and to make regulations

setting out circumstances in which the CMA is allowed to take over competition investigations commenced by sector regulators.

## Entry into force

The competition provisions of the ERRA will enter into force, and the CMA will become operational, on dates to be specified by the Government in a Statutory Instrument. Those dates are likely to be in April 2014.

In the meantime, a raft of CMA guidance documents are under preparation, which will be issued for consultation during the course of the year.

## Comment

While the changes are unlikely to come into force until April 2014, they may have some impact on businesses before then. In particular, the institutional upheaval involved in the creation of the CMA creates a significant risk that the volume and quality of decision making will be adversely impacted in the period before and after its launch.

In the intervening period, businesses should plan for the introduction of the wider cartel offence. In some respects, the defences for non-concealment and seeking legal advice will align the interests of employees and employers, by creating incentives for employees not to hide infringing conduct. In others, however, they create potential for conflict. For example, employees may push for unnecessary and undesirable disclosure of confidential commercial arrangements to customers, or insist on extensive legal advice for a range of benign arrangements that are caught by the offence's imprecise wording.

To the extent that existing uncertainties are not resolved by the CMA's prosecutorial guidance, businesses will need to consider cost-effective ways to protect themselves and their employees, for example through compliance training, standardised procedures for seeking legal advice and routine contractual disclosures.

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