

# News brief



## UK competition reforms

### Enhanced powers for single authority

On 15 March 2012, the Department of Business, Innovation and Skills (BIS) announced its much-anticipated final proposals to reform the UK competition law regime (the proposals).

#### A new, single regulator

Under the proposals, the functions of the Competition Commission (CC), and the competition functions of the Office of Fair Trading (OFT), will be transferred to a new, single competition authority: the Competition and Markets Authority (CMA) (*see box "Implications of the changes"*).

The CMA will have jurisdiction to carry out UK merger control reviews and market investigations, and will also act as the primary enforcer of both civil and criminal competition laws. The scope of its role in purely consumer protection issues is yet to be decided.

#### Mergers and acquisitions

The voluntary merger filing regime will be retained and strengthened under the proposals. Most respondents to the government's consultation were strongly opposed to the introduction of an automatic mandatory and suspensory merger filing regime (*see Exclusively online article "Reform of the UK competition regime: room for improvement?"*, [www.practicallaw.com/7-505-2066](http://www.practicallaw.com/7-505-2066)).

Under the proposals, transactions will not be subject to a mandatory filing regime. However, the CMA will have wider powers to require merging businesses to be operated independently during the CMA's review process, including the discretion to trigger a power to sus-

### Implications of the changes

The combination of the Competition Commission (CC) and the Office of Fair Trading (OFT) into a single markets authority, the Competition and Markets Authority (CMA), should mean faster, more efficient and less costly merger reviews and market investigations for businesses. In cases where the CMA launches a detailed phase 2 investigation, companies will no longer need to spend time explaining their business and the issues again to a new case team, as they do at present.

However, there may be a concern that this could potentially make it more difficult to change the mind of the case team, given the considerable time they would have already invested in a phase 1 investigation (known as 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.

In the short term, there is a risk that the institutional upheaval involved in the merger of the CC and OFT may adversely affect the volume and quality of decision making by both bodies. However, some of the more radical reforms that were considered as part of the consultation process, but have not been included in the final reforms, would have exacerbated this risk and in this regard, the final reforms are to be welcomed.

The removal of the dishonesty criterion from the cartel offence is more controversial (*see "Criminal cartel offence" in the main text*). It may be hard to justify given that the OFT has not brought a single criminal cartel offence case before a jury to date. As the relative difficulty of discharging the existing burden of proof remains untested, this reform may not be viewed as strictly necessary. Removing the requirement of dishonesty could lead to the conviction of employees for something that they may not have recognised as wrongful behaviour. Competition law training for employees at risk will therefore become even more important.

pend all integration steps prior to clearance. New legislation will also clarify that the CMA can reverse integration steps that have already taken place.

The proposals also contemplate the introduction of binding deadlines and information-gathering powers in phase 1 investigations, aimed at ensuring faster reviews. The statutory merger review

deadline will be 40 working days for phase 1 reviews, with no change to the phase 2 time limit of 24 weeks. For undertakings in lieu of a referral to a phase 2 investigation, statutory time limits will be introduced and the process amended to make it more transparent. In phase 2, there will be a 12-week statutory time limit from the date of the final decision (which can be extended

by six weeks) for the CMA to accept remedies.

Filing fees are to rise sharply; for example, for deals involving a target with turnover of more than £120 million, fees will increase from £90,000 to £160,000.

### Market investigations

The CMA will be required to consult on making a market investigation reference within six months of launching a market study. The deadline for completing a phase 2 investigation will be shortened, with a further deadline introduced for implementation of remedies. The CMA will also have enhanced powers to gather information, 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. However, the ability of designated consumer bodies to bring a super-complaint leading to a market investigation will not be extended to small and medium-sized enterprises, as had originally been proposed.

### Antitrust investigations

Under the proposals, the CMA will keep separate its investigation and decision-making functions in an attempt to ensure objective and efficient decision-making. The details of

the operation of the CMA are to be developed by the government and the OFT, but could include the use of panels similar to those used in phase 2 merger reviews and market investigations.

In addition, more robust administrative timetables will be developed, and the Secretary of State will have the power to impose statutory deadlines if case timelines are not effectively reduced.

There will also be enhanced powers during competition investigations, including compulsory interviews and civil financial penalties (instead of criminal sanctions) for parties who do not comply with certain formal requirements, and the criteria for the imposition of interim measures will be relaxed.

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. However, the government will consult on whether, if cases are appealed, the majority of parties should have to contribute to the costs of the Competition Appeal Tribunal, unless this is waived in the interests of access to justice.

### Criminal cartel offence

The requirement for dishonesty is to be removed from the criminal cartel offence. The proposals indicate that

prosecutors would only need to establish an individual's participation in one of the categories of criminal cartel agreement (price fixing, market sharing, output restrictions and bid-rigging). However, the offence would not be made out if the parties have agreed to publish details of the arrangements before they are implemented; for example, in the London Gazette. The offence would still require proof of the mental elements of intention to enter into an agreement, and intention as to the operation of the arrangements in question.

### Sector regulators

The sector regulators (such as Ofcom and Ofgem) 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.

### Implementation

The proposals are subject to Parliamentary timing and approval. BIS has stated that it aims to have the CMA operational by April 2014, so it is likely that the government intends to introduce a new competition bill to Parliament in the next session (around May 2012).

*Alex Nourry is a partner, Chris Worrall is a senior associate, and Chandralekha Ghosh is an associate, at Clifford Chance LLP.*