



Legal Update
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The OFT/CC Reforms - Throwing the Baby Out with the Bathwater?

One year after opening a consultation on merging the two UK competition authorities, the British Government announced on 15 March 2012 its response.¹ The centrepiece of these reforms will be the creation of a unified Competition and Markets Authority ('CMA') by April 2014 on a statutory footing. The Government's proposals are designed to streamline the decision-making process and increase efficiency. Whether these changes will result in throwing the proverbial 'baby out with the bathwater' remains to be seen.

Background: UK Alphabet Soup

Unlike the unified European Commission, the UK adopted a multi-layered structure to enforce its competition regime. The Office of Fair Trading ('OFT') is the primary enforcement authority for both merger control and behavioural matters such as price-fixing cartels. On the mergers side, the OFT conducts a 'Phase I' review of a merger: only where it believes a substantial lessening of competition may arise will it refer a merger to the Competition Commission ('CC') for a further 'Phase II' review. Each public body is independent with separate staffs, budgets and premises. On the behavioural side, the OFT investigates breaches of the prohibitions on anti-competitive agreements and abuses of market dominance, and it also conducts market studies. The CC has no role in investigating breaches of the prohibitions and it may investigate a market only where the OFT has referred that market to it for in-depth review. Sectoral regulators (e.g. OFCOM, OFWAT, OFGEM) have the same powers as the OFT in their sectors, which they exercise concurrently with the OFT, and they may also refer cases to the CC. A specialist Competition Appeals Tribunal ('CAT') may hear appeals from OFT or CC decisions.

With so many different pairs of eyes scrutinising UK competition enforcement, substantial checks and balances have been built into the system. International observers have reported a high regard for the UK system. The CC has stated that "*in Global Competition Review's annual survey of the world's competition regimes, the CC has topped the table for the last five years.*" The British Government will no doubt want to maintain the same high marks whilst achieving its domestic objectives. The proposals discussed below go some way to that end, though the detailed implementation process remains to be seen.

Proposals and Commentary

MERGER CONTROL

- *Voluntary:* The UK will retain its unusual voluntary merger control regime, together with its current jurisdictional thresholds (25% 'share of supply' / target's turnover exceeding £70m). This followed extensive discussion about making merger notifications mandatory where the thresholds are met, as the European Commission requires. Retaining the current system will arguably preserve the UK's flexible approach and ability to target problematic cases, rather than generating excessive, 'technical' filings. However, the UK regime will be one of a very small number of voluntary regimes.
- *More Expensive:* Despite business lobbying hard against making the system more expensive, the UK Government will increase the OFT's merger fees from 6 October 2012, so that the merger control system achieves 60% cost recovery. There will be no cost recovery for behavioural cases.

¹ Please see the full set of materials at <http://www.bis.gov.uk/Consultations/competition-regime-for-growth?cat=closedwithresponse>. The CC's statement is at <http://www.competition-commission.org.uk/media-centre/latest-news/2012/Mar/cc-responds-to-competition-regime-plans>. The OFT's statement is at <http://oft.gov.uk/news-and-updates/pressstatements/2012/17-12>.

Value of the UK turnover of the enterprise being acquired	Current level	New level
£20m or less	£30k	£40k
Over £20m but not over £70m	£60k	£80k
Over £70m but not over £120m	£90k	£120k
Over £120m	£90k	£160k

- *'Unscrambling Eggs'*: This is a consequence of retaining a voluntary merger regime where parties can close transactions before receiving clearance. The CMA will have stronger powers to block pre-emptive action by companies seeking to integrate their operations, once the CMA starts to investigate a merger that has not been pre-cleared. These will include financial penalties.
- *Timelines*: businesses should benefit from clearer administrative timelines. The CMA will have a 40 working day statutory timeline in Phase I cases, mirroring the OFT's informal practice to date. There will be a new procedure and timeline to negotiate undertakings in lieu of a Phase II reference, plus a new time limit to impose remedies in Phase II cases. This may help to speed up the review process, although the maximum 24 week length of Phase II investigations remains the same, to maintain the quality and robustness of decisions. Even now, many Phase II investigations are already completed in less than the allotted time, especially those resulting in clearances.

CARTEL INVESTIGATIONS

- *Back to the Future?* The most striking reform is re-writing the cartel offence in the Enterprise Act 2002 by deleting the 'dishonesty' element. To undermine the most damaging secret arrangements between conspirators, the offence will no longer include those cartels which the parties have agreed to publish in a suitable format (e.g. in the London Gazette) before they are implemented, so that customers and others are aware of them. The official explanation is that 'dishonesty' offences are particularly difficult to prosecute in a white collar criminal environment and the reform will increase the number of prosecutions. However, publishing

restrictive arrangements may take the law back to the era of the Restrictive Trade Practices Act 1976, before the modernisation of UK law with the Competition Act 1998. In addition, the European Commission ended the notification of restrictive agreements in 2004, encouraging parties to self-assess with their legal advisors. The question is therefore whether this will unduly overburden the CMA's resources.

- *Accelerating Administrative Inquiries*: the CMA will take over the OFT's role in carrying out the administrative enforcement of antitrust investigations. Its rules will see the process accelerated and decision-making made more robust, e.g. by separating investigations from decisions. In the meantime the OFT will begin consulting on improving its own procedures, after a mixed record of investigations in 2010 / 11.

MARKET INVESTIGATIONS

- *Wide-ranging*: In a similar way to the European Commission's sector inquiries, the CMA will have the power to range across industries and markets to identify competition issues and make recommendations. The Secretary of State (currently Dr Vince Cable) will be able to request the CMA investigate certain 'public interest' concerns as well as competition issues.
- *Quicker*: To date the OFT has carried out market studies and the CC market investigations (of up to two years). Phase I market studies will now have a statutory timetable and Phase II market investigations will be shortened to 18 months. There will be new time limits to impose Phase II remedies in market investigations. These are designed to reduce the burden on parties in terms of expense and management time. This follows a number of particularly onerous, long-running cases and should lead to swifter outcomes.

CONCURRENCY

- *Clarity*: The sectoral regulators (see above) will remain in a system of concurrent enforcement. The new legislation will strengthen the place of competition law over other sectoral legislation and boost the co-operation between the CMA and its counterparts. This is aimed at making more transparent the 'alphabet soup' mentioned above.

APPEALS

- *CAT*: Aggrieved parties may still make ‘merits based’ appeals to the CAT against the CMA’s decisions. The CAT will have to take into account statutory guidance on penalties. The general policy aim is that financial penalties should reflect the ‘seriousness of the infringement’ and the ‘need’ for deterrence.

Leadership

The leadership of the CMA is still to be determined. However, in February 2012 OFT chief executive John Fingleton announced his resignation after seven years at the OFT. Mr Fingleton said in a statement that *“as the government moves closer to a decision on the future structure of the regime, this is a good time for someone new to take the helm at the OFT and steer the competition and consumer regime into the future.”* He will depart later in 2012.

CMA Status

The British Government has said that the CMA will be an independent Non Ministerial Department (‘NMD’), free from ministerial influence. To ensure transparent decision making and sound accountability, the CMA’s Chief Executive and Board will be accountable directly to Parliament. The CMA will be required to consult on its planned work and set out at the end of the year how it has performed. The British Government is still to clarify the scope of the CMA with regards to its consumer functions.

Further Review

As the legislative process continues the Mayer Brown competition team in London will monitor events and provide further updates as the CMA takes shape. If you have any questions or require specific advice on any matter discussed in this publication, please contact the lawyer listed below:

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