New chiefs at the OFT

The Office of Fair Trading (OFT) this week announced the appointment of Dr John Fingleton, currently Chairman of the Irish Competition Authority (ICA), as its new Chief Executive. Dr Fingleton will work closely with Philip Collins, the OFT Chairman designate, whose appointment was announced in March 2005. Both posts will be held by the outgoing Sir John Vickers until 30 September 2005. What must now be clarified is how these roles will work together in practice.

Dr John Fingleton

The appointment of Dr John Fingleton, an experienced regulator, as full-time Chief Executive of the OFT demonstrates a continued commitment to active competition enforcement.

Dr Fingleton has argued strongly in favour of an “effects-based approach” to competition law, regardless of whether the restrictions are public or private.

It is expected that Dr Fingleton, an economist, will continue to promote economic rigour in the OFT’s decision making process.

Dr Fingleton is currently Chairman of the ICA, a post he has held for 5 years, and he was reappointed for a second five-year term just three months ago. His tenure has been a period of significant change, with the entry into force of enhanced enforcement powers in the Irish Competition Act 2002. Dr Fingleton has overseen the most prolific era of competition law enforcement in Irish history. The Authority conducted a significant number of dawn raids and spent more days in court enforcing competition law in 2004 than in its entire previous history.

The ICA has recently settled a number of high profile court cases, in particular in the alcoholic drinks and dentistry sector. It has also recently completed a study into the non–life insurance sector, the non–investment banking sector and reviewed the restrictions to competition in eight professions.

Significantly for the OFT, the ICA’s 2004 annual report highlights the first ever prosecution of the criminal cartel offence in Ireland. The OFT, together with the Serious Fraud Office, is currently investigating its first potential cartel offence case and Dr Fingleton’s expertise in this arena will no doubt prove valuable to the OFT.

Prior to joining the ICA in 2000, Dr Fingleton taught economics at Trinity College, Dublin from 1991–2000 and has held visiting lectureships at the Université Libre de Bruxelles and the Graduate School of Business at the University of Chicago. It will be interesting to see whether the latter experience will increase further the impact of US economic thinking on the OFT’s economic analysis. In that respect, he has set out his belief that decisions in respect of all restrictions (whether public or private) should be made on the basis of market effects on competition and not on simplistic “high-market-share-is-bad” type rules.

More broadly, Dr Fingleton has argued strongly that competition policy driven by competitiveness should be integrated into domestic policies such as regulatory reform, productivity and the promotion of consumer welfare.
Philip Collins

The appointment of Philip Collins as part-time Chairman of the OFT represents a welcome injection of further senior private sector expertise to the OFT.

The dual structure of Chairman and Chief Executive is new to the OFT. It is not yet clear precisely how their roles will evolve – or, indeed, how transparent the differences in their respective functions (and those of the Board) will be.

Philip Collins will take over the role of OFT Chairman, also from 1 October 2005. He was previously a senior competition partner at international law firm Lovells, where he was also a member of both the Energy and Pharmaceuticals and Biosciences Groups. He has nearly 30 years’ experience of competition law in practice and has been based in Brussels for the last 12 years. Mr Collins was educated at Exeter University and received a BCL from Oxford.

Mr Collins has advised clients in a wide variety of sectors on EC and UK competition law, appearing before the European Courts, the European Commission and the UK authorities. He has been involved in many high profile cases, including representing Masterfoods in the impulse ice-cream (freezer exclusivity) cases. Other previous clients of Mr Collins include Statoil and Sony.

Mr Collins will take up this appointment on a part-time basis. He expects to carry out his role from his current base in Brussels. While there has been press comment questioning this decision, we would be surprised if this proves to be a major impediment in practice.

Comment

Philip Collins and John Fingleton assume their new roles at an opportune time. The new powers granted to the OFT over the last few years have now been road-tested by the OFT and before the Competition Appeal Tribunal. The changes brought about to the UK mergers regime are firmly in place and the effects of European Antitrust Modernisation and the recast Merger Regulation are now bedding down. The OFT’s new appointees take over at a time when the OFT can fully grasp the reins of enforcement.

It is no doubt envisaged that these appointees will bring together complementary experience and skills. It is not however yet clear quite what the division of labour will be between the roles of Chairman and Chief Executive.

The post of Chief Executive was created during the last stages of the passage of the Enterprise Bill through Parliament. For the sake of continuity during the infancy of the Enterprise Act 2002, and whilst the Competition Act 1998 bedded down, provision was made for one person (Sir John Vickers) to hold both roles until now.

When the House of Lords proposed the role of Chief Executive, the debate centred on the findings of the Cadbury and Hampel reports which advocated a split in the roles to avoid an unwelcome concentration of power in corporate bodies. It was argued that a public body which regulates companies should also reflect these principles in its governance. It remains to be seen, however, how these two roles will work together. For example, a significant question for business is to what extent will Mr Collins as Chairman be involved in individual cases and if so, how would a difference of view between the two be resolved – for example will either have a casting vote on the OFT Board?

As a general proposition, however, the OFT’s new structure is to be welcomed. However capable and open-minded an individual is, a more formal collegiate structure which entrenches a system of checks and balances and draws upon different sources of expertise and experience should be expected to improve the quality and consistency of decision-making.
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