

BIS Consultation on Changes to UK Competition Regime.

In October 2010, the UK Government announced plans to reform the UK competition regime by creating “a simpler structure with a single competition authority and a stronger role for front-line consumer services”.

Today, the Department for Business, Innovation and Skills (“**BIS**”) released its consultation on the proposals, providing more detail on the precise nature of the potential reforms. As anticipated, the core proposal of the consultation is the merger of the Office of Fair Trading and the Competition Commission to create a single Competition & Markets Authority (“**CMA**”, for purposes of this bulletin). The clear hope here is that the current ‘two tier’ competition law processes – merger control and market investigations – will be streamlined by the creation of the CMA.

However, the consultation is more wide-ranging than institutional reform, and looks at a range of proposals in and around the core “CMA proposal” said by BIS to be designed to create efficiencies, stimulate growth, and increase beneficial regulatory activity in areas where government has identified a lack of intervention (although BIS has been at pains to state that its focus is on the quality, not volume, of regulatory actions taken). Significant changes to antitrust enforcement (cartels and abuse of dominance), an area where the OFT has been criticised by the National Audit Office and others, seem likely. The system for sector regulation looks set to be the only significant area of the current competition law regime to remain largely unchanged, although BIS is keen to explore options for greater cooperation between the sector regulators and the competition authorities on competition issues.

If the most radical options included in the consultation are carried through to legislation, the CMA would be a potent authority with greater responsibilities, and greater powers, than the OFT and CC combined. The debate is therefore likely to be most heated over what checks and balances are required to guarantee procedural fairness to parties. Government has reasserted its commitment to an independent CMA, free of political interference.

Merger of OFT and CC to create a ‘CMA’

Institutional separation is a key feature of the current regime, particularly in the context of merger control reviews and market investigations, where the

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OFT (or relevant sectoral regulator) conducts the initial investigation and the CC makes the final enforcement decision.

The consultation seeks to explore how to get the ‘best of both worlds’ by creating separate first and second phase review processes within the combined CMA, while retaining the efficiency benefits of a single authority. It appears likely that the current two phase processes, merger control and market investigations, will retain this fundamental characteristic to one degree or another.

The key question is where to strike the balance between meeting streamlining objectives and guaranteeing procedural fairness. The issue is made more complex by the fact that the appropriate balance may be different for different branches of competition law.

The consultation also looks at whether the CMA should have objectives enshrined in statute, the hope being that this will make it more purposeful and also more accountable, although BIS is also mindful of the need for the CMA to have the flexibility to respond to changes in the economic environment. More prosaically, the consultation also considers the introduction of tighter deadlines in merger and market investigation cases.

Merger Control

Apart from the merger of OFT and CC, perhaps the biggest reform being considered for the merger control regime is the possibility of a move from the current voluntary regime to a mandatory, suspensory filing regime similar to that in place under the EU Merger Regulation and in all other EU Member States.

There is clearly a concern in government that under the current voluntary regime problematic mergers can escape scrutiny. There is also concern about the significant number of problematic deals that are completed prior to investigation by the CC, making it more difficult for the effects of such deals to be prevented or remedied.

Conscious of the potential burden on business created by a mandatory regime, the consultation also seeks views on the introduction of a small business exemption. The OFT has expressed reservations regarding such a move because, for example, it could allow for creeping acquisitions of stores by large national retailers (an issue which the French merger control rules were amended to capture).

Market Investigations

The consultation gives a clear indication that the market investigation regime itself is in no danger of becoming a casualty of the reforms. No doubt this will be bad news for many companies who, while doing nothing wrong themselves, have been the subject of lengthy market investigations since the regime was introduced.

Indeed, while BIS acknowledges a need to reduce timescales for market investigations, its main concern appears to be the lack of investigations initiated and the lack of impact on sectors where government perceives that market investigations could have been of benefit.

The consultation seeks views on:

- > the benefits of the CMA having an ability to initiate market investigations not only on the basis of perceived failure in a particular market, but also on the basis of a type of conduct which might cut across a number of markets;
- > a possible statutory duty for the CMA to monitor particular sectors; and
- > powers to report on public interest issues in the context of a market investigation if requested to do so by ministers.

This last proposal is forwarded by BIS as a way of eliminating the need for ad hoc bodies (such as the Independent Commission on Banking) to address issues with both competition law and public interest angles. The concern here will be to effectively circumscribe the categories of legitimate public interest concerns to prevent arbitrary intervention.

In this regard, it is noteworthy that the super complaint procedure by which consumer bodies can in certain circumstances cause a market to be investigated looks set to be retained, with one proposal being to extend the right to launch a super complaint to SMEs.

The consultation also includes proposals for the use of consumer protection law alongside competition law as a complementary tool for addressing market problems. In this regard, BIS sees competition law as part of a wider reform package looking at the overall consumer landscape and strategies for consumer empowerment to deliver more competitive markets.

Antitrust Enforcement

As for market investigations, the consultation acknowledges a need to reduce timescales for investigations while looking at ways to increase the number of antitrust enforcement actions, particularly actions for abuse of dominance.

The consultation also looks at options for reforming the decision making process for antitrust enforcement actions to increase procedural fairness. The most radical option identified is the possible move to a prosecutorial system with institutional separation of investigation and decision-making, such that the CMA's preliminary decision is then prosecuted before a tribunal (such as the Competition Appeal Tribunal) or court. This is the system employed in jurisdictions such as the United States and Australia.

Sector Regulation

There had been speculation that the consultation would involve a reconsideration of the sector regulators' concurrent competition powers,

possibly going as far as suggesting possible abolition of those powers except in specifically defined contexts. It seems clear from the consultation that abolition of concurrency is 'off the table' and indeed such a proposal would be at odds with the greater concurrency being pursued in for example the healthcare sector (via the possible establishment of Monitor as economic regulator) and in Post. The consultation instead looks at ways to improve the operation of concurrency, for instance by 'joint working' between the sector regulators and competition authorities.

BIS will explore possible reforms to sector regulation separately (likely later in the spring), but has indicated that in relation to their competition law functions it will look only at relatively minor reforms to improve the existing system, such as imposing an obligation on sector regulators in certain circumstances to use their competition powers rather than enforce under the applicable licensing regime.

Criminal Cartel Offence

There had been speculation that the consultation might look at ways to improve outcomes of criminal enforcement actions following recent failures of process in this area. In fact, the proposal on this point is directed more to the fundamentals of the offence itself than to process, and looks at potential reform of the dishonesty element of the criminal cartel offence to make it easier to secure convictions (perhaps with an eye to the spectacular collapse of the BA/Virgin criminal cartel trial in 2010).

Responding to the consultation

The consultation will remain open for the next three months, until 13 June 2011.

Linklaters LLP will be commenting itself on the proposals, and we would be delighted to discuss our clients' views.

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