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UK competition regime all change or more of the same?

Foreword

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Foreword

UK competition regime all change or more of the same?

The UK competition regime is to be reformed again. The Enterprise and Regulatory Reform Bill (ERRB), which is currently before Parliament, will amongst other things, merge the Office of Fair Trading (OFT) and the Competition Commission (CC) to create the Competition and Markets Authority (CMA). The new body will be given additional powers in some areas but will lose responsibilities in others. In addition, whilst legislation has yet to be introduced, the Government has also consulted on changes designed to remove some of the obstacles that currently hinder competition law actions being brought privately in the courts.

Over the next 12 months, much ink will be spilled, and many trees felled, by those analysing the likely impact of these changes. Will they lead to more or less public and private enforcement? Will they increase or decrease the likelihood of Phase II merger investigations and market investigation references (MIRs)? What will the reduced role of the new agency in consumer matters mean for the "integrated competition and consumer" approach which has been a unique selling point of the UK regime interventions?

Of the three major reforms to the competition regime over the last 15 years, the latest is, in my view, the least significant. The Government has made clear that the basic tenets of the UK system are to be retained. In the area of merger control, there will still be a voluntary notification system albeit with greater powers for the new agency to suspend uncompleted mergers and to control the degree of integration of undertakings in completed deals. There will continue to be two, largely independent phases for complex cases: decisions are likely to be taken, as now, by agency officials at Phase I and by independent panel members at Phase II, thus continuing to give parties the benefit of a 'fresh pair of eyes' review in complex cases.

Similarly, the system under which "markets" (rather than particular companies, transactions or agreements) are investigated will, in essence, retain most of its current features.

For anti-trust cases, like the OFT, the CMA will be an administrative decision-making body (rather than, for example, being turned into a prosecuting authority as some had argued for).

Appeals of decisions by the CMA will be to the same bodies as now and on the same legal bases – this will be unaffected by the ERRB (however, the Government has recently suggested that it will look again at this during 2013).

These structural similarities do not mean, however, that the regime will be identical to the one that precedes it. In a speech to the Law Society's Competition Section Annual Dinner, Lord Currie set out a vision for the CMA with the following words:

"We need to make sure that the Competition and Markets Authority is established as a vibrant organisation with a fresh, dynamic culture that embodies both new elements and the best of the two legacy bodies and retains and integrates the talent of their staff…The combined organisation will be able to deploy resources more effectively and flexibly to the different parts of its work. It will deliver decisions in a more timely way with no diminution of quality, to the benefit of consumers and businesses. It will provide a single, and therefore stronger, voice and advocacy, both at home and internationally, on competition and consumer issues."

Lord Currie also flagged that the CMA would play a bigger role in the regulated sectors of the economy by working in partnership with and providing leadership to the sector-specific regulators on competition and market issues. This would follow a path of enhanced cooperation, led by the new Authority, drawing on the sectoral expertise of those regulators and the competition expertise of the CMA.

This is an exciting and compelling vision for the new body and has the potential to deliver further improvements to what is already a world class competition regime. However, much will depend on its practical implementation. Four factors will be crucial in this regard.

Key challenges

The first is the allocation of resources between the agency's different functions. Whilst efficiencies will no doubt be sought and achieved, the decision to spend more, less or similar resources between enforcement, mergers and markets work will clearly have an important impact. This is particularly the case if there is a significant reallocation of resources – it is worth noting in this regard that the OFT and the CC have, over the last decade and a half, spent vastly greater sums on mergers and markets work than on competition enforcement. This allocation will, in my view, need to be considered afresh.

The second major factor will be the balance that is struck between, on the one hand, the speed of delivery of cases and, on the other, the resources/time that will be allocated to internal quality assurance and ensuring that decisions are robust. Whilst the recent experience of the OFT's Cartels and Criminal Enforcement division shows that it is possible to increase both the number of interventions as well their quality, there is always a degree of trade-off between the pursuit of these two aims.

How this trade-off is resolved will be a key determinant of the success of the new agency. It is worth noting in this regard that the Governments' concerns in its consultation document were clear: it worried about "the low number of antitrust cases, the time they take and the limited deterrence to anticompetitive behavior that results". This concern was echoed by respondents to the consultation: the main thrust of the criticism made of the OFT was that it has taken far too long to deliver far too few infringement decisions – the (lack of) quality of some cases and practices were noted by several respondents but few argued that the majority of infringement decisions taken were insufficiently robust. The relative robustness of infringement decisions is reflected in some of the data: according to the OFT between 2000 and 2012, around 95% of parties against whom competition decisions were made either did not appeal their case to the Competition Appeal Tribunal (CAT) or were unsuccessful on liability claims.

In my view, these factors suggest that the greater concern of the new agency should be to increase the number and speed of infringement decisions even if this were to come at the expense of a slightly bigger loss rate on appeal.

The alternative approach would be to focus on improving the quality of decisions. In doing so, the CMA would hope to increase the throughput of cases by reducing the frequency of appeals (thereby releasing resources for new cases that would otherwise be tied up defending decisions before the CAT). Whilst a reasonable approach, the success of this strategy would largely be outside of the control of the CMA and would depend on a significant percentage of parties choosing not to appeal decisions. Whilst not impossible, the probability of parties rejecting the option of appealing to the CAT, particularly where significant fines have been imposed or where important commercial issues are at stake, would not appear to be high.

The third factor will be the willingness of the CMA to take competition cases in the regulated sectors. Unlike many jurisdictions, there have been almost no prohibition decisions in these parts of the UK economy over the last 15 years. UK regulators have strongly preferred to rely on regulatory powers rather than competition enforcement to achieve their desired outcomes. Although understandable, this is a significant lacuna and will change only if the regulators are convinced that the CMA will act, if they do not use their powers in appropriate cases.

The fourth factor will be the ability of the CMA to increase the number of experienced staff working for it and, more generally, to operate in ways that are more akin to professional service firms– a regular refrain from critics of the OFT has been its lack of senior staff and bureaucratic decision-making processes relative to some agencies. Significant steps have been taken over the last few years to address this issue. For example every case run by the OFT's Cartels and Criminal Enforcement division is now lead by a partner level lawyer. This, and process changes, have allowed civil cartel and criminal cases to be handled far more effectively than in the past, resulting in five infringement decisions in 2012/13 alone, two of the highest fines ever successfully imposed by the OFT, a number of significant no grounds for actions decisions and the first successful consumer prosecution ever by the OFT.

However, more needs to be done to improve processes and, in particular, to retain and recruit high calibre staff. Key to this will be the reputation of the new authority and the success of any restructuring that is undertaken. The former will (at least initially) be driven by the quality of senior appointments made to the new body – a strong leadership team will be crucial if the agency is to be attractive to high calibre staff. An important start has been made in this regard: Lord Currie was a hugely successful Chairman of OFCOM whilst Alex Chisholm, the CEO designate of the CMA, was the highly regarded head of the

Communications Regulator in Ireland. In the longer term, the success of the agency and the marketability of the skills gained through employment there will be huge drivers for staff retention and recruitment.

With respect restructuring, the ability of the CMA's leadership to make radical changes will be limited by two crucial decisions that have already been made. First, the new agency will operate within the pay scale of the wider civil service. This will be a huge challenge, particularly given the market rate for competition lawyers and economists. Second, the vast majority of the staff of the two agencies will be transferred automatically to the CMA. Devising a means, within these constraints, of offering sufficient financial rewards to attract high calibre staff, particularly at the "senior associate/ junior partner" level, will be essential if the CMA is to fulfill the UK Governments' aspirations for the regime.

Key ancillary changes

However, even more significant than the merger of the CC and the OFT to the development of the regime will be the ancillary legislative changes that are currently before Parliament. Four of the proposed changes are noteworthy in particular:

First, the CMA will be able to compel individuals to give evidence to it orally in antitrust cases under the UK Competition Act and Article 101/102 TFEU. This change could have a significant impact on enforcement in the UK. Given the weight placed on witness evidence by the CAT (much greater than in any other administrative regime of which I am aware), the lack of a statutory provision enabling the OFT to require witnesses to provide oral evidence during the administrative procedure has in recent years been one of the biggest obstacles to the effective and efficient investigation of cases.

Second, the new Act will require the CMA to take and publish Phase I merger decisions within 40 days of receiving a satisfactory submission from the parties. Whilst the OFT has generally dealt with the vast majority of mergers in this timeframe, imposing a statutory deadline with limited "stop the clock" provisions could increase the risks of Type I and Type II errors by reducing the time available to, and increasing the pressures on, case teams. To compensate, the CMA may, in complex cases, have no choice but to rely far more than the OFT has done on extensive "pre-notification" discussions; in addition, it might increase the size of case teams in difficult matters (which could have consequences for the resourcing of other areas of the CMA's work).

Third, under the new Act, merging parties will only be able to offer remedies in Phase I after the CMA has made a provisional decision to go to a Phase II review. This is a significant change from the current practice under which undertakings are offered before the Decision is adopted (with very limited ability for the parties to change their offer after the Decision has been taken). The proposed change will allow the parties to tailor their offers better to the actual competition problems identified and may lead to more access to decision makers for parties, at least in relation to remedy proposals.

Fourth, and perhaps most significantly, are the changes proposed to the criminal cartel regime. Under the current rules an individual is guilty of an offence only if he/she *dishonestly* enters into certain types of agreements (price fixing, market sharing, *etc*). In response to the difficulties of prosecuting the offence, the Government decided to legislate to remove the dishonesty element and to replace it with an "exclusion" for those arrangements that fall within the criminal cartel regime but which are notified to customers or published in a prescribed form (the 'publication exclusion').

There has been considerable opposition in some quarters to this change, with concerns expressed that the removal of the dishonesty requirement could criminalise legitimate commercial arrangements. To address these concerns, the Government proposed a number of amendments to the Bill. As a result a defendant will avoid a conviction if he/she shows that he/she:

→ did not intend to conceal the arrangements from customers;

→ did not intend that the arrangements would be concealed from the CMA; or

→ took reasonable steps before entering into the agreement to ensure that the arrangements would be disclosed to a professional legal adviser for the purpose of obtaining advice about them before they were made or implemented (the 'professional advice defence').

A number of objections have been made to these defences. It has been suggested, for example, that it is difficult to know what would constitute an 'intention not to conceal' and that, being a negative, the concept will be hard to pin down.

I do not share these concerns. In my view, the defences do not require the defendant to show that he/she had a *positive* 'intention *not* to conceal' the arrangement. Rather, it will be sufficient for the defendant to show that there was an *absence* of an intention to conceal the arrangements from customers or the CMA. As regards the professional advice defence, there is, of course, a risk that hardcore cartelists may seek 'sham' advice to bring the defence into play. However, where there is clear evidence of this (and the other elements of the cartel offence are met) I would expect a prosecution to be brought. It would then be for the jury to decide whether the defence had been made out. It is also important to stress that the defence applies only to the cartel offence against individuals; it offers *no protection* for the company from civil penalties and private damages actions for breach of competition law.

I have set out my views on how the new offence will work in detail in a recent speech which is available at: http://www.oft.gov.uk/news-and-updates/speeches/2012/1112.

Private enforcement

In addition to the legislative changes currently before Parliament, the Government is currently consulting on changes to the private enforcement of competition law.

These possible future changes include:

→ widening the role of the CAT to hear stand-alone cases, as well as follow-on cases, and to grant injunctions;

→ encouraging the use of Alternative Dispute Resolution;

→ the introduction of a "fast track" regime, which would deal with simple cases quickly, particularly those involving SMEs. The fast-track regime would allow the CAT to set both a cost-cap and a cap on cross-undertakings of damages, so that a business is aware early on in the process what costs it will face. If a business thinks that the costs would be too high, then it can decide not to pursue the case without incurring any costs; and

→ the introduction of a collective settlement regime (similar to the one in the Netherlands). Under such a regime, the business concerned and the claimant organisation would jointly approach the CAT to approve an offer of settlement. The CAT would be able to hear evidence, call witnesses and appoint an expert to assist it in making a decision. The CAT would then make a decision as to whether it considers the level of compensation to be fair, just and reasonable.

Perhaps, most significantly, the Government is considering introducing a limited opt-out regime for private actions. Under the proposals, which apply whether the underlying claimants are consumers or businesses, or a combination of the two, claims would be able to be brought either by claimants or by genuine representatives of the claimants, such as trade associations or consumer associations, but not by law firms, third party funders or special purpose vehicles. The CAT will be required to certify whether a collective action brought under the regime should proceed under an opt-in or an opt-out basis.

Additional safeguards have been proposed to prevent speculative or unmeritorious claims and to prevent US-style class actions, namely:

→ A strong process of judicial certification, including a preliminary merits test, an assessment of the adequacy of the collective representative and a requirement that the CAT consider that a collective action is the best way of bringing the case.

→ Establishing that the 'opt-out' aspect will only apply to UK-domiciled claimants, while non-UK claimants would be able to opt-in to a claim if desired.

→ Prohibiting treble or exemplary damages (*i.e.* preventing the business from paying more than the total level of compensation due) in collective actions.

→ Applying the "loser-pays" rule in the assessment of costs and expenses and explicitly clarifying in the CAT Rules of Procedure that this should be the starting point for such assessments.

→ Prohibiting the use of contingency fees, while continuing to allow conditional fees and after-the-event insurance. Contingency fees are payable where lawyers agree to take a percentage of the overall compensation, whereas conditional fees reflect a percentage of the legal fee (up to, but no more than, 100%) charged if a case is successful.

→ Requiring any unclaimed sums to be paid to the Access to Justice Foundation, but leaving defendants free to settle on other bases, including on a cy-près basis(*i.e.* to an organisation that represents this particular group of claimants) or a reversion-to-the-defendant basis, subject to approval by the CAT judge.

→ Requiring that any opt-out settlement must be judicially approved.

In my view, these changes, particularly in relation to opt-out actions are long overdue. In 2007, the OFT published detailed advice to the then-Government on ways in which to improve the effectiveness of redress for consumers and businesses that have suffered loss as a result of breaches of competition law. The current proposals are, in most respects, consistent with that advice and, in my view, strike a reasonable balance between empowering victims to recover losses, increasing the overall deterrent effect of the competition regime and avoiding the pitfalls of the US system for private actions. If enacted, they would, I believe, lead to a more effective competition regime in the UK.

Concluding remarks

The reforms currently under way will, if enacted and properly implemented, further improve the UK regime. The most significant impact is likely to come from the proposed changes to those seeking redress in the courts (particularly the proposal to allow opt-out actions to be brought) and from revisions to the criminal cartel offence, allied with the improvement to the civil competition system. The creation of the CMA from the merger of the OFT and CC promises much but carries with it significant risks that will need to be managed and addressed. An important start has been made in this regard with the appointment of Lord Currie as Chair designate and Alex Chisholm as CEO designate.

However, by not taking more radical action to reform the competition system through the ERRB I had believed that the Government had missed a unique opportunity to deliver a step-change in the effectiveness of the competition regime. This is because, in my view, the proposed changes in the Bill fail to address the key flaw in the UK's competition regime: that is, the combination of an EU-type administrative decision-making body with an appeal system that results, in practice, in a complete rehearing of cases. In fact, in many cases, "appeals" have, in effect, turned into full blown trials with cross-examination of witnesses and the submission of new evidence.

However, on 20 March the Government announced that it would, during the course of 2013, consult on a series of potentially important reforms to the regulatory and competition appeals' framework including:

- the grounds on which other regulatory appeals and appeals of competition decisions can be brought, to make them clearer and more consistent;
- streamlined processes and strengthened governance arrangements for the CAT and Competition Service, and a full review of the CAT's rules;
- bringing greater consistency across sectors, for instance, on which appeal body hears each type of appeal;
- reducing opportunities to game the system, for instance, by presenting new evidence during appeals; and
- introducing fast-track procedures to achieve quicker judgments in simple cases.

These changes are likely to be resisted strongly and vocally by many (or perhaps even the majority of) stakeholders. However, if implemented, they have the potential to improve the UK system radically by addressing the key challenge in the regime: how to marry an EU-style administrative decision-making system with appropriate rights of appeal.■

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