UK Competition Law

UK Government Proposes Landmark Reform of Competition Law

SUMMARY

The United Kingdom Government has published detailed proposals to reform UK competition law. The proposals are set out in three separate documents and will result in substantial changes to many aspects of the UK’s competition law regime.

In the first of the three proposal documents, published on 15 March 2012, the UK Government set out its response to a consultation on a series of changes to UK competition law planned to become effective by April 2014. These changes will affect mainly institutional and procedural aspects of UK competition law, as well as certain substantive aspects.

The principal changes are:

Institutional Reform

- The creation of a new body, the Competition and Markets Authority, to replace the Office of Fair Trading and the Competition Commission as the primary competition law enforcement authority.

Merger Control

- Enhancement of the powers for the UK authorities to prevent and reverse post-merger integration between companies whose merger is under investigation, but no change to the voluntary nature of merger notifications in the UK, or to the jurisdictional thresholds.
- Changes to the timing and procedure of merger investigations.

The Cartel Offence

- Removal of the “dishonesty” element of the criminal cartel offence, with the aim of making it easier for the UK authorities to prosecute individuals for committing the cartel offence.

On 28 March 2012, the Office of Fair Trading launched a related consultation on its investigation procedures.
The principal changes proposed in that consultation are:

**Separation of Decision-Making**
- Separation of the investigative and decision-making processes with a view to ensuring the impartiality of decision-makers.

**Procedural Oversight of Investigations**
- Greater scrutiny of investigations by officials from outside the investigation teams.
- Extension of the trial period for the office of Procedural Adjudicator for a further year, and transfer to the Procedural Adjudicator of responsibility for managing oral hearings.

**Increased Visibility and Openness**
- The Office of Fair Trading will increase its communication with parties under investigation, and with the public generally.

On 24 April 2012, the UK Government issued a consultation on changes to the procedural and substantive treatment of private damages actions for infringements of competition law. The proposed changes are intended to facilitate private litigation to stop, and to obtain damages for, anticompetitive behaviour.

The proposed changes are wide-ranging and include:

- Extending the jurisdiction of the Competition Appeal Tribunal to include stand-alone damages actions (in addition to its current jurisdiction to decide follow-on damages claims).
- Measures aimed at encouraging damages actions by small and medium-size enterprises.
- The introduction of an “opt-out” system for collective actions.
- Encouragement of alternative means of dispute resolution in order to avoid litigation altogether whenever possible.

The UK Government has recognised that encouraging private litigation for competition law infringements could disincentivise parties from making leniency applications, which would be to the detriment of competition law enforcement generally. Consequently, the consultation seeks input on measures to safeguard leniency programmes in the face of increased private enforcement.

**BACKGROUND**

On 15 March 2012, the UK Government’s Department for Business, Innovation and Skills published a detailed response to its year-long public consultation on changes to UK competition law.¹ The response document, “Growth, Competition and the Competition Regime: Government Response to Consultation” outlines the UK Government’s intentions to reform UK competition law and summarises the analysis that underpins the UK Government’s decision to make the various changes. As part of its analysis, the

¹ The consultation was initiated by publication in March 2011 of *A Competition Regime for Growth: A Consultation on Options for Reform.*
response document identifies the alternative solutions put forward in the consultation to address perceived shortcomings of the current UK competition regime and describes why the chosen solutions appear preferable to the alternatives.

Institutional Changes
As had been widely expected, the enforcement functions of the Office of Fair Trading (“OFT”) and the Competition Commission (“CC”) will be transferred to a new body, the Competition and Markets Authority (“CMA”). The CMA will be a “non-ministerial department” and, as such, will be directly accountable to Parliament. The CMA will be managed by a Board, which will be responsible for its overall strategy and performance.

The CMA will retain the two-phase approach to investigations currently followed by the OFT and CC. Thus, the CMA’s Board will be responsible for taking Phase 1 decisions in merger investigations and market investigations, while Phase 2 decisions will be taken by panels drawn from a pool of independent experts.

The CMA will have a broader role than the OFT and CC in enforcing UK competition law in regulated sectors, such as energy, water and telecommunications, which have their own sector regulatory authorities (Ofgem, Ofwat and Ofcom). While the sector regulators will retain (concurrently with the CMA) the power to apply the general UK competition rules in their respective sectors, the CMA will have the power to take over competition law investigations from the sector regulators when it considers itself better placed to carry out the investigation. This power will be complemented by the requirement for enhanced consultation between the sector regulators and the CMA.

Merger Control – Retention of the Voluntary Notification Regime
The UK Government’s consultation considered whether the UK should move from a voluntary merger notification regime to a mandatory notification regime. The UK Government’s major concern with the current merger regime is that because it is voluntary, many mergers are not notified to the OFT. Consequently, most UK merger reviews take place after the completion of the transactions under review, making it more difficult for the OFT and CC to investigate and impose appropriate remedies, which in extreme cases would include the requirement to unwind a completed merger. Moreover, the UK Government was concerned that because notification is voluntary, some anti-competitive mergers might escape review altogether.

The UK Government raised the prospect of abandoning the voluntary notification regime in favour of a mandatory notification regime. In its response, however, the UK Government has adopted a strong stance in support of the voluntary regime, buttressed with additional enforcement powers. In order to

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2 The UK authorities have only rarely required mergers to be unwound. However, a recent example of such an order was on 21 March 2012, when the CC required Stericycle Inc. to divest Ecowaste Southwest Limited.
strengthen the voluntary notification regime, the CMA will be given a discretionary power to order the suspension of integration between merging parties whose merger is under review by the CMA. This will include powers to reverse action that has already taken place, for example by requiring the recreation of separate reporting lines in the merged business. Where merging parties continue integration despite such an order, the CMA will be empowered to impose penalties of up to 5% of the merging parties’ respective global group-wide turnover. The CMA will also retain the OFT and CC’s authority to seek a court injunction to ensure compliance with measures to stop integration of the merging parties’ businesses pending clearance of the merger.

The current jurisdictional thresholds (based on share of supply and the target’s turnover) will remain unchanged.

**Merger Filing Fees and Timetable**

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<th>UK Turnover of Target</th>
<th>Current Fee ('000)</th>
<th>New Fee ('000)</th>
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<tr>
<td>&lt;£20 million</td>
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<td>&gt;£120 million</td>
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Merger filing fees will increase significantly from October 2012, from a 33% increase for transactions involving a target with UK turnover of less than £120 million to a 78% increase for transactions involving a target with UK turnover of more than £120 million.

In addition, the UK Government will introduce a forty-working-day statutory timetable for the CMA to complete Phase 1 merger reviews. This will replace the OFT’s current forty-working-day (non-binding) administrative timetable as well as the Merger Notice procedure, which prescribes a binding twenty-working-day timetable for Phase 1 merger reviews. The new regime will include a more detailed statutory timetable for merging parties to submit Phase 1 remedies, and for the assessment of such remedies by the CMA. The timetable for Phase 2 merger investigations (24 weeks, subject to extension) will not change.

**Antitrust Enforcement**

The UK Government’s consultation document identified the heavy burden placed on investigated parties by the current antitrust enforcement regime as a major concern. It also highlighted concerns with the speed and quality of OFT antitrust decisions, and certain perception of bias when the investigative and decision-making functions rest with the same team of officials.

Although the consultation document discussed the possible replacement of the current administrative approach with a prosecutorial approach, under which the CMA would act as a prosecutor, and decisions...
on infringement and penalties would be taken by the courts, the UK Government rejected such a radical change. The UK Government has, however, decided to make material changes to the administrative procedure in order to remedy the deficiencies noted above. In particular, a new timetable will be imposed on the CMA for antitrust investigations. In addition, efforts will be made to encourage greater communication between investigators and the parties; case teams will be subject to greater scrutiny from CMA lawyers and economists not assigned to the case team; and, as described above, the investigative and decision-making responsibilities will be separated within the CMA.

The UK Government has indicated that there currently may be “unwarranted incentives to appeal decisions and fines” because of a perception that the Competition Appeal Tribunal ("CAT"), which is the tribunal responsible for hearing appeals against decisions of the OFT and CC, may not take the same approach to determining fines as the OFT and CC. To remedy this perceived problem, the UK Government proposes to legislate to ensure that the CMA and CAT follow the same procedures for setting penalties, thereby reducing incentives to appeal to the CAT purely to achieve reduced penalties.

Finally, the penalties for failure to comply with certain (not all) aspects of UK antitrust investigations will be changed from criminal liability to civil financial penalties. The UK Government has determined that civil penalties represent a better, and more appropriate, sanction for failing to comply with an investigation. Criminal sanctions will remain, however, for more serious types of non-compliance, such as obstruction and falsifying or destroying documents.

The Cartel Offence
It is striking that although participation in a cartel has been a criminal offence in the UK since 2003, there has been only one case where individuals were convicted of the offence (the Marine Hose cartel). Even that was an uncontested prosecution. The UK Government has acknowledged the difficulty in successfully prosecuting the cartel offence and, with a view to overcoming that difficulty, will remove the “dishonesty” element from the offence. Removing the element of dishonesty will bring the cartel offence in line with other economic offences, such as insider dealing and bribery, and will focus the criminal sanction on effect, rather than intention. The UK Government hopes that in doing so, the deterrent effect of the offence will be strengthened. The UK Government has also decided to carve out from the offence agreements that were entered into “openly” (i.e. not in secret). It remains to be seen how “open” an agreement between competitors on prices, output or customer or market allocation will have to be in order to shield the individuals that made it from exposure to the cartel offence.

Market Investigations
The UK Government recognises that the market study/market investigation powers of the OFT and CC, which were introduced by the Enterprise Act 2002, have not had the impact envisaged by their proponents. The market investigation regime currently allows the OFT to independently launch a

3 Section 188 of the Enterprise Act 2002, which entered into force in June 2003.
(Phase 1) market study into a particular market. If the OFT has reasonable grounds to suspect any feature of the market serves to prevent, restrict or distort competition, it can then make a referral to the CC for an in-depth (Phase 2) market investigation. The UK Government identified three main concerns with the current market investigation regime: it is too complicated and involves duplication; the investigation process takes too long; and the connection between the Phase 1 market studies by the OFT and Phase 2 market investigations by the CC is often disjointed.

The UK Government will adopt a number of changes with a view to streamlining the market investigation process and thereby increasing the number and relevance of market investigations carried out by the CMA.

New, shorter, time limits for all stages of the market investigation regime will be introduced. The UK Government hopes that shorter timelines will increase transparency in the decision-making process and encourage companies under investigation to offer remedial undertakings in order to avoid Phase 2 market investigations. In order to ensure that the CMA is able to obtain the information necessary to complete a Phase 1 study within this reduced timeline, it will be given enhanced information gathering powers.

The CMA will be given the power to include determinations on matters of public interest during Phase 2 investigations. It is hoped that this will streamline the investigative process when a matter under investigation touches on both competition and public interest issues. In order to allay fears that such responsibility may stretch the CMA beyond its areas of expertise, or resources, the UK Government will include qualifications aimed at ensuring the CMA remains focused on competition enforcement, and only exceptionally considers matters of public interest.

The CMA will also have the power to launch “horizontal” market investigations across multiple product markets. At present, the OFT is able to launch a market study of a specified market, and is not able to investigate common behaviour across a number of markets.

The OFT’s Consultation on Procedural Reforms

On 28 March 2012, the OFT published a consultation on proposed reforms to investigations and decision-making under the Competition Act 1998 (“CA98”).\(^4\) The OFT wishes to increase the speed of CA98 investigations, enhance case teams’ engagement with parties under investigation and improve the robustness of its investigations and decision-making.

Changes in the OFT’s Decision-Making Process

The OFT’s investigation and decision-making processes will be separated. Case teams, led by Senior Responsible Officers (“SROs”), will take decisions on procedural issues such as opening cases, issuing Statements of Objection (“SOs”), and closing cases before issuing an SO. However, substantive

\(^4\) Office of Fair Trading (OFT1263con2) Review of the OFT’s investigation procedures in competition cases (March 2012).
decisions on infringements and undertakings will no longer be taken by case teams, effectively separating the investigative and decision-making roles of the OFT.

The OFT will establish a “Decisions Committee” made up of senior OFT officials. Substantive decisions in relation to investigations will be taken by a panel of three decision-makers (at least one of whom is a lawyer and one of whom is a senior member of staff on the OFT’s Decisions Committee) appointed once the OFT has issued its SO (a “Case Decision Group” (“CDG”)). The CDG will consult with the Decisions Committee prior to taking any decision, thus ensuring uniformity of decisions across the OFT.

Case teams will also be subject to more scrutiny from OFT lawyers and economists who are not part of the case team.

The new decision-making procedures will apply to cases that have not reached the oral hearing stage at the time the changes are implemented (most likely in the second half of 2012). Cases in which an oral hearing has already occurred will be completed under the current OFT procedures.

Procedural Oversight
The trial period for the office of Procedural Adjudicator (“PA”), a similar position to the European Commission’s Hearing Officer, will be extended for another year. The PA’s main role is to act as a final administrative appeal forum within the OFT in the event of dispute between the case team and the parties under investigation on matters of procedure. The PA will also take responsibility for managing oral hearings in OFT investigations.

In cases where the new procedure applies, oral hearings will be attended by the parties under investigation, the PA, the CDG and the case team.

Increasing Visibility and Openness in OFT Investigations
To improve the information available to third parties interested in its ongoing investigations, the OFT proposes to publish “case opening notices” and maintain case timetables on its website so that interested parties can determine what cases are open and their status.

In order to improve communication between investigated parties and the case teams, the OFT proposes to increase the number of “state of play” meetings, giving investigated parties more direct access to case teams.

The OFT will also introduce the right for parties to make representations on key elements of fine calculations (either in writing or orally). The fine calculations will either be provided as part of the SO (allowing investigated parties to include their comments on proposed penalties in their response to the SO), or as a separate document.

Oral hearings will be enhanced to provide for more interaction between the case team and the investigated parties, and to allow testing of evidence and legal and economic arguments. As noted
above, the PA (instead of the head of the case team) will now be responsible for conducting oral hearings.

Responses to the OFT’s consultation are due by 19 June 2012.

The Consultation on Private Damages Actions

On 24 April 2012, the UK Government issued a consultation on options for reforming the UK regime governing private litigation in competition law. The UK proposals reflect four key objectives: establishing the CAT as a major venue for competition actions in the UK; introduction of an “opt-out” collective actions regime; promotion of alternative dispute resolution processes for resolution of competition law-related private complaints; and ensuring that private enforcement acts as a compliment to the public enforcement regime and does not undermine leniency programmes.

The UK Government has observed that there are several deficiencies in the current UK regime for obtaining private redress for competition infringements. OFT research highlights widespread opinion that private enforcement is the least effective element of the UK’s overall competition regime. The current “opt-in” requirement for collective action cases makes it difficult to gain a critical mass of claimants. Only one collective redress case has been brought, without any degree of success. Furthermore, having to rely on follow-on damages actions for redress limits claimants to seeking redress only after an infringement decision has been made. As a result, claimants are unable to obtain injunctions to prevent the continuation of the anti-competitive behaviour. The CAT’s inability to hear arguments on matters that are not contained in an infringement decision prevent it from being an effective venue for actions that go beyond follow-on damages claims.

Increasing the Role of the CAT

In order to encourage parties to initiate competition related private actions, the UK Government has proposed a number of specific changes aimed at making the CAT a major venue for competition litigation. Additionally, it has proposed that special provisions be adopted allowing the CAT to use a “fast track” procedure for SME’s who currently find it too costly and time consuming to try to seek remedies for competition infringements.

The proposed changes to the role and functioning of the CAT include:

- Changes to allow the UK courts to transfer cases to the CAT at their discretion.
- Amending the CA98 to allow the CAT to hear stand-alone competition claims, thereby extending its jurisdiction beyond purely follow-on damages claims.
- Allowing the CAT to hear and decide on applications for injunctive relief (a power that it currently does not have).
- Creating a “fast track” procedure aimed at certain lower-value claims, particularly when brought by SMEs. The fast track procedure will focus on providing injunctive relief so that SMEs have access to redress in a timely manner.
The introduction of a rebuttable presumption of loss in cartel cases. As proposed, there would be a presumption that a cartelist was able to overcharge its customers by 20% compared to what the price would have been in the absence of the cartel. It would remain open to the parties, both the claimant and the respondent, to adduce evidence that the actual overcharge was above or below that level.

The UK Government has decided not to enact legislation on the passing-on defence because it believes that this sensitive issue would most appropriately be dealt with at the EU level.

Collective Actions
Since Which?’s claim in 2008 against JJB Sports for price fixing of replica football jerseys, there have been calls for a US-style “opt-out”, rather than “opt-in”, form of collective redress. In the consultation, the UK Government made clear that it does not support opt-out for all types of claims. However, it believes that an opt-out model may be appropriate in claims based on competition law infringement. In particular, because of the typically low value of each individual claim for competition law infringement, without an effective method for amalgamating a class of claimants, claims are not being brought.

The UK Government has therefore proposed an opt-out system of collective redress. In addition, the proposed system would allow claimants’ lawyers to bring actions on behalf of businesses and individuals simultaneously, and as either stand-alone or follow-on claims. Under the proposals, it would be for the CAT to determine if the opt-out model was suitable in a particular case.

The consultation goes to some length to demonstrate the differences in the proposed approach as compared to the US class action system. In an effort to avoid what the UK Government identifies as a “litigation culture”, it is proposed that any opt-out claim could only be brought by “a party that has itself suffered harm or a body that could reasonably be considered to represent the wider interests of those who have suffered harm”.

Encouraging Alternative Dispute Resolution
In keeping with its wider stance of encouraging ADR, the UK Government is seeking input on ways the CAT can facilitate the use of ADR in competition cases. The UK Government has not gone so far as to suggest ADR should be mandatory. Instead, the CAT will encourage parties to use ADR through the introduction of pre-action protocols which encourage ADR and formal settlement offers. The CAT will be able to take account of a party’s efforts to settle when making its determination on costs.

The UK Government also proposes to give the OFT, and subsequently the CMA, the discretionary power to impose a scheme of redress on an infringing party. It is suggested that such an approach would, in certain circumstances, reduce the need for duplicative legal proceedings.

A Complement to Public Enforcement
Measures to encourage private enforcement of competition law could discourage potential leniency applicants who may be reluctant to provide documents and testimony if that evidence could be used against them in a subsequent damages litigation.

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The UK Government has tentatively proposed protecting from disclosure documents “directly involved in the leniency application and which would not have been created if the company had not been seeking leniency”. Additionally, the UK Government proposes to protect leniency applicants from joint and several liability and limiting their liability to the damage they directly caused.

Responses to the UK Government’s consultation are due by 24 July 2012.

**COMMENT**

The package of changes represent the most radical proposals to reform UK competition law since the Enterprise Act entered into force in 2003, introducing the criminal cartel offence as well as a number of significant institutional changes. The institutional streamlining of the OFT and the CC into a single body follows a trend for institutional simplification that has led, in the recent past, to similar changes in other countries, such as France and Spain.

The relatively light changes in merger control may not go far enough for some given that the voluntary nature of UK merger control, as well as the jurisdictional thresholds, remain unchanged. The UK Government’s decision to maintain these key aspects of the UK merger control regime was motivated largely by the desire to minimise the regulatory burden on business and avoid the increased public cost of a mandatory notification regime.

The proposals to change the OFT’s investigation and decision-making process show that the UK Government has taken note of criticism levied against the current investigation procedures. The proposed changes complement the UK Government’s objective of maintaining an administrative, rather than prosecutorial, approach to antitrust enforcement by trying to ensure that the administrative procedure is fair to parties under investigation and produces legally robust decisions.

The UK Government’s proposals in relation to private actions will undoubtedly cause some controversy. While certain of the proposals, such as the introduction of opt-out actions and the rebuttable presumption of a 20% overcharge, have a potential to create immediate effects, many of the less attention-grabbing proposals have the potential to create long-term changes in the way competition litigation is pursued in the UK.

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