

# Client Alert

Antitrust Practice Group

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## Reform of UK Competition Regime – One Step Closer

On 15 March, 2012, almost a year since a public consultation was launched, the UK Department of Business, Innovation and Skills (BIS) announced wide reaching changes to the UK competition regime. The reforms straddle almost every area of competition law, though stops short of the more radical changes that were originally proposed. In particular, the UK's Competition Commission (CC) and the Office of Fair Trading (OFT) will be merged into a single competition authority to be known as the Competition and Markets Authority (CMA) and it will no longer be necessary to prove 'dishonesty' to secure a criminal cartel offence conviction.

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### Background

The March 2011 consultation explained that the key aims of the proposed reforms were to:

- improve the robustness of decisions and strengthen the competition law regime;
- support the competition authorities in taking forward the right cases; and
- improve speed and predictability for business.

BIS noted that "reform should wherever possible reduce the cost to business and the public purse."

### Key reforms

The current reforms, in light of the public consultation, will cover almost every area of UK competition law and include the following:

#### *CMA*

- Creation of a new single body responsible for competition law investigations and enforcement. The CMA will be comprised of two parts – a board charged with strategy, governance and first phase merger and market investigations; and an independent body of experts who will decide on second phase investigations.
- CMA (and sector regulators) will be subject to a "performance framework" to monitor their effectiveness.

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*Comment:* The UK has traditionally had a dual-authority approach to competition law enforcement, with the OFT responsible for the first phase of review and the CC responsible for the second phase. This was largely supported on the basis that the bifurcation of review brings procedural safeguards in terms of a “second pair of eyes” that can scrutinise potentially problematic cases after the initial screen by the first stage authority. While the reforms are expected to bring about efficiencies for business and the CMA itself in having one central enforcement body, concerns have been raised that the merged structure will present concerns for procedural due process. The proposal that the CMA be subject to a performance framework indicates a readiness by government to seek to ensure that the CMA achieves the enhanced performance expected. However, limited evidence has been presented of the anticipated savings in public and private resources.

## *Merger control*

- Retention of voluntary merger control notification and review.
- Enhanced powers of the CMA to unwind mergers that have completed and to suspend implementation where a merger review is ongoing.
- New statutory time limits for all stages in the merger review process.
- Increased merger control fees to a maximum £160,000.

*Comment:* The retention of voluntary merger control will come as a relief to business and was supported by industry and practitioners alike, against calls to introduce a mandatory system. The strengthening of powers to unwind mergers that have completed and to suspend implementation may be seen as a product of the voluntary system which imposes no impediment on the parties to a merger from implementing their transaction prior to regulatory review. However, this may leave the competition authority with more limited ability to restore the *status quo ante* through remedies should it find that a merger gives rise to serious competition concerns.

## *Cartel offence*

- Removal of the ‘dishonesty’ element from the statutory criminal cartel offence introduced by the Enterprise Act 2002. Prosecutors will have to prove only that the individual had “mental elements of intention to enter into an agreement and intention as to the operation of the elements in question.”
- Change in the definition of the cartel offence if the parties have agreed to publish in a suitable form (*i.e.*, in the London Gazette) details of the arrangements prior to their implementation.
- Retention of an administrative approach to investigation and enforcement and rejection of a prosecutorial approach.

*Comment:* The government views the removal of the dishonesty element as a route to improve the rate of cartel offence convictions. It notes that there have been only two cases since the cartel offence was introduced which is considered to reduce the deterrent effect of the offence. However, easing the route to prosecution means that individuals now face criminal charges not by reference to whether their conduct is judged to be ‘dishonest’ but by whether they have acted covertly, which factor will not be present where they have advertised the practice. It may strike many as an odd way to define the parameters of criminal liability, despite the purported definitional clarity this reform may bring.

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## *Antitrust enforcement*

- Enhanced administrative approach to antitrust enforcement involving separation between investigation and decision making.
- Imposition of civil financial penalties on parties for non-compliance of formal requirements during antitrust investigations.
- Removal of the current criminal sanctions for parties failing to comply with formal requirements during antitrust investigations (except in cases involving falsifying and destruction of documents).
- Power for the Secretary of State to introduce statutory time limits for cases.
- Warrants authorising entry to premises by force to be issued to the Competition Appeal Tribunal.
- Enhanced powers to require a person to answer questions in antitrust investigations.

*Comment:* The changes are expected to “modernise the UK’s competition toolkit” by giving the CMA enhanced powers and flexibility. The fact remains that businesses will be subject to more onerous competition law enforcement in the UK. This means that they will need to make a renewed effort to educate employees about the heightened enforcement environment in terms of the types of conduct that will give rise to violation but also the scope for procedural offences and the need to protect the company’s rights of defence.

## *Market investigations*

- Retention of the power to conduct market investigations but subject to strict timelines at the first and second stage.
- Rejection of a proposal to extend the super-complainant mechanism to SME bodies.
- Power for the Secretary of State to request the CMA to investigate public interest issues with competition issues.

*Comment:* The UK has for some time operated a market investigation system which allows the OFT to investigate markets which may not be working effectively and, along with the sector regulators, to refer those markets to the CC for an in-depth investigation. Concerns have been expressed that such investigations, which may be undertaken even where no company is suspected of having infringed competition law, place an enormous burden on company as well as regulatory resources. In particular, a CC investigation may last up to two years. It remains to be seen whether the proposed strict timelines for such investigations will be an effective antidote to such problems.

## *Concurrent application of competition law by sector regulators*

- Retention of separate sector regulators who have concurrent powers with the competition authority to apply competition law.
- A greater role for the competition authority (CMA) in investigations in regulated industries.

*Comment:* The government aims for closer liaison between the CMA and the sector regulators. This is partly motivated by a desire to use the best tools and expertise (whether competition law enforcement or sector regulation) for tackling the underlying issues. Historically, there has not been significant dispute between the competition authorities and the sector regulators over the use of their respective powers and elements of cross-fertilisation

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between both. Going forward, it seems that the new regime is geared to a preference for using competition law powers over sector regulation and with the CMA able to take competition cases from the sector regulators.

## Outlook

Reforms to UK competition law were originally put forward as an attempt to generate efficiencies and reduce regulatory burdens. The system has been praised by international antitrust peers but criticised for being slow and expensive. The time lag since the regime overhaul was proposed and consulted upon last year led many to question whether the original plans might, in fact, be jettisoned. The current proposals are a mixed bag, pushing ahead with some fundamental changes (a new single enforcer and redefinition of the cartel offence) but stopping short of other controversial changes (mandatory merger control).

The proposals are subject to approval by parliament and, if approved, the CMA is expected to be fully operational by April 2014. That milestone is not likely to be the end of the reforms since review of the CMA holds out the prospect of, at least, further tweaking. A more fundamental rethink should not, however, be ruled out depending on whether it delivers the performance improvements expected.

*For further information or to discuss how your business may be affected, please get in touch with UK antitrust partner Suzanne Rab or your usual King & Spalding contact.*

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