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UK Office of Fair Trading and Competition Commission Set Out Their View for Overhaul of UK Competition Regulation

On 14 June 2011 the UK Office of Fair Trading (OFT) and the Competition Commission (CC) each published their formal responses to the UK government's consultation on reforms to the UK competition regime.

The OFT and the CC largely support the government's objective of enhancing the UK's competition regulation through measures which would include merging the CC and the competition responsibilities of the OFT into a single Competition and Markets Authority (CMA). However, they express concerns about some of the more 'radical' government proposals including the introduction of mandatory merger control. The OFT's response outlines its preferred options for reform in relation to the creation of the CMA and reform of the markets, mergers and antitrust investigations procedures, the criminal cartel offence, concurrency of regulatory powers between the OFT and UK sector regulators, and the disclosure of information to overseas authorities. The CC's response focuses on the CMA and the requirement for separation between first and second phase investigations in mergers and market investigations. The consultation and responses raise some important questions. However, one fundamental issue appears not to have been confronted head-on in the consultation, which is the question of whether the range of sweeping reforms actually depends on a merger between the OFT and the CC.

Background

The UK government unveiled its plans for reform of the UK competition regime on 16 March 2011.

The UK competition regime was reformed between 1998 and 2004, yet the consultation has raised concerns about, chiefly:

- difficulties in successfully prosecuting antitrust cases at reasonable cost in reasonable time;
- the current system of voluntary (merger) notification giving rise to problems in dealing with the anti-competitive effects of completed mergers;

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- whether the market investigation regime, with its split between market studies by the OFT and market investigations by the CC, makes the best use of the resources and powers available to the UK competition authorities;

- whether the exercise of competition powers concurrently by the OFT and the UK sector regulators can be improved.

Among the options for reform considered in the consultation are:

- merge the OFT and the CC into a single authority: the Competition and Markets Authority or "CMA";

- introduce a mandatory filing regime for mergers;

- reduce the timescales for market investigations;

- extend the right to make super-complaints in respect of antitrust infringements to include small and medium-sized enterprises (SMEs);

- increase the number of enforcement actions and reform the decision-making process;

- reform of the 'dishonesty' element of the criminal cartel offence to make it easier to secure convictions. Criminal sanctions for individuals involved in so-called 'hard core' cartel activity were introduced in 2003 under section 188 of the Enterprise Act 2002.[1]

The issues raised are not entirely new. However, the central plank of the reform - the merger of the OFT and the CC - is a fundamental institutional change.

OFT response

The OFT largely supports the merger of the OFT and the CC to create a single authority with responsibility for competition policy and enforcement but sets out its views as to the preferred options for reform. The OFT response document is detailed and comprehensive and it is beyond the scope of this comment to address every issue in detail. The OFT's comments on the following aspects of the government proposals are of particular note:

[1] On 11 June 2008, three UK businessmen were sentenced to imprisonment for between two and a half to three years after pleading guilty to committing the cartel offence. The men admitted to dishonestly allocating markets and suppliers, restricting supplies, price-fixing and bid-rigging in relation to the supply of marine hose and ancillary equipment in the UK. In addition, the three men were disqualified as company directors for between five and seven years. This is the first time that convictions were brought under the cartel offence. On 14 November 2008, the UK Court of Appeal reduced the sentences of three years imposed on two of the individuals to 30 months and two years, and the sentence of 30 months imposed on the third individual to 20 months. This reflects the terms of the plea agreements that the individuals reached with the US authorities.

- Creation of the CMA: The OFT comments that it has long supported a merger of the OFT and the CC to create a consolidated authority with responsibility for implementation of competition and consumer policy. It believes that this could lead to enhanced productivity and growth in the UK economy and enhanced consumer welfare.

- Markets regime: The OFT believes that, in order to make the markets regime as effective as possible, the CMA must retain consumer enforcement tools. It considers that the regime should enable the CMA to take an "holistic" approach, enabling it to decide which tools - competition or consumer powers - would be best suited to the job.

- Extension of super-complaints to bodies representing SMEs: The OFT does not support the government proposal that bodies representing SMEs should have the power to make super-complaints on behalf of SMEs. Such "super-complaints" made by designated consumer bodies are an exception to the regulators' current discretion when dealing with a complaint since there is an obligation to respond within 90 days. The OFT believes that the extension of the super-complaints regime could chill competition by allowing smaller businesses to challenge commercial practices which might be efficiency-enhancing.

- Mergers: In general, the OFT considers that the current voluntary merger notification system provides a balance between the need to address anti-competitive mergers and the burdens on businesses and taxpayers arising from merger control. Since the OFT views the current system to be working well, it is not supportive of a radical shake-up but does believe that incremental changes would be beneficial.

    - Mandatory notification: The OFT raises concerns about the introduction of a mandatory notification regime. It considers that this could present an increased burden on public and business resources and that the case for such a mandatory system is not established. Generally, the OFT believes that a 'hybrid' model would be preferable to a mandatory system. This would involve mandatory notification of mergers above a certain threshold (coupled with an obligation to suspend the merger prior to clearance) and a voluntary system for mergers below the threshold.

    - Exemption for small mergers in mandatory and voluntary regime: The OFT is of the view that a discretionary exception to the duty to refer a merger for a second stage investigation is less predictable than fixed thresholds. It therefore has no objection to replacing the current *de minimis* exception to the duty to refer with an exemption for transactions involving small businesses based on defined thresholds.

- Criminal cartel offence: The OFT maintains its belief that the criminal cartel offence is an important component of the UK competition regime. It believes that, in order for this to be most effective, the offence must be clearly defined so that individuals know when conduct may be treated as criminal. The OFT supports the government proposal to remove the requirement to prove dishonesty on the part of defendants. The OFT believes that 'openly' made agreements should not be subject to criminal liability but notes that such agreements could still form the basis for an infringement of the Competition Act 1998. It believes that a revised cartel offence would not provide a loophole to avoid civil liability for infringements that did not amount to 'hardcore' cartel conduct.

- Concurrency: The OFT raises concerns about the operation of the current concurrency regime. It considers that this tends to lead to duplication and fragmentation in the roles of the UK competition and sector regulators and, in some instances, an "enforcement gap" arising from the OFT having a limited role in practice in competition law enforcement in the regulated sectors. It considers that a combination of options for strengthening the primacy of competition law over sector regulation and giving the CMA a stronger role in regulated industries would be the best option.

- Overseas information: Currently when the OFT proposes to disclose information to an overseas authority it has to have regard to certain considerations. This means that it has to conduct an assessment in individual cases of the safeguards that exist in the overseas jurisdiction for the handling of the disclosed information. It must also consider whether the disclosure might harm the legitimate business interests of the undertaking or the interests of the individual to which the information relates. In the OFT's experience, this procedure can be lengthy and resource-intensive (both for the OFT and the overseas authority). The OFT therefore considers that amendments could be made to legislation to allow an up-front assessment of which jurisdictions have sufficient legal safeguards. This would obviate the need to conduct a full assessment of the relevant statutory disclosure conditions each time a disclosure is to be made. It also considers that there is scope for streamlining the obligation to have regard to the business interests or individual interests of the undertaking or individual to which the information relates.

CC response

The CC states that it "wholeheartedly" supports the government's aim of enhancing what it describes as "the world class calibre of the UK's competition regime." The CC believes that a merged competition authority with a clear focus on competition issues can:

- bring increased clarity and authority to competition policy and advocacy;

- deploy skilled staff flexibly across the full range of competition tools; and

- streamline and speed up processes to reduce burdens on business.

However, the CC sanctions caution and says that the merger must preserve the characteristics of the existing system that have given it its "high reputation and credibility" with business in particular:

- clear separation between phase 1 screening of cases (including case selection) and thorough and objective phase 2 investigation and decision-making;

- use of panels of independent expert members to conduct the phase 2 investigation; and

- fair and transparent processes governed by statutory timescales.

Together, these features are considered by the CC to ensure that the most important issues get the appropriate level of scrutiny and that the decisions of the authority are based on the evidence in each case, on sound economic analysis and on processes that withstand challenge.

Comment and next steps

At 124 pages (excluding appendices) the consultation was much wider ranging than originally contemplated-spanning mergers, cartels, antitrust and market investigations. Business will welcome some of the reforms, particularly the tighter timeframes in competition investigations. However, reactions to the original consultation were mixed and the publication of the OFT's and the CC's views, while generally approving the need for improvements, urge caution.

The merger of the CC and the OFT is at the core of the proposals. Views have been muted on the scope for efficiencies, not least since the static cost savings from combining the authorities appear relatively limited.[2] It is important that the combination of functions under one super-competition authority, with responsibility for first and second stage investigations, does not compromise independence in decision-making in a second phase investigation, which provides the opportunity for a deeper "second look" review in more difficult cases.

The proposal for mandatory merger notification has met a lukewarm response. The motivation behind this change is to seek to ensure that potentially anti-competitive mergers do not escape review. However, a fine balance will need to be struck to ensure that the potential savings that are sought through the merger of the two authorities are not, in fact, cannibalised through an increasing docket of cases. The UK has had a voluntary system of merger notification for many years and has built up experience and expertise in obtaining market intelligence around mergers which fall within its jurisdiction. As a matter of practice, it is typical for parties involved in mergers which raise competition issues to pre-notify their merger to the OFT in order to obtain upfront legal certainty.[3]

The government proposes amendments to the cartel regime. The unsuccessful prosecution in the criminal cartel case against British Airways executives in 2010 has led many to call for reforms to the system. Amongst the proposals is the abandonment of the dishonesty requirement in favour of a requirement to show that the offence was committed in secret. While there is expressed concern amongst business that the existing system is lacking in robustness and agility in decision-making, there is not universal support for the scope of reform. For example, while the removal of the dishonesty requirement may make it easier to secure convictions this would alter the basis and ambit of the offence.

The consultation closed on 13 June and the government will consider responses over the months to come. Most observers (from regulators, lawyers and businesses) agree that there is scope for improvements in the system. In this period of hiatus, is the merger of the OFT and the CC and the extent of reform necessarily a *fait accompli*? It remains to be seen how far reaching the changes will be in practice. Few would argue that the *status quo* cannot be improved. However, before refining the detail of the individual proposals a closer examination of (or at least visibility on) the costs and benefits of the OFT and CC merger and, in particular, whether achievement of the individual reforms hinges on that institutional change, may provide a sounder basis for moving forward. It is to be recalled that the UK is certainly not

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2 Estimates of savings of around GBP 1.3 million have been quoted publicly.

3 The OFT may refer a merger falling within its jurisdiction to the CC for a fuller review within four months of completion or material facts becoming known to the OFT, whichever is later.

starting out from scratch in the development of a world class competition regime. It is therefore important that the recognised benefits the UK system - some in part deriving from the two tier structure - are not sacrificed in any consolidated super-authority. Or, to put it another way, that the 'baby' of procedural safeguard is not thrown out with the 'bathwater' of institutional change.