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A legal update from Dechert's Antitrust/Competition Group

New UK Competition and Markets Authority: What's in a Name?

Key Points

As of 2014, there will be one national Competition and Markets Authority.

Merger Control

- The UK merger control regime will remain voluntary.
- The operations of the Office of Fair Trading and Competition Commission will be merged under the Competition and Markets Authority.
- It is yet to be determined whether the case team will remain the same in both between Phase One and Phase Two investigations.
- Decision makers will remain separate for Phase One and Phase Two investigations.

Cartels

- To improve enforceability and levels of prosecution the "dishonesty element" will be removed from the offence.
- A new safe harbour will be introduced providing protection to companies if they publish in the London Gazette (or a similar publication) business arrangements before they are implemented. A limited disclosure to customers of arrangements which could fall foul of competition law, but which have other countervailing benefits may also trigger the availability of the safe harbour.

Summary

On 16 March 2011, the UK government's Department for Business, Innovation and Skills (BIS) launched a consultation proposing a number of reforms to the UK competition regime. After considering the responses on its proposals from interested stakeholders, the BIS released its final response on 15 March 2012. In a retreat from a wide array of changes proposed in the initial consultation, the number of changes actually endorsed is relatively limited. This *DechertOnPoint* focuses on the following significant changes:

- Procedural updates to the UK merger control system;
- The merging of the existing UK competition authorities to create one single over-arching body: the Competition and Markets Authority (CMA); and
- Amendments to the criminal cartel offence to increase the prospect of successful prosecution.

The Consultation

The consultation was part of the UK government's plan to support and encourage economic growth by overhauling and strengthening the UK competition regime to eliminate inefficiencies and make the regime more predictable for businesses.

The government received 115 responses from organisations including SMEs and large enterprises, representative organisations, Government organisations, legal and academic bodies and other interested parties on different aspects of the proposed amendments.

Merger Control Updates

The Current System

In the UK, the current merger control regime is voluntary. This means that even if the relevant jurisdictional thresholds are met, it is not mandatory to notify the transaction to the UK

competition authorities. The jurisdictional thresholds for notification in the UK consist of two alternative tests:

- Share of supply: the merger would create or enhance a 25% share of any market in the UK; or
- Turnover: the target's turnover is over GBP 70 million in the UK.

If either threshold is met, parties to a transaction should consider whether it is necessary to notify the transaction to the UK authorities in light of the substantive issues raised by the transaction and/or of the desire for legal certainty. These thresholds will not change.

As the regime is voluntary, parties are free to close the transaction prior to obtaining regulatory clearance. This is in contrast to the other 26 European Member States and the majority of other competition regimes around the world, which have mandatory and suspensive regimes. In most countries, if the jurisdictional thresholds are met, the transaction must be notified and cannot close before regulatory clearance is obtained.

In practice, a large number of transactions are notified by parties to the UK authorities to gain legal certainty. This is because if the transaction is not notified, the UK's Office of Fair Trading (OFT) has the power to launch a review of the deal up to four months after closing becomes public. In these circumstances, the OFT will normally request that businesses cease further integration through "hold-separate undertakings". If businesses do not agree to cease integration, the OFT can seek enforcement of these hold-separate arrangements through the courts.

One of the options put forward under the consultation was to make the UK merger control regime mandatory and suspensive under the consultation. This was unpopular with respondents who argued that there was insufficient evidence to justify a fundamental change to the mergers regime. Additionally, any type of mandatory notification would significantly increase costs to both business and the competition authorities and would go against the Government's objectives of promoting growth and reducing regulation. A mandatory regime was therefore not adopted by the BIS in its response and the merger regime will remain voluntary. However, the CMA will have the new authority to order that parties enter into hold-separate arrangements while it conducts its review, without the need to go to court. The CMA will additionally have the power to impose a maximum penalty of up to 5% of aggregate group worldwide turnover of each enterprise should companies continue with integration measures in breach of a CMA order.

The Review Process

Currently in the UK there are two main bodies concerned with regulating merger transactions: the OFT and the Competition Commission (CC).

The OFT is the body which currently deals with all mergers in the first instance — "Phase One" investigation. If, following the OFT's initial assessment, it considers that a merger is likely to cause a "substantial lessening of competition" in the UK, the OFT is obliged to refer the case to the CC for review — "Phase Two" investigation. The CC then performs a second, independent review on the transaction, before giving a final decision as to whether the transaction will be cleared without restriction, cleared with restrictions (e.g. remedies such as divestiture) or blocked (the latter is very rare in practice).

Unlike the process used by the European Commission, where the case team (i.e. the team of Commission lawyers and economists that conduct the case investigation and make the enforcement decisions) remains the same in both Phase One and Phase Two, the UK's use of two separate authorities is intended to provide a system of checks and balances. This separation of powers means there is less likelihood of so-called 'confirmation bias', whereby the same decision makers may seek unjustifiably to affirm the existence of issues identified at Phase One during a Phase Two investigation. A key drawback of having two separate authorities for Phase One and Phase Two inquiries is that businesses are required to spend extra time and money educating two separate authorities.

The New Competition and Markets Authority: What's in a Name?

In order to increase the efficiency of the competition regime, the functions currently being performed by the OFT and the CC in isolation, will be transferred to a single body — the CMA.

Practical Implications: Case Teams

Under the current system, the case teams conducting the Phase One and Phase Two reviews are different. It has been left for the CMA to establish its own principles as to whether case teams will now be uniform and continue from Phase

One to Phase Two or whether they will remain separate. It seems likely that increased efficiency will only be achieved if the CMA decides that the same case team will be used throughout. If this option is chosen, it will no longer be necessary to educate two separate teams about the transaction, which should create efficiencies and save time.

If the CMA decides to continue using separate case teams for Phase One and Phase Two, as under the current system, it is difficult to envisage how significant efficiency gains or time saving will be achieved in the review process.

New Decision Making Structure

The CMA will be split into the CMA Board and independent Panels.

Phase One Decision Maker: CMA Board

The CMA Board will be comprised of a Chief Executive Officer, Non Executive Chair, executives and non-executives. Like the current OFT, the CMA Board will be responsible for Phase One decisions and overall strategy, performance, rules and guidance on the process.

Phase Two Decision Maker: Independent Panels

These independent Panels will take over the function currently being performed by the CC and be responsible for Phase Two merger and market decisions and regulatory appeals. A mix of full and part-time individuals appointed by the Secretary of State will form a pool of panelists. Each Panel will be comprised of a number of relevant independent experts, taken from the pool, who will then investigate and report on a specific inquiry.

The use of separate decision makers for each phase is in effect a continuation of the existing UK merger process and should help to ensure that there remain sufficient checks and balances to protect the parties from 'confirmation bias'. However, as previously pointed out, if there is no uniformity of case team the reforms simply continue the status quo under a new name. In other words, it is difficult to pinpoint at this stage how exactly the reforms increase efficiency. Moreover, the current time limits of 40 working days for Phase One decisions and 24 weeks for Phase Two decisions will remain in place (although both will become statutory), which is not indicative of a more efficient and streamlined process.

Appeal

Currently, any party (including interested third parties) aggrieved by an OFT or CC decision may appeal to the Competition Appeal Tribunal (CAT) for a judicial review of the decision.

All CMA decisions will remain subject to a possible full merits appeal to the CAT.

Undertakings in Lieu of Referral to the CC

Currently the OFT cannot accept undertakings, aimed at mitigating any competition issues in lieu of a referral to the CC prior to deciding to refer the transaction for Phase Two review. There is currently no formal timetable for offering undertakings.

Subsequent to the consultation, following a Phase One decision the parties will now have a maximum of 90 working days in total to offer and agree with the CMA undertakings in lieu of referral to Phase Two. This means that the parties can offer acceptable remedies or amendments to the terms of the transaction to the CMA, so that the transaction will be cleared at the end of Phase One without having to spend time and costs progressing to a Phase Two investigation.

Fees

At the moment the merger fees payable range from £30,000 to £90,000, depending on the type and size of the acquisition.

These fees will now be based on the UK turnover of the enterprise being acquired and will be increased to range from £40,000 to £160,000.

Cartels

Current System

Unlike the EU, the UK has a criminal cartel offence which was introduced in 2003 by the Enterprise Act. The offence states that "*an individual is guilty ... if he dishonestly agrees with one or more other persons to make or implement [prohibited] arrangements [e.g. price fixing] ... relating to at least two undertakings*". To date there have only been two prosecutions under the offence. One of these prosecutions was settled by means of a plea arrangement, the other was unsuccessful due to procedural irregularities.[1] This

[1] R v Whittle and others [2008] EWCA Crim 2560, R v G and others [2010] EWCA Crim 1148.

very modest record of enforcement may be explained at least in part by the difficulty in proving the "dishonesty" element, as it is necessary to show that the offender had knowledge that he was committing a crime in breach of competition law.

Update

Following the consultation, the "dishonesty" element will be removed from the offence in order to improve enforceability, increase the number of prosecutions, and enhance its deterrent effect. Proof of intent, i.e. that the individual knew that he was entering into the agreement and knew of its operation, will still be required, but not that he knew it was illegal and dishonest.

It is intended that a safe harbour be introduced if companies make customers aware of business arrangements being entered into, i.e. where they have been published in the London Gazette (or similar publication) before they are implemented. It is not necessary for legitimate arrangements to be published, but where parts of an arrangement fall within the scope of the amended offence, whilst still presenting certain countervailing benefits, a company will now be required to disclose the offending provisions. Other non-offending provisions may be kept confidential.

This new "safe harbour approach" seems somewhat burdensome on companies. The changes necessarily require that businesses must undertake an analysis to determine whether an agreement it enters into may fall under the remit of competition laws. This is not in itself a bad thing, but practically speaking it puts companies into the position of needing to make an evaluation of the risks and rewards of such notification, which may require serious consideration in close cases.

Possible Alternative

An alternative would have been to adopt a US style criminal cartel offence. In the US, certain agreements constitute *per se* violations (because they contain no redeeming features which are pro-competitive) and it is these agreements which fall within the scope of the offence. Per se violations are generally agreements amongst competitors to restrict competition with respect to prices, output, customers or geographic markets. In the US, cartel law is judge made, and the scope of the US offence is established and developed by case law, rather than through an exhaustive list drafted by legislators.

The US system has been successfully implemented and is serving its purpose in deterring cartel behaviour, with numerous successful prosecutions.

It remains to be seen whether the changes made to the UK criminal cartel offence will be as successful.

Next Steps

Where changes in primary legislation are needed, such as the creation of the CMA, the government intends to have the relevant measures passed and operational by April 2014. The remaining measures will be implemented gradually.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/antitrust.

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