Kluwer Competition Law Blog

Bonfire of the quangos – a burning desire to reform the UK competition regime

Simon Pritchard (Allen & Overy LLP) · Friday, October 29th, 2010

UK competition rules and enforcement infrastructure

When it comes to competition law enforcement, does the UK pursue a different path to its European counterparts? Well, it is British tradition to favour a *common sense* approach and we have been known to criticise the *arcane bureaucracy* of certain supra-national institutions. These preferences will surely be revealed in the infrastructure of modern UK competition law enforcement. After all, it's all still a reasonably new regime: the relevant legislation came into force in 2000 and 2003.

Indeed, *mes amies*, it is all very simple.

First, there is the Office of Fair Trading (OFT). The OFT is the authority generally designated to apply Articles 101 (anti-competitive agreements) and 102 TFEU (abuse of dominance) in the UK and is the chief enforcer of their domestic equivalents, i.e. Chapters I and II of the Competition Act 1998 (CA98).

But there are of course other antitrust law enforcers. Due to "concurrency" provisions, alongside the OFT are the sectoral regulators empowered to apply the relevant EU and UK law powers in their appropriate industry sectors, such as Ofcom (media and communications), Ofgem (energy), Oftwat (water), and the Office of the Rail Regulator, for example. So it's perhaps a 5-player market.

Merger control is more concentrated: we are back to one institution, the OFT. It conducts merger control across all sectors of the economy. Well, that's to say it does Phase I merger control. The Competition Commission (CC) is actually the one that does Phase II merger control. So merger control is more like a two-player market. Well, perhaps an upstream monopoly and a downstream monopoly.

Did I say two players? Sure. Mainly. That said, where a merger raises public interest issues such as media plurality, national security or — more recently — stability of the financial system, the relevant Secretary of State (SoS) can issue a public interest intervention notice and makes the final call on the merger. Such as in *Lloyds/HBOS* (SoS decides financial stability trumps competition concerns; no reference) or *BSkyB/ITV* (SoS decides media plurality is an additional reason to refer the case to the CC, alongside competition concerns; CC finds a competition but not a plurality

problem).

In a case referred by the SoS, the CC reports back to the SoS once it is done, rather than make the final decision on remedies itself. So the administrative process stage in a CC reference case (putting aside later appeals) is: OFT – SoS – CC – SoS. A slight complication: the reporting body to the SoS on the media plurality issues (as distinct from the competition issues) is of course Ofcom, not the OFT, so that part of it is Ofcom – SoS – CC – SoS. (For financial stability, it was the tripartite authorities – the Financial Services Authority, HM Treasury and the Bank of England – reporting to the SoS on this issue, alongside the OFT on competition issues.)

Still, the CC does enjoy a sort of bona fide monopoly on market investigation references (MIRs). The MIR regime has no direct equivalent, at least at EU level. Broadly speaking, it is typically a 24-month version of an EU sectoral inquiry conducted by the CC on referral from the OFT (or a sectoral regulator) but with the potential for the endgame to result in the imposition of behavioural and/or structural remedies to cure an "adverse effect on competition" even in the absence of a CA98 infringement by one or more industry players (indeed, the legislative logic of MIRs is to fill an enforcement tool gap that CA98 does not touch, rather than to generate CA98 cases ex post, as EU sectoral inquiries are designed to do). The OFT has the power to accept undertakings in lieu of making an MIR to the CC but has not done so to date (unlike in merger control, where it often does accept Phase I remedies, a.k.a. undertakings in lieu of a merger reference).

The various institutions are supervised by a specialist tribunal, the Competition Appeal Tribunal (the CAT). The CAT can hear CA98 appeals on a full-merits review — and has overturned and substituted its own judgment for that of the OFT, for example, in some cases. The CAT can also hear merger and MIR appeals, but according to principles of judicial review, broadly similar to the principles applied by the Court of First Instance (now General Court) in Luxembourg in respect of European Commission decisions. The CAT has had a solid record on overturning the OFT on CA98 decisions and on early OFT decisions not to refer mergers to the CC, and on overturning CC decisions in respect of Phase II merger control and MIR remedies and remitting them to the CC: that would be OFT – CC – CAT – CC. No undue judicial deference to the administrative agencies here (though both the OFT and CC have had their successes at the CAT too).

Still, would you believe that even the purpose-built CAT is not a one-stop-shop for judicial control of (non-merger, non-MIR) antitrust cases? No, it needs an infringement/fining decision on the CA98/TFEU side to gain jurisdiction, so cartel damages claims that are litigated before an infringement decision has been issued have to go through the High Court, and so do various types of challenges to OFT procedure or acts that are not a CA98 infringment or fining decision.

The most striking example of institutional pinball, however, is not even the OFT/Ofcom- SoS – CC – SoS case in a public interest merger case (which to date has only happened once, although it then went on appeal, so it was OFT/Ofcom – SoS – CC – SoS – CAT – Court of Appeal; as the CC/SoS won in the Court of Appeal there was no more pinball back to the SoS). No, it is telecommunications pricing determination cases that take the cake, not least because there are so many more of them than public interest intervention merger cases. Unique to this regulated sector, these decisions involve a first tier determination by Ofcom, followed by an appeal to the CAT, who is obliged to refer price control issues to the CC, and then final judicial review to the CAT. There have been nearly 40 such Ofcom – CAT – CC – CAT – (Ofcom) cases since the Communications Act 2003 came into force.

Simple and streamlined, huh? To top that off, with so many cooks that are — or could be — in the antitrust kitchen, there are many who cry there is not enough coming out of the kitchen, or it takes way too long (or of course, for those on the receiving end of an investigation, it doesn't taste very good when the food does arrive). It would appear to be a recipe for change, not least when the new Coalition Government, in its effort to reduce the budget deficit, has taken the torch to many (non-"Whitehall" non-ministerial) British institutions in what has become known as "the bonfire of the quangos". (Quango: *derogatory (Br).* – a **qu**asi-**n**on-**g**overnmental **o**rganisation.)

Secretary of State announcements on reform

Important announcements on regime reform have been made this month by the UK government:

Merger of the OFT and CC into a single competition authority and transfer of consumer enforcement

On 14 October, Vince Cable, the SoS for Business, Innovation and Skills announced

— the combination of the OFT and CC into a "single competition and market authority" responsible for merger control, market investigations, cartel and antitrust cases, as well as number of functions with respect to regulated utilities;

— that consumer enforcement currently handled by the OFT would not be folded into the merged authority but instead transferred — or devolved — to the Citizens Advice service and local authority trading standard authorities

http://www.bis.gov.uk/news/topstories/2010/Oct/BIS-Partner-bodies-streamlined

The OFT's public response to the announcement can be found here:

http://www.oft.gov.uk/news-and-updates/press/2010/107-10

Strengthened antitrust enforcement and market investigations and possible compulsory merger regime

On 25 October, the SoS gave a speech to the Confederation of British Industry which in relevant part was as follows:

"And the UK's competition regime is regarded as one of the best in the world – particularly because of its independence and the transparency of decision making … But there is scope for improvement. In particular, there are difficulties in successfully prosecuting anti-trust cases and a paucity of market investigation cases. I would also like to question whether our current system of sector-specific regulation is ideal, or could we achieve something better through cross sector regulation.

A system that is too slow imposes unacceptable costs on the regulated, and is an insufficient deterrent for would-be abusers of a dominant position. Competition Act cases have taken on average three and a half years between the investigation to a final decision. This is too slow – hardly the "efficient and timely processes" that the CBI has called for.

I also want to ask if we are making enough investigations. Our rate of three or four a year looks odd compared to 15 in France and even more in Germany.

In the New Year, the Government will consult on proposals to deliver more streamlined and consistent processes – including bringing the Competition Commission and the competition functions of the Office of Fair Trading together to form a single competition authority, which I hope will be more proactive in addressing problems."

Later, on the subject of merger control, the SoS said

"We will seek to go further: for example, by looking at requiring the pre-notification of mergers to bolster the ability of the competition authorities to preserve competition"

and in so doing for the first time also introduces the proposition that with institutional reform may come a compulsory merger regime (with pre-notification obligations and suspensive effect) familiar to EU circles and the vast majority of the world's 60+ merger control jurisdictions, rather than the "voluntary" regime applicable in the UK, Australia and New Zealand.

The full text of the speech is available here

&http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=416169&NewsAreaID=2

I will provide commentary in a forthcoming post.

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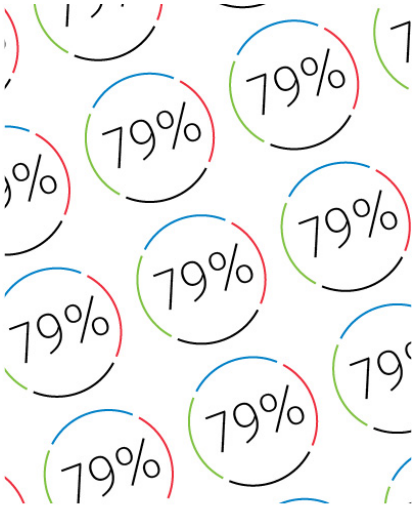

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