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Reform of the U.K. Competition Regime

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In March 2011, the U.K. Government Department for Business, Innovation and Skills ("*BIS*") consulted on proposed reforms to the U.K. competition regime. The objectives were lofty ("improving the robustness of decisions," "supporting the competition authorities in taking forward high impact cases," and "improving speed and predictability for businesses") and the proposals in part structural (most notably to merge the OFT and CC). Naturally, the consultation generated a great deal of interest and was used as a platform to move forward various raging debates (e.g., the appropriateness of an antitrust agency as investigatory, prosecutor, and decision maker). Last week, BIS issued its response outlining the decisions that the Government intends to progress (the "*Response*"). Understandably the media and press attention has focused on the merger of the OFT and CC and on the change to the standard for prosecuting the criminal cartel offence. Those aspects clearly merit attention but, as explained below, there is also some devil in the detail elsewhere.

I. THE CMA

The Response details BIS's decision to create a new CMA and transfer the functions of the CC and the competition functions of the OFT to it. According to the Response, the benefits of this merger are "(1) greater coherence in competition practice and a more streamlined approach in decision making…, (2) more flexibility in resource utilisation to address the most important competition problems of the day and better incentives for sector regulators to use antitrust and markets tools to deal with competition problems, (3) faster, less burdensome processes for business, (4) a single strong centre of competition expertise, which can provide leadership for the sector regulators on competition enforcement and a single authoritative voice for the UK internationally; and (5) increased accountability and transparency in public bodies and lead to savings in corporate governance and back office costs."

Critically, however, BIS has not decided to change the way in which the CC and OFT have traditionally made decisions (e.g., Phase I decisions will continue to be made under a "Board structure" whereas Phase II decisions will be made by a panel), and so cases will continue to benefit from a "fresh pair of eyes" at Phase II. In addition, the timetables proposed in the Response are, in some cases, markedly longer than the current regime (see below in relation to the Mergers Regime) and new measures designed to provide transparency (i.e., over and above the OFT's recent initiative to improve the transparency of its Competition Act investigations) are not proposed. Accordingly, it is not immediately apparent how and why the merger will provide "greater coherence," a more "streamlined approach in decision making", "faster, less burdensome

processes for business," or "increased accountability and transparency."

Accordingly, it seems that any benefits that the merger may bring would need to fall under different headings (e.g., "more flexibility in resource allocation," a single British advocate for competition matters, and "savings in corporate governance and back office costs"). The focus on cost-saving is interesting given that, all else equal, a well functioning competition regime is capable of generating significant revenue for the Government. In addition, it is by no means clear that the case for cost savings has been shown given the (potentially significant) costs associated with merging the two bodies, each of which has a different structure and different personality. Indeed the Response itself admits that the "creation of the CMA is not expected to result in savings over and above those which need to be achieved as a result of the Spending Review, but will facilitate these." In these circumstances, the case for establishing the CMA is perhaps less than compelling and it is curious that BIS did not progress, or give significant attention to, the proposal to merge the sectoral regulators (Ofcom, Ofgem, Ofwat etc.) into the CMA.

The rationale for a merger may not be readily apparent but there seems to be political will to see it though regardless. Given the current differences between the OFT and CC (both in governance structure and in personality), a successful merger will depend on a number of factors, including the choice of Chairman and CEO. Strong leadership and a clear, workable, and effective governance structure should improve the prospects of creating a strong CMA but it is by no means plain sailing.

II. CRIMINAL CARTEL REGIME

The most significant and controversial, decision in the Response is BIS's decision to remove the "dishonesty" element from the cartel offence and define the offence so that it does not include cartel agreements that the parties publish in a suitable format before implementation. Although certain exceptions will exist (none of which will likely apply to hardcore cartel agreements), the reform significantly diminishes the standard for the cartel offence. The drivers for this change seems to be the fact that the *Ghosh* dishonesty standard is difficult to prosecute (there have been only two cases prosecuted since 2003), and, as a result, the cartel offence is argued not to have sufficient deterrent effect. BIS considers the move to a lesser standard to be consistent with the definition of other economic crimes, such as insider trading, and that it will not open the floodgates because the offence still requires *mens rea*. The decision is worrying for a number of reasons:

First, the decision as to the standard to apply to the criminal cartel offence was not determined by reference to the mischief that the Government is trying to prevent (i.e., hardcore cartel behavior) but by reference to the difficulties associated with prosecution and the number of successful convictions. Indeed, disturbingly, the analysis seems to have been conducted by reference to how many people the Government had expected to imprison and not by reference to the specific conduct to be deterred ("While levels of prosecution were never expected to be high, they were *certainly expected to be higher than they have been to date*.") Difficulty of prosecution is not a basis for expanding the scope of activities that are considered criminal behavior. This is particularly so where, as here, the offence is intended to apply to mid-level executives who may not be privy to the full commercial impact of their actions.

Second, the idea that conduct should not be forbidden where the existence of an agreement is published in advance is fraught with legal and practical difficulty. For example, there is no clarity on what type of agreements should be published (in particular because the law on "agreements" for

the purposes of Chapter I Competition Act 1998 is not mature), what level of detail would be sufficient, or who should publish them (given that the cartel offence is a personal offence and the agreement is entered into by the company). Indeed, the significance of the consequences and legal/practical uncertainties may lead companies to publish many agreements out of an abundance of caution. Such notifications have serious implications on the ability of businesses to negotiate confidentially perfectly legal agreements, such as mergers and joint R&D agreements, and might also put British businesses at a disadvantage when compared to other jurisdictions.

Third, even if "difficulty in prosecution" is a relevant consideration for the reform of the standard for the cartel offence, the fact that the newly proposed standard is "consistent with" the standard for insider trading does not mean that the regime will be any more effective. Insider trading prosecutions in the UK remain rare and the manner of prosecution is also still the subject of much criticism. In addition, a standard less than dishonesty may not be appropriate for cases where the customer assists in the *actus reus*.

Fourth, the approach of requiring companies to publish their agreements in the London Gazette (or similar publication) might also have negative consequences for damages claims based on cartel behavior, as one might argue that the relevant limitation period runs from the date the agreement was published. If that is the case, a number of possible claims will potentially be time-barred, especially if the claimant wishes to wait to gain the benefit of a competition authority's decision as regards liability.

The analysis of the proposed reform of the cartel offence betrays a lack of critical examination. At worst, the proposal represents a worrying desire to imprison sufficient individuals to have a deterrent effect without due focus on the conduct that those individuals engaged in. At best, and at the very least, the proposal gives rise to more fundamental questions than it answers.

III. THE MERGERS REGIME

In the Consultation, BIS stated its view that the principal perceived failures of the Mergers Regime were that (1) the voluntary nature of notifications could mean that it was more difficult to apply remedies in completed transactions (the so-called "unscrambling the eggs" problem), (2) certain potentially anticompetitive mergers were escaping review, and (3) the merger process was not streamlined. BIS, therefore, proposed to consider whether another type of regime (e.g., a mandatory or hybrid mandatory/voluntary notification system) or amendments to the jurisdictional thresholds and process were necessary or appropriate. Each of these aspects is dealt with in turn:

Voluntary Regime. BIS has decided to maintain the voluntary regime, albeit with some amendments (e.g., statutory time limits for all aspects of the merger review process, statutory information gathering powers, statutory power to suspend and reverse integration steps, and to impose fine for failing to comply with hold separate requirements). The proposals neatly compromise the need to have a strong mergers regime capable of enforcing effective remedies with the ostensibly strong desire from the business and legal community to maintain a voluntary regime. Provided that the principles are properly implemented, it seems possible to achieve the objective of a *de facto* suspensory period while a review is being conducted. That said, some important questions nevertheless remain. For example, it remains to be seen when and how the CMA will apply these powers. Blanket application in all cases risks unnecessarily decelerating the pace of pro-competitive mergers. Accordingly, targeted use on a case by case basis (e.g., where the CMA has reasonable grounds to believe that the transaction may have an anti-competitive impact) would

seem more proportionate and achieve the legitimate aims.

Jurisdictional Thresholds. Given the decision to maintain a voluntary regime, the Response proposes to maintain the current jurisdictional thresholds and not empower the CMA to have jurisdiction over all mergers save those that are exempted by a small mergers exemption. Whilst the decision not to grant the CMA jurisdiction over all mergers is to be welcomed, the fact that BIS chose not to analyze in any detail the issue of whether the current jurisdictional thresholds remain appropriate (i.e., whether they allow the CMA to have jurisdiction over the right types of cases) is a missed opportunity. When considering the reforms, BIS's objective seems to have been to examine whether a mandatory regime would have the "same scope" as the current voluntary regime but this ignores entirely the question of whether the current scope is appropriate. Accordingly, as is the case today, the scope of review will be left, in large part, to the CMA and the risk that potentially anticompetitive mergers progress without review remains real.

Timetable. BIS proposes to introduce statutory time limits to the review process: 40 working days for Phase I capable of extension where information is outstanding; 24 weeks for Phase II, extendable by 8 additional weeks; and a total of 50 working days from Decision to finalize remedies. The statutory Phase I review period will now be one of the longest in the world. By way of example, the European Commission has 35 working days to consider a merger (including proposed remedies) and adopt a decision. The equivalent period for the OFT is up to 90 working days (though a Decision would be rendered on working day 50). In addition, given that notification by way of a Statutory Merger Notice (which had a shorter review period) will no longer be available, parties will not have the option to expedite a review. Accordingly, perhaps despite the good intentions (e.g., BIS was concerned to ensure that the availability of remedies did not adversely affect the CMA's decision of whether a merger is anticompetitive), it is difficult to see how BIS's decision streamlines the process.

IV. ANTITRUST REGIME

The Response considers carefully perceived failings of the Antitrust Regime (notably the low number of cases and unsuccessful prosecutions, the duration of the investigations, and the fact that the OFT is currently the investigator, prosecutor, and decision maker). The focus is likely to be, in large part, as a result of the submissions of a number of respondents who addressed this issue and because of the active debate on this topic that exists at the EU level. BIS has decided, however, not to amend the current structure of the regime (e.g., not to move to a prosecutorial model or to amend the internal structure of decision making) principally because the OFT's recent *Competition Act Procedures Guidance* adopts steps designed to quell concerns (e.g., the Guidance proposes changes to the decision making to avoid confirmation bias).

Although the OFT's Guidance is unquestionably a step forward, concerns remain because the procedures themselves remain largely untested. BIS seems to have recognized this by requiring the OFT to consider further how it might ensure procedural fairness, expand the role of the Procedural Adjudicator, enhance "independence of mind," and improve its project management capabilities. In addition, BIS intends to adopt legislative measures to enhance the Antitrust Regime (e.g., introduce a statutory time limit for investigations, require a separate decision maker from the person responsible for the investigation, require the use of adjudication panelists in antitrust cases, require the Secretary of State to review the operation of the Antitrust Regime within 5 years, and ensure that financial penalties imposed should reflect the seriousness of the infringement and specific and general deterrence).

The proposed amendments to the Antitrust Regime demonstrate that, at the very least, the U.K. Government and its antitrust agencies are alive to the drawbacks of the current model whereby the OFT is investigator, prosecutor, and decision maker (e.g., the potential for confirmation bias to impact the robustness of decisions). Although BIS stopped short of a structural change such as moving to a prosecutorial model, the ongoing review requirements suggest that this issue will still be considered closely in the future.

V. THE MARKETS REGIME

The Response seeks to address complaints that the Markets Regime is too complicated, duplicative, lengthy, and disjointed. In order to address these concerns, BIS intends to introduce statutory time limits and confer information gathering powers upon the CMA (with civil penalties for failure to comply) at the market study phase before a reference is made, creating a formal Phase I. It will also afford the CMA some flexibility in the manner in which investigations are conducted (e.g., an ability to investigate across markets and to consider public interest issues alongside competition issues). In addition, the CMA will be empowered to require companies to appoint a trustee to monitor and arbitrate the implementation of any remedies imposed and to publish certain "non-price" information.

The bolstering of the CMA's powers in the Markets Regime may reveal an intention to use market investigations more often than is currently the case. The more formalized structures should function to make the procedures more transparent but given that the proposed statutory timetable could mean that investigations last nearly 4 years (including extensions), the prospects of a faster and cheaper process are less than secure. It will be key, therefore, to ensure that the focus of any investigations is well directed (i.e., that the market(s) selected for investigation are truly performing poorly). It will also be important to ensure that the new trustee process is properly implemented (e.g., businesses are not being required to publish information that is objectively confidential).

VI. CONCLUSION AND NEXT STEPS

Certain of the proposed reforms will be subject to changes in primary legislation (i.e., principally to the Enterprise Act 2002 and the Competition Act 1998), which will happen in the ordinary course, and others will be implemented directly (some following further consultation). In the meantime, we watch with interest how a number of important questions are resolved (e.g., the appointment of the Chairman and CEO) and how the issues raised above will be addressed.

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