Kluwer Competition Law Blog

Interim Measures in the UK: Towards Better Protection for Complainants?

Rosanna Connolly (Sidley Austin LLP) · Tuesday, April 24th, 2012

On 15 March 2012, almost exactly a year after it launched its consultation concerning possible reforms to the UK competition regime, the UK Government's Department for Business, Innovation and Skills ("BIS") announced the changes that it had decided to implement, with the intention of developing and improving the competition regime in the UK. There will be relatively few changes to the UK's substantive antitrust law under the Competition Act 1998 (the "CA 1998"), but one particular change – the lowering of the threshold for granting interim measures – could be of great significance to competition law enforcement in the UK going forward.

Under the current regime, if the Office of Fair Trading ("OFT") has commenced an investigation under section 25 CA 1998, the OFT (or a sector regulator) is allowed to impose interim measures if it "considers that it is necessary for it to act under this section as a matter of urgency for the purpose: (a) of preventing *serious, irreparable damage* to a particular person or category of person; or (b) of protecting the public interest" (section 35(2) CA 1998 (emphasis added)). Although section 35(2) CA 1998 has been in force for over a decade, the OFT has only once granted interim measures – during a 2006 investigation into an alleged abuse of a dominant position by the London Metal Exchange ("LME").

The OFT's 2006 foray into the world of interim measures was a somewhat chastening experience. The interim measures direction was appealed to the Competition Appeals Tribunal ("CAT"), but, before the appeal was heard, the OFT withdrew its direction following receipt of substantial and material new evidence. The CAT went on to make a costs award in favour of the LME. It criticised the OFT's "superficial and flawed" procedure, and described the decision as " ill-founded". The CAT also expressed concern that the OFT granted the interim measures direction based only on a limited understanding of the business of the complainant (and of the market in general), and based solely on information provided to it by the complainant. Furthermore, the CAT considered that the quality of the evidence on which the OFT relied "fell below the standard which should normally be required by an authority such as the OFT when carrying out its functions under section 35 of the Act".

The wording of the interim measures test, combined with the effect of the OFT's experience in the LME case, means that the threshold for OFT intervention is very high. Serious and irreparable damage are cumulative criteria and the test has been interpreted as a requirement that, absent interim measures, the relevant business will exit the market or go out of business.

The proposed change to the interim measures test would mean that the threshold is triggered where there is a "perceived need to act for the purposes of preventing *significant damage* to a particular person or category of person" (emphasis added). This change is consistent with the tests used in equivalent circumstances in other UK regulatory regimes. For example, the test for imposition of a provisional enforcement order in section 23(3) of the Postal Services Act 2000 requires Ofcom to have regard to "the extent to which any person is likely to sustain loss or damage as a result of anything likely to be done or omitted in contravention of the licence condition before a final order may be made".

However, the change imposed by BIS might result in divergence between the approach in the UK and the approaches followed by the European Commission ("Commission") and by the authorities in other EU Member States. Following the tests laid out in earlier judgments of the European courts, Article 8 of Regulation 1/2003 provides that in "cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures". The Commission itself has only ever granted interim relief in a handful of cases and has never granted interim relief using the power set out in Regulation 1/2003. Arguably, the threshold for granting interim relief under Regulation 1/2003 is already more onerous than the current threshold under the CA 1998 because the Commission must be able to make out a prima facie case that a prohibition has been infringed, whereas the OFT must merely have a reasonable suspicion of an infringement.

In some EU Member States, the threshold tends to be similar to the UK's current threshold of "serious, irreparable damage". By way of example, Article 35 of the Belgian Competition Act provides that the authority can adopt interim measures during the period of investigation provided there is an "urgent need (i) to avert a situation that could cause serious, imminent and irreparable harm to the undertakings whose interests are affected by the practices complained of, or (ii) to avert a situation that is contrary to the general economic interest". The French competition authority can adopt interim measures during an investigation provided that the potentially infringing conduct results in "a serious and immediate prejudice to the economy in general, to the sector at stake, to the interests of consumers or to those of the complainant", while the Portuguese competition authority can adopt interim measures during an investigation if the practice being investigated may cause damage that is "imminent, serious and irreparable or difficult to rectify".

Interestingly, despite the above similarities in tests, the BIS response indicates that the UK Government understands that the authorities in other EU Member States make greater use of their powers to impose interim measures. ECN briefs indicate that the Belgian competition authority adopted interim measures addressed to de Beers in 2010, and the French competition authority addressed interim measures to La Poste in May 2011, Google in June 2010 and SFR in September 2009.

Interim measures can be an important weapon in a competition authority's armoury. They allow for the prevention of potential harm to consumers and competitors in circumstances where the competition authority is still investigating a suspected infringement. The benefits of using interim measures are perhaps most evident in instances of predatory pricing, where the exclusionary purpose of the abusive behaviour can be achieved before the behaviour is prohibited.

Given that the OFT has had a single (and somewhat chastening) experience of interim measures under the current test, it is noteworthy that it was the OFT itself that proposed the change to the interim measures threshold. Issues surrounding interim measures in antitrust cases were not

explicitly included in BIS' March 2011 consultation, but the OFT chose to raise the point nonetheless in its response.

The introduction of a lower threshold may have important consequences. First, the increased likelihood of an interim measures direction might change the dynamic of competition even before an investigation is opened. Second, complainants may be more inclined to lodge complaints and make requests for interim measures. Third, arguably dominant companies may be forced into taking a different approach when balancing regulatory risk against short term profits. However, the CMA (which will replace the OFT and the Competition Commission from 2014) will need to adopt a robust process and rigorously assess the quality of the evidence before it. Following the implementation of the reforms, it will be interesting to see how the modification of the threshold for making an interim measures direction will impact the investigation of infringements.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Tuesday, April 24th, 2012 at 10:56 am and is filed under United Kingdom
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.