

This update provides an overview of the key legal and policy developments in UK & EU Competition law in June 2011. For further information, please contact a member of our competition team or your usual Burges Salmon contact.

OFT and Competition Commission respond to BIS consultation on competition reforms

Key Points

- The Office of Fair Trading (“OFT”) and Competition Commission (“CC”) cautiously welcome proposals to merge.
- However, both bodies expressed reservations about moving to a system of mandatory merger notification.

Background

On 14 June, the OFT and CC published their responses to the Government’s consultation on options for reforming the UK competition regime.

In March 2011, the Department for Business, Innovation and Skills (“BIS”) published a consultation document¹ setting out a number of proposals to reform the current UK competition regime with the aim of improving the robustness of decisions, supporting the competition authorities in making high impact decisions and improving speed and predictability for business.²

A key part of the reform package is a proposal to merge the competition functions of the OFT and the CC to create a single Competition and Markets Authority (“CMA”).

Creating a single competition and markets authority

The OFT supports the creation of a single competition authority and believes that this can provide for the more efficient and effective use of resources and for a more powerful single

advocate of the benefits of effective competition. Although the OFT agrees that there should be different decision makers for Phase 1 and Phase 2 merger and market investigation decisions, it appears to envisage Phase 2 investigations simply being a continuation of the initial Phase 1 investigation with the same staff continuing to work on the case and the ultimate decision makers being accountable to and appointed by the CMA.

The CC also supports the creation of the CMA, but argues that the new authority must preserve the clear separation between Phase 1 screening and Phase 2 investigations/decisions with independent expert panel members, from a variety of different business and academic backgrounds, continuing to conduct the latter. It has also proposed extending the system of separate Phase 2 decision making by member panels to antitrust cases, something which the OFT considers is unnecessary.

The OFT’s approach represents a shift away from the existing two phase regime. Whilst this may avoid some duplication, there are concerns that it may also remove necessary checks and balances and lead to “confirmation bias”. The benefits of having a separate and independent review of the OFT’s Phase 1 decisions have been underlined in a number of recent merger inquiries where the CC has comprehensively rejected the OFT’s initial Phase 1 conclusions.

The markets regime

The Government consultation considered that the market investigation regime is underutilised and proposed a number of changes including enabling second phase investigations into practices across several markets; enabling the CMA to consider public interest issues; and granting super-complaint powers to bodies representing Small or Medium Sized Enterprises (“SMEs”).

The OFT’s primary concern with respect to the markets regime is that the CMA should retain responsibility for both competition and consumer issues. This dual responsibility had enabled the OFT to take a “holistic” approach to market analysis. With regard to the specific proposals, the OFT: supports allowing the investigation of practices across several different markets, although it considered that the use of such a power is likely to be infrequent; has concerns that providing reports to the Government on wider public interest issues could detract the CMA from its core function and risks politicising it; and opposes the extension of the super-complaint system to bodies representing SMEs.

¹ A Competition Regime for Growth: a consultation on options for reform - BIS, 16 March 2011 - <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf>

² We first covered the announcement of the proposed reforms in our October edition http://www.burges-salmon.com/Practices/commercial/competition/Publications/UK_EU_Competition_Update_October_2010.pdf

The CC also supports allowing investigations across several markets; supports reporting to the Government on wider public interest issues (as it already does in a number of areas); and supports the extension of the super-complaint system to bodies representing Small and Medium Sized Enterprises.

More generally both the OFT and CC also had a number of detailed comments on proposed measures to reduce timescales and strengthen information-gathering powers.

Mergers

The Government invited views on whether the UK should move away from its current voluntary notification system for mergers towards a mandatory pre-notification system similar to that operated by the EC and in virtually every other jurisdiction. It argued that the two main disadvantages of the current voluntary regime are firstly, the risk that anticompetitive mergers could escape scrutiny altogether and secondly, the difficulties of unwinding completed mergers which are later prohibited.

The OFT had concerns that the introduction of a mandatory notification regime would place an unnecessary burden on public resources and business and that its ability to capture harmful mergers that fell below any mandatory notification thresholds could be lost. The OFT therefore favoured either improving the existing voluntary regime or adopting a “hybrid” model with mandatory notification for transactions above a certain threshold, and a voluntary notification system for transactions below the threshold.

The CC had mixed views on mandatory notifications. Whilst a mandatory regime would ensure most anticompetitive mergers were scrutinised and achieve greater consistency with regimes in operation in many other jurisdictions, it could also impose greater costs on the CMA and parties. Such costs would often be borne by parties engaged in neutral or even pro-competitive mergers as well as by those meriting scrutiny. The CC considered that these are significant disadvantages in a mandatory regime and that the merits of mandatory notification may not outweigh them.

The Government is also consulting on whether the jurisdictional thresholds need to be changed. Currently in order to qualify for investigation, the target company must have UK turnover exceeding £70m or the parties must have a combined 25% share of supply.

The OFT accepts that the current “share of supply test” is too vague for a mandatory notification regime but believes that in order to capture all potentially anti-competitive mergers, the turnover threshold would need to be set at as low as £5m. This would compare very unfavourably with much higher turnover thresholds in similar sized economies in Europe and the OFT itself accepts that this would result in more than a twentyfold increase in merger notifications (from 55 in 2010 to 1,190). The OFT, therefore, favours retaining a voluntary regime, with a “small business exemption” (where the target’s turnover is below £5m and the acquirer’s turnover is below £10m). However, even this compromise is likely to impose a very significant additional burden on business, as many merging parties will still wish to notify transactions above this threshold in order to gain greater certainty.

The CC is concerned that the notification thresholds referred to above would be too low for an efficient notification trigger. They therefore

recommend a higher threshold for mandatory notification, with the CMA retaining discretionary jurisdiction to investigate mergers below this threshold (but above any “small business exemption”).

The antitrust regime

The Government is also consulting on a number of proposed changes to the antitrust regime including developing either an internal CMA tribunal or moving to a US-style prosecutorial system where the CMA prosecutes cases before the Competition Appeal Tribunal.

The OFT is not convinced that any case has been made for fundamental reform of the investigation of Cartel and Abuse of Dominance cases under the Competition Act 1998. In particular, the OFT opposes moving to an internal tribunal model or a prosecutorial model for antitrust enforcement.

The CC also opposes the proposals, and instead believes antitrust cases should follow the two-stage merger model. This might take the form of enabling panels of independent members with appropriate expertise to conduct the second stage of antitrust case decision-making within the CMA.

Commission opens Phase II investigations into Seagate/Samsung and Western Digital/Hitachi mergers

On 30 May 2011, the European Commission announced that it had opened two separate Phase II merger investigations into the planned acquisitions of the hard disk drive (“HDD”) business of Samsung by Seagate Technology, and the storage business of Hitachi by Western Digital. Although the transactions are being examined separately, the Commission’s examination will take account of the effect of both mergers.

HDD systems are used in a variety of professional and consumer electronic goods to store and access digital data. There are currently five HDD manufacturers worldwide (only one of which is not a party to either proposed merger).

The Commission’s initial Phase I market investigations identified three concerns. Firstly, the consolidation of Seagate’s market leading position. Secondly, the integrations could lead to a reduction in the demand of ‘heads’ (a component of HDDs), negatively impacting the heads supplier TDK of Japan and consequently the main competitor Toshiba (which is heavily dependent on TDK heads). Finally, due to the fact that Samsung is an important supplier of HDDs to other External Storage Devices manufacturers, the merger has the potential to negatively effect competition in this connected market. These effects are exacerbated by the occurrence of two mergers.

The Commission will report on both investigations on 10 October 2011.

CAA finds that Gatwick Airport’s check-in charges were discriminatory and not transparent

On 1 June 2011, Gatwick Airport Limited (“GAL”) was found to be in breach of its obligations to determine its charges according to “relevant, objective, transparent and non-discriminatory criteria”.

Ryanair successfully complained to the CAA on the basis that the

internet check-in charge levied by GAL included a charge for baggage handling, which applied even where the passengers only took hand luggage. The CAA stated this was discriminatory as it applied identical reasoning to dissimilar transactions, without an objective justification. GAL was further criticised for the lack of transparency in calculating its check-in charges. GAL must now implement transparent and non-discriminatory check-in and baggage charges by 1 April 2012.

This appeal acts as a reminder to airport operators across the EU to ensure that their charges for the use of airport infrastructure are transparent and non-discriminatory. Ryanair has pledged to review the charging structures at other European airports and take similar action where necessary.

Competition Commission approves Tail Lift spare parts and Irish Ferries Mergers

On 10 June 2011, the CC cleared the acquisition of Ross and Bonnyman "(R&B)" Limited by Ratcliff Palfinger Limited "(RP)", two of the three largest suppliers of column tail lifts for commercial vehicles in the UK.

As reported previously³, the OFT had expressed concerns over R&B's decision to leave the market for the manufacture of commercial tail lifts and RP's subsequent decision to purchase R&B's spare parts business. If the decisions had been linked, then R&B's market exit would have had the effect of a manufactured reduction in competition as opposed to natural market forces.

Following submission of evidence by R&B, the CC was satisfied that the market exit and merger decisions were mutually exclusive. In addition, the CC was satisfied that the merger would not lead to a lessening of competition in the spare parts market.

On 29 June 2011, the CC cleared the Stena AB / DFDS IRISH Sea Ferries Merger. The OFT had expressed similar concerns to those aired in the Tail Lifts Spare parts merger, namely that Stena exited a competing route on the same day as the acquisition. The OFT could not rule out that Stena's exit from the route had been as a result of the merger. It considered that the market was highly concentrated, and that, prior to the closure of the competing route, the parties had competed head-to-head with each other.

However, the CC concluded that Stena's exit from the route was probably inevitable following the acquisition. The CC continued that the acquisition did not substantially reduce competition as the two routes now operated by Stena do not compete closely, and each has a direct competitor. In addition, barriers to entry were not insurmountable.

Department of Health responds to health service competition recommendations

On 20 June 2011, the Department of Health (DOH) published the Government's response to the NHS Future Forum Report on the Health and Social Care Bill.

From a competition law perspective, the Government has accepted many of the recommendations in the report and has amended the Social Care Bill in several key areas, including, crucially, ruling-out privatisation. The other major changes include a review of the powers of Monitor, the new health regulatory body, which will now be responsible for protecting/promoting patients' interests and value for money as opposed to promoting competition. Features of the new look Monitor include:

- concurrent competition powers with the OFT to prevent abuses of competition in the industry;
- responsibility for price setting and supporting the continuity of vital services; and
- assisting the new NHS Commissioning Board with the preparation of guidance on the application of choice and competition in the NHS.

Other key recommendations include a new Bill placing a duty on commissioning boards to promote patient choice and a recognition of the requirement to protect the NHS from private operators cherry picking profitable services.

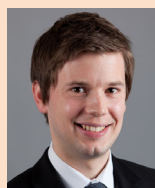
There remains considerable opposition to the Social Care Bill and it remains to be seen whether Monitor's powers will be further refined, particularly as the future shape of the core competition regime is still uncertain.

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³See Issue 7 February 2011 http://www.burges-salmon.com/Practices/commercial/Publications/UK_EU_Competition_Update_February_2011.pdf