



This publication provides an overview of the key legal and policy developments in UK & EU competition law in October 2010. For further information, please contact your usual Burges Salmon contact or a member of our competition team.

Office of Fair Trading and Competition Commission to merge after “bonfire of quangos”

Key points

- The merger will create a single competition and markets authority responsible for enforcing competition law in the UK.
- The OFT's consumer protection functions will be transferred to Trading Standards and the Citizens Advice Service.
- Details of the structure and procedure of the new body will be considered in the consultation process opening in early 2011.

Background

After months of speculation, on 14 October the Government announced a consultation on merging the competition functions of the Office of Fair Trading (“OFT”) and Competition Commission (“CC”).

The move is part of a broad range of cost-saving measures proposed by the Government which will result in 192 public bodies being abolished and a further 118 merged.

News of the merger has been welcomed by John Fingleton, the OFT's Chief Executive: *“We have advocated the merger of the [CC] with the OFT for some time. With the right design, a single competition and markets authority can deliver better, faster results for consumers and the economy, and greater consistency for businesses.”*

The current system

The UK is unusual in having two separate competition authorities with distinct functions.

For cartel and abuse of dominance cases, the OFT has sole responsibility for investigation and enforcement. The OFT's decisions are then subject to full appeal to the Competition Appeal Tribunal (“CAT”).

By contrast, for merger control and market investigations, there is a two stage process involving both the OFT and the CC.

Qualifying mergers are initially notified to and investigated by the OFT. Where the OFT has serious concerns, it may then refer the transaction to the CC for a second phase in-depth assessment.

Similarly, where the OFT considers that a market does not appear to be meeting the needs of consumers, it may conduct a preliminary market study. Where the OFT has serious concerns, it may then refer the matter to the CC for a full market investigation (for more information on market studies, please see our September 2010 issue).

In addition to its competition law functions, the OFT also has responsibility for a wide range of consumer protection work. This is now likely to be transferred to local Trading Standards and the Citizens Advice Service.

Potential benefits of reform

The Government has argued that this reform will address perceived weaknesses of the current system. In particular:

- Cost: the merger could result in significant cost savings for the Government;
- Speed and efficiency of process: in relation to mergers,

the CC will conduct its own independent investigation rather than draw on work the OFT has already undertaken. Whilst many parties welcome the “fresh pair of eyes” this provides, it can lead to additional delay and duplication; and

- Length of inquiries: many parties’ experience of investigations by the OFT and CC is that they take far too long.

Challenges for reform

The details of the new authority’s structure and procedures will be subject of debate during the consultation process due to begin in early 2011. There is a difficult balance to be struck between realising efficiencies and ensuring adequate protection of the parties’ rights.

In particular, if one of the consequences of having a single decision maker is that all decisions by that body are subject to a full appeal on the merits, as opposed to judicial review, this may mean that the new system is, overall, neither cheaper nor more efficient.

Reform of other bodies involved in implementing UK competition law

In addition to the proposed merger of the OFT and CC, the Government has also announced that:

- The Competition Service, which provides support services to the CAT, is to be abolished;
- PostComm will be merged into OFCOM; and
- OFGEM and OFWAT are to be retained, subject to the conclusions of ongoing reviews into their regulatory functions.

Court of Appeal overturns CAT ruling on apparent bias

On 13 October, the Court of Appeal overturned an earlier judgment of the CAT which had found that the CC’s market investigation into BAA airports was tainted by apparent bias.

The Court of Appeal held that the relationship between one of the CC inquiry members and the Manchester Airport Group was too remote to be a real concern.

Accordingly, the Court of Appeal has upheld the CC’s original decision which ordered the divestiture by BAA of Gatwick, Stansted and either Edinburgh or Glasgow airports. Burges

Salmon advised the CC on the corporate aspects of the subsequent sale of Gatwick Airport in 2009.

BAA has already announced its intention to seek permission to appeal to the Supreme Court.

OFT publishes draft guidance on application of competition law to land agreements

Following the announcement earlier this year that, with effect from 6 April 2011, land agreements will no longer benefit from a specific exclusion from Chapter I of the Competition Act 1998,¹ on 15 October the OFT published for consultation its draft guidance on the application of competition law to land agreements.²

The draft guidance provides general advice to companies on the application of both the Chapter I and II prohibitions to land agreements and focuses on restrictions that affect or limit the way in which land may be used, or how a right over land may be exercised.

The guidance also includes worked examples of how the OFT is likely to assess a number of common scenarios involving land agreements and a self-assessment flowchart.

However, as much of the advice provided by the draft guidance is very general in nature, companies party to land agreements may still feel a degree of uncertainty as to their status from 6 April 2011, although they may be comforted by the OFT’s conclusion that it ‘*expects that only a minority of restrictions will infringe the prohibition.*’³

Gaviscon firm Reckitt Benckiser agrees fine with OFT and admits abuse of dominance

On 15 October, the OFT announced that Reckitt Benckiser had agreed to pay a fine of £10.2 million for abuse of its dominant position. It is the first penalty for abuse of dominance imposed by the OFT since 2003.

The abuse took the form of withdrawing and de-listing Gaviscon’s Original Liquid from the NHS prescription channel following the expiry of its patent.

Ordinarily, when a patent for a drug expires, and a generic name is assigned to the drug, GPs can use prescribing software to search for a well-known branded product and then provide patients with an “open” prescription that lists the generic name

¹ See Burges Salmon publication in July 2010 http://www.burges-salmon.com/Practices/commercial/competition/Publications/Are_your_land_agreements_anticompetitive.pdf

² OFT1280 (October 2010).

³ Paragraph 2.1 of the draft guidance.

of the product. Pharmacies can then choose whether to dispense the branded drug, or an equivalent, but cheaper, generic product.

The effect of the de-listing in this case was that when GPs search for "Gaviscon" on their prescribing software, the product identified would be Reckitt Benckiser's alternative product Gaviscon Advance Liquid, which is patent protected until 2016. Therefore, pharmacies continued to receive prescriptions for the patent protected product and had no option but to dispense it rather than cheaper generic equivalents.

This announcement by the OFT is also timely given that the European Commission published a report on the pharmaceuticals sector in July 2009 which stated that the Commission and national competition authorities should take enforcement action where there is evidence of drug companies seeking to prevent the entry of generic drugs.

Date set for main hearing in tobacco appeals

At the first case management conference held on 18 October, the CAT set the date of the main hearing for the appeal against the OFT's decision on allegedly anti-competitive agreements between tobacco manufacturers and retailers.

The hearing is scheduled to begin on 15 September 2011 and may run until the end of November 2011. Accordingly, the overall timetable for this appeal is considerably longer than the target of nine months indicated by the CAT in its Guide to Proceedings for 'straightforward cases'.⁴

Burges Salmon is acting for the Co-operative Group Limited on its appeal.

OFT consults on draft compliance guidance

On 19 October, the OFT published draft guidance on how businesses can comply with competition law⁵. This is intended to provide further guidance on the steps businesses can take to comply with competition law.

The OFT considers that businesses need to have an unambiguous commitment to competition law compliance at all levels of the business to ensure that staff do not think that infringing competition law is worth the risk.

Although there is no automatic discount for undertaking compliance activities, the OFT will consider reducing the amount of any penalty by 10% where adequate compliance steps have been taken.

For further information please contact:



Laura Claydon
Partner

Tel: +44(0)117 939 2273
laura.claydon@burges-salmon.com



Marc Shrimpling
Solicitor

Tel: +44(0)117 939 2221
marc.shrimpling@burges-salmon.com

⁴ See paragraph 3.4(iii) of the CAT's Guide to Proceedings (October 2005).

⁵ OFT1278 (October 2010)