
UK Government Proposes Changes to Competition Laws, Including Criminal Cartel Offence

2012-04-02

On 15 March 2012, the UK Government published its response to a year-long consultation on proposals for the reform of UK competition law. The planned reforms are wide-ranging, covering:

- the antitrust regime, including changes to the criminal cartel offence;
- the merger regime (although the current voluntary notification regime will not be changed); and
- the markets regime.

Many of the proposals will require legislation, so the timing of their implementation is uncertain.

A new competition body

The Government plans to create a new "*Competition and Markets Authority*" (CMA) which will merge the functions of the Competition Commission (CC) and the competition functions of the Office of Fair Trading (OFT). It is hoped that the CMA will be in place by April 2014 and that the merger will lead to greater coherence and more streamlined decision-making processes.

The UK's current system, whereby the OFT carries out the initial review of mergers and markets and the CC then carries out a more in-depth review with a "fresh pair of eyes", is widely praised for the separation between the OFT's investigation and the CC's independent review and decision-making. The Government indicates that, despite merging the CC and OFT, it will enact legislation to ensure that this real separation is retained. In particular, the decisions currently taken by the CC will continue to be taken by independent panellists.

The antitrust regime

The Government's consultation document identified a range of options for improving enforcement of the antitrust provisions, focusing in particular on ways to minimise what are perceived to be burdensome procedural requirements. A shift to a more prosecutorial system, whereby the regulator would not rule on infringements or penalties, but would "prosecute" cases before the

relevant tribunal, was considered but ruled out. Instead, the Government plans to enhance the existing administrative system, whereby decisions on infringement and penalty are taken by the competition authority itself, by implementing changes to improve the robustness and speed of its decision-making. The OFT is expected to consult shortly on the details of the proposed procedural changes.

In addition to these procedural reforms, the Government plans to legislate for a number of additional powers, including the power to require a person to answer questions during "dawn raid"-style antitrust investigations and the introduction of civil fines for companies that do not cooperate with the CMA's investigation (for example, by missing deadlines for replying to information requests). Both powers would echo powers at the EU level.

The criminal cartel offence

Currently, under the Enterprise Act 2002 (the Act), an individual is guilty of the cartel offence if he dishonestly agrees with one or more other persons that undertakings will engage in one or more specified prohibited activities. The Government is concerned that the dishonesty element makes the offence difficult to prosecute, and that it puts the UK at odds with international best practice on the definition of hard-core cartel offences. It is noteworthy that there have only been two cases prosecuted since the Act came into force in 2003, one that was uncontested as the result of a plea bargain in the US and another that collapsed shortly after coming to trial.

The Government appears to have attributed this lack of prosecutorial activity to the nature of the cartel offence and has decided to introduce legislation to amend it. The proposal is that the dishonesty element be removed and that it would be sufficient that the individuals intended to enter the cartel agreement, but that the offence will not be committed where the parties have agreed to publish details of the arrangements in a form that would be accessible to customers before they are implemented. Publication would need to take place in a suitably accessible form in a medium specified in the legislation, for example the *London Gazette*. The Government's apparent policy rationale for this approach is that consumers who are informed about arrangements can choose to contract elsewhere.

Moreover, whilst the removal of the dishonesty element will make the offence easier to prove and will bring it more in line with equivalent offences in other jurisdictions, it is an open question whether it will lead to any significant increase in the number of successful prosecutions. The inaction to date appears to have been the result of a number of factors. The collapse of the OFT's *BA/Virgin* case, its first—and so far only—contested prosecution of the criminal cartel offence two weeks into trial in May 2010, was the result not of issues with the substantive offence but of inherent tensions between individual interests in criminal proceedings and corporate interests in civil settlement. Those tensions remain and, together with the OFT's concern to avoid another high profile defeat, may well have contributed to the lack of further criminal prosecutions.

Mergers

The Government consulted on making merger notification above defined jurisdictional thresholds mandatory as in most jurisdictions. Ultimately, however, it has decided to maintain the current voluntary merger notification regime, arguing that it gives the CMA greater flexibility to examine potentially anti-competitive mergers, while also reducing the burden on firms concluding acquisitions that clearly do not raise competition law issues.

The CMA will be given increased powers to order merging companies to suspend all integration activities or face a fine of up to 5% of a company's aggregate worldwide group turnover.

The Government will also legislate to introduce a series of time limits for its merger review. Phase I investigations will need to be completed in 40 working days (plus any time during which the CMA stops the clock pending the parties providing it with requested information); the current 25 working days "statutory merger notice" regime will be abolished. The timeframe of 24—or exceptionally 32—weeks for Phase II investigations will remain unchanged. There will also be specific time limits for the offering, consideration of and negotiation of undertakings to alleviate any competition concerns that the CMA has identified. Again this echoes EU practice.

Other significant changes

These include:

- amendments to the market study regime, including a new power to investigate practices common to a number of markets (and new and reduced time limits); and
- strengthening the obligation on sector regulators (such as the energy regulator, Ofgem, and the communications regulator, Ofcom) to enforce competition law.

Further information

The full consultation document and the Government's response to it can be accessed [here](#) and [here](#).

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