

Antitrust and Competition Client Service Group

From Bryan Cave, London

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UK Government Holds Consultation to Improve Competition Regime - Watch this Space

On 16 March 2011 the UK Department for Business, Innovation and Skills (UK BIS) published a consultation paper which seeks comments on various options for far-reaching changes to the UK competition regime. The Government's objective is to consult on how best to: (i) improve the robustness of decisions and strengthen the regime; (ii) support the competition authorities in taking forward high impact cases; and (iii) improve speed and predictability for business. The closing date for comments is 13 June 2011. The Government plans to publish its response to comments in the autumn of 2011.

Among the options discussed in this 172 page document, we would note the following three in particular:

Proposal for the creation of a single UK Competition and Markets Authority

One of the most far reaching proposals is for the merger of the Office of Fair Trading (the "OFT") (whose powers encompass, among others, antitrust enforcement and the first phase of merger and market investigation/studies cases) and the Competition Commission (whose powers include, among others, the second phase of merger and market investigations as well as, in certain cases, remedies) into a single new body, the Competition and Markets Authority (the "CMA"). The consultation proposes that this radical change would streamline the competition regime and make it more cost efficient by reducing duplication in merger and market studies cases. The CMA would have its predecessor entities' rights and responsibilities with respect to competition matters and might also benefit from increased powers, such as more centralised and enhanced investigation powers.

However, some concern has been expressed that the OFT's consumer protection powers could be transferred to local trading standards bodies and citizens advice bureaus without the necessary resources and ability at the national level to take on powerful companies in consumer protection cases.

Proposals to improve the UK's Merger Control Regime

The UK currently operates a voluntary pre-merger notification system in respect of concentrations not caught by EU merger controls. UK BIS is seeking views on options to address certain disadvantages of the current voluntary system, namely the risk of missing anti-competitive mergers

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and difficulties in applying remedies to completed anti-competitive mergers. It is also seeking views on options to reduce timescales for decisions and strengthening investigative powers.

With a view to strengthening the system, the consultation puts several options forward, including:

- **Voluntary vs. Mandatory Notifications:** The consultation discusses variations ranging from implementing a more robust version of the voluntary filing system that would include strengthened interim measures to put a halt to integration in certain cases, to the implementation of a full mandatory pre-merger notification regime, such as found in other EU member states, including the possibility of a requirement to suspend completion of the merger until clearance has been granted.
- **Thresholds:** Currently, thresholds are met resulting in a “relevant merger situation,” which allows for review of mergers that are voluntarily notified or on the regulatory authority’s own initiative, if either the UK turnover of the enterprise being acquired exceeds £70 million or the transaction results in the creation or enhancement of at least a 25% share of supply of goods or services in the UK.

Options for change include full mandatory notification where UK turnover of the target exceeds £5 million and worldwide turnover of the acquirer exceeds £10 million, or a hybrid mandatory notification where the value of the UK target’s turnover exceeds £70 million (the current UK turnover test), with the authority retaining the ability to take action where the turnover falls below £70 million but the share of supply test is met. The current share of supply test is not the same as a market share test used in determining competitive harm, and in any event would be problematic as a basis for determining whether a mandatory filing is required.

Comments are also sought on whether the thresholds should be changed to eliminate the share of supply test and substitute a more objective threshold if the voluntary notification system is retained.

- **Small Merger Exemption:** The Government is also considering introduction of an exemption for transactions involving small businesses in either a voluntary or hybrid mandatory system of notification.
- **Statutory Timescales:** Various options to streamline timescales depending on the nature of the notification regime proposed are under consideration, along with issues relating to extensions of time for information gathering and stop the clock powers and earlier consideration of remedies.

Proposal to amend the UK Criminal Cartel Offence

A third key proposal aims to increase the deterrent against the formation of cartels. To date the UK Criminal Cartel Offence has resulted in only two prosecutions. All of the options put forward in the consultation propose to either remove or replace the ‘dishonesty’ element of the offence. Any of these could have far reaching consequences as to how businesses approach and deal with risk management in light of the UK Criminal Cartel Offence.

Watch this space as this consultation will most likely result in wide-ranging changes to the current UK competition regime and could significantly affect businesses operating or seeking to operate in the UK.

For further information on this topic, or should you want assistance in taking part in the consultation, please direct your queries to your Bryan Cave contact or to:

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