

Client Advisory | *October 14, 2010*

UK Government Confirms Plan to Merge Competition Authorities and Reform Consumer Protection Enforcement

The UK government has confirmed today that, as part of its so-called ‘bonfire of the quangos,’¹ it intends to make substantial changes to the current institutional framework for the enforcement of competition (antitrust) and consumer protection law.



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Many details remain unclear, pending formal consultation on the government’s proposals, which is due to take place in 2011. It does appear likely, however, that such changes will require potentially far-reaching amendments to the substantive legal framework within which the existing agencies operate and will also have implications for the nature and amount of competition and consumer protection enforcement activity for some years to come.

The UK currently has two agencies with primary responsibility for competition law enforcement: the Office of Fair Trading (OFT) and Competition Commission (the Commission). Both bodies operate from offices in central London, are independent of ministers and are headed by a Chairman and Chief Executive, who are appointed by government. Whereas final decisions on OFT cases are usually taken by the Chief Executive or OFT staff, decisions on a Commission inquiry are taken by a group of lay ‘members’ (typically, a group will comprise three to five members, plus a group chairman). Decisions by the OFT and Commission may be appealed to the specialist Competition Appeal Tribunal.

The agencies’ responsibilities are currently allocated as follows:

OFT

- enforcement of UK and European Union law prohibitions of anticompetitive agreements (including cartels) and abuse of market dominance
- criminal prosecution of individuals for cartel activity (shared with the Serious Fraud Office)
- initial investigation of mergers
- identification of markets that may not be functioning properly for further investigation by the Commission
- enforcement of consumer protection law
- licensing of consumer credit providers
- general competition and consumer advocacy

Commission

- in-depth investigation of mergers
- detailed investigation of markets that may not be functioning properly
- hearing of certain regulatory appeals from sectoral regulators.

Speaking this morning, the Liberal Democrat Secretary of State for Business, Innovation and Skills, Vince Cable, stated that he is “minded to merge the Competition Commission and the competition and markets investigations functions of the OFT to create

¹ In the language of UK administration, a ‘quango’ (shorthand for ‘quasi-autonomous non-governmental organisation’) is any public body that is not part of a ministerial department. The term covers non-departmental public bodies, as well as non-ministerial departments and public corporations. According to the government, its review covered 901 such bodies, of which 481 will be reformed in some way (either by abolition, merger or other substantial reform).

a single, streamlined expert competition and markets authority.” Under this proposal, reviews of mergers and markets would therefore be undertaken throughout by one and the same agency. Although the position has not been confirmed, it appears that the new body would retain the OFT’s criminal cartel enforcement powers.

Significantly, the consumer protection functions of the OFT will not be moved to the new authority. The Secretary of State confirmed that it is his intention to “shift almost all relevant central Government funding for consumer bodies” to Citizens Advice (a charity that advises consumers on their rights) and to the roughly 200 local authority trading standards offices, with the latter being given responsibility for enforcement of “almost all consumer law.” As a result, the OFT looks set to lose all of its consumer protection powers, except to the extent that its market investigation activity requires consideration of issues that directly affect consumers.

The promised benefits of these changes are greater speed of investigations, simplicity and efficiency and hence reduced costs for business and government. The extent of any negative repercussions may take some time to emerge.

Although the UK’s dual agency system is unique (one could even say anomalous), it has a long history, with the Commission dating back to 1948 (including its predecessor the Monopolies and Mergers Commission) and the OFT dating back to 1973 (or 1956, if one considers the Registrar of Restrictive Trade Agreements as its predecessor). Unsurprisingly, the current legal framework has formed around this institutional structure. Even when legal changes have been far-reaching, such as the introduction of

a penalties-based prohibition regime under the Competition Act 1998, they have been largely based on existing institutions. As a result, radical changes to the institutional structure will inevitably require corresponding changes to this legal framework. These may well go beyond simply renaming responsible agencies and encompass wider consideration of the substantive legal framework, including for example whether the jurisdictional thresholds for the UK merger control regime are appropriate and whether the new unified agency should retain the Commission’s extensive market investigation order making powers.

Although the current system can undoubtedly be slow, it does have the benefit of objectivity and rigour. Businesses generally value the fact that, once cases reach the Commission, they are determined by a group of individuals who typically have extensive experience of running or advising businesses. Although this feature could be retained in any new system, it remains to be seen whether it will be. It is also evident from experience with Competition Act 1998 cases that a single agency system does not guarantee rapid investigations.

Many question marks remain over how consumer protection will be ensured under the proposed framework and, in particular, how competition and consumer enforcement will be coordinated. Earlier this year, when speaking out in favour of a single agency approach, the Chairman of the OFT was careful to note the importance of ensuring that “the benefits of an integrated approach to competition and consumer issues ... are retained”. Although the Secretary of State has stated that “national and regional threats” to fair trading will be coordinated nationally, it is not clear who will

undertake this coordination, given that trading standards currently operates purely at a local level. Perhaps this role will be given to the Trading Standards Institute (whose roots go even further back, to the 1881 Incorporated Society of Inspectors of Weights and Measures), although this would require significant additional capability.

The government has already announced its intention to transfer the OFT’s consumer credit licensing functions to a new Consumer Protection and Markets Authority, which will take on the consumer-facing functions of the soon to be abolished Financial Services Authority. It is unclear, however, whether that new body will be given any broader coordination role for consumer protection or whether its role will be limited to the financial services sector. The fact that it was not mentioned in today’s announcement suggests the latter, which could be a missed opportunity for creating a unified national consumer protection agency.

Perhaps unsurprisingly, consumer advocacy bodies have already spoken out against the proposed changes, warning of the risk of throwing out the baby with the bathwater. No doubt, the flood of statements issued in the course of today is merely a foretaste of the lively debate that will accompany formal consultation on the Government’s proposals.

Once the waters subside, the UK may well stand to benefit from a simpler, more streamlined enforcement system for both competition law and consumer protection. In the short to medium term, however, we can expect to see significant uncertainty and disruption, and possibly a drop in enforcement activity, as the new institutional structure, and legal framework, is confirmed and put into place.

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