

UK Parliament Debates Changes to UK Competition Regime – Need to Know

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The UK Parliament has now begun to debate the changes to the UK competition regime announced on 15 March 2012. The draft legislation, set out in the Enterprise and Regulatory Reform Bill, was introduced into Parliament on 25 May and is being debated in detail by the House of Commons. The Government hopes that the Bill will become law towards the end of 2012.

The main provisions of the Bill are summarised below:

A new Competition and Markets Authority

The Bill provides for the abolition of the Office of Fair Trading (OFT) and Competition Commission (CC), and the creation of a new authority, the Competition and Markets Authority (CMA). Most of the existing functions of the OFT and the CC will be merged into the CMA.

Other regulators that currently have competition enforcement powers, such as Ofcom, the ORR, Ofgem and Ofwat, will continue to have, as now, concurrent powers to enforce competition law in their sectors, though there will be a change of emphasis – see below.

Changes to Merger Control

The UK will remain one of the few jurisdictions where notification of mergers meeting jurisdictional thresholds for review is not compulsory. However, the CMA will have a new discretionary power to require the parties to suspend all steps to conclude a deal pending the CMA's review of the merger. Non-compliance will be sanctioned by fines of up to 5 percent of worldwide sales. This now constitutes an important exception to the parties' previous freedom to close at their risk. Under the existing regime, integration steps may only be suspended in the case of already completed mergers, or where a referral is made to the CC. The CMA is required under the Bill to publish a statement about the circumstances under which the new power over uncompleted deals might be exercised.

The existing separation between a shorter first phase review of mergers and a fuller in-depth second phase review will be maintained, with the CMA board taking phase 1 decisions, and groups of independent panellists (being the existing members of the CC) taking phase 2 decisions. The power to require companies and individuals to provide information or other evidence in connection with any merger investigation will be extended to the first stage review, with fines for non-compliance.

There will now be a statutory deadline of 40 working days for the first phase review – though this may be extended where, for example, the CMA has served notice on one or more of the parties requiring the provision of further information. Phase 2 will remain at 24 weeks extendable by no more than eight weeks, and the CMA will now have a statutory deadline for implementing any remedies at the end of phase 2. There will be a continuing obligation on the CMA to act expeditiously in considering mergers.

The Bill imposes an obligation on the Secretary of State to review the workings of the merger regime every five years.

Changes to Anti-trust Regime

The Bill does not contain changes to the substance of the bans on anti-competitive agreements and abuses of market power, but does contain changes to the criminal cartel offence (see below), and to the way in which alleged infringements are investigated.

Much as the OFT does currently, the CMA will carry out an investigation as to whether an alleged infringement of the prohibition on anti-competitive agreements or abuse of dominant market position has occurred. The CMA's decision will be subject to appeal to the Competition Appeal Tribunal on the merits, and further appeal on points of law only to the Court of Appeal.

Until the CMA is established, the OFT will continue to investigate infringements and is currently consulting on whether to introduce an internal separation among staff who undertake investigations and those who take decisions: the purpose of this is to introduce more objectivity into decision making and reduce the risk of so-called 'confirmation bias'. It may be that the CMA will similarly distinguish between the investigatory phase and the decision phase.

The CMA will have a new power to demand on notice the production of information relevant to its investigation from any director, manager or employee of a business being investigated by the CMA. There are safeguards relating to the use of such information against the business concerned. The CMA will be able to impose fines for non-compliance and must publish a statement of its fining policy.

The Bill gives the Secretary of State power to adopt, after consultation, statutory deadlines for Competition Act investigations.

The CMA will have a controversial power to publish a notice, once it formally opens a Competition Act investigation, setting out the nature of the investigation, its subject matter, the sector and the parties. There is a great deal of opposition to this proposal and it remains to be seen if this will survive the parliamentary process.

A major change is proposed in relation to the criminal cartel offence created by the Enterprise Act 2002. Given the very limited success in prosecuting individuals involved in cartels, the Government has decided to remove the requirement for prosecutors to prove dishonesty, as is already the case in insider dealing offences. Intention will still be needed, and individuals who publicise agreements so as not to keep them secret will have a defence. This is a controversial amendment likely to take up much parliamentary time.

Sector Regulators and Concurrency

Concurrent competition powers of the sector regulators¹ will be maintained, with a greater emphasis on using their competition powers (rather than ex-ante regulation), and a higher degree of coordination with the new CMA.

Very importantly, the Bill envisages that the CMA might have power to take over the competition elements of a case from a sectoral regulator.

Market Investigations

Powers to investigate markets, outside the scope of investigation into practices or agreements between specific companies, will be retained. This power will be extended to include investigations into practices that occur across different markets.

As in the case of mergers, there will continue to be a short phase 1 investigation and, as appropriate, an in-depth phase 2 investigation.

Time limits for phases 1 and 2 of market investigations have been shortened. At phase 1, the CMA will have to begin to consult on a decision to make a Market Investigation Reference within six months of launching a market study, and conclude all market study reports within 12 months of launch. Phase 2 investigations will now need to be finished within 18 months (although the CMA will have powers to extend the time limit by six months in exceptional circumstances), and the CMA will have to implement phase 2 remedies within six months.

The CMA will have wider information-gathering powers at phase 1 than the OFT currently enjoys.

As under the current regime, the Secretary of State will have the power to request the CMA to investigate public interest issues alongside the competition issues in market investigations: this will extend to the new cross-market investigation regime. The new provisions will permit the Secretary of State to appoint an expert on the public interest issue in question to advise the CMA.

The Bill imposes an obligation on the Secretary of State to review the workings of the markets regime every five years.

FURTHER INFORMATION

For any further information about the Bill and its potential impact, please contact a member of our Competition Group.

¹ The sectoral regulators with concurrent competition powers are the Office of Communications; the Gas and Electricity Markets Authority; the Water Services Regulation Authority; the Office of Rail Regulation; the Northern Ireland Authority for Utility Regulation; the Civil Aviation Authority;



and Monitor. Under the Financial Services Bill, the new Financial Conduct Authority will have a competition objective when using its powers (see [FCA to take on competition objective](#)).

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