

UK Government announces overhaul of competition regime – Need to Know

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On 15 March 2012, the UK Government released its plans for reform of the UK competition regime. We summarise the main reforms.

A new Competition and Markets Authority (CMA)

The Government will create a new authority merging most of the functions of the existing Office of Fair Trading (OFT) and Competition Commission (CC). Although the two authorities will be merged, their powers will continue to be exercised separately.

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, even at a stage where there has been no finding that the proposed transaction raises competition concerns. 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 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 circumstances under which the new power over uncompleted deals may be exercised are unclear at this stage.

The existing separation between a first stage review of mergers by the OFT and a fuller second stage review by the CC will be maintained, with the CMA board taking stage 1 decisions, and groups of independent panellists (presumably being the existing members of the CC) taking stage 2 decisions.

Merger fees will increase from £30K to £40K at the bottom end of the scale, with an increase at the top end (UK turnover of target more than £120m) from £90K to £160K.

Changes to Anti-trust Regime

The existing regime where the OFT effectively acts as investigator, prosecutor and judge, subject then to an appeal to the courts on the merits, is retained. The Government has not opted for a U.S.-style prosecutorial approach.

In the face of very limited success in criminal prosecution of 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.

The existing appeal court, the Competition Appeal Tribunal, is retained and will have a new power to recover its own costs from the parties.

Sector Regulators and Concurrence

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

Market Investigations

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

As in the case of mergers, the existing institutional separation between the OFT and CC will be reproduced within the CMA.

Time limits for phases 1 and 2 of market investigations have been shortened. At phase 1, the CMA will have 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.

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