

Risk of Intervention in Market for Information and Communications Technology Services for the Public Sector

Further scrutiny from the UK Office of Fair Trading into public sector ICT services raises the spectre of intervention and forced changes to the market.

Introduction

The Office of Fair Trading (OFT) has decided, following its call for information in July 2013, to commence a market study into the supply of information and communications technology (ICT) goods and services to the public sector.¹ Market Studies often lead to far reaching intervention by the UK authorities — ranging from structural intervention such as requiring behavioural changes, such as prohibiting types of commercial practices or clauses in agreements or even forcing the disposal of businesses.

OFT has stated its continuing concerns about the large shares that some suppliers have of public sector ICT services. These high shares together with possible high barriers to entry and expansion (notably for smaller scale ICT suppliers) and the high costs of switching suppliers led OFT to decide to study the market in greater detail. The study will focus on the extent to which the high shares of some suppliers, the barriers to entry and the difficulty of switching suppliers arise from the market structure and the commercial behaviour of suppliers of IT outsourcing services and software to the government. OFT has claimed that the study will be informed by the current and recently concluded reports and other initiatives on public sector procurement but will not duplicate them.² Thus OFT will be analysing primarily the market structure and practices of suppliers to the public sector, not the way the government procures its ICT services.

Market Study Procedure

OFT intends to issue its report by the end of March 2014, just before OFT's role passes to the Competition Markets Authority.

Given this comparatively short deadline, OFT will start sending out questionnaires requesting information and inviting third party comments as soon as possible. Major suppliers, other significant market participants and interested parties will also be invited to meetings. At the end of a market study the OFT will issue a report and, if it provisionally decides that action should be taken, will consult on the outcome. The potential outcomes of the market study include, a market investigation ; a competition investigation; and/or making recommendations for other action such as new legislation or procedures. Where OFT provisionally decides that there should be a market investigation it will consider whether undertakings may remove the need for a reference. In this instance an undertakings option would be difficult as there are too many market participants with diverse interests for there to be a workable consensus.

Currently OFT does not have the power to require the production of information during a market study. However, where ICT suppliers provide information to OFT the information should not be false or misleading. OFT does have the power to require information when consulting on whether to make a market investigation reference after it has issued its report.

From 1 April 2014, OFT and the Competition Commission's roles will be assumed by a single institution, the Competition and Markets Authority (CMA). Since OFT's report is planned for March, the CMA will likely make the formal decision on what action to take following the study. As a consequence of the institutional change, the CMA's Expert Panel would oversee and make any decisions if there is a market investigation reference (this has sometimes been referred to as a phase two market investigation). In another potentially significant change to the market investigation regime, from April 2014, the Secretary of State will have the power to intervene in a market study procedure on public interest grounds to make decisions on whether public interest issues should be considered during a phase two market investigation. At the end of the investigation procedure the CMA expert panel will provide a report to the Secretary of State on the public interest considerations and make a decision on non-public interest matters. The Secretary of State will make the final decision on the public interest considerations.

Possible Outcomes and Next Steps

The Competition Commission has in recent months demonstrated an increased willingness to intervene in markets. This change — consistent with a major motivation for the changes to the UK competition regime — will facilitate a more interventionist stance by UK competition authorities, including the CMA.³ For instance, the Competition Commission is taking steps to impose behavioural remedies on statutory audit services providers to foster switching among providers.⁴ The Competition Commission has also provisionally decided to force disposals in the cement market to allow a new market entrant and impose behavioural remedies to reduce the risk of information sharing.⁵ Forced disposals are also a possibility at the conclusion of the private healthcare services market investigation.⁶ Prior to these procedures, forced disposals had been relatively rare in UK market investigation procedures — the disposals ordered at the conclusion of the British Airports Authority (BAA) Airports investigation in March 2009 being the notable recent example.⁷

The Competition Commission's previous remedies orders illustrate that if the CMA does go on to find an adverse effect on competition, the CMA is likely to consider interventionist remedies.

Practical Approaches for ICT Suppliers

Based on our experience responding to these market studies, ICT suppliers must take a strategic approach to responses to questionnaires and points made in meetings. Also adopting a consistent approach on key issues throughout the procedure can be very important. For instance, one key issue could be the extent to which the market has been shaped by government procurement practices and whether the mooted changes in procurement would alter the market structure given the expiry of existing contracts. Demonstrating this point early in the procedure could reduce the risk parties would be drawn into an extended market investigation procedure. Another important issue to consider is the status of information provided to the OFT and whether the information should be treated as commercially sensitive. As shown in the private healthcare market investigation, such considerations can lead to important procedural consequences if the CMA believes intervention is necessary in the market.⁸

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Endnotes

¹ See OFT press release 69/13, 15 October 2013

² See various Cabinet Office, NAO. Select Committee and OFT papers referred to in Note 2 of the OFT press release 69/13, 15 October 2013

³ See Annex 1 of BIS consultation "Competition Regime: Consultation on CMA Priorities and Draft Secondary Legislation", 15 July 2013 – The new and independent Competition and Markets Authority has been given wider powers to ensure fair and open competition to support the government's aim of securing strong, sustainable economic growth.

⁴ See "Statutory audit services for large companies market investigation - A report on the provision of statutory audit services to large companies in the UK", Competition Commission's Final Report of 15 October 2013 - Remedies sought include (a) tendering for statutory audit engagement at least every ten years for FTSE 350 companies; (b) a review of the FTSE 350 audit engagements by the Audit Quality Review (AQR) team of the Financial Reporting Council every 5 years; (c) an annual review of the auditing firms by AQR team; and (d) the prohibition to include provisions in loan agreements which restrict a company's choice of auditors.

⁵ See Competition Commission published provisional findings of May 2013 and provisional remedies in October 2013. The final report is expected in December 2013. The Competition Commission found that a combination of structural and conduct features in the GB cement markets give rise to an adverse effect on competition. The remedies currently being consulted on include (a) the divestiture of cement plants to facilitate the entry of a fifth competitor to the market; (b) restrictions on the publication of data of the GB cement market; (c) the prohibition of generic price announcement letters; and (d) measures to promote competition in the supply chain for material needed to produce cement.

⁶ See "Private Healthcare Market Investigation - Provisional findings report" of 28 August 2013 - Possible remedies identified include (a) the divestiture of hospitals where one operator owns a cluster in a local area; (b) the prevention of partnerships between incumbent operators and NHS hospitals or private patient units in areas where just one or two hospitals can be found; (c) measures to limit inducements to consultants for referrals; (d) the prevention of leveraging in negotiations with insurers of strong local positions; and (e) an improved availability of information on consultant fees and quality of hospital services. Procedural issues lead to challenges to the Competition Appeal Tribunal. See Endnote 8.

⁷ See "BAA airports market investigation: A report on the supply of airport services by BAA in the UK" of 19 March 2009. The Competition Commission found that the monopoly of airport operations in the south-east of England and in Scotland had an adverse effect on competition to the disadvantage of airlines, passengers and freight providers. In its final report of March 2009 it required BAA Airports Ltd to sell Gatwick and Stansted Airports as well as either Edinburgh or Glasgow. Furthermore it suggested changes to the regulatory regime to address competition issues concerning Heathrow airport which was found to restrict competition being the only hub in the UK.

⁸ See 1218/6/8/13 BMI Healthcare Limited v Competition Commission (No. 1). [2013] CAT 24 of 2 October 2013 in which the Competition Appeal Tribunal held that the Competition Commission did not allow for appropriate access to the information it collated for involved parties to respond properly to the provisional findings. Also see 1220/6/8/13 BMI Healthcare Limited v Competition Commission (No. 2) of 09 October 2013 – In another challenge to Competition Commission’s handling of access to information the Competition Appeal Tribunal stayed the proceedings by Order of the Chairman in light of the pending Eurotunnel appeal in which the Tribunal is currently assessing similar questions.