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The Government's spending review provides an opportunity to look strategically at possible reforms in U.K. competition law enforcement. The reforms that modernized the U.K. regime of competition enforcement with the 1998 Competition Act and the 2002 Enterprise Act have largely been successful. The United Kingdom is now seen as one of the worldwide leaders in best practices for competition enforcement. Actions of competition authorities and regulators are subject to an effective system of appeal and judicial review by a respected and authoritative Competition Appeal Tribunal ("CAT").

The rhetoric of the "public interest" that would bring larger parts of competition law enforcement back into the political sphere under a public interest (as opposed to competition) test seems to have receded. This retreat should be welcomed, as it would have put the United Kingdom out of step with international best practices. The financial crisis has not shifted that paradigm. Cases such as Lloyds/HBOS are—and should remain—the exception. There is, however, scope for reform to help the system, as a whole, deliver more for less.

Three areas for reform stand out:

1) Market investigation references ("MIR");
2) Scope of appeals on Ofcom telecommunications price determinations; and
3) Merger control.

In each of these three areas at least three of a quartet of authorities or tribunals funded by the Government (Office of Fair Trading ("OFT"), Competition Commission ("CC"), Office of Communications ("Ofcom"), and CAT) are engaged. Is there scope to rationalize these areas, delivering sound outcomes without damaging and even improving on the achievements reached so far? Yes.

On MIR, the U.K. system envisages a first look at the investigation by either the OFT or a sectoral regulator such as Ofcom who, based on wider competition and/or sectoral enforcement policy and expertise, spot areas to be looked at. Cases can then be sent for a full investigation of up to two years by the CC. The CC findings can be appealed on judicial review grounds (i.e. not on merits but essentially on grounds of lawfulness, reasonableness, and fairness) to the CAT. It is a system that is not working. It is unnecessarily lengthy, creating uncertainties and waste of resources. The two-tier system of initial review and full investigation can be consolidated under a single roof, subject to the judicial review of a confident tribunal such as the CAT.

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A similar theme applies to telecommunications pricing determinations. Unique to this regulated sector, these decisions involve a first tier determination by Ofcom, followed by an appeal to the CAT, who is obliged to refer price control issues to the CC, and then final judicial review to the CAT. There have been nearly 40 such cases since the adoption of the Communications Act 2003. They involve a large amount of public resources in both investigation and judicial defense and there is no consistency in the approach the system as a whole takes towards analogous decisions taken by other sectoral regulators such as Ofgem, the ORR and the CAA. Ed Richards, Ofcom's chief executive, at a speech at the Jevons Institute this summer raised the question of "whether the regulatory system strikes the right balance between justice and efficiency in decision making. Or whether we have ambled somnolently into a world where regulators are expected to make timely decisions to promote competition, but find it ever increasingly difficult to do so."[2] In some respects it is a fair question, but the answer is not to lower the standards of judicial review, which work perfectly well, but to look at whether the number of degrees of appeal (and scrutiny on merit) is disproportionate and inefficient.

In merger control actors are the OFT and CC in the United Kingdom and a case allocation system between the OFT and the European Commission in Brussels. For cases that start (or end up with) the OFT, the Enterprise Act envisages that the OFT, in a full-scale investigation, would refer consideration of a subset of mergers which may give rise to a substantial lessening of competition to the CC, allowing for the possibility of a UK-centric merger that starts review in Brussels going through three separate competition authorities.. The OFT statutory threshold for reference to the CC is low, perhaps too low. That said, the OFT has used its margin of appreciation to mitigate the practical implication of this in recent years, often by stretching the boundaries of what is typically done in Phase I merger control in peer regimes. However, after one of the longest Phase I timetables globally, mergers then referred to the CC are subject to a further six to eight month fresh phase II review. And, on top of this procedure, the CAT's judicial review powers have been used frequently of late to correct the CC on merger (and MIR) cases.

Most view the overall outcome of the process as sound but—especially in current times—question the price tag for both the public and private purse.

The difficulty is always in achieving the right balance between the cost of the system and its demonstrable ability to get to the right answer or achieve the best outcome. No one doubts that the authorities have worked hard to do more with less, to and improve on *outcomes* (protecting or improving competition and in turn productivity) rather than mere outputs (number of cases). In these respects, perhaps the most important element are the soft internal factors: an institutional culture that fosters debate and dissent, the balance of economic, legal, and other expertise, and a self-critical approach that has its outputs assessed in ex post reviews to learn from the past. Overall, great culture and high quality staff can compensate for suboptimal normative rules or the architecture of a system but this is not the terrain of legislative reform—and does not mean the architecture cannot be improved.

For its part, the EU Commission as a single authority introduced internal checks and balances in its merger case processes: think of the peer review and chief economist unit reforms that the EU Commission introduced after the big merger case losses in 2002, partly to compensate for the slowness of judicial review from the EU courts.

[2] http://media.ofcom.org.uk/2010/07/13/competition-law-and-the-communications-sector/

The Enterprise Act premise of retaining the two-authority model under the current regime went one better than Brussels as far as safeguards against *over*-enforcement (blocking benign mergers): the checks and balances of an entirely separate institution was perceived as worth the cost, and the CC's predecessor, the MMC, was a well regarded second pair of eyes operating the public interest test of the prior legislation.

In the intervening years U.K. merger control and MIRs have become more analytically- and fact-intensive as competition policy has become professionalized and more expensive, aided by the heightened rigor flowing from effective judicial review. Also, the problem in Brussels of slow EU court review is not prevalent in CAT proceedings. Finally, while the OFT's work overlaps with the CC as the second pair of eyes, the third pair of eyes that is the CAT has quashed (parts of) the last seven merger/MIR cases decided by the second pair of eyes. Overall, this suggests an expensive degree of overlap between the three sets of 'judges' on such cases. Nor can a second pair of eyes correct for under-enforcement (clearing a harmful merger), something which tends to trouble the private sector less than over-enforcement but is an equally important public policy objective.

If a single authority were to emerge, no doubt some efficiencies would be achieved by bringing the process under one roof, with two stages, especially if the best of both the OFT and CC were integrated into the merged authority. But can we maintain the separate decision-making which, in our view, gives important safeguards to the party?

Maintaining the separation should be possible by a reform which requires that the final decision on whether a merger is cleared (conditionally or unconditionally) or blocked is taken by a small college separate from the initial decision-maker(s). This could, for example, be a standing set of "Commissioners"—though various governance models are conceivable—who can challenge the case team "prosecuting" the case with appropriate procedural safeguards. These safeguards and predictability of decision-making, which would be obtained by entrusting decision-making to a restricted body such as Commissioners (with the ability of dissent), are paramount so that the OFT and CC's high reputation in merger control can be maintained from both a procedural and substantive perspective.

In order to strengthen the outcome of a process handled by a single authority one could leverage the expertise of the CAT. We would favor adding to their current right to judicial review of a merger control decision a right for the merging parties only (and not third parties) to appeal a decision blocking a merger on the merits. Pending mergers are fragile creatures and it is possible that such a right might not be used frequently in practice—but most likely in close-call cases. And it would provide a powerful discipline for the new merged single authority in competition enforcement.