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I. THE ROLE OF THE CMA

On March 15, 2012, following a consultation last year, the U.K. Government finally announced its plans to reform the U.K, competition regime and, on May 9, plans for an Enterprise and Regulatory Bill incorporating the proposals were included in the Queen's speech, setting out the forthcoming legislative program for 2012-2113.

The merger of the existing U.K. competition authorities—the Office of Fair Trading ("OFT") and the Competition Commission ("CC")—into a new body, the Competition and Markets Authority ("CMA"), was first proposed as part of Vince Cable's[2] "bonfire of the quangos[3]" in October 2010. At that time, the Government announced that nearly 200 quangos would be culled and a further 118 would merge, in an effort to improve accountability and cut costs.

Since October 2010, it has, in essence, been a certainty that a merger between the OFT and the CC would go ahead, notwithstanding the fact that they are both relatively small, low-turnover agencies, and the obvious cost savings arising out of a merger between them are not immediately apparent. Indeed, it is estimated that the creation of a single CMA entity will only save the Government, on average, approximately £30 million (less transitional costs) over a 10-year period.[4] Therefore, while the original impetus may have been one of cost cutting and the creation of efficiencies, the merger may in reality be seen by many as more of a philosophical change, driven by the fact that the Government believes a single body, without any internal rivalry or differing views, would be a stronger advocate for competition in the United Kingdom than the current regime.

The responses to the Government's consultation indicated that those who use the system are largely skeptical about the reforms, especially the controversial loss of the "second pair of eyes" which necessarily comes from having two reviewing authorities. Indeed, the existing U.K. competition regime is highly regarded internationally, with the CC achieving the highest rating of five stars and the OFT receiving 4.5 stars in a recent *Global Competition Review* rating report.[5] In particular, the U.K. merger regime has been commended for its technical competence, independence from the political process, transparency and access to decision-makers, and

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[2] Vince Cable is Secretary of State for the Department for Business, Innovation and Skills.

[3] A quango is a "quasi-autonomous non-governmental organisation." The phrase is used in the United Kingdom for an organization to which government has devolved power. Officially, such an organization is a "non-departmental public body," or "NDPB."

[4] Department for Business, Innovation and Skills, *A competition regime for growth: A consultation on options for reform, Impact Assessment*, pp. 74 & 75.

[5] RATING ENFORCEMENT 2011, GLOBAL COMPETITION REV.

accountability and robustness of decisions,[6] making lawyers and businesses alike nervous about the loss of the current regime.

The CMA is expected to be operational by April 2014 and it remains to be seen how effective it will be in practice. Aside from the obvious change of there being one governing body rather than two, the majority of the changes to the existing institutional framework are incremental adjustments aimed at streamlining the existing regime and increasing its effectiveness and rigor, rather than a complete overhaul of the current system.

Perhaps the most unwelcome change relates to the removal of "dishonesty" for the criminal cartel offense, which is likely to give rise to increased uncertainty for business and risks unintended consequences if there is no clarity on the scope of the revised offense. The success of this, and of the CMA more generally, will depend on appropriate implementation of the reforms and on leadership and resourcing of the CMA.

II. AN INDEPENDENT TWO-PHASE REGIME?

The Government hopes that the creation of the CMA will lead to a more coherent and streamlined decision-making process, which will be easier to coordinate across a single body, while not losing the effectiveness of the current two-tier system. The key message arising from many respondents to last year's consultation was that the separation of Phase I and Phase II decision making ensures independence and a fresh scrutiny of cases upon a referral. The Government has therefore sought to preserve this insofar as this is possible in a single authority, so there will be a two-phase process for the mergers and markets regimes within the single CMA body. The Phase I decisions will be taken by the CMA Board, which will decide whether the test for a Phase II review is met and whether any undertakings in lieu of a Phase II referral are acceptable. Upon referral by the Board, Phase II decisions will be taken by an independent panel with no executive involvement.

The Department for Business, Innovation and Skills ("BIS") hopes that this procedure will ease concerns over losing the benefit of a second pair of eyes that the existing regime currently offers. However, as the new two-phase system will be conducted by decision makers who are within the same institution, it is unclear whether the system will, in reality, achieve the independence that the OFT and the CC have separately maintained. This is not least because staff resourcing of cases, including from Phase I to Phase II, will be left to the CMA. Indeed, the CMA is unlikely to achieve its objectives of streamlining and efficiency if it does not carry staff members of case teams over from Phase I to Phase II. While case continuity may be helpful, in particular in terms of efficiency, it does carry the risk of "investigatory capture," so it is crucial that appropriate checks and balances are developed to safeguard the neutrality of Phase II within the single CMA.

III. PREMATURE CHANGES TO THE CRIMINAL REGIME

The most controversial reform in the new regime is the removal of the "dishonesty" element from the cartel offense. The Government believes that the requirement to prove dishonesty makes the criminal cartel offense harder to prosecute and so puts the United

[6] KPMG PEER REVIEW OF COMPETITION POLICY, 2007.

Kingdom at odds with developing international best practice on how to define a hard-core cartel. The change is seemingly so that the CMA can secure more criminal convictions, possibly in light of the much-commented-on collapse of the British Airways/Virgin criminal cartel trial in 2010.[7]

Given that the current criminal system has hardly been tested, this broadening of the scope of the regime is premature, as no jury has yet been given the opportunity to properly consider the application of the current test. Further, of the two prosecutions that have been brought since the offense was enacted,[8] neither supports a conclusion that the element of dishonesty prevented a successful prosecution of the offense.

The removal of dishonesty risks blurring the distinction between criminal and civil conduct; there are a number of breaches of competition law under the Competition Act 1998 which clearly do not meet the current requirement for dishonesty and therefore criminal liability can quickly be excluded. There will no longer be so evident a distinction under the new regime. It is of course unclear whether juries will, in practice, convict where there is no clarity as to "criminal" intent. At the same time, however, businesses may hold back from certain behavior that is competitively benign (or indeed pro-competitive) if there is a perceived risk of falling foul of the letter (albeit not the spirit) of the criminal offense.

BIS suggests that there can be a safe harbor for companies who have published details of their business arrangements in the *London Gazette* (or other similar publication) before implementation. Not only is this burdensome on companies, it is also an artificial approach that hampers the normal course of business, in particular for arrangements which are confidential and that incur costs.

IV. CIVIL CARTEL REGIME

The Government has adopted a "minimalist" approach to the civil cartel regime, opting to make incremental changes to its existing procedures rather than undertaking a major overhaul. The most radical option that the Government contemplated was a move to a prosecutorial system with institutional separation of investigation and decision making, as used in jurisdictions such as the United States. There was some support for this from the legal community, as there has been a lack of confidence as regards procedural and substantive review in a number of OFT cases. However, the U.S. system is mature and it could not be assumed that similar outcomes would be observed in the early stages of a new U.K. regime. The prosecutorial system also risked the CMA bringing fewer cases if it perceived prosecution to be difficult and requiring a significant allocation of resources.

However, in a nod to ensuring that decision making is robust under the new regime, the role of the Procedural Adjudicator will be expanded and parties will have increased access to decision makers at an interactive oral hearing chaired by the Adjudicator. Practitioners urge that,

[7] On May 10, 2010, the OFT announced the withdrawal of its criminal proceedings against four current and former British Airways executives for price-fixing. In addition, on April 19, 2012 the OFT announced that it was halving the fines originally imposed on British Airways following the conclusion of the civil proceedings, to £58.5million, to reflect new guidelines for financial sanctions and British Airways' co-operation with the OFT's inquiry.

[8] *Marine Hoses* and *British Airways/Virgin*.

in addition to the Procedural Adjudicator, the CMA ensures the reformed system will have sufficient senior staff who are able to take decisions during a case. Whether this will happen or not is likely to depend on the budget allocated to the CMA and, within that, to investigating civil cartel cases. Given general budgetary constraints, it is not clear whether the CMA will have deep enough pockets to build up its senior cohort to the requisite size.

V. MERGERS AND MARKETS REGIME

In relation to mergers, despite having consulted on a move to a mandatory regime, the Government has decided to retain the existing voluntary system, which is highly unusual in global terms. However, the voluntary system works well, is viewed as relatively efficient, and is well-regarded, so, although perhaps surprising to international spectators that the CMA will continue to buck the trend of other mandatory regimes, it would have been a retrograde step to introduce a mandatory merger control system to replace an effective voluntary one.

The Government also intends to increase the filing fees by a significant amount, up to a maximum of £160,000 from October this year. This will make the United Kingdom among the highest-charging global jurisdictions for merger control. Mergers involving larger companies often fall within the jurisdiction of the European Union, meaning the burden of this fee will likely fall disproportionately on smaller companies.

In addition, the Government is not providing a "service" to the merging parties, but rather to society at large, so it is hard to justify such high fees from the perspective of the acquiring party. Nevertheless, it is not surprising that the Government has opted for this substantial increase given the current financial pressures on the public purse. Furthermore, it is not the OFT's practice to call in non-issue cases in order to generate fees so, provided this does not change, this should limit exposure to the high fees.

A further reform that may, in fact, bring about a noticeable change is that the CMA will have a wider discretion to prevent pre-emptive action than the OFT has now, including a power to suspend integration steps in completed and anticipated mergers, and it will also have a power to reverse integration steps that have already occurred. This will likely make purchasers more reluctant to complete without prior clearance unless there is an unequivocal lack of competition concerns.

The reforms will also include the introduction of a new statutory timetable for Phase I reviews of notified anticipated mergers. Under the new regime, the CMA will have 40 working days to conduct its review, which may only be extended by the CMA issuing "stop-clocks" when waiting for information from the merging parties. The statutory timetable for Phase I reviews will be triggered when the CMA has received satisfactory information to begin its investigation, which will afford the CMA a degree of control over commencement of the review period. However, these changes will not impact on the CMA's four-month statutory period to review completed mergers, nor on the twenty-four week limit (with a possible eight-week extension) of Phase II reviews.

The most radical change in the markets regime is that the Government will allow for market investigations to encompass practices that occur across different markets. The Government believes this will lead to a more targeted approach to tackling recurring sources of complaints. It is not clear, however, how it will be implemented. Any market review involves

identification of relevant markets in order to both assess the competitive set and whether anyone has market power, and thus it may be logistically impracticable both to extend the ambit across different markets and also to have sufficient time for a thorough and fair scrutiny of potential issues.

The length of market investigation has also theoretically been shortened to a maximum period of eighteen months (from the current twenty-four months) but, with a possible extension of six months for complex cases, it remains to be seen whether, in reality, the time taken to complete investigations will in fact be the same.

VI. CHALLENGES OF THE TRANSITIONAL PERIOD

Most of the reforms under the CMA are not expected to be operational until April 2014, although there is much to do in terms of legislative preparation and practical implementation.

This state of flux in the U.K. competition regime is compounded further by the fact that John Fingleton, current Chief Executive of the OFT, will be stepping down from his role in the second half of this year. In his resignation letter, Fingleton said that he believes the reform proposals have "reached a suitable juncture to enable arrangements for succession to be taken forward."[9]

However, there are many uncertainties surrounding the new regime and the success of the reform proposals also depend on finding a strong replacement CEO who can lead the competition authorities into this new era with a steady hand. There will be a further challenge for both bodies in finding suitable mid-level staff who will remain motivated over the next few years of uncertainty. Whatever benefits the new regime may have in the longer term, including potentially as a higher profile agency capable of consistently attracting high-caliber candidates, there is a short-term risk that the current work of each body will suffer as it struggles to attract appropriate staff and manage its case load while preparing for implementation of the reforms at the same time.

The CC and the OFT will also have to align their interests in the period leading up to the creation of the CMA. As they do not always sing from the same hymn sheet, there will no doubt be the need for much behind-the-scenes negotiation and diplomacy so as to present a unified front.

VII. CONCLUSIONS

The reforms have met with a lukewarm (albeit not overly hostile) reception from practitioners and businesses in the United Kingdom. As discussed earlier, there are a number of significant challenges ahead in developing the details for the new institution and its procedures and practices, in deciding on the transitional OFT leadership and long-term CMA leadership, in bolting two different cultures together, and in not losing the best of the current system. However, now that the fates of the OFT and CC are sealed, we can expect that BIS (with the support of the OFT and the CC) will strive to ensure that they do create an "even more" world-class regime and for the new agency to win the respect of domestic and international commentators.

[9] John Fingleton's resignation letter to the Secretary of State, February 22, 2012.