UK’s Office of Fair Trading and Competition Commission to be merged to form the Competition and Markets Authority

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On 15 March the UK government announced that it will merge the UK’s two competition authorities to create a single authority, the Competition and Markets Authority (CMA). The CMA is due to be operational by April 2014 and is expected to result in a broad sweep of reforms to competition enforcement in the UK.

The UK government hopes that the reforms will simplify the regulatory regime and make it more efficient and cost-effective.

The current roles of the OFT and the CC

Under the current two-tier structure, the enforcement of competition rules is undertaken by the Office of Fair Trading (OFT) and the Competition Commission (CC). The OFT’s competition functions include investigating mergers at Phase I as well as conducting antitrust investigations and market studies. The CC, on the other hand, cannot initiate cases but conducts Phase II merger enquiries in cases referred to it by the OFT. The CC also conducts market investigations (again where an OFT market study refers a particular market to it) and can remedy market-structure problems where it finds that competition is not working in a particular sector (as it did, for example, when it required BAA to sell certain airports).
The reforms envisaged

The fundamental reform to the UK competition regime will be the merger of the two authorities. The remaining reforms, while significant, focus on enabling better enforcement. Importantly, the CMA will still remain an independent body, free from ministerial influence and only accountable to the UK parliament. We discuss some of the most important changes to the UK system below.

- Changes to the mergers regime

Voluntary notification remains but with enhanced “unwinding powers” for the CMA: The UK merger regime will remain voluntary. At a time where there is significant burden on business and a need to stimulate growth, the UK government decided to retain the relatively uncommon voluntary system of merger notification. However, one of the more consequential reforms envisaged will involve the CMA being provided with a discretion to suspend, and even reverse, all integration steps in a proposed merger. If companies decide to integrate without clearance they run a significant risk of an expensive “unwinding” process. This legislative step is meant to encourage notification of mergers to the CMA where a merger poses genuine competition concerns.

Jurisdictional thresholds remain: The UK Government is not proposing to change the notification thresholds for mergers in the UK: the jurisdiction of the CMA will therefore be triggered where the target’s UK turnover exceeds £70 million or where the share of supply of goods or services in the UK of the merger entity would exceed 25%. A statutory de minimis test for mergers involving small business will also be introduced although possibly not immediately.

Statutory time limits: the new regime will also introduce statutory time limits into the Phase I merger-review process. A 40-working-day time limit will apply to Phase I investigations, which may be extended if the clock is stopped in anticipation of further information from the parties. This reflects the period already specified by the OFT in its guidance, so it may be that, depending on the new authority’s appetite to use its “clock-stopping” power, the merger-review timetable changes little, in practice. Moreover, new time limits will apply to the submission of merger remedies to the CMA.

- Changes to the antitrust regime

While the UK government considered introducing a US-style prosecutorial regime, it finally decided to retain an administrative antitrust enforcement regime. Nevertheless, welcome amendments will be made to the statutory procedural rules to introduce a number of fair procedure principles. For example, those responsible for carrying out an investigation will be different to those charged with making a final decision on a case. It is hoped that the enhanced administrative process will introduce more objectivity in the
Amendments to the criminal cartel offence

Under current legislation an individual can only be found guilty of a “cartel offence” if they “dishonestly agree” with others to engage in a cartel. In light of the paucity of cases prosecuted in this field, legislation will remove the “dishonesty” element of the offence to enhance enforcement, which may well result in increased prosecutions for cartel offences in the UK.

Conclusion

The UK government has not opted for a dramatic re-haul of antitrust processes, despite significant pressure from business to do so. While, from an institutional perspective, the operation of the regime will certainly be different, it remains to be seen whether in practice the proposed reform will lead to speedier and more efficient disposal of merger and antitrust cases.

One aspect that is not yet known is whether the CMA will use its “unwinding powers” extensively in completed mergers. To the extent that it does, closer consideration will need to be given to the possibility of notifying a transaction to the CMA, even if notification is voluntary, as unwinding can be very expensive.

Clients with any further queries in relation to these changes are invited to contact the O’Melveny & Myers team in Brussels.