Criminal prosecutions & stricter cartel and merger enforcement – highlights of the UK competition law reform

Tomorrow, on 1 April 2014, significant changes to the UK competition regime are coming into effect. This update focuses on three highlights of what is arguably the most fundamental reform in a generation. Specifically it provides food for thought for companies in relation to (i) a reinvigorated competition watchdog, (ii) a real threat of criminal prosecutions in the UK, and (iii) a potential shift in strategic planning in the M&A context.

New setup, increased funding & new vigor?

On 1 April 2014, Victoria House in central London will lose two tenants and gain a new one: The Office of Fair Trading (“OFT”) and the Competition Commission (“CC”) will be merged into, and replaced by, a new single body, the Competition and Markets Authority (“CMA”).

These institutional changes at the heart of this reform will undoubtedly impact the way in which competition rules are policed in the UK. Indeed, the CMA has already produced ample material on how it intends to do so, publishing two tranches of guidance notes¹ (the first on 10 January and the second on 12 March 2014).

However, arguably the most important aspect in practice will be the creation of a reinvigorated watchdog. To a certain degree, this is almost consequential: As a newly-established body, the CMA will likely seek to impose itself and ensure those who are subject to its regulatory remit take it seriously. In addition, the CMA has also been promised more financial resources. HM Treasury announced in its 2013 spending round that the CMA would receive 31% more funding in 2015/16 than it currently receives (representing

an extra £16 million). The additional financial firepower is to be used primarily on up to 10 additional antitrust investigations. This will almost double the number of investigations.

**Dishonest no more – the UK criminal cartel offence**

* Dishonesty requirement removed

In the course of its last major competition law reform, the UK had added to its statute books a criminal offence designed to punish individual cartelists for the damaging consequences their illicit actions had on the wider economy: where an individual dishonestly agreed with one or more other persons to implement, or cause to be implemented, arrangements constituting price fixing, output restriction, customer or market sharing, or bid rigging, that individual would face up to five years in prison and/or an unlimited fine. And to establish “dishonesty”, the prosecution was required to prove that the elements of the Ghosh test were met.

This requirement was soon considered by some to be too restrictive to allow the OFT successfully to effect the prosecution of a meaningful number of individuals. In addition, case law suggests that price fixing must be accompanied by some “aggravating features” other than secrecy in order to be dishonest.

Above and beyond this, the OFT’s botched attempt at securing a conviction of four individuals in the British Airways case in 2008 meant that the only conviction to date under the UK criminal cartel offence has been as a result of US plea bargaining in the Marine Hose case. In other words, the UK regulator has thus far only secured one conviction against individuals for the criminal cartel offence, and that case was the result of plea bargaining in another jurisdiction.

The removal of the dishonesty requirement is likely to breathe new life into the cartel offence. Indeed, some observers have argued that managers may now unwittingly commit a strict liability-type offence, for which they may end up in jail.

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3 Cf. Enterprise Act 2002, ss.188-190.

4 Cf. R v Ghosh, [1982] EWCA Crim 2. The defendant’s actions must be dishonest according to the ordinary standards of reasonable and honest people, and the defendant must have realised that reasonable and honest people would regard the actions as dishonest.


New defences

In lieu of the “dishonesty” element, a handful of new defences have been introduced. An individual may rely on these:

1. where the arrangements were not intended by the individual to be concealed from customers;
2. where arrangements were not intended by the individual to be concealed from the CMA, and
3. where the individual took reasonable steps to disclose the arrangements to legal counsel to obtain legal advice before implementing the arrangements.

The wording of these “get-out-of-jail cards” has been widely criticised. The defence that arguably throws up the most questions is the third one: Will “legal counsel” be limited to an external antitrust specialist counsel or will it include also an in-house counsel, whose specialisation is in litigation or corporate law? Will the meaning of “legal counsel” be restricted to lawyers who are authorised to practice in the UK only? Or will it be a defence, e.g., for a company officer to have obtained legal advice from a Mexican lawyer prior to implementing the arrangements? Will it suffice merely to obtain legal advice, irrespective of whether the advice was that an arrangement was lawful or unlawful? The application of all three defences will be closely watched and it remains to be seen to what extent the courts will allow them in practice.

Contemplating a deal

Scrambling the eggs

The changes also impact the other main pillar of antitrust law - merger control. On paper, the voluntary nature of UK merger control will remain unaffected. Nonetheless, the CMA will be equipped with increased powers to suspend all integration steps and, crucially, can require integration steps already taken by the parties to a merger to be reversed at an early stage. These new powers are designed to address one of the perceived weaknesses of a voluntary merger control system: What to do if the parties have already “scrambled the eggs” to such an extent that a return to the status quo ante is no longer feasible in practice?

In addition, the CMA will also be able to impose fines of up to 5% of annual worldwide turnover, in the event of a party breaching a hold-separate order imposed on it by the regulator. In the past, the OFT would have only been able to suspend any further steps of integration going forward. From now on, the CMA will be able, at Phase I of a merger review, to require an “unscreaming of the eggs” and slap significant fines on parties in breach of its orders.

It remains to be seen how widely these additional powers will be used by the CMA. But any uncertainty over the CMA approach increases strategic risks for businesses.

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8 For completeness, in addition to the three new defences to the offence which have been inserted into the Enterprise Act at s.188B, two new exclusions from the offence have also been inserted at s.188A. These are the notification exclusion at s.188A(1)(a) and the publication exclusion at s.188A(2)(a) of the Enterprise Act 2002, as amended.
9 Cf. Enterprise Act 2002, s.188B (1).
10 Cf. Enterprise Act 2002, s.188B (2).
11 Cf. Enterprise Act 2002, s.188B (3).
Internal documents

It should also be noted that the scope of internal documents to be submitted to the regulator at EU level (the so-called “5.4 Documents”) has been expanded\(^{12}\). Previously, 5.4 Documents were limited to documents prepared specifically for the transaction, but now any internal documents assessing any of the affected markets prepared within a two-year window prior to the deal must be submitted. The CMA may well decide to take its cue from the European Commission when furnishing the parties to a merger with information requests.

CONCLUSION

The new UK competition regime will likely prompt more investigations by a re invigorated, and better funded, antitrust watchdog with wider powers. It will likely result in more individuals facing prosecution. This will present new challenges for businesses. For instance, while the admission of price-fixing vis-a-vis the CMA may be beneficial for a company seeking leniency or fine reduction, it may well be incriminating for the individual involved. In addition, the CMA undoubtedly has gained more intrusive powers under the merger control regime, which will impact strategic considerations and deal flexibility in the M&A context.

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\(^{12}\) Ct. “Brussels starts new year with “simplification” package for EU merger reviews – not so simple”
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