

## Here cometh the CMA ...

The UK competition regime is in the midst of its most significant reform since 'Modernisation' in 2004. This article will address some of the most significant changes that are underway and comment on their likely impact on practitioners and their clients. In particular we will look at the reforms introduced by the Enterprise and Regulatory Reform Act 2013 ("ERRA") including the creation of the Competition and Markets Authority ("CMA").

### Creation of the CMA

The UK competition regime has been criticised as being inefficient and lacking sufficient enforcement activity. This was one of the drivers behind the introduction of the competition reforms contained in ERRA by the Department for Business, Innovation and Skills ("BIS"). ERRA establishes the CMA, to which the competition functions of the Office of Fair Trading ("OFT") and Competition Commission are to be transferred. The CMA came into existence on 1 October 2013. It will operate in 'shadow form' until 1 April 2014, when almost all of the other competition related provisions of ERRA enter into force and the CMA will acquire its full powers.

The creation of a new regulator has required the creation of new guidance documents and internal policies in relation to which there have been two consultations. The first tranche of draft guidance was published for consultation in July 2013 in conjunction with draft secondary legislation for implementing aspects of ERRA reforms. BIS has recently published for consultation the second tranche of CMA guidance notes, alongside a consultation on the treatment of existing OFT and Competition Commission guidance and further draft secondary legislation. Stakeholders have until 11 November 2013 to respond to this second consultation. Both sets of draft secondary legislation are discussed further below.

The CMA is also consulting on its proposed vision, values and strategy. This follows a BIS consultation on a draft ministerial statement of strategic goals for the CMA also in July 2013. This was intended to provide a transparent statement of how the government sees the competition regime fitting with its broader economic objectives. It states that the government considers the central task of the CMA to be to ensure that the forces of competition are fully harnessed to support the return to strong and sustained growth. The CMA will be asked to have regard to the ministerial statement, but will operate independently and is not obliged to follow it.

The need for competition to support growth was also a central theme in a speech on current enforcement on 6 September 2013 by Sonya Branch, the OFT Executive Director of Enforcement and Mergers on competition enforcement investigations. Ms Branch also emphasised that one of the principal aims of creating a single, streamlined organisation is to enable perceived inefficiencies and overlaps across the

***"It is difficult to think of another time when there have been so many crucial changes in this area, whether actually in train or in contemplation."***

Sir Gerald Barling, President of the Competition Appeal Tribunal, Westminster Business Forum, 10 September 2013

UK competition regime to be eliminated and to allow for resources to be allocated more efficiently. This is echoed in the CMA's proposed strategy.

The CMA's proposed strategy also sets out the issues on which the CMA is likely to focus its attention in the first few years which include: regulated sectors; emerging sectors / business models (including online models); and markets which have historically been public services. Regulated sectors appear to be of particular interest given the intended make up of members of the panel of independent experts (the "CMA panel") which will conduct in-depth merger and market investigations. At least six of the members of the CMA panel must be utility specialists.

At the launch of the CMA the CMA Chief Executive, Alex Chisholm, discussed its mission and strategy. He warned against the CMA taking too much of a "quantitative approach" in its strategy for investigations but said that the authority would need a balance between more complex cases and "vanilla cases to remind people of the importance of deterrence" and that the measurement of the impact of the CMA's work should be the total impact on consumer wealth rather than the number of cases considered. The OFT has in the past been criticized for the low number of investigations it has undertaken, given its status as a leading EU National Competition Authority. It was also criticised for the substantial number of investigations that it closed without a finding of competition law infringement. All eyes will be on the CMA to see how its enforcement activity compares with that of its predecessor.

### Other UK Competition law reforms

The remaining reforms introduced by ERRA are also intended to improve the speed, quality and robustness of decision-making. An administrative approach to competition enforcement (where the authority is investigator, prosecutor and decision-maker) will be maintained with enhanced provisions for investigative powers, interim measures, fines and time limits. Many have argued that an administrative system raises concerns of 'confirmation bias': the perceived danger that the decision-maker may be strongly inclined to conclude that the case which it initiated and investigated is proven. A prosecutorial approach similar to that adopted in a number of other jurisdictions (e.g. the U.S. and Australia) has been considered during the current reforms. Separately, the European Commission has also been urged to adopt such an approach, with the European Commission, in effect, prosecuting a case before the General Court (or some equivalent body). However, this

### TIMELINE OF CURRENT SIGNIFICANT REFORMS TO UK COMPETITION LAW REGIME

**March 2011:** Government consultation on options for reforming UK competition regime



**11 March 2012:** Government announced decision on creation of the CMA and various reforms to the competition rules in the Enterprise Act 2002 and Competition Act 1998



**9 May 2012:** Queen's speech announced that government will introduce Enterprise and Regulatory Reform Bill (the "Bill") which will implement the government's decisions on reforming the UK competition regime



**May 2012 – April 2013:** Reading of the Bill in House of Commons and House of Lords



**2 May 2013:** ERRA 2013 published



**15 July 2013:** BIS launched consultation on statutory instruments to implement provisions of ERRA and CMA's strategic priorities



**17 September 2013:** BIS launched 2<sup>nd</sup> consultation on draft secondary legislation to implement aspects of ERRA and draft CMA guidance documents



**1 October 2013:** CMA established in shadow form



**1 April 2014:** CMA comes into full effect and all other ERRA reforms not already in force implemented (apart from specific Monitor provisions)

would require a change to EU Treaties and does not appear to be a realistic option. It was decided to retain the administrative system in the UK.

ERRA contains various amendments to the two main UK competition law statutes (the Enterprise Act 2002 – which relates to the merger and markets regime and the criminal cartel offence; and the Competition Act 1998 – which governs the anti-trust enforcement regime and the concurrent powers of the various UK regulators with competition enforcement powers). The most significant changes are summarised briefly below.

- **Market Investigations:** the two stage approach to market investigations will be retained with phase II being referred to the CMA panel. Tight statutory timeframes have been introduced for market studies to speed up the total timeframe for investigations. It has been suggested that speed and efficiency can be promoted by narrowing investigations at an early stage and preparing more focused reports. The CMA will also have wider information gathering powers during the initial market study stage. Currently, the OFT is not able to require information during the early stages of a market study. Once a market study notice has been published, the CMA will have full investigatory powers for the duration of the whole market investigation. Those investigatory powers will be backed up by civil fixed or daily penalties. The CMA is also given the power to impose interim measures if a reference to phase II is made. This will include the power to require the parties to take steps to reverse pre-emptive action taken or to reverse the effects of such action. It has been stressed that the CMA must guard against the statutory maximum period for investigations becoming the norm.

- **Competition Investigations:** the CMA will be able to require individuals to answer questions during an investigation and will be obliged to inform the investigated company only if the individual being questioned has a current connection with it. This has raised concerns about a company's ability effectively to defend, especially as ERRA does not provide for companies' access to these witness statements. The current criminal sanctions for failing to comply with formal investigatory requests have been replaced with civil sanctions and fines with the intention of making it easier to punish failure to co-operate. Criminal sanctions will remain where a party has been obstructive, provided false/misleading information or destroyed documents. The Competition Appeal Tribunal ("CAT") will now be able to issue warrants to enable dawn raids. The CMA is given a new power to publish a notice announcing that it is investigating one or more companies under the protection of absolute privilege against defamation. Possibly one of the most significant changes is that the threshold before which the CMA can impose interim measures in investigations is to be substantially lowered from 'serious, irreparable damage' to 'significant damage'. Finally, more formal arrangements for concurrent exercise of competition investigative powers by the CMA and the relevant sector regulators are introduced. An obligation on sector regulators to consider whether it is more appropriate to proceed under the competition regime before using sector specific powers is also provided.

- **Mergers:** the two stage approach to merger investigations will be retained by the CMA. Decisions will be taken by the “CMA Board” at phase 1 and the CMA panel at phase 2. The CMA will also have enhanced investigative powers and a new power to take interim measures in the event it has reasonable grounds to suspect that pre-emptive action has been taken in anticipated (as well as completed) mergers. This will be backed up by the power to impose financial penalties for breach of those measures. New statutory time limits for merger investigations are introduced for all parts of the review process.

- **Criminal Cartel Offences:** cartel activity can be a criminal offence under UK law if the activity can be shown to be dishonest. However, there has been only one successful prosecution under the current regime. The requirement to prove dishonesty is considered to have been a major contributing factor to the lack of successful prosecutions. The “dishonesty” element of the offence has therefore been removed by ERRA. New defences have been introduced including the “professional advice” defence. This defence has attracted controversy as it requires investigators only to have sought legal advice (with no requirement to follow any advice obtained).

### What does all this mean?

The changes are primarily aimed at increasing efficiencies and reducing costs. There is a clear undercurrent of governmental pressure to improve the enforcement record of the UK regulators. Even the CMA appears to recognise implicitly that this may be necessary by stating that it will “improve the historical record in front of courts without avoiding tough cases or ducking controversial decisions.” In time, an increase in the number of market investigations and a faster merger regime can be expected as well as possibly an increase of competition investigations. There is a sense that the CMA is likely to become more interventionist. These reforms, in tandem with continuing reforms of the CAT, are intended to build on, and improve, the UK’s reputation in Europe and worldwide for competition law enforcement.

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Draft statutory instruments to implement some of the reforms were published by BIS for consultation (on 15 July 2013 and 17 September 2013). These cover:

- (i) civil sanctions for failure to comply with investigatory requests and other procedures in competition investigations, mergers and market investigations;
- (ii) imposition of financial penalties for failure to comply with interim measures in mergers;
- (iii) enhanced pre-emptive order and information gathering powers;
- (iv) timing of mergers fees;
- (v) exceptions to the criminal cartel offence;
- (vi) the interactions between regulators in respect of their concurrent competition powers, including transfer of cases; and
- (vii) the ability of the CAT to issue warrants.

The coming months will see further secondary legislation to implement the remaining changes which is awaited with interest, as is 1 April 2014, when the new 'improved' regime is finally rolled out in practice....



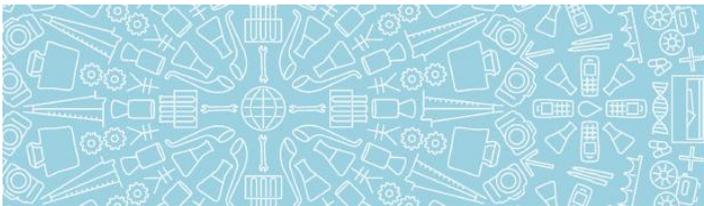
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