CLEARY GOTTLIEB

Alert Memo

LONDON, MAY 29, 2012

www.clearygottlieb.com

UK Government Publishes Enterprise and Regulatory Reform Bill

In March 2012, the UK Government announced plans to reform the competition regime, following a consultation exercise in 2011 (see Alert Memo, UK Government Reforms the Competition Regime[1]). The Government has now published draft legislation that would implement its proposed changes, as part of the Enterprise and Regulatory Reform Bill (the "Bill").[2]

The Bill provides for the establishment of a new competition authority, to be called the Competition and Markets Authority (the "CMA"). The OFT and Competition Commission will be abolished, and their functions transferred to the CMA. The Government expects the CMA to be formed by October 2013, and to be operational by April 2014.

The CMA will be managed by a board of directors and chief executive, with a panel of commissioners acting as decision makers in Phase II mergers and markets cases, and in certain regulatory decisions. The Government plans to appoint the chairman of the CMA within the next two months, and a chief executive shortly afterwards. These individuals, working with a "Transition Board", will be responsible for overseeing the integration and set-up of the new body, while ensuring that the OFT and Competition Commission are able to carry on business as usual in the meantime. It is unlikely that the new chief executive will take over formal responsibility for the OFT. However, this remains a possibility, as the current chief executive, John Fingleton, announced his resignation earlier this year, and intends to leave office during 2012.

---

1 Available at: http://www.cgsh.com/bis_response_on_uk_competition_regime/

2 The Bill is available at: http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html

The Bill would introduce changes to all main areas of the competition regime: mergers, antitrust, criminal cartels, and markets cases. It would also introduce a number of other miscellaneous changes, including minor changes to the concurrency regime and references by the sectoral regulators, and granting the Competition Appeal Tribunal (the "CAT") the power to issue warrants in competition cases.

I. MERGERS

The CMA would carry out both Phase I and Phase II investigations of mergers, with a panel of commissioners acting as decision makers at Phase II. Although the voluntary merger regime will remain (*i.e.*, there is no requirement to notify mergers and obtain clearance), the CMA will still be able to "call in" cases that are not notified. It will also gain stronger powers (including the power to impose fines) to prevent parties from implementing transactions prior to clearance. This is intended to minimise the risk of having to unwind transactions after the event. The use of hold-separate powers – which would in future extend to anticipated mergers as well as completed mergers – is likely to become more frequent as a result.

Under the Bill the CMA would be required to complete Phase I investigations within 40 working days, consistent with the OFT's current non-binding administrative timetable. However, it remains to be seen whether the imposition of a statutory deadline will speed up cases in practice. The CMA is almost certain to insist on longer pre-notification discussions as a matter of routine before it starts the statutory review timetable (an increasingly common feature even under the current regime), potentially extending the process as a whole. The OFT has argued that a statutory timetable for merger cases cannot operate unless it has powers to require the production of information. The Government has accepted this argument. Under the Bill, the CMA would gain formal information-gathering powers in Phase I cases (as well as in Phase II cases), with the ability to impose fines on parties who fail to comply, including third parties.

The process for offering undertakings in lieu of a Phase II reference is also likely to change. Currently, parties offering undertakings have to do so during the normal Phase I review period. The OFT decision maker will not find out whether the parties have offered undertakings until after he or she decides that the test for a Phase II reference has been met. There is very limited opportunity to amend the scope of undertakings offered after this point (and only in so-called "near miss" cases). This approach is intended to ensure that the decision maker's substantive assessment is not influenced by knowing whether undertakings have been offered. However, one of the disadvantages of this approach is that parties have no opportunity to discuss undertakings with the decision maker before they are offered. To

address this concern, parties offering undertakings in lieu of a Phase II reference in future would have five working days after the 40 working day review period to offer undertakings. The CMA will have a further five working days to decide whether to accept the undertakings in principle, and a maximum period of 50 working days (subject to extension) to negotiate and formally accept those undertakings. This is a welcome innovation, as it will allow parties to understand the competition concern they need to address when considering whether to offer undertakings. However, it is questionable whether this innovation will allow materially more interaction with the decision maker than at present, particularly in complex cases, where the discussion and formulation of possible undertakings can take several weeks.

II. ANTITRUST

The antitrust regime (anticompetitive agreements and abuse of dominance) will remain relatively unchanged, with the CMA carrying out investigations and issuing infringement decisions, subject to a right of appeal to the CAT, much as the OFT does now. The Bill would, however, introduce new powers allowing the CMA to question individuals connected to businesses under investigation, and to fine businesses and individuals for failing to comply with the CMA's information-gathering powers. The Government has decided not to impose time limits on antitrust investigations, but the Bill would allow the Secretary of State to introduce time limits at a future date.

The Bill paves the way for "collective" decision making in antitrust cases (*i.e.*, for infringement decisions to be taken by a group of individuals, separate from the investigating case team). It also envisages amendments to the statutory Rules governing antitrust investigations to introduce oral hearings, and to provide a formal basis for settling antitrust cases and for the appointment of a Procedural Adjudicator (both of which currently exist without a formal statutory basis). The OFT is already consulting on the detail of all of these areas.[3]

Under the OFT's proposals, decisions in antitrust cases would be taken by a group of three OFT executives, separate from the investigating case team. The group would be appointed after a statement of objections has been issued, and would be responsible for weighing up the party's defence against the evidence presented by the case team. This approach is intended to avoid "confirmation bias", the risk that if the same person acts as

[3] See: http://www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/ca98-procedures-guidance

investigator and decision maker, it is difficult for that individual to reach an objective decision. Another criticism of the OFT's current approach is that parties do not have sufficient opportunity to present their defence directly to the decision maker. Under the current statutory OFT Rules, any party that receives a statement of objections has the right to submit representations orally, as well as in writing. In March 2011, the OFT confirmed that the case decision maker would attend all oral representations meetings (which had not always been the case previously).

However, this process is by its nature one-sided: the OFT listens to what is said, but there is little interaction. The OFT is in favour of making the process more interactive by introducing an oral hearing in its place, and is consulting on what format a hearing should take (for example, whether it should be adversarial or inquisitorial). The introduction of an oral hearing would represent a significant shift in approach. Currently, oral representations are a right of defence, to be exercised at the discretion of the party under investigation. At an oral hearing the party would be subjected to questioning by the authority (which is why legislation is needed), and the process is less obviously a right of defence.

III. CRIMINAL CARTELS

The criminal cartel offence would be amended under the Bill, so that it would no longer be necessary for the prosecutor to show that an individual acted dishonestly. However, in future an individual who otherwise enters into a hardcore cartel agreement will not be guilty of an offence if details of the agreement are made known to customers before they purchase (or in bid-rigging cases, when a bid is made), or if they are published before being implemented, in a manner to be stipulated by the Secretary of State (possibly in the London Gazette). This change has been widely and heavily criticized as being unworkable in practice and for creating tensions between the interests of the individual and those of the company. There is also little evidence that the requirement to show dishonesty has inhibited prosecutions in the past.

The requirement to show dishonesty before convicting an individual of criminal behaviour was the subject of Parliamentary debate when the criminal cartel offence was introduced just over 10 years ago. It remains to be seen whether Parliament will be prepared to accept a different approach now.

IV. MARKETS REGIME

The changes to the markets regime under the Bill are in line with the Government's position in its response document. Market cases would consist of two stages, a formal

Market Study, followed by a possible Market Investigation Reference. Both would have statutory timetables and formal information-gathering powers. Currently, Market Studies are conducted without formal powers except where the OFT is proposing to make a Market Investigation Reference to the Competition Commission. Although the two processes would be more akin to a Phase I and Phase II investigation in future, the CMA would retain the power to take other forms of action following a Market Study (*e.g.* to open antitrust enforcement proceedings, or apply consumer law). The CMA would also have the power to consider market common to more than one market as part of a single Market Investigation, and may be required to consider and advise on public interest considerations in addition to competition matters.

The Bill will now undergo Parliamentary scrutiny, with its second reading in the House of Commons scheduled for June 11, 2012. The Bill is expected to receive Royal Assent in July 2013.

* * *

Please feel free to contact any of your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CLEARY GOTTLIEB

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299