SQUIRE SANDERS

A Competition Regime for Growth?
Business Implications of the UK Competition Regime Reform

The UK's competition law regime is on the cusp of the most fundamental and comprehensive reform in a generation, as a result of recently-enacted or planned reforms at both the UK-level and at EU-level, which will come into operation over the next couple of years.

The two most significant sources of these reforms at UK-level are:

- The Enterprise and Regulatory Reform Act 2013 (ERRA), which was enacted in April 2013 and whose reforms will mostly come into effect in April 2014.
- The Consumer Rights Bill (CRB) currently being consulted on by the UK Government and could come into effect as early as late 2014.

Set against the background of a very challenging economic climate characterised by low/stagnating growth, these reforms are being presented as a necessary contribution to economic growth, aimed at stimulating competition and increasing efficiency and innovation levels, ultimately to the benefit of UK consumers. The proposed reforms include:

- Replacing the Office of Fair Trading and Competition Commission with a new unified Competition and Markets Authority (CMA), aimed at reducing delay and duplication and enabling a more dynamic public enforcement of the competition rules.
- Measures to improve the efficiency and transparency of investigations of suspected anticompetitive agreements or abuse of dominance under the Competition Act 1998 (CA98).
- Lowering the bar for the prosecution of individuals for the cartel offence under the Enterprise Act 2002 (EA02) by removing the dishonesty element of the offence.
- Bringing in new statutory time limits for merger control reviews and for market studies/investigations.
- Promoting a greater use of the competition laws by sector-specific economic regulators and enhancing the CMA's coordinating role as regards the use of the competition rules in regulated sectors.
- Encouraging more private legal actions seeking damages/injunctive relief for violations of the competition rules including, if the UK Government's current proposals are enacted, introducing US-style "opt out" class actions albeit with a number of safeguards against abuse (see February 2013 publication).

However, a number of the proposed reforms have the potential to significantly increase the costs and risks of doing business in the UK, which, given the continuing economic environment, is cause for considerable concern:

- The reforms are likely to lead to an increase in the intrusiveness and burden of CA98 investigations, as the CMA will have broader investigatory powers, for instance to compel individuals to answer questions about suspected violations, and will have a greater ability to impose "interim measures" pending the outcome of an investigation.
- The removal of the dishonesty element under the cartel offence, although replaced by a number

of transparency defences, could lead to a period of uncertainty having the effect of slowing down commercial decision-making (much will depend on the content and clarity of the prosecutorial guidance which the CMA is obliged to publish).

- The CMA will have enhanced powers to interfere with completed mergers (including a new power to unravel integration that occurred before the CMA calls-in a merger filing, on top of the existing power to impose forward-looking "hold-separate" obligations) and will have wider investigatory powers during a Phase I merger control review.
- The CMA will have powers to conduct market studies and market investigations across markets, again with enhanced investigatory powers for market studies.
- Introducing for the first time "opt-out" collective actions raises very significant concerns of importing some of the drawbacks of US style class actions, with the potential to impose a huge burden on UK businesses and creating incentives to settle questionable actions.

In short, there are legitimate concerns that these reforms will impose an additional and costly regulatory burden on UK business, shortly to face:

- More (and more intrusive) competition investigations and market studies/investigations.
- An increased risk of criminal prosecution.
- Potentially more intrusive merger control reviews of completed mergers including very small mergers (the UK Government passed on the opportunity to establish a "safe harbour" for small mergers on the grounds that it was not "a high priority at this time"), edging the UK closer to those regimes which require pre-approval for qualifying mergers.
- A much greater prospect of being sued for competition law infringements including by the representatives of classes of private litigants (many/most of whom may have simply failed to "opt-out" of the action).

In addition, the European Commission is also proposing/considering a number of reforms at EU level including:

- A package of proposals to facilitate private antitrust damages actions (see June 2013 publication).
- Reform of the EU Merger Regulation: on 20 June 2013 the Commission launched a consultation, including as regards options for extending the scope of the EUMR to the acquisition of minority non-controlling interests.

The combined impact of the various reforms to the UK competition regime represents a step-change for UK businesses. Whether this will be conducive to the growth of UK businesses and of the wider UK economy remains to be seen. One thing is certain; the reforms already enacted and coming into effect in April 2014 represent a materially increased level of antitrust risk for UK businesses (and individuals). Firms doing business in the UK would be well advised to review their compliance procedures and business practices now, to ensure they are prepared for April 2014.

SQUIRE SANDERS

Below, we outline in further detail the most significant reforms coming into effect under the ERRA.

Type of Reform	Significance
Antitrust Investigations	• CMA will have power to compel current/former employees to answer questions about suspected infringements including during dawn raids, subject to heavy penalties for failure to comply. • CMA's power to impose interim measures will be subject to a lower "significant damage" test, compared to the existing "serious irreparable harm" test.
Criminal Cartel Offence	• Dishonesty requirement abolished. • New transparency defences: — Customers given "relevant information" (sufficient to disclose that the offence might apply) in advance. — The person requesting bids given relevant information at or before the time a bid is made. — Relevant information published (in a manner specified by the Secretary of State) before the arrangements are implemented. — No intention, at the time they enter into the arrangements, to conceal the nature of the arrangements from customers or from the CMA. — Reasonable steps to disclose the nature of the arrangements to professional legal advisers for the purposes of obtaining advice about them before they are made.
Market Investigations	• CMA empowered to conduct cross-market investigations, rather than being limited to investigating only one market at a time. • Introduction of new statutory time limits including: — CMA obliged to publish market study notice describing scope, timeframe and period for making representations. — Market studies to be completed within 12 months of market study notice. — Market investigations to be completed within 18 months (extendable by six months). — Market investigation remedies must be implemented within six months (extendable by four months).

Type of Reform	Significance
Merger Control	• New CMA power to require post-completion integration to be reversed and to impose penalties of up to 5% of aggregate worldwide turnover for breach. • New statutory 40 working day time limit for Phase 1 merger reviews (Phase II review time period remains 24 weeks, extendable by eight weeks). • Phase I remedies can be submitted within five working days of the CMA's decision to initiate a Phase II review, with the CMA having a further five working days to decide whether or not to suspend the Phase II review pending consideration of the remedies (in which case, the CMA will have a further 40-80 working days to decide whether or not to accept the remedies). • New CMA power to suspend the commencement of a Phase II merger investigation for up to three weeks if possible that the merger may be abandoned. • Phase II reviews will be conducted by a panel of independent experts operating independently of the CMA board.
Sectoral Regulators (e.g. Ofcom; Ofgem; Ofwat; CAA)	• Sectoral regulators must consider whether it would be more appropriate to proceed with enforcement under competition law before using sector-specific powers. • CMA power to take over competition law cases from sectoral regulator if better placed.

Contacts

Diarmuid Ryan
London
T +44 20 7655 1310
diarmuid.ryan@squiresanders.com

Edouard Sarrazin
Paris
T +33 1 5383 7400
edouard.sarrazin@squiresanders.com

Brian N. Hartnett
Co-leader Antitrust & Competition
Brussels
T +322 627 11 01
brian.hartnett@squiresanders.com

Mark J. Botti
Co-leader Antitrust & Competition
Washington, D.C.
T +1 202 626 6292
mark.botti@squiresanders.com

Oliver H. Geiss
Brussels
T +322 627 11 12
oliver.geiss@squiresanders.com