

BIS Consultation – the case for and against mandatory merger filings

The Department of Business, Innovation and Skills (“BIS”) has recently published proposals for a major reform of the UK competition regime, including the merger of the OFT and the Competition Commission into a single Competition and Markets Authority (the “**Consultation Paper**”). Amongst the more significant changes proposed are changes to the UK merger rules which, if implemented, would impose significant additional costs on businesses in the UK.

THE CHANGES PROPOSED

BIS proposes a spectrum of options for changes to the notification regime, including a scheme for mandatory notification of mergers fulfilling certain turnover thresholds and a hybrid notification scheme providing for mandatory notification of mergers fulfilling certain turnover thresholds and voluntary notification of mergers below those thresholds, subject to satisfaction of a share of supply test .

The proposed turnover tests for the full mandatory notification regime are: (i) target UK turnover in excess of £5 million; and (ii) worldwide turnover of the acquirer in excess of £10 million. The proposed thresholds for the hybrid mandatory notification regime are: (i) mandatory filings where the target’s UK turnover exceeds £70 million; and (ii) the ability for the UK competition authority to investigate mergers that meet the current share of supply test (creation or strengthening of a share of supply of 25% or more of goods or services of any description) but that do not meet the £70 million threshold.

LIKELY IMPACT OF CHANGES

The Government estimates, in the impact assessment published by BIS in conjunction with the Consultation Paper (the “**Impact Assessment**”), that these thresholds would increase the number of filings in the UK from 88, which is the average number of decisions made per year by the OFT in the last three years, to approximately 1190 per year, in the case of the mandatory notification option and to 380 per year, in the case of the hybrid notification option.

RATIONALE FOR CHANGES

BIS proposes mandatory merger filings as a method of addressing the perceived drawbacks of the current UK merger regime. These perceived drawbacks are principally the risk that some anti-competitive mergers escape review and that the UK competition authorities are required to investigate a large proportion of completed cases, which in turn makes it “difficult to apply appropriate remedies”.

In relation to the first perceived drawback, BIS quotes a report prepared by Deloitte for the OFT which suggests that only 50% of cases which are capable of giving rise to a substantial lessening of competition (“**SLC cases**”) are

brought to the attention of the OFT. However, the report does not cite a single example of a merger that raised serious competition issues that escaped review by the OFT because it went unnoticed. The OFT has powers to refer completed transactions up to four months after completion. In our experience there are few mergers that are implemented that raise serious competition issues and escape review within that timeframe, not least because of the propensity of customers and competitors to complain – often vociferously – about merger transactions that they perceive to affect them adversely.

In relation to the second perceived drawback, the number of completed mergers that have been referred to the Competition Commission and that have proved problematic to unwind is small. The Impact Assessment recognises this point: “the unscrambling problem has only affected a handful of the many SLC cases the OFT has investigated” (paragraph 103). Moreover, many of the completed mergers that have been referred to the CC have involved transactions that would have fallen below the thresholds mooted for mandatory notification. When reviewing completed mergers, the OFT now routinely asks for hold separate undertakings at an early stage to prevent integration of businesses at the review stage. There are, as a result, few recent cases where unwinding is difficult. In addition, we consider that the proposal to introduce financial penalties for breach of hold separate undertakings would address the problems experienced in a minority of cases without the need for mandatory merger filings.

COSTS IMPLICATIONS OF PROPOSALS

Even if a mandatory merger notification system may be perceived to reduce the risk that some anti-competitive mergers escape review or that completed mergers prove difficult to unscramble, we consider these advantages are relevant only to a small number of cases and would be overshadowed by the regulatory burden and costs to business and the UK competition authorities.

Under a mandatory notification regime businesses would incur costs in cases that raise no competition issues. These costs would include delays in implementing the transaction, management time, legal costs and merger fees. In the Consultation Paper, BIS proposes that under a mandatory regime there either be a flat fee of £7,500 per merger or a fee of £4,000, £8,000 or £12,000 depending on the turnover of the enterprises being acquired. These proposals are lower than current fees (£30,000, £60,000 or £90,000, depending on the turnover of the enterprises being acquired); this is because more mergers would qualify to pay a fee. However, it is likely that the proposed fees are understated, as BIS is proposing to set merger fees to recover the full costs of the merger control regime and the proposed fees do not take into account the additional costs of mandatory notification.

The cost to the UK competition authorities would increase as a result of reviewing more cases. In the event of a full mandatory notification regime, according to the Impact Assessment, the additional direct cost would range between £3.8 million and £8.5 million. This extra cost represents an increase of between 37% and 82% relative to the cost of 2009/10 merger control work (£10.4 million).

CONCLUSION

The current voluntary regime provides businesses with considerable flexibility. Buyers of businesses who are prepared to proceed to completion are not disadvantaged in an auction process relative to bidders who have no competitive overlaps. Sellers who want to dispose of businesses quickly for financial reasons can proceed to completion without the burden of going through a regulatory review process.

The current regime also focuses resources on cases that raise competition issues, which is a more efficient use of resources. This ought to be of particular relevance at a time when Government policy is to cut back on unnecessary regulation, red tape and to streamline public services.

The existing regime has been independently assessed as “world class” and if it ain't broke don't fix it.

A copy of the Consultation Paper and Impact Assessment can be found at the following website: www.bis.gov.uk.