The legal regime of competition in United Kingdom

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Abstract

The United Kingdom has recently introduced a unitary competition regime. Begining with 1979, the United Kingdom was a primary exponent of the neoliberal philosophy, putting in first place market, privatisation, liberalisation and deregulation. For that reason, a competition policy did not exist too much in practice for almost two decades. An important aspect was the influence of European Union competition law. Even in a such situation, the supranational policy could not take the place in of a domestic competition policy. The British Parliament adopted some rules in 1998 in the field of anti-competitive agreements and the control of abuse of dominance and in 2002 in the field of merger control. In March 2012, there were announced the proposals for the reformation the United Kingdom competition law regime. According to the proposals, the functions of the Competition Commission and the competition functions of the Office of Fair Trading (OFT), will be the competences of a new, single competition authority, the Competition and Markets Authority (CMA). The new body will have jurisdiction to analyse merger control reviews and market investigations, and in the same time will act as the main institution enforcing the competition laws.

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JEL Classification: K21, K33

1. Introduction

The main components of the UK competition regime are market studies and market investigations (examining markets which do not work well for consumers, with powers to impose remedies where an adverse effect on competition is found), merger control (maintaining competitive pressures in markets by prohibiting anti-competitive mergers between businesses or otherwise remedying their potential adverse effects on competition), anti-trust (enforcing legal prohibitions against anti-competitive business agreements, including cartels and the abuse of a dominant market position) and competition advocacy (promoting the benefits of competition and challenging barriers to competition, such as those which might result from existing or planned Government regulations).[2]

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[2] Parker, J., Ares, E., Barclay, C., Conway, L., Edmonds, T, Kelly L, Seely *House of Commons Library Research Paper* 12/33, 2012, p. 17.

2. First regulations in the field of competition

The UK was the first European country to introduce competition legislation at the end of the Second World War[3].

The 1948 Monopolies and Restrictive Practices Control and Enquiry Act was the first to put into evidence the 'public interest' principle, and to establish that investigations into competition cases would be undertaken administratively on a case-by-case basis in line with British preference for non-adversarial approaches to regulation.

The competition aspects of mergers have been regulated since 1965 when the Monopolies and Mergers Act extended the competences of the Monopolies Commission. The United Kingdom became only the second state after the United States to have a fully merger control regime[4].

According to the Act, the Secretary of State for Industry had the power to initiate investigations by the newly established Monopolies and Restrictive Practices Commission (MRPC) into industries in which it was thought that anti-competitive practices may have negative effects to the public interest. The threshold (limit) for investigation was that in excess of one third of supplies (or purchases) on the market must be made by one enterprise (or group of associated enterprises).

The 1973 Fair Trading Act strengthened the administrative framework, setting up an independent agency[5].

The UK's competition legislation was based on a pragmatic evolutionary approach, relying on an administrative investigative style

The Fair Trading Act was passed in order to provide an environment for free competition, and was focused on the restriction of monopoly.

We can speak about a monopoly when a person or group of persons to secure the sole exercise of any known trade throughout the country. There are certain monopolies authorized by the statutes[6].

3. Developments

The competition Act of 1998 repealed the Fair Trading Act, 1973[7].

Chapter 1 is forbiding the agreements which fix prices, control production, share market or sources of supply, apply dissimilar conditions to equivalent transactions and make the conclusion of contracts subject to acceptance by other

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[3] Michelle Cini, *The Europeanization of British Competition Policy*, ESRC Seminar Series/UACES Study Group on the Europeanization of British Politics and Policy-Making, University of Sheffield, Seminar Paper, 2003, p. 5.

[4] Michelle Cini, *cited work*, p. 6.

[5] Michelle Cini, *cited work*, p. 6.

[6] Shrishti Dutt *Competition law in India, US and UK. A comparative analysis,* Internship report, 2012, p. 23.

[7] Michelle Cini, *cited work*, p. 8

parties of supplementary obligations which by nature of commercial usage have no connection with the subject of such contracts.

Chapter 2 declares unlawful the behaviour of any undertaking which amounts to the abuse of dominant position is prohibited if it consists in imposing unfair purchase or selling prices, limiting production, market or technical development, applying dissimilar conditions to equivalent transactions with other trading parties, or making the conclusion of contracts subject to acceptance by other parties of supplementary obligations having no connection with the subject of contracts.

On the other hand in U.K a number of sectoral regulators have power to apply the Competition Act in the same time with other legislations.

The UK competition rules have been regulated in a european manner by the Competition Act 1998 and the Enterprise Act 2002.

This secondary legislation adjusts UK competition law to Regulation 1/2003 of the EC[8].

Like EC competition law, agreements between undertakings, decisions by associations of undertakings and concerted practices are regulated in UK law. These forms of conduct are forbidden if they have as their object or effect the prevention, restriction or distortion of competition within the UK.

Until 1 May 2004, undertakings could apply for an individual exemption by notifying their agreements to the competent national competition authority. In order to be in line with Regulation 1/2003 of the EC, the British legislation has abolished the notification system, which was modelled upon the scheme of the old EC individual exemption system[9].

Notification has been replaced by a legal exception regime.

Section 18 of the Competition Act 1998 stipulates that any conduct on the part of one or more undertakings that amounts to the abuse of a dominant position is prohibited. It is clear that this prohibition is a copy of Article 82 EC[10].

According to the Enterprise Act 2002, the possibility exists that the competent authority can carry out market investigations if it is suspected that any feature or combination of features of a market prevent, restrict or distort competition in the UK. The most important characteristic of these investigations is that they focus upon the operation of the market as a whole, rather than upon the way a single enterprise or several enterprises operate.

An important aspect of the 2002 reform in UK competition law was the adoption of new merger control rules[11].

Unlike EC competition law, the UK merger control regime provides that no legal requirement exists to notify mergers to a competition authority, whether prior to the deal or even after its completion. In practice most mergers are notified on a

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[8] Johan Van den Gronden, Sybe De Vries *Independent competition authorities in the EU*, „Utrecht Law Review", Volume 2, Issue 1 p. 49.

[9] Johan Van den Gronden, Sybe De Vries, *cited work*, p. 50.

[10] Johan Van den Gronden, Sybe De Vries, *cited work*, p. 50.

[11] Johan Van den Gronden, Sybe De Vries, *cited work*, p. 51.

voluntary basis. In assessing whether competition has substantially been lessened, the competent competition authority must consider whether coordinated behaviour in the market will occur because of the concentration at hand, resulting in reduced competition in the market.

According to the 1998 Act UK competition law can now impose real penalties for infringements. The Appeal Tribunal, which has jurisdiction to review competition law decisions, was also established.

The main competence of the Office of Fair Trading (OFT) is to apply and enforce the competition rules, but it also has numerous consumer responsibilities under a wide range of consumer protection legislation.

The powers of the OFT in the field of enforcement have been enlarged. It has been granted powers such as entering premises, and it can disqualify company directors, where their companies are guilty of an infringement of the cartel prohibition or the prohibition on the abuse of a dominant position. A court eventually makes a disqualification order after the OFT has started a procedure. If such an order has been made, the company director concerned is forbidden from office for a period of maximum 15 years.

The enforcement of competition rules by penal law has been made possible by the 2002 legislation. The penalties could constitute a term of imprisonment of a maximum of 5 years and a potentially unlimited fine. Proceedings may be brought by the Director of the Serious Fraud Office (and in Scotland by the Lord Advocate)[12].

The new 1998 Competition Act repealed the Restrictive Trade Practices Act 1976, the Restrictive Practices Court Act 1976, the Resale Prices Act 1976[13].

It replaced too Sections 2 to 10 of the Competition Act 1980 relating to the control of anti-competitive practices and introduces consideration of European competition law principles when interpreting the prohibitions under the Act.

The new Act also introduced a change in the administration of competition policy, replacing the Monopolies and Mergers Commission (MMC) with a new Competition Commission (CC), with effect from 1 April 1999[14].

The new Commission was divided into two parts, one involving the traditional reporting duties (called the 'reporting side' of the Commission) and the other involving the appeals (in the form of Appeals Tribunals).

The reporting side of the CC has a large number of different functions called in the Act 'the general functions of the Commission'. Panels of four or five Members of the Commission conducted the inquiries (three months for mergers or newspapers inquiries and six months for a utility case).

Monopoly investigations took longer, between 9 and 12 months. The Commission did not have the authority to initiate its own investigations[15].

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12 Johan Van den Gronden, Sybe De Vries, cited work, p. 52.

13 David Parker *Reforming competition law in the UK : The Competition Act 1998,* University of Bath School of Management, Centre for the Study of Regulated Industries, Occasional Paper 14, 2000, p. 3.

14 David Parker, *cited wor*k, p. 3.

15 David Parker, *cited work,* p 4.

An important institutional change was the setting – up of Appeal Tribunals within the Commission with an equivalent status to the High Court. The Tribunals are headed by a legally qualified President with the same status as a High Court judge. Each Tribunal has a legally qualified chairperson (who may be the President) and two lay-members, drawn from as appeals panel of members of the Commission[16].

4. The last reforms

The 2002 reform has also guaranteed the independence of the Competition Commission (CC).

Before this reform the Competition Commission was a body that mainly issued reports and recommendations in the field of merger control and the regime for dealing with 'monopoly. The Competition Commission had decisive power in merger review process.

The process begun with the OFT. If the initial investigations of this authority indicated that the merger may result in a substantial lessening of competition, the OFT refered the merger to the Competition Commission.

References could also been made by the Secretary of State for Trade and Industry. As a result, the Competition Commission carries out a market investigation. If the Competition Commission finned that there is an adverse effect upon competition or any other detrimental effect upon consumers, it is obliged to determine which actions should be taken.

The Competition Commission has decisive powers in this procedure. The Secretary of State was entitled to intervene in cases in which the public interest is in question[17].

If we compare with the old regime of the Enterprise Act 1973, the influence of the Secretary of State has been considerably reduced.

According to the present UK merger review rules, the Secretary of State is only involved in the merger review process in exceptional circumstances, if issues that have been listed by the national legislature are involved. According to UK law, only issues related to media, newspapers and national security could amount to a ground for public interest intervention in the merger control process.

In a merger case, in which a public interest consideration is involved, the Secretary of State may issue an intervention notice requiring the OFT to report to him on the competition and public interest aspects of the merger[18].

Until 1 April 2014, and the establishment of the Competition and Markets Authority, the main competition institutions were as the Office of Fair Trading (OFT), responsible in particular for antitrust enforcement and for the first phase of merger and markets cases, the Competition Commission (CC), responsible for second phase merger and market investigations and, in appropriate cases, for the

[16] Johan Van den Gronden, Sybe De Vries, *cited work*, p. 52.
[17] Johan Van den Gronden, Sybe De Vries, *cited work*, p. 55.
[18] Parker, J., Ares, E., Barclay, C., Conway, L., Edmonds, T, Kelly L, *cited work*, p. 56.

imposition of remedies to any anti-competitive effects found and the Competition Appeal Tribunal (CAT), a specialised judicial body, which hears appeals and decides certain cases involving competition or economic regulatory issues[19].

The new legislative package is including tighter statutory deadlines in merger and market cases, an exemption for small businesses from merger control, the handling of antitrust cases and empowering the CMA to carry out investigations into similar practices across different markets.

The functions of the Competition Commission (CC), and the competition functions of the Office of Fair Trading (OFT), will be transferred to a new, single competition authority: the Competition and Markets Authority (CMA)

The CMA will have jurisdiction to carry out UK merger control reviews and market investigations, and will also act as the primary enforcer of both civil and criminal competition laws.

The CMA will be required to consult on making a market investigation reference within six months of launching a market study. The deadline for completing a investigation will be shortened, with a further deadline introduced for implementation of remedies. The CMA will also have enhanced powers to gather information, to impose remedies and to conduct investigations into practices spanning a number of different markets.

There will also be enhanced powers during competition investigations, including compulsory interviews and civil financial penalties (instead of criminal sanctions) for parties who do not comply with certain formal requirements, and the criteria for the imposition of interim measures will be relaxed.

5. Conclusions

The package of changes represent the most radical proposals to reform UK competition law since the Enterprise Act, introducing the criminal cartel offence as well as a number of significant institutional changes. The institutional streamlining of the OFT and the CC into a single body follows a trend for institutional simplification that has led, in the recent past, to similar changes in other countries.

The relatively light changes in merger control may not go far enough for some given that the voluntary nature of British merger control, as well as the jurisdictional thresholds, remain unchanged. There were maintained the key aspects of the UK merger control regime was motivated largely by the desire to minimise the regulatory burden on business and avoid the increased public cost of a mandatory notification regime.

The changes are maintaining an administrative, rather than prosecutorial, approach to antitrust enforcement by trying to ensure that the administrative procedure is fair to parties under investigation and produces legally strong decisions.

[19] Johan Van den Gronden, Sybe De Vries, *cited work*, p 17.

Bibliography

1. Cini, M., *The Europeanization of British Competition Policy*, ESRC Seminar Series/UACES Study Group on the Europeanization of British Politics and Policy-Making, University of Sheffield, Seminar Paper, 2003.
2. Dutt, S., *Competition law in India, US and UK. A comparative analysis*, Internship report, 2012.
3. Parker, D., *Reforming competition law in the UK: The Competition Act 1998*, University of Bath School of Management, Centre for the Study of Regulated Industries, Occasional Paper 14, 2000.
4. Parker, J., Ares, E., Barclay, C., Conway, L., Edmonds, T., Kelly L., Seely, A., Ward, P., *House of Commons Library Research Paper* 12/33, 2012.
5. Van den Gronden, J., W., De Vries, S., A., *Independent competition authorities in the EU*, „Utrecht Law Review", Volume 2, Issue 1, 2006.