Responses to BIS Consultation - "A competition regime for growth: a consultation on options for reform" - A to C

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RESPONSE TO THE DEPARTMENT FOR BUSINESS INNOVATION & SKILLS (BIS) ON

"A COMPETITION REGIME FOR GROWTH: A CONSULTATION ON OPTIONS FOR REFORM"

Introduction

Addleshaw Goddard LLP's comments on the proposals put forward in the BIS Consultation on options for reform (the **Consultation Document**), are set out below.

The views we express reflect our own experiences and concerns in representing clients in UK (and EU) competition law matters and interacting with the Office of Fair Trading (**OFT**), the Competition Commission (**CC**) and the Competition Appeal Tribunal (**CAT**). The concerns are ours as well as those of some of our clients.

The Consultation Document explicitly acknowledges that the UK competition regime is a world class regime and internationally regarded as one of the best in the world. We believe this should be recognised and reinforced by improvements that build on current procedures, rather than wholesale reform that risks undermining a regime that generally works well. Some of the proposals set out in the Consultation Document are not merely minor improvements to the existing regime but would result in a major recalibration of it.

The OFT and the CC have both undertaken a lot of work to improve their processes over the last decade as they gained experience in using new regulatory tools. It is worth noting that evidence referred to in the Consultation Document is now relatively old (for example, the 2007 KPMG report) and does not take account of more recent changes in procedure as reflected, for example, in the "Guide to the OFT's procedures in competition cases" (OFT 1263, March 2011). We welcome many of the changes that have been made, but believe that there is scope for further improvement.

We have not attempted to address all areas and issues raised in the Consultation Document, but focus our comments on the key areas of the markets, mergers and antitrust regimes. As already noted, we do not, on the whole, endorse major change to these regimes. Nevertheless we would like to see improvements of existing procedures to strengthen and streamline processes and increase certainty of, and confidence in, outcomes for businesses. In the antitrust arena in particular, stronger measures are required; we favour an enhanced administrative procedure, with a rebalancing between the first investigatory phase and a strengthened post statement of objections second phase.

Chapter 1. Why reform the competition regime?

Response to chapter 1.

The stated objectives for the reform of the UK's competition framework are clearly laudable. However, they are not always compatible with each other. For example, speedy and transparent decision making may of necessity be at the expense of robustness and quality. In improving the competition regime an appropriate balance will need to be struck to ensure that each of the objectives supports rather than undermines achievement of the others. This may mean accepting that not all deserving cases will be investigated by the OFT, or that setting binding statutory time limits would be unworkable. We consider that any reform at this stage should be seeking, above all, to improve the robustness of decisions and predictability for business.

Change for change 's sake has little merit. We remain uncertain as to the advantages of a single authority over the current model, given that similar levels of checks and balances are envisaged and

are necessary. These are likely to be as resource intensive as the existing regime and, therefore, may cancel out capital, asset and other savings made elsewhere. While we might point to particular advantages and disadvantages under both unitary and two tier models, we consider that, overall, it is not clear that they would swing the balance decisively in favour of one model over the other.

Chapter 3. A Stronger Markets Regime

Response to chapter 3

We agree with the Government that the markets regime is an important feature of the UK competition regime and has delivered a number of important benefits. However, the length of time that it has taken to complete market studies (between 33 to 67 months for cases that have been referred to the CC, including the OFT stage, remedies and legal challenge) and the burden that is placed on businesses are a cause for concern and we support the need for modernising and streamlining the existing regime. Our comments on the proposals in the Consultation Document are as follows:

Enabling investigations into practices across markets

At paragraph 3.8 of the Consultation Document the Government proposes enabling the new competition authority to carry out in-depth investigations into practices across markets. We note that there used to be a similar power under the Fair Trading Act 1973 (**FTA**) and the CC produced reports on this basis during the 1970s and 1980s, with varying levels of success and impact.

As a matter of principle, it would seem wrong to have investigations into "practices" within a regime focused on competition effects. Taking the examples listed in the Consultation Document, the impact of switching barriers, below cost selling, or the offer of extended warranties, will all vary depending on the market context (taking account of the types of customers, the importance of the purchasing decision, the cost of the service etc). The scope of any remedies package will similarly vary. Looking back at historical examples, we note that the FTA complex monopolies investigations of beer ties and petrol solus agreements reached different conclusions with respect to similar practices.

The OFT can currently carry out "horizontal" market studies, but its activities currently cover both consumer and competition. Its wider ranging studies have been very much consumer focused e.g. misleading advertising, which is firmly in UCTA territory. Further, OFT market studies are conducted on a minimal statutory basis, with very limited powers (beyond the threat of a reference). To the extent "horizontal" studies are appropriate at all for a competition authority, they are more appropriate at a phase I survey stage than in phase 2, which should be more focused, as an issue is explored in detail with the aim of reaching workable remedies.

At best, we consider the proposed power would either be redundant, because it would not be a workable investigation tool or, if used, would result in anodyne reports that produce no definitive outcome. At worst, it would risk "one-size fits all" remedies that are a retrograde step in a regime that otherwise focuses on examining and remedying the effects of practices within relevant defined markets.

Enabling the CMA to provide independent reports to Government on public interest issues alongside competition issues

Although the proposal is presented as an alignment with the merger regime, the circumstances of a merger regime are rather different where, as a matter of necessity, competition and public interest issues need to be considered at the same time and having regard to the same facts.

In a market context, the justification for joint consideration of public interest issues and competition issues is much less and the risks greater. There is less imperative for a common streamlined process

and the public interest issues are potentially many and diffuse (as the 2008 groceries investigation has demonstrated). To ask the CC to consider public interest issues in tandem with competition issues, even if it is not asked to take decisions in relation to these, risks undermining the proper focus on competition. Indeed, under the FTA regime, there was a real concern that wider public interest factors were distracting from proper competition analysis.

There is also the issue of relevant expertise. Competition bodies are experts in competition issues. They do not have relevant expertise in respect of, for example, financial stability matters etc. While a new competition authority might seek to draw that expertise in for specific purposes, it is questionable that it would be able to do so as effectively as a bespoke body.

We also have concerns that any broadening of the adverse effect on competition test to include public interest issues would seriously jeopardise the attempts to streamline the administrative process for such studies and would risk lengthening (rather than reducing) the timetable.

Paragraph 3.12 of the Consultation Document refers to the specific example of the Independent Commission on Banking. However, the perception of our clients is that as a matter of process and analysis this has worked reasonably effectively and has probably been preferable to going through the CC on the same remit. We do not believe that there is any real justification for drawing these types of inquiries into the CC and, indeed, that there may be drawbacks in doing so.

Extending the super-complaint system to SME bodies

The Government is also seeking views on whether the super-complaint system should be extended to SME bodies (paragraph 3.14 of the Consultation Document).

This is unnecessary in our view: the aim of the super-complaint regime is to ensure that the consumer "voice" is heard, via designated consumer bodies. SMEs already have a voice in the broader market study and investigation process, (for example, the Association of Convenience Stores in the groceries inquiry). Allowing SMEs to make super-complaints raises concerns that their interests, which may conflict with those of consumers, would be given disproportionate weight. It should also be remembered that the competition regime is there to promote competition in markets for the protection and benefit of consumers. It is not about protecting competitors.

We note the observations made by John Fingleton in this regard in his speech of 25 May 2011 and agree with them.

Reducing Timescales

At paragraph 3.18 of the Consultation Document, the Government proposes that statutory timescales for Phase 2 market investigations should be reduced from 24 months to 18 months for the majority of cases. Paragraph 3.18 also notes that the Government is considering whether statutory timescales should be introduced for Phase 1 studies and for implementation of remedies following Phase 2 market investigations.

If Phase 2 statutory timetables can be shortened (and we do not underestimate the challenges to doing so), this would be a welcome amendment.

It is less clear to us that the introduction of statutory timescales for Phase 1 would be a welcome addition. This is because there is a huge variation in Phase 1 timescales (and rightly, because this depends on the type of case involved). If binding timescales were to be introduced, they would need to be at the upper end of the scale to allow for these variations. This could have the perverse effect of lengthening the time taken on the simpler investigations. It would, however, be helpful for the authority

to be held to account on its timing and that might be achiev ed by a practice of publishing indicative administrative timetables (as adopted by the CC). There is no need for a statutory basis to do this.

Improving interaction between Market Investigation References (**MIR**) and Antitrust Enforcement

When they work wel l, a clear benefit of the current MIR regime is that there is no risk of fines or of follow on damages claims against participants. T his opens the process up for serious analysis and fact-finding, which hopefully results in workable remedies that make mar kets work better. Raising the spectre of antitrust enforcement changes that dynamic.

For example, the European Commission's sector inquiries (such as the pharmaceutical and energy inquiries) have not been perceived to hav e bee n as productive as market stud ies/MIRs, in part because the European Commission does not hav e the same range of remedies that are av ailable in the UK for remedying any market defects that are identified. They are perceiv ed to hav e been used predominantly as a tool to gather information , as a pre -cursor for launching antitrust investigations . Over time , using MIR powers in a similar way is likel y to distort the conduct of inquiries and their effectiveness.

Information gathering in antitrust cases must comply with particular requirements , not least because cases may spill over into criminal prosecutions. Evidence gathering in MIRs is presently more fluid.

The better approach is to keep the market and antitrust regimes separate and distinct and to retain a range of remedies appropriate to each type of p rocedure. (This is not to suggest that, in terms of improving procedures , experience gained in one area should not be used to inform and improv e practice and procedure in the other.)

Remedies

At paragraph 3.31 of the Consultation Document the Gov ernment proposes to amend Schedule 8 to the Enterprise Act 2002 (**EA2002**) to enable the competition authorities to require parties to appoint and remunerate an independent third party to monitor and/or implement remedies. At paragraph 3.32 the Gov ernment also proposes to amend Schedule 8 to the E A2002 to require parties to publish certain non-price information. We are of the view that the proposed amendments to Schedule 8 of the EA2002 are sensible and address lacunae that hav e arisen in recent inquiries.

Powers on remittal and removal of duty to consult on decision not to make a MIR

We also regard as sensible the proposal at paragraph 3.37 of the Consultation Document, regarding the clarification of powers following remittals of mergers and mar kets, and the proposal to rev ise the duty to consult relevant persons on decisions not to make a MIR.

Chapter 4. A stronger merger regime

Response to chapter 4

The current UK voluntary regime works well in ident ifying potentially problematic mergers (via the OFT's merger intelligence function and horizon -scanning and competitor or customer complaints). We do not believ e any significant anti-competitive mergers (the first "drawback" identified in the Consultation Paper) are being missed.

The issue of com pleted mergers (the second "drawback" identified in the Consultation Paper) should not be giv en disproportionate significance. Whilst this is an issue, it can be addressed adequately by better hold-separate provisions and a strengthening of the penalties for breaching any hold -separate undertakings/order. This is not a problem that can be wholly solved by a mandatory notification

regime in any event – these are often very small mergers, which may fall outside any sensible turnover thresholds.

Streamlining the regime by reducing timescales and strengthening information gathering powers is to be welcomed. But the length of current timetables is partly down to the fact that, in a voluntary regime, the OFT primarily deals with potentially problematic cases. Average timescales under a mandatory regime can be expected to be shorter than under a voluntary regime, but the time taken to assess more complex mergers is unlikely to reduce significantly.

In essence we and our clients are not in favour of moving to a mandatory regime. We consider that there are significant disadvantages in terms of cost to the competition authority and to business and any move risks losing the flexibility of the current regime. Debt-for-equity swaps by financial institutions in the process of restructuring distressed lending are a particular example of where the UK regime works well. The potential impacts on competition of such transactions are typically minimal or non-existent and speed is vital. The costs of a mandatory filing would fall to the target and the delay in being able to proceed could well make the difference between the debt-for-equity deal being feasible or not, with the consequential risk of insolvency for the target company.

On balance, we cautiously support strengthening the authority's Phase 1 information gathering powers. This would allow better testing of evidence and submissions and may reduce the number of mergers that go to Phase 2. A further concern we have is that, under a unitary competition regime, there might be a greater willingness to push mergers into Phase 2 for more in-depth investigation, but stronger Phase 1 information gathering powers should help guard against this.

The Consultation Document makes a number of proposals on jurisdictional thresholds under various scenarios covering voluntary, mandatory and hybrid notification. Given our position in favour of retaining the voluntary regime, we do not comment on these in any detail. Nevertheless, we do consider the proposed thresholds for mandatory and hybrid notification to be surprisingly low and risk being too inclusive - particularly the proposed full mandatory thresholds. Thresholds at the proposed level will place undue burdens on both businesses who would have to comply with the notification requirements and on the competition authority in dealing with a large number of notifications, most of which would be unlikely to raise competition concerns. With respect to the suggestion of a small mergers exception, the benefit of this would be all but lost if it were to include, in addition to a turnover limit for the target, an acquiring party turnover limit of ten million pounds.

Chapter 5. A stronger antitrust regime

Response to chapter 5

Too many OFT cases to date have taken too long and some have been misconceived, either in taking the wrong cases, or reaching wrong outcomes. It is necessary to address those failings and we have set out our proposals below. However, we do not wish to see the kind of fundamental change of procedure envisaged by options 2 and 3.

Whatever system is adopted we consider it essential that full appeal on the merits be retained and that there be no move towards the European regime on appeals. The opportunity for evidence to be heard and tested a second time before a separate body is fundamental for achieving a robust but fair regime that is perceived as such. This is vitally important on antitrust cases given the size of potential penalties and the potential for related criminal cases against individuals involved in the alleged breach. The concerns this raises relating to the ECHR are entirely addressed if business retains the opportunity to have its voice heard on appeal in a full merits review.

We can, on its face, see the attraction of a prosecutorial approach, particularly in cartel cases which are fact intensive and result in severe, quasi-criminal penalties. However, in all, we believe that there are sufficient, significant drawbacks which weigh strongly against adopting a prosecutorial system.

We question whether either of options 2 or 3 would materially alter workloads or costs for business and the competition authorities and overall timescales, even if appeal rights were to be limited to judicial review. For a prosecutorial system in particular, initial "running in" could take many years as it would entail a major shift in the role, skills and culture of the competition authority (from investigator to prosecutor).

It is also unclear whether/how leniency, early resolution and settlement procedures might work under a prosecutorial system. Removal or reduced operation of these options would be a major setback for competition enforcement.

We are doubtful that a prosecutorial model, with cases argued before a tribunal, is best suited to undertaking detailed economic analysis and engaging in multifaceted remedies discussions that are needed in Chapter II and complex Chapter I cases. In particular, a competition authority may be better able to deploy flexible procedures and the expert staff and resources necessary to the fact finding and analysis required in such cases. It would not be desirable to seek to replicate such resource at tribunal level.

It is too soon, in the scheme of things, to throw out the current system. We believe the better approach would be to enhance and improve the current administrative system, to address concerns around timing and the separation of investigation and decision-making roles, through stronger internal review processes. Further consideration should only be given to more fundamental change if, having allowed sufficient time for improvements to the current system to feed through, it is clear that they do not adequately address the issues.

The OFT, apparently learning the lessons from its earlier cases, has already made improvements that are still feeding through and bedding down. For example, the OFT now has a better focus on prioritisation and the right choice of cases, better use of leniency, early resolution and settlements and has recently introduced new internal processes. The effect on its case management is becoming apparent in the contrast between its handling of the long-running tobacco products and dairy products investigations in which a number of allegations were dropped at relatively late stages of the investigations, and the more recent grocery products and private motor insurance investigations, which have been brought to a conclusion within two to three years.

These improvements are helpful developments, but the future competition authority's processes must be further strengthened. Whilst we have explained why we are not in favour of a prosecutorial model we observe that there is considerable support for radical from some sections of the business community. We believe that support is born out of frustration with the failings of the current system and that frustration must be addressed.

The OFT currently operates a form of two phase process (pre and post statement of objections (**SO**)), but we consider that there could be a better balance struck between the two phases and a strengthening of review and decision-making stages.

First phase investigations currently tend to be very long, leading to a fully developed statement of objections, and followed by a relatively short decision making stage. This could be improved by shortening the first phase and producing the SO at an earlier point (accepting that SOs might not be as fully-fledged as at present). The post SO stage could then be strengthened by allowing for deeper scrutiny by a fresh pair of eyes, possibly drawing for this on CC practice, by forming a panel of members at the SO stage. Such a panel (or similar entity) would receive reports and evidence from the investigation team and submissions and evidence from the business(es) under investigation, and

chair an oral hearing at which both the investigators and the parties under investigation would be heard. The resultant decision of the competition authority would be signed by the members of the panel in the same way as the OFT Board Directors currently do.

A change of this nature would provide a degree of "third party" review by fresh eyes, to protect against confirmation bias within the administrative procedure. Businesses will feel they have a better opportunity of making their points with greater likelihood of them being taken into consideration. All the current leniency/settlement/commitments processes could be retained under this system and there would still be the right of appeal to the Competition Appeal Tribunal (**CAT**) in the ordinary way (on the merits). We do not consider that change along these lines should involve further significant time or cost, particularly if firm administrative timetables are employed. We would expect that most cases, suitably resourced, could be dealt with within about a year to the SO stage and reach final decision a further year thereafter. Additionally, we would expect appeals to the CAT to decline as more robust decisions are taken and businesses are more satisfied with the process leading to a decision.

Other improvements we would welcome include introducing stricter administrative timetables and tightening the penalties framework.

It is unclear that there are benefits to statutory timetables in antitrust cases or that they could be workable. Indeed, such timetables are likely to change the incentives and priorities for the competition authority and the parties investigated and may lead to precipitous investigatory steps or to stalling by parties investigated, and eventual dropping of cases as formal deadlines approach. But it would nonetheless be helpful for the OFT to produce non-binding administrative timetables for both phases of antitrust investigations.

We would also welcome a tightening of the penalties framework. A more coherent framework for imposing fines would reduce the likelihood of appeals (and the overall time it takes to conclude competition procedures). Given the quasi-criminal nature of competition enforcement and the high level of fines that may be imposed, a fully coherent framework should, in any event, be a requirement.

Offences for non compliance with an investigation

We agree that the proposal at paragraph 5.55 of the Consultation Document to amend the legislation to allow the OFT to impose financial penalties on parties who fail to comply with the OFT's powers for investigating suspected infringements is a sensible amendment.

6. The criminal cartel offence

Response to chapter 6

In our view it is appropriate for the criminal test to have a high threshold given the seriousness of a criminal offence and the resultant penalties. We therefore support the retention of the "dishonesty" requirement. In an egregious case (code words, deliberately covert behaviour etc) the dishonesty standard would be met. But the offence should not catch, for example, ambiguous information exchanges and the "dishonesty" requirement should guard against such outcomes.

In relation to the proposals for a "not made openly" or "secrecy" tests we note that there is potential ambiguity as to what these mean in practice and a wide variety of possible standards and interpretation. It seems to us that the Consultation Document is suggesting these tests as a proxy indicator for dishonesty (i.e. covert action, which is covert because the parties recognise it to be wrong) which may be easier to demonstrate than dishonesty. But such tests are difficult to interpret and are more detached from the core concern, which is ultimately intentional wrongdoing i.e. dishonesty.

Chapter 7. Concurrency and sector regulators

Response to chapter 7

We make just a few brief observations on the interaction of the use of regulatory and competition powers by the sectoral regulators and on the sharing of resources between the competition authority and the sectoral regulators.

Strengthening the primacy of competition law over sectoral regulation

There should be no presumption in favour of antitrust tools over regulatory tools. In some cases the regulatory tools provide the direct answer to an issue that is only indirectly addressed by the application of competition law.

For example, in an access dispute, ultimately what needs to be resolved is an access price. Where there are regulatory tools available, these provide a much more straightforward and direct means to achieve resolution than addressing the issue as an excessive pricing and/or margin squeeze case, where matters of market definition, dominance etc will also need to be addressed. This should not be a cause for concern providing that, in reaching regulatory decisions, the regulator is mindful of the impact on competition of its determination. To take the access price example again, in setting a determined price using regulatory powers, the regulator must also be confident that the determined price is consistent with competition law (i.e. neither excessive nor margin squeezing). In that regard we are aware that at least some cases which have been tackled as a matter of competition law have nevertheless ultimately required a regulatory review (for example in the Albion Water case, Ofwat is currently conducting a price determination under its section 40/40A Water Industry 1991 Act powers, notwithstanding the exhaustive competition review under Chapter II of the CA98 that has progressed through Ofwat and the CAT).

The CMA to act as a proactive central resource for the sector regulators

In thinking about the interaction between the sectoral regulators and the competition authority, it is important to recognise that there is great variation between the resourcing and case load of each of the sectoral regulators. This is in large part a result of the nature of the industry under regulation and the maturity of liberalisation and competition in each sector. For some of the sectoral regulators with infrequent competition complaints and cases, the ability to call on competition authority resource is likely to be more useful than for others.

In our view, the availability of competition authority resource and expertise to the sectoral regulators is clearly helpful and potentially very valuable, but each regulator should retain ultimate control of its cases and choose whether it wishes to call on such resource. This is important to ensure continuing coherence of regulatory and competition policy. We have observed the launch of the market study into anaerobic digestion by the OFT at Ofwat's request with interest – in principle, this could be a good model for cooperation and resource sharing between the new competition authority and the regulators.

Chapter 11. Merger fees and cost recovery

Response to chapter 11

Introduction

The existing approach, where charging for public competition enforcement (of whatever form) is limited in scope, has a sound basis. Ensuring that markets are more competitive and work well is a

public good which benefits the economy as a whole and it is appropriate that the costs of such public enforcement are, in large part, borne by the public. Other than in the context of merger cases, where the parties exercise pro-active choice, at least in their decision to merge, there is a very limited sense in which engagement of companies with competition authorities can be said to provide a service to those concerned. It could be argued that complainants call on the services of a competition authority, but Government has, quite rightly, not proposed charging such parties, as to do so would create disincentives to the detection and resolution of anti-competitive conduct or market structures.

It is true that the operation of the competition regime is expensive for Government. It should also be recognised that it imposes significant costs on businesses who are asked to engage with the competition authorities. Such businesses range from "blameworthy" parties who are infringing competition law, to market participants of all kinds in market investigations, and to customers, suppliers and competitors whose views and evidence are sought in merger or CA98 cases. Not all of these parties will have a substantive interest in the outcome of the competition authority's inquiries, but will nevertheless be required to undertake significant work in gathering information and assisting the authority. Many companies currently undertake such responses in the spirit of civic duty. Such constructive cooperation (and investment) from business would be harder to secure if businesses felt that Government was fully recovering its own costs, but leaving third parties being asked (or required) to contribute to bear their own costs.

The current arrangements have a certain logic of fairness with interested parties, third parties and Government each bearing their own costs of the process, which is conducted in the public interest. To disturb this equilibrium with cost recovery for Government, but a continued burden, particularly for disinterested third parties, may inadvertently have consequences for the robustness of the competition authority's decision making if full cooperation is undermined.

A few further comments are made below in relation to specific proposals in the Consultation Document.

Merger fees

Businesses accept that mergers are a process in which they choose to engage and that such processes inevitably incur costs. In that sense, the principle of charging for mergers is accepted (although it should be recognised that the requirement of fees is not universal, particularly in jurisdictions where notifications are mandatory, such as at European level).

However, very high merger fee levels, particularly under a voluntary regime, weigh heavily on the parties and can be a disincentive to notification. Mergers which might otherwise be pre-notified may not be in the future and could be left to be addressed as completed mergers, or not at all. This could ultimately result in greater costs for competition authorities and the economy as a whole.

In our experience, the last increase in merger fees has already acted as a noticeable disincentive to use the system. We are aware of cases, particularly where the merger concerned was small, where the level of merger fee was a determining factor for companies considering whether to make a voluntary pre-notification of their merger.

Full cost recovery may well undermine the optimal operation of the merger regime.

Recovering the cost of antitrust investigations

As we have already noted in the introduction to this section, effective competition enforcement is a public good, not a benefit to the parties concerned. Parties in breach of competition law should of course be appropriately sanctioned, both to deter wrongdoers individually and for deterrence more

generally. However, this is achieved through an optimal fining policy and should not be confused with cost recovery.

Companies are already acutely sensitive to the potential for fines to distort a competition authority's incentives and we are routinely asked whether CA98 fines go to the OFT 's budget. We can currently address this and clearly explain the underlying logic of fining policy.

However, if charges are made to recov er an authority's costs, there is a high risk that this will create at least a perception that the competition authori ty has an incentive to reach adverse findings in order to ensure recov ery of its costs – even if those costs are paid into central funds. We find it difficult to see how, in practice, charges termed as cost recov ery could be regarded as having any purpose other than to manage competition authority budgets and hold the authority to account in the longer term, even if in the short term the money goes to central funds. Real or perceiv ed links between the potential incentiv es of the authority and the outcome o f the process is likely only to encourage more adversarial processes, with more challenges and appeals and further implications for the timeliness and cost of proceedings.

There is also an important d ifference between parties before a competition authority and those before a sectoral regulator . Regulated companies are "repeat customers" who know their regulator well, accept that regulation is a characteristic of the service they offer and a cost of doing business. Businesses appearing before a competition authority may do so rarely, may be unfamiliar with the authority and its processes, and will be extremely concerned that they obtain a fair hearing. Cost recovery will give them no comfort on this score.

Recovery of CAT costs

Our concerns about the risks of bias and per ception of bias will perhaps be greatest in the context of appeals. By way of illustration, i f the CAT has an interest in ensuring its costs are cov ered in the course of appeals, there may be a perception that it will have an incentive to find a gainst well resourced parties on the basis that they are more likely than, for example, a f ailing business to be able to p ay costs related to the CAT 's running. Inserting the CAT as a potentially interested party in its own decision making would be ill advised.

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Allen Overy

Response to BIS

A Competition Regime for Growth: A Consultation on Options for Reform

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This response represents the views of law firm Allen & Overy LLP on the Department for Business, Innovation & Skills' (**BIS**'s) March 2011 consultation paper *A Competition Regime for Growth: A Consultation on Options for Reform* (the **Consultation Paper**). We set out below our responses to the individual questions posed by BIS in the Consultation Paper (with the exception of Questions 35 to 39 on the Impact Assessment, in relation to which we do not believe that we can provide adequate responses without disclosing confidential information). We have also inputted into the responses by the JWP and CLLS, and have attempted not to duplicate points that were made in those submissions.

Why reform the competition regime?

Q1. The Government seeks your views on the objectives for reform of the UK's competition framework, in particular:

- **improving the robustness of decisions and strengthening the regime;**
- **supporting the competition authorities in taking forward the right cases;**
- **improving speed and predictability for business.**

1. In our view, the UK competition regime is, for the most part, already robust and effective; it is also held in high regard internationally, as the Consultation Paper acknowledges (para 1.4). We are not persuaded of the case for wholesale reform, although we accept that incremental improvements could be made in certain areas, notably in streamlining the market investigations regime, and the procedures for prosecuting antitrust infringements. Whilst the policy objectives of improving robustness of decision making, supporting the authorities in prioritising the right cases and improving speed and predictability are no doubt laudable in themselves, we see a serious risk in simply making change for change's sake. That concern underpins many of our observations in this response.

Q2. The Government seeks your views on the potential creation of a single Competition and Markets Authority.

2. We can see some potential efficiency benefits in having a single Competition and Markets Authority (**CMA**), most notably in terms of avoiding unnecessary duplication of investigation and analysis in the markets and mergers regimes. However, we note that the creation of the CMA is not expected to lead to significant cost savings, and overall we consider that the case for change is finely balanced.

3. A critical issue in designing the CMA is to avoid any risk of confirmation bias. It is accepted in the Consultation Paper that the two phase process for the mergers and markets regimes should be retained under the new CMA structure. Ensuring a "fresh pair of eyes" in the second phase investigation is in our view a vital safeguard to protect against confirmation bias. We have some concerns as to whether this risk can be satisfactorily mitigated in a single authority structure. We return to this theme later in this response.

4. Finally, we do not agree with the general theme running through the Consultation Paper that more cases need to be brought (particularly in relation to the markets regime (para 3.5) and the antitrust regime (para 5.6)). The CMA should instead be given the ability to bring the *right* cases, with the focus being on quality rather than quantity. It is important that the CMA is able to set its own priorities with regard to case selection.

A stronger markets regime

Q3. The Government seeks your views on the proposals set out in this chapter for strengthening the markets regime, in particular:

- **the arguments for and against each of the options;**
- **the costs and benefits of the options, supported by evidence wherever possible.**

5. The markets regime is peculiar to the UK competition system and has evolved in ways that were not readily foreseeable at the time of its introduction in the Enterprise Act 2002 (**EA02**). This is particularly so in the way that the Office of Fair Trading (**OFT**) has used market studies, along with less formal reviews of markets and market features (e.g. the review of entry barriers in retail banking and the infrastructure "stock take"). While the markets regime is a potentially useful tool, enabling the authorities to address market failures and deliver significant benefits to the UK economy, we see scope for the regime to be improved and strengthened.

6. First, the current two-phase system with separate authorities undertaking the investigation at each phase creates a risk of institutional rivalry. That may well be one of the reasons why there have been so few market investigation references (**MIR**s) in the 8 years since the EA02 came into force. It may also explain why there have been only two references by a sectoral regulator (ORR, in the case of the ROSCOs, and Ofcom in the case of movies on pay-TV), albeit the Consultation Paper notes at para 7.12 that the threat of an MIR can sometimes be effective in securing remedies. Bringing the markets regime under the scope of a single authority would solve the problem of institutional rivalry between the OFT and Competition Commission (**CC**) (although it would not address the apparent reluctance of sector regulators to make MIRs).

7. Second, there is significant ambiguity in the dividing line between an OFT market study and other types of fact finding review carried out by the OFT. Arguably this should not matter very much as the initiation of such a review or study does not of itself confer any information gathering powers on the OFT. However, it does create a risk of confusion for business and in policy terms it seems to us unsatisfactory that the OFT should effectively be able to side-step the statutory regime by using non-statutory mechanisms for reviewing markets.

8. Under the current system, the OFT and CC's wide ranging powers (which can ultimately result in the break up of companies without a prior finding of competition law infringement) are subject to important checks and balances – first, the two stage review process, with phase 2 involving a rigorous investigation of the market in question, and second, the possibility of judicial review by the Competition Appeal Tribunal (**CAT**). However, we believe that these safeguards could go even further, and that there may be a case for a *full merits* review by the CAT where the CMA resorts to structural remedies.

9. We agree with many of the areas for potential improvement of the markets regime identified by BIS (para 3.5), and in particular the concern over the length of time taken for final decisions to be reached in market studies, and especially MIRs. We recognise that both the OFT and CC have taken steps to reduce the length of their investigations, although significant improvements are yet to be seen. The proposal to reduce the timescale for MIRs to 18 months, and to introduce a statutory timeframe for phase 1 market studies (para 3.18), would go some way to addressing this concern. We favour the approach that any statutory timeframe should apply to all phase 1 market studies – it would be unnecessarily complex and unworkable in practice if only market studies which were likely to result in an MIR were subject to a binding timetable. We also agree that there must be certain safeguards in order to ensure that these timeframes can be extended where necessary (para 3.19). Such extensions should, however, be exceptional and the concept of "exceptionally complex

cases" should be narrowly defined in order that extensions do not become routine. Any "stop the clock mechanism" should also be tightly defined.

10. In terms of the proposals to modernise the markets regime (paras 3.7-3.16), we believe that:

    (a) Enabling the CMA to carry out "horizontal" investigations of practices that affect more than one market is of questionable benefit; we note that there were very few such references under the old Fair Trading Act regime and we find it difficult to envisage that there would be many candidates for such investigations in the future.

    (b) The CMA should not be able to provide independent reports to the Government on public interest issues alongside competition issues. This would introduce a degree of administrative discretion beyond the technical competition analysis which could result in uncertainty for business and the markets under scrutiny. It is also unclear how this additional power would fit with the roles of the sectoral regulators, who are surely better placed to deal with public interest aspects in their own areas of expertise.

    (c) The super-complaints system should not be extended to SME bodies. Such entities can already bring complaints to the OFT through the ordinary channels. The goal of competition law is, ultimately, to protect consumers from harm. It is therefore appropriate that the super-complaints system applies to consumer representative bodies – allowing SME bodies within its scope is not a natural extension.

11. Given the potential burdens and costs to industry, we consider that there should be a clearer statutory definition of a market study, and a statutory threshold for initiation of a market study, should information gathering powers be extended at the phase 1 stage.

12. In terms of the proposals to ensure that remedies are proportionate and effective (paras 3.29-3.36), we believe that:

    (a) Amending Schedule 8 to the EA02 to require parties to publish certain non-price information is a sensible improvement and will assist in the identification of proportionate remedies.

    (b) Revising the thresholds for review of remedies will create too much uncertainty and could allow for a further investigation through the back door.

Q4. The Government also welcomes further ideas, in particular, on modernising and streamlining the markets regime, and on increasing certainty and reducing burdens.

13. See the response to Question 3 above.

<u>A stronger mergers regime</u>

Q.5 The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular:

- **the arguments for and against the options;**
- **the costs and benefits of the options supported by evidence wherever possible.**

14. We have set out our detailed thoughts in response to Question 6 below. In summary:

- We are strongly opposed to the option of a full mandatory regime with the thresholds described by BIS at para 4.27. We consider that this would be unworkable in practice, and

that it would be a disproportionate means to address BIS's concerns with the current regime. It represents an unnecessary regulatory burden (with associated resource and costs implications) both for business and for the CMA.

- A hybrid mandatory regime represents in reality the worst, not the best, of both worlds. As described at 17, it would not capture any more problematic mergers than under the current system, and would force the notification of a large number of non-problematic transactions.

- We support the retention of the voluntary merger regime, with strengthened powers of the authority in relation to interim measures.

Q.6 The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?

15. As noted by BIS (para 4.1), the current voluntary merger regime is regarded internationally as "world class". It is flexible and has enabled the OFT to capture mergers that would otherwise escape review under most other jurisdictions (for example, as a result of the "material influence" level of control). To dilute this flexibility would be to lose one of the primary reasons for the regime's success. We therefore believe that extremely compelling reasons are required to justify its amendment and certainly any wholesale reform.

16. BIS notes that one of the overall objectives of the Consultation Paper is to improve the "speed and robustness" of decisions (para 4.2). However, we do not believe that the proposals to introduce a mandatory regime (whether full or hybrid) would contribute to this goal – in fact, they may well do the opposite:

(a) A mandatory merger regime would provide no improvement in terms of speed. Although a mandatory regime could be designed around a tighter (statutory) phase 1 timescale (30 working days instead of the current OFT administrative timetable of 40 working days), it would be wrong to assume that this will accelerate the overall timescale for obtaining phase 1 clearance. In fact our concern is that it will result in a lengthier overall phase 1 process, as we expect that a tighter statutory phase 1 period will inevitably lead to longer pre-notification discussions with the CMA before the authority is willing to start the clock (based on our experience of the EU merger regime). This concern will be exacerbated if (as we expect) the informational requirements of a mandatory notification form are more onerous than under the current regime (again, based on our experience of the EU regime, where the Form CO imposes burdensome information requirements for all "affected markets", even in cases that demonstrably raise no substantive competition concerns).

(b) Related to this, a mandatory regime would capture a huge number of unproblematic mergers which previously would not have fallen within the OFT's jurisdiction (based on BIS's estimates that 1,200 mergers per year would qualify for notification under the mandatory regime, according to the statements in para 11.14). This implies a huge additional burden for the phase 1 authority and this is another reason why we expect that it will simply result in lengthier timetables for pre-notification.

(c) It is also unclear how a mandatory regime would increase the robustness of merger decisions – BIS gives no indication of how this will happen, and in our view there is no logical connection between mandatory notification and robustness of decision making. In any event, arguably UK merger decisions are already sufficiently robust, containing high quality, sophisticated, substantive analysis, both at phase 1 and phase 2. This is necessarily facilitated by the phase 1 and phase 2 timetables being slightly longer when compared to some other jurisdictions. To increase the speed of the decision-making could detrimentally impact the quality of those decisions. In our view, the best option is therefore to retain the

current voluntary regime, albeit with some minor amendments such as a reduced timescale for undertakings in lieu and remedies implementation.

(d) If mandatory notification were to be introduced, it would be necessary, in the interests of legal certainty, for the authority to publish clear guidelines on the types of transactions meeting the mandatory notification requirements (as the Commission has done in its Consolidated Jurisdictional Notice): this would be essential, as there would inevitably be many grey areas, most likely around the concept of control, which parties' turnover should be taken into account, whether a transaction is or is not a merger, etc. In addition, the authority would need to be prepared to give guidance in individual cases (as the Commission does), where there are doubts as to whether a transaction is notifiable. This implies an additional resource burden for the authority which would need to be taken into account.

17. BIS goes on to discuss two specific drawbacks of the current mergers regime: (i) the risk that some anti-competitive mergers escape review; and (ii) the difficulty of applying appropriate remedies in completed merger cases (para 4.3). However, it is not clear which of these issues is its primary policy concern when considering the options for merger regime reform. Addressing each in turn:

(a) Catching problematic mergers that fall under the radar

- The statement from the Deloitte report that there is a 1:1 ratio of problematic mergers that are notified compared with those which are not (and not picked by the OFT), included at para 4.4 of the Consultation Paper, is too vague to form the basis for such a major change in policy. Moreover, the Deloitte report was published prior to the OFT taking steps to bolster its merger intelligence function, resulting in more non-notified transactions being called in. This indicates that the problematic mergers which are currently escaping examination by the OFT are most likely to be small value transactions (large transactions materially affecting the UK market are likely to have a public profile which would be picked up by the merger intelligence unit).

- A mandatory regime with the extremely low jurisdictional thresholds proposed by BIS (para 4.27) would address this concern, but is not workable in reality. It would introduce a disproportionate burden (not to mention cost) on business to make filings in relation to benign mergers. Designing a merger regime is necessarily a matter of trade-offs, and arguably three main factors must be balanced: (i) trying to ensure that problematic cases are examined; (ii) trying to ensure that the much greater number of non-problematic cases are not examined; and (iii) setting jurisdictional thresholds that are straightforward and easy to apply. The mandatory jurisdictional thresholds proposed by BIS would satisfy (iii), but such a regime would be heavily weighted towards (i), at the expense of (ii). Many other jurisdictions at least require a same-jurisdiction overlap, and usually have much higher thresholds – under this proposal the UK would be out of line with most other sophisticated merger regimes.

- A mandatory regime with reasonable thresholds would not solve this concern. It would catch no more mergers than the current regime, and arguably would catch fewer (on the premise that the problematic mergers which are escaping review are small value mergers, and would not therefore be caught by jurisdictional thresholds set at a reasonable level).

- The proposed hybrid mandatory regime is no better. Notification would only be mandatory where the £70 million turnover threshold is met, thus sharing the problem identified above in relation to the mandatory (reasonable thresholds) regime: it would not result in any more problematic mergers being caught than under the current voluntary regime. In support of this, we calculate that over 75% of phase 2 mergers resulting in an SLC since 2004 qualified for jurisdiction under the share of supply rather than the turnover test. Therefore a hybrid

regime which retained the voluntary element with regard to share of supply would not radically change the current situation.

- Our strong preference is, therefore, the retention of the voluntary merger regime. As noted above, BIS acknowledges that the OFT has taken steps to improve its merger intelligence function in recent years (para 4.4). However, the Consultation Paper does not quantify how much of a positive effect these steps have made. Based on data provided by the OFT's Chief Economist, Amelia Fletcher, in a 2010 speech given to the Law Society's Competition Section, we understand that over 20% of cases in 2009/2010 where the OFT found an SLC were brought in by the merger intelligence function. This indicates that the OFT's merger intelligence function is already proving to be effective, and in our view BIS should be focusing on improving and strengthening this function as a proportionate means of addressing the concern that problematic mergers are escaping review.

(b) Solving difficulties surrounding completed mergers

- The introduction of a mandatory regime would be a highly disproportionate way to address this issue which is, in reality, a very particular problem that requires a much more targeted solution (interestingly, the Impact Assessment concedes that this problem has arisen in only a "handful" of cases: see para 103). This could be achieved by simply strengthening the current provisions on interim measures (i.e. initial undertakings/orders) already contained in the EA02.

- In our view, the current interim measures provisions could be improved in two respects: (i) by extending the CMA's powers to intervene; and (ii) by increasing the speed of intervention by the CMA following notification.

- With regard to the CMA's powers, we favour the option proposed by BIS in the Consultation Paper (para 4.15) to enable the CMA to require reversal of action that has already taken place. This power should be used only in exceptional cases, and should be exercised in a proportionate manner. We believe that the threat of such reversal would send a strong message to parties in relation to the risks they run in integrating their businesses prior to receiving merger clearance. It would incentivise parties to approach the CMA early to give interim undertakings. The CMA should also be given an explicit power to appoint a monitoring trustee during phase 1, in appropriate cases.

- In terms of the timing of intervention to prevent pre-clearance integration, we do not believe that an automatic statutory restriction on further integration (triggered upon notification) would be appropriate. A better option would be for the CMA, once it has received the notification of a completed merger, promptly to invite the parties to agree interim undertakings, outlining the scope of the CMA's powers in the event that undertakings are not given. If undertakings were not forthcoming, the CMA would have the ability to serve a notice on the parties that a statutory restriction on integration would be applied. Again, this would encourage parties to agree reasonable interim undertakings with the CMA in order to avoid the more extensive statutory provisions.

18. The introduction of a small merger exemption (paras 4.40-4.42) into the voluntary process is in principle a sensible proposal. However, we agree with the approach of the CBI (para 4.41) rather than that of BIS, i.e. that the exemption should apply where the turnover of the target is less than £5 million, and that the turnover of the acquirer is not a relevant consideration to whether a merger is "small" or not. Moreover, we question whether the exact scope of the exemption should be set out in primary legislation: it is a threshold which would benefit from regular review and, where appropriate, revision (depending on market circumstances), and it may therefore make more sense for it to be capable of amendment by secondary legislation.

19. At para 4.51 BIS addresses the question of whether the CMA should be able to consider remedies in phase 2 without having to decide whether the merger has resulted, or will result in, an SLC. In the interests of streamlining phase 2 reviews, this is a welcome proposal. However, we see a potential legal difficulty in framing the standard of proof to be applied by the CMA in order to accept remedies at this stage – given that it would not yet have decided on whether the merger situation has resulted (or may be expected to result) in an SLC, we assume that it would be necessary for the CMA to apply the phase 1 "realistic prospect" standard, as opposed to the "balance of probabilities" standard.

Q.7 The Government welcomes further ideas on the strengthening of the mergers regime.

20. See response to question 6 above.

A stronger antitrust regime

Q.8 The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime, in particular:

- **Options 1-3 for improving the process of antitrust enforcement;**
- **the costs and benefits of the options, supported by evidence wherever possible.**

21. We acknowledge the concerns set out in the Consultation Paper regarding the current antitrust regime (paras 5.6-5.18).

22. We do not believe that Option 1 (retaining and enhancing the OFT's existing procedures) would go far enough satisfactorily to address these concerns, particularly those relating to the length of time taken to process decisions, and the risk of confirmation bias due to a lack of a separation of powers.

23. Whilst we have some sympathy with the introduction of a fully prosecutorial antitrust enforcement regime under Option 3, moving to this approach would be, as noted by BIS, a "big change" from the current system, and one which in our view is unnecessary to address the concerns identified. Such a system would be unprecedented in the UK, and there would be a risk that its introduction could create a regime which did not function effectively. It would lead to lengthy trials before the CAT, resulting in greater costs for parties (in turn giving an incentive to parties to settle rather than contest a case at full trial).

24. Our preferred route is a variant on Option 2, establishing an independent decision-making panel to take second phase decisions (para 5.38), with the possibility of a full merits appeal before the CAT. We do not favour the proposal to establish an Internal Tribunal within the CMA (para 5.31) as we believe it would unnecessarily replicate the CAT, and we would oppose the suggestion that appeal should be on grounds of judicial review only (para 5.35): the right of businesses to a full merits appeal is an important discipline on both the investigatory and analytical activities of the OFT and should be retained. It would motivate the CMA to produce robust, reasoned decisions that would withstand judicial scrutiny. A two stage antitrust process involving a panel of experts (with appropriate safeguards against confirmation bias) would also harmonise the regime with the models used in both the mergers and markets regimes.

Q.9 The Government also seeks views on the additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.57, and the costs and benefits of these.

25. We support the existing proposal of the OFT to introduce administrative timetables for antitrust cases (para 5.48) as providing significantly greater certainty for businesses subject to antitrust investigations. This would build upon the increased transparency and predictability already achieved

by the OFT as a result of the publication of its March 2011 Guide to investigation procedures in competition cases.

Q.10 The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.

26. There is in our view a need for more disciplined case management of antitrust investigations, with involvement of senior personnel. We recognise the resourcing and budgetary constraints under which the OFT is currently operating; however, the skills shortage affecting the OFT will compromise the ability to prosecute successful antitrust cases. Until that issue is addressed, we are sceptical as to the ability of institutional reform to deliver significantly improved outcomes.

The criminal cartel offence

Q.11 The Government seeks your views on the proposals set out in this chapter to improve the criminal cartel offence, in particular:

- **the arguments for and against the options;**
- **the costs and benefits of the options, supported by evidence wherever possible.**

Q.12 Do you agree that the 'dishonesty' element of the criminal cartel offence should be removed?

Q.13 The Government welcomes further ideas to improve the criminal cartel offence.

27. It is important, as the Consultation Paper acknowledges, to ensure that the criminal cartel offence does not catch agreements that might be lawful under the civil prohibitions. The requirement to prove dishonesty under the current cartel offence goes a considerable way to mitigating this risk. However, we do see potential problems with the dishonesty test, as in many cases of cartel conduct the individuals involved in making the agreement are not necessarily motivated by personal financial gain. That said, the observation in para 6.14 of the Consultation Paper, based on the YouGov poll, that only around six in ten people in Britain believe that price-fixing is dishonest, does not seem to us to be probative, one way or the other. The current cartel offence effectively acknowledges that not all price-fixing is dishonest – which is essentially why the offence is framed so as to require the additional element of dishonesty.

28. Having identified the pitfalls of the current dishonesty requirement, it is not obvious that there is any better alternative:

- Cartel behaviour is usually secret, but secrecy in itself is not a sufficiently clear defining characteristic, as many perfectly legitimate commercial agreements are entered into in similar conditions of secrecy.
- Cartels are typically entered into with the intention of preventing or distorting competition between the participants, but a move to an "intentional" *mens rea* element does not on its own solve the problem that it might potentially catch agreements that are capable of exemption under Chapter I or Article 101(3).
- Cartels sometimes involve an element of deception, in so far as customers are led to believe that the suppliers are making their pricing decisions unilaterally. Potentially an offence framed in terms of an "intention to deceive" might be viewed as preferable to the current dishonesty test, but it is unlikely to make the task of securing convictions any easier.

Concurrency and sector regulators

Q.14 Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?

29. We agree in principle with BIS's conclusions that the concurrency regime should be retained (para 7.16). However, we do see benefits in allowing the CMA to have a more central role in prosecuting antitrust cases in the regulated sectors, or at least for there to be a degree of cooperation between the sector regulator(s) and the CMA in running an antitrust investigation, along the lines suggested at para 7.27. We are not persuaded that there is a need for a general presumption in favour of applying competition law instruments in preference to sector specific legislation (paras 7.20-7.23).

Q.15 The Government seeks your views on the proposals set out in this chapter for improving the use and coordination of concurrent competition powers in particular:

- **the arguments for and against the options;**
- **the costs and benefits of the options, supported by evidence wherever possible.**

30. See response to Question 14 above.

Q.16 The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.

31. See response to Question 14 above.

Regulatory appeals and other functions of the OFT and CC

Q.17 Do agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?

32. We agree that the sectoral reference and appeal jurisdictions of the CC should be transferred to the CMA as the most appropriate body to take on these responsibilities.

Q.18 The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

Scope, objectives, and governance

Q.19 The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.

33. In principle we see advantages in setting out clear objectives for the competition authority/authorities on the face of the legislation. We consider that this is likely to provide a clearer focus to the institution, and to provide a more disciplined approach to prioritising cases.

Q.20 The Government also seeks your views on whether the CMA should have a clear principal competition focus?

34. Although we would want the authority/authorities to have a clear competition focus, we do have some concerns about removing the consumer protection functions from the OFT. In some cases market failures may be due not simply to problems of market structure or the behaviour of suppliers, but to consumer behaviour. We regard consumer protection tools and competition policy instruments as two sides of the same coin, and we are concerned that the competition authority

would (for example) be unable to tackle perceived market failures using unfair contract terms legislation. We see a real danger in a lack of a joined-up approach if these powers are devolved into other agencies, and a risk of yet more institutional rivalry between different enforcement bodies.

Q.21 The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.

35. We support BIS's proposals for the governance structure of the CMA (paras 9.16-9.20). It is important that the CMA retains a clear policy function, separated from the day to day running of casework. It is appropriate for the Supervisory Board to have the responsibility for policy with the Executive Board having clear functions relating to case selection and the implementation of that policy.

Decision making

Q.22 The Government seeks your views on the models outlined in this Chapter, in particular:

- **the arguments for and against the options;**
- **the costs and benefits of the regime and to business, supported by evidence wherever possible.**

36. The "Base case" decision-making model set out at Figure 10.2 is, in our view, the appropriate composition for the mergers regime. For both mergers and markets we welcome the retention of the current panel structure, i.e. a small group of members drawn from a large panel of experts. We favour a small number of these panellists being full-time members, to ensure continuity of experience and consistency in decision-making. As noted at 24 above, for the antitrust regime we believe that a similar phase 2 investigatory panel structure should be established (Figure 10.5). For antitrust cases, full appeal to the CAT on the merits should be retained. We also believe that the markets regime could be further strengthened by "upgrading" appeals to the CAT from judicial review to full merits, in cases where structural remedies are being imposed (see 8 above).

37. Nonetheless, we also see potential drawbacks in the creation of a single authority, particularly in the field of mergers, where we see a risk that the CMA will make decisions about whether mergers should be subjected to a phase 2 investigation rather than being cleared at phase 1 with undertakings. There is in our view a risk that this will lead to a shift in the current institutional balance between the OFT and the CC, with more cases being subjected to in-depth investigation.

Q.23 The Government also seeks views on the appropriate composition of the decision-making bodies set out in this Chapter, and in particular what the appropriate mix of full-time and part-time members is.

38. See response to question 22 above.

Q.24 The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process.

39. See response to question 22 above.

Merger fees and cost recovery

Q.25 What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/mandatory notification regime?

40. We strongly oppose the increases to merger fees suggested by BIS at para 11.11 and 11.12. The level of these fees is likely to deter companies (particularly SMEs) from notifying their transactions to the CMA, running counter to BIS's objective of catching as many problematic mergers as possible.

Q.26 Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons.

41. We do not agree with this proposal. It is out of line with the approach under EU law and we can see no justification for it, other than to raise revenue for Government. It is likely to create perverse incentives for the authority to devote maximum resources to a case, rather than trying to run an investigation efficiently.

Q.27 What are your views on recovery where there has been an infringement decision being based on the cost of investigation?

42. Again, we are opposed to this, essentially for the reasons given in response to Question 26 above.

Q.28 What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?

43. If cost recovery were to be introduced, we would certainly want reductions for immunity and leniency applicants, and similarly for parties who agree to early settlement and commitments. However, we are opposed to cost recovery as a matter of principle for the reasons already given.

Q.29 Do you agree that [showing any costs to be recovered on the infringement decision detailing the fine] would be an appropriate way to collect the costs, separates the fine from costs in a way that makes appeals clear and that the costs should go to the consolidated fund rather than the enforcement authority?

44. We do not agree with the principle of cost recovery; it is in our view irrelevant that the costs are paid to the consolidated fund, as there will still be incentives for the competition authority to use its resources inefficiently in prosecuting cases.

Q.30 Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?

45. In the event that cost recovery were to be introduced, we can see good arguments why a successful appellant should not have to pay them, or why the costs should be reduced if the appeal succeeds on some but not all grounds.

Q.31 Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?

46. This proposal is open to the same objections as a matter of principle as discussed in response to Question 27 above.

Q.32 Do you agree that telecoms appeals should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful

appeal from the appellant at the end of the hearing? If not, your response should provide reasons supported by evidence where appropriate.

47. Yes, we agree that telecoms appeals should be treated in the same way as other regulatory appeals.

Q.33 What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what effect, if any, would there be on CAT incentives?

48. We can see no convincing justification for treating the CAT any differently from any other court in the UK, and on that basis we do not believe that cost recovery should be allowed.

Overseas information gateways

Q.34 How well is the current overseas information disclosure gateway working? Is there a case for reviewing this provision?

49. We do not feel strongly that there is a case for reviewing or reforming the provision on overseas information gateways.

Allen & Overy LLP

American Bar Association

Joint Comments of The American Bar Association Section of Antitrust Law and Section of International Law on "A Competition Regime for Growth: A Consultation on Options for Reform" of the United Kingdom's Department of Business Innovation & Skills

May 2011

The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the "Sections") of the American Bar Association ("ABA") respectfully submit these comments to the Department of Business Innovation & Skills as part of its consultation, "A Competition Regime for Growth: A Consultation on Options for Reform" (the "Consultation").

The Sections appreciate the opportunity to present our experience and views on two of the central issues in the consultation: reform of the "dishonesty" requirement in the Enterprise Act and adoption of a pre-merger notification process.

The Sections have substantial experience with the antitrust/competition laws of the United States and other jurisdictions, particularly in the areas of cartel enforcement and merger control. The Sections' comments reflect their expertise and experience with U.S. law and their familiarity with competition law and policy internationally, as well as expertise in the economics underlying the analysis of antitrust issues.

1. EXECUTIVE SUMMARY

1.1 The Criminal Cartel Offense

The Sections welcome the UK Government's consideration of reform of the criminal cartel offense contained in Sections 188-189 of the *Enterprise Act 2002*. While the introduction of the cartel offense marked a significant development in competition law enforcement in the UK, prosecution and conviction of 'hard-core' cartel activity has not been as successful as might have been expected.

The Sections have developed considerable experience with criminal enforcement of hard-core cartel conduct in several jurisdictions, particularly the United States. The Sections have relied on that experience in formulating these

comments and hope that they may be of some assistance in the evaluation of proposals to reform the UK criminal cartel offense.

The Sections respectfully submit comments on the proposal to remove the necessity to show dishonesty as an element of the criminal cartel offense. The Sections' comments address the general proposition as well as each of the four options for reform set out in Chapter 6 of the consultation document.[1]

There is a need to use an appropriate mental element (the *mens rea*) to differentiate between 'hard-core' criminal activities and antitrust violations that are properly enforced through civil means, and to capture the 'criminality' of the prohibited conduct. However, from the Sections' perspective, dishonesty is not the most appropriate determinative characteristic. The notion of dishonesty as adopted for the cartel offense requires both objective and subjective elements and obliges the jury to make very complex social judgments. The Sections are aware that the element is used in other areas of UK criminal law, for example, in theft and fraud. However, the dishonesty element does not translate seamlessly into the cartel offense. Further, the *Ghosh*[2] test, on which the dishonesty element in the cartel offense is founded, has long been controversial in UK criminal law. Such an esoteric test inevitably complicates prosecutions and reduces convictions—a point that the UK Government has acknowledged in the consultation document.

The Sections strongly agree that the dishonesty element should be removed. We urge the Government to consider Option 3 in the Consultation for the reasons articulated in these comments. However, the Sections believe that an even better alternative is to remove the dishonesty element and replace it with a *mens rea* that the defendant agreed to cause the relevant corporate entities to engage in the conduct specified in Section 188 of the *Enterprise Act* 2002 and knew, or ought to have known, of the terms of the conduct engaged in.

1.2 A Mandatory Merger Regime

The Sections welcome the UK Government's decision to consider whether the introduction of a mandatory merger regime might help to further strengthen the performance of UK merger review.

The Sections recognize that benefits and drawbacks inherently exist in both voluntary and mandatory notification regimes, but in the Sections' view, adoption of a well-designed and efficiently operated mandatory notification system applicable to mergers above a reasonable size threshold would enhance the efficacy of the UK's merger regime.

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1 The Sections are not commenting on the UK Government's aim to reduce the risk that the cartel offense would be considered as "national competition law" because this issue is specific to the EU competition law modernization regime under Council Regulation (EC) No 1/2003.

2 *R v Deb Baran Ghosh* [1982] EWCA Crim 2.

Mandatory systems are the prevalent type of pre-merger notification regimes in the world. Moreover, the international business community has become accustomed to mandatory pre-merger notification and has adapted to the obligations of such systems.

If, as discussed in the Consultation, the UK Government should choose to retain and improve a voluntary regime, the Sections would recommend the inclusion of an automatic statutory restriction rather than a clarification of CMA powers to prevent pre-emptive action. The former would provide the parties with relative certainty, enabling more effective business planning, and avoid burdensome and time-consuming negotiations over a hold-separate arrangement for each transaction subject to an inquiry. The latter option would, in contrast, foster uncertainty regarding how CMA would proceed in individual cases.

The Consultation proposes two options in relation to jurisdictional thresholds. The Sections respectfully submit that neither proposal should be adopted in the form outlined in the Consultation and instead the UK Government should consider a higher threshold for UK turnover in conjunction with a mandatory suspensory regime. This would better reflect prevailing trends in other jurisdictions with mandatory thresholds.

2. COMMENTS ON THE PROPOSED REFORM OF THE CRIMINAL CARTEL OFFENSE

All four of the UK Government's options for reform of Section 188 of the *Enterprise Act 2002* propose the removal of the element of dishonesty from the criminal cartel offense. The Sections believe that this is the correct approach for the reasons discussed below.

At present, an individual is guilty of a criminal offense if he dishonestly agrees with one or more other persons to make or implement, or cause to be made or implemented, arrangements in which at least two competing companies engage in specified cartel activities in the UK. The specified activities include direct or indirect price-fixing, limitation of production or supply, sharing customers or markets, and bid-rigging. Dishonesty can be established only if it is proven to the satisfaction of the jury, and beyond reasonable doubt, that the actions of the individual were dishonest by the ordinary standards of reasonable and honest people and, if so, that the defendant realized that his actions were dishonest according to those standards.

In adopting the 'dishonesty' approach, the UK Government recognized "the need to define carefully the criminal offence so as to make it clear that only individuals actively involved in agreements which could never be exempt would be caught. The government has no desire to criminalise involvement in benign agreements which would not be unlawful under existing competition law."[3]

Like other jurisdictions that prosecute cartel conduct criminally, the UK criminal offense applies to 'hard-core' or 'serious' cartel offenses and not more generally to horizontal arrangements that might be appropriate under Article 101(3) TFEU or Section 4 of the *Competition Act 1998*. Other jurisdictions have sought to draw the distinction between criminal and civil liability in various ways but all have recognized the critical importance of the distinction.

The Sections applaud the UK Government's desire to maintain this distinction between civil and criminal enforcement. Thus, it is imperative that a line between criminal and civil liability is drawn as clearly as possible. Certainty and consistency in the application of the criminal law are important to facilitate compliance, protect the interests of defendants, and enable the law to be an effective deterrent. However, the Sections recognize the difficulty of defining with precision conduct that constitutes the offense (the *actus reus*). The formulation must capture only 'hard-core' cartel behavior involving criminality, leaving restrictive agreements that do not involve turpitude to the realm of civil enforcement.

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[3] A *World Class Competition Policy*, Department of Trade and Industry, July 2001, Cm. 5233, para. 7.27.

2.1 The 'Dishonesty' Element in Other Jurisdictions

The United States

The Sherman Act (1890) is both a civil and a criminal statute. It does not rely on concepts such as 'dishonesty' to distinguish criminal from civil offenses. Instead, the Act requires evidence only that the parties actually agreed to engage in anticompetitive conduct. Although this is the *actus reus*, the evidence will also satisfy the *mens rea* element, which is required before criminal liability can be imposed under U.S. constitutional law.[4] The United States has the benefit of being able to rely on a long history of prosecutorial discretion in cartel matters. The U.S. Department of Justice ("DOJ") has long prosecuted as criminal violations conduct (and, more specifically, agreements) that the U.S. courts deemed to have no possible legitimate business or economic justification—price fixing, bid rigging, and customer, territorial, and market share allocations. The enforcement community in the United States understands that criminal conduct has to be carefully defined so that all business persons and counsel advising them know what the boundaries are and have repeatedly defined the conduct subject to criminal prosecution clearly and simply, as follows:

> [T]he cartels that . . . have [been] prosecuted criminally invariably involved hard-core cartel activity — price-fixing, bid-rigging and market and customer-allocation agreements. The conspirators have discussed the criminal nature of their agreements; they have discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they have gone to great lengths to cover up their actions . . . . Moreover, the cartels typically involve senior executives at firms — executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs.[5]

Over time, those decisions and pronouncements by the DOJ have developed into principles on which firms, individuals, and their counsel now rely to predict with reasonable confidence when certain conduct may create the risk of criminal exposure. Those principles have proven to be extraordinarily important

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[4] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 (1978).

[5] *See* Scott Hammond, Deputy Asst. Attorney General, U.S. Dept. of Justice, *Caught in the Act: Inside an International Cartel*, OECD Competition Committee Working Party No. 3: Public Prosecutors Program, at 2-3 (Oct. 18, 2005), www.justice.govlatr/public/speeches/212266.htm; *see also* R. Hewitt Pate, Asst. Attorney General, U.S. Dept. of Justice, *Vigorous & Principled Antitrust Enforcement: Priorities & Goals*, ABA Antitrust Section Annual Meeting, at 6 (Aug. 12, 2003) ("The cases we criminally prosecute at the Division are not ambiguous."), www.justice.gov/atepublic/speeches/201241.htm.

to (and useful in) the efficient administration of justice in the United States. Thus, the inclusion of an additional dishonesty component, as is the case in the UK cartel offense, has not been considered to be necessary.[6]

By carefully limiting criminal enforcement to 'hard-core' violations, the DOJ has established clear, predictable boundaries for business. In addition, DOJ enforcement officials have observed that this narrow focus reduces the complexity of proof in cartel cases.[7] By focusing criminal cases "on conduct that has no plausible business justification and that usually occurs in secret, accompanied by preemptive cover-ups and misrepresentation, defendants cannot reasonably argue that they failed to grasp the illegality of their actions."[8] Thus, the *Sherman Act,* which is based on the notion of conspiracy, requires only a deliberate intention to engage in the conduct prohibited by law. The jury must be satisfied that the defendant 'knowingly and intentionally' became a member of a conspiracy to fix prices, rig bids, allocate territories, etc. This *mens rea* element requires that the defendant was aware of the nature of his actions, and intended to achieve the goal of the conspiracy.

Canada

There is also no explicit statutory concept of dishonesty in Canadian law, which imposes criminal sanctions for participating in 'hard-core' cartel activities. Rather, Section 45 of the *Competition Act* (R.S.C., 1985, c. C-34) states that any person who, with a competitor in respect of a particular product, conspires, agrees or arranges any of the following is guilty of an indictable offense:

- fixing, maintaining, increasing or controlling the price for the supply of the product;
- allocating sales, territories, customers or markets for the production or supply of the product; or
- fixing, maintaining, controlling, preventing, lessening or eliminating the production or supply of the product.

Previously, the Canadian *Competition Act* prohibited only conspiracies that had serious or 'undue' competitive effects, as determined under a 'partial rule of reason' analysis. Price-fixing, market-allocation and output restriction conspiracies are now illegal *per se* in Canada. Today, conviction under the revised Act requires the prosecution to prove beyond reasonable doubt both the *actus reus* and the *mens rea* of the

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[6] Although the concept of dishonesty plays no explicit statutory role in criminal antitrust enforcement in the United States, the elements of dishonesty, secrecy, and/or subterfuge appear to play a role in the exercise of prosecutorial discretion.

[7] *See* Thomas O. Barnett, Asst. Attorney General, U.S. Dept. of Justice, *Seven Steps to Better Cartel Enforcement,* Presentation to the 11th Annual Competition Law & Policy Workshop, European Institute, at 3 (June 2, 2006), www.justice.gov/atr/public/speeches/216453.htm.

[8] *Id.*

offense. The *actus reus* is established by demonstrating that the accused was a party to a conspiracy, agreement, or arrangement with a competitor to fix prices, allocate markets or customers, or lessen production or supply of a product in the manner described above. The *mens rea* is established by demonstrating that the accused subjectively intended to enter into the agreement and had knowledge of its terms.[9]

Under the revised Competition Act, the standard for a criminal conviction is far less complicated and closer to the U.S. standards of proof.[10]

Australia

The concept of 'dishonesty' was considered by the Australian Government during the draft stages of the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*. The test for 'dishonesty' used in other Australian statutes (e.g. the *Criminal Code Act 1995* and *Corporations Act 2001*) is based on the *Ghosh* standard currently adopted for the purposes of the *Enterprise Act 2002*. The need to demonstrate dishonesty in the criminal cartel offense was, however, rejected in favor of strict liability, with no requirement to prove dishonesty or to show that the conduct was known by the parties to be illegal. To establish the Australian criminal offense, it is sufficient to prove beyond reasonable doubt that the parties had 'knowledge or belief' that the conduct in question had the elements (including purpose) that make up the definition of the cartel offense, even if they did not appreciate that it was cartel conduct.[11]

Other Jurisdictions

The dishonesty concept has no parallel in the criminal cartel laws of France, Germany, Ireland, Japan, or Korea.

The Greek competition regime was amended significantly in April 2011 to bolster the competition commission's ability to prosecute individuals for cartel offenses and increase the levels of fines. The Greek offense is based on strict liability; there is no requirement to prove a *mens rea*. Any individual or representative of an entity who "enters into an agreement" to carry out prohibited activities, such as market sharing, is guilty of a criminal offense (*Law No. 703/1977*Art. 29). As far as the Sections are aware, there was no discussion about the implementation of a statutory *mens rea* in the discussions leading to the reform of the law.

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9 Facially pro-competitive activities such as joint ventures and strategic alliances are assessed under the new Section 90.1 provision, which is civil.

10 Competition Act (Canada), R.S.C., 1985, c.19, (2nd Supp), s.19.

11 The Sections provided comments to the Australian Competition Consumer Commission counseling against the use of a dishonesty standard. See Comments of the American Bar Association Section of Antitrust Law and Section of International Law In Response to the Commonwealth Government of Australia's Request for Public Comment on the Draft Legislation Providing Criminal Penalties for Serious Cartel Conduct, February 2008.

The current UK regime is therefore at odds with the direction taken by other EU and non-EU enforcement regimes. Although the Sections do not believe that alignment of approach and theory between countries should necessarily be the principal driver of change, it is worth noting that other countries have rejected the dishonesty element as a requirement for the criminal offense, chiefly because it added complexity, made convictions more difficult and, thus, placed the deterrent value of the statute in jeopardy.

2.2 The Disadvantages Of the 'Dishonesty' Element

The UK Government is correct that there are challenges presented by maintaining the element of dishonesty in the current UK criminal cartel offense, as defined by the *Ghosh* test.

One of the most significant criticisms of the *Ghosh* standard is that it invites a complex social judgment on which different juries might give different answers, and thus may make 'hard-core' criminal activity unnecessarily difficult to prosecute.[12] The use of dishonesty as a distinction between criminal and non-criminal conduct, therefore, creates a risk of inconsistent prosecutorial outcomes.[13] Many have argued that the standard is ambiguous. While the *Ghosh* test (for all its deficiencies) assists juries in reaching a common-sense result in relatively straightforward fraud or theft charges, it may well make it more difficult for a jury to capture the nuance and effect of hard-core cartel conduct. For example, as commentators have pointed out, it could be difficult for a jury to draw the line between aggressive business practices and criminality, and some jurors might be swayed by defendants' arguments that they agreed to fix prices to avoid having to close their factories and make their workers redundant.[14]

The Sections also believe that the *Ghosh* standard of dishonesty may focus the concept of dishonesty on the idea of making an illicit profit, causing an illicit loss, or otherwise jeopardizing the economic interests of others.[15] These are not factors considered in determining criminal liability in U.S. cases and will frequently prove a difficult element to establish in relation to many cartels.

The Sections also note that removing the dishonesty element would not necessarily result in the offense lacking a sufficient and clear *mens rea*, as is evident from the approaches taken in the United States, Australia, and Canada, among others.

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12 J. Joshua, *The UK's new cartel offense and its implications for EC competition law: a tangled web*, 28 E.L. Rev. (2003) at 626.

13 UK Law Comm'n Consultation Paper No. 155, *Legislating the Criminal Code: Fraud & Deception,* ¶ 5.15 (1999).

14 *See*, for example, Joshua (2003), at 626.

15 As discussed by C. Harding, et al., *Breaking Up the Hard-core: The Prospects of the Proposed Cartel Offense,* Crim. L.R. 933, 938 (2002), and by Joshua (2003).

The Sections therefore respectfully agree that the dishonesty element should be removed from the offense. Although we are aware that it is the standard used in other UK criminal offenses, for example fraud and theft, we do not consider that it is appropriate for this particular offense.

Dishonesty is not an additional element required for the conviction of offenses under the *Bribery Act 2010*. The Joint Prosecution Guidance issued by the Serious Fraud Office and the Director of Public Prosecutions (the "Prosecution Guidelines") states that the concept of 'improper performance' in Section 4 of the *Bribery Act 2010* is based on a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned. In turn, the element of wrongfulness required for conviction of the offense of bribing another person is described in the Prosecution Guidelines as an intention to induce improper performance, or knowledge or belief that the acceptance of the bribe involves improper performance. This *mens rea* falls well short of dishonesty standard in *Ghosh*.

However, if the UK Government decides to preserve the dishonesty element, it should focus on the objective limb of the *Ghosh* standard rather than the subjective limb. At the very least, the two limbs of the standard should be made alternatives, so that proof of either objective or subjective dishonesty should suffice to establish a criminal offense. The factors laid out in Deputy Assistant Attorney General Hammond's remarks[16] - especially the existence of acts taken to avoid detection - could usefully be incorporated as a demonstration of the conditions that could satisfy the dishonesty standard.

2.3 *Option 1: Removing The 'Dishonesty' Element From The Offense And Introducing Prosecutorial Guidance*

The Sections recommend removal of the dishonesty element and agree that prosecutorial guidance would be a beneficial tool. However, we do not believe that prosecutorial guidance would, by itself, provide the desired level of clarity and certainty.

The Sections are concerned that there have only been two criminal cartel cases brought under Section 188 and only one successful conviction. The combination of the removal of the express statutory wording and the lack of case law may make it difficult for individuals and businesses to understand fully the scope of the law and whether or not they have committed or are about to commit an offense. The Sections are also concerned that the changeable nature of prosecutorial guidance may not give the level of clarity that is needed in the offense and that we understand to be required by Article 7 of the ECHR.

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[16] *See* note 5, above.

In addition, although prosecutorial guidance is a useful tool, it is something that must develop carefully over a long period of time, and generally is not consistent with a rule of law approach to enforcement. In the U.S., it has been developing over 120 years and, in more recent decades, the strong enforcement principles discussed herein have become entrenched in the system. But this approach should not be viewed as a substitute for a well-defined criminal offense, which likely is the minimum requirement to secure the interests of the UK Government and the proper functioning of the criminal process.

2.4 *Option 2: Removing The 'Dishonesty' Element From The Offense And Defining The Offense So That It Does Not Include A Set Of 'White Listed' Agreements*

Option 2 creates a list of permitted agreements. Such a list would have to be comprehensive and carefully and exhaustively defined. Such a list would have a limiting effect on and would unnecessarily complicate business decisions, as well as counseling businesses on the risk involved in their decision-making. Unlike the U.S. prosecutorial discretion model, which will consider all aspects of the company's conduct based on over 100 years of prosecutorial decisions and judicial action, this option is limiting on both the prosecutors and the business community. The U.S. prosecutorial discretion system, as described on pages 3 to 5 of these Comments, works effectively because it is based on a set of common principles subject to judicial review that has stood the test of time.

Furthermore, even if this were overcome, a list defined by 'type' of agreement would need to give at least some consideration to economic features. As the consultation notes, this would be closer to a civil antitrust style approach. As mentioned above, the Sections would prefer to see a clear distinction between the criminal and civil systems.

It is unclear whether this option would give rise to a strict liability offense. If not, the option does not appear to address the mental element of the offense satisfactorily. There would still be a need for an effective and appropriate *mens rea* to replace the current dishonesty element.

2.5 *Option 3: Replacing The 'Dishonesty' Element Of The Offense With A 'Secrecy' Element*

Option 3 is a feasible alternative to the present system. As mentioned above, 'secrecy' plays an effective role in the exercise of prosecutorial discretion in the United States. It is a clearer and less subjective concept than dishonesty and less apt to vary among different communities. On that basis, it is more likely that juries would understand the language and the concept better than the concept of dishonesty. It would also continue to distinguish between the criminal cartel and the civil antitrust offenses.

However, the Sections are not certain that an offense based on the concept of secrecy would be any easier to prosecute than the present offense. The prosecutor

would still need to prove that the defendant 'secretly agreed,' or conspired to enter into an agreement to commit one of the prohibited actions, and the jury would need to consider whether or not the defendant committed the offense on the basis of what a reasonable person would consider to be covert behavior. The Sections question whether, from the prosecutor's point of view, the use of 'secrecy' would have any real difference in effect.

Importantly, however, the removal of the need to satisfy the subjective element of the *Ghosh* test is a practical benefit that should not be dismissed readily.

If this option is selected, it would benefit significantly from greater clarification of the element of secrecy. Confidential sharing of business secrets, even among competitors, may further legitimate business interests such as in the context of merger discussions or beneficial collaborative joint ventures. The more relevant and problematic secrecy involves stealthy or clandestine conduct designed to avoid detection - especially by government enforcement authorities - as opposed to conventional business steps for the legitimate preservation of confidential business information. Thus, there is a readily apparent distinction between, on the one hand, use of a code name for a potential merger transaction or placement of strict controls on the dissemination of corporate planning and strategy materials in order to preserve appropriate business confidentiality, and, on the other hand, use of false names or suppression of attendance lists or travel records to conceal participation at a cartel meeting. Moreover, the distinction between active and passive secrecy, while potentially useful, could raise concerns unless further clarification is provided. In particular, passive secrecy, if considered a sufficient threshold to attract criminal liability, will need greater clarity to enable individuals to understand the type of conduct that would, and would not, fall within the scope of the offense.

2.6 *Option 4: Removing The 'Dishonesty' Element From The Offense And Defining The Offense So That It Does Not Include Agreements Made Openly*

Option 4 is the preferred option of the UK Government. However, the Sections respectfully express their concerns over how this option would work in practice.

First, we are unsure whether a notification of, say, price-fixing would be sufficient to enable customers to choose to contract elsewhere, as envisaged in paragraph 6.52 of the Consultation. For example, where there is no real or readily available substitute for the whole volume of the affected products from companies that are not members of the cartel, customers (whether intermediaries or final consumers) may be unable to put the information to good use.

Second, it is possible that an intermediary may not object to the presence of an upstream cartel. This might be the case where the intermediary charges for the finished product or service on a 'cost plus' basis. In such circumstances, the customer may benefit if the additional element is expressed as a percentage of the cost –

assuming the customer either does not face effective competition in the downstream market or the cartel affects a high proportion of the intermediary's competitors. Even where the customer does not benefit, it may be indifferent to the additional costs incurred through the cartel where it is able to pass it on to its own downstream customers.

Third, there may be other factors to consider, such as the practicability of announcing arrangements "to all consumers" in particularly large or complex markets, or the timing of making such announcements. For example, companies may choose not to announce competitively sensitive information involving market conduct until immediately before the agreement takes effect. Alternatively, parties to a cartel may choose to release the information at a time prior to its taking effect but in circumstances where customers would incur high switching costs.

Fourth, the willingness of individuals to disclose conduct to third parties may be constrained by their actual or perceived fiduciary or employment obligations to their employer.

Finally, any failure to disclose may not *in itself* be a reliable sign of criminal conduct.

For the reasons discussed above, the Sections are concerned that the presence or absence of a disclosure to customers may not be a sound basis for distinguishing criminal and non-criminal conduct.

2.7 *An Alternative To Consider*

Of the four options articulated, the Sections believe that Option 3 is closer to the three objectives the UK Government seeks: ensuring that the offense does not apply to agreements that are lawful, reducing the likelihood that conviction would depend on judgments taken on detailed economic evidence and providing juries with a test that they can understand and apply. However, Option 3's proposal of a secrecy requirement, while somewhat more objective, still creates difficulty in presenting the prosecution, as jurors may have very different views of what is covert or secret. The secrecy issue should not be the determinative issue for the jury to decide, yet it can be an important component of their thinking.

The Sections, therefore, urge the UK Government to consider eliminating the "dishonesty" element and rely only on the *mens rea* element that the defendant agreed to cause the companies to engage in the conduct specified in Section 188 and knew, or should have known, of the terms of the conduct and what it would cause to happen. In U.S. cases, the common formulation of the charge is that the defendants knowingly participated in the illegal conduct and "did those things that they combined and conspired to do." This would focus the prosecution not on a list of specific actions that a defendant did or did not do, but on the common sense finding that there was no

rationale for doing what the defendant did other than to violate the antitrust law. That provides jurors with a test they can understand and apply.

3. COMMENTS TO CHAPTER 4: "A STRONGER MERGER REGIME"

The Consultation correctly observes that the UK merger regime is highly regarded internationally and that its strengths include technical competence, independence from the political process, transparency, accountability, and robustness of decisions. Particularly because such attributes already exist in the current system, the Sections commend the UK Government for conducting this rigorous evaluation into whether certain changes would enhance the process and further strengthen the performance of UK merger review. To this end, the UK Government appropriately focuses on three key areas: the voluntary notification rule, methods to streamline the process, and a potential small business exemption. The Sections are pleased to submit the following comments on these issues.

3.1 Adoption of a Mandatory Notification Regime

In the Sections' view, adoption of a well-designed and efficiently operated mandatory notification system applicable to mergers above a reasonable size (discussed *infra*) would enhance the efficacy of the UK's merger regime. The Sections recognize that benefits and drawbacks inherently exist in both voluntary and mandatory notification regimes. Sections 4.3 through 4.5 of the Consultation explain two primary drawbacks to voluntary notification. First, the UK Government may not learn about mergers that raise competitive concerns. Second, crafting effective remedies can be difficult when, as is often the case, the UK Government does not learn about such mergers until after the parties have extensively combined their operations.

These problems can largely be eliminated in a system that both requires pre-merger notification and (as the Consultation suggests in §§ 4.18-4.22) temporarily suspends the right to integrate pending well-defined and reasonably tailored UK Government review periods. To be sure, mandatory pre-merger notification is not without drawbacks, because it imposes significant burdens on the participants. For the UK Government, an apparatus of skilled professionals is necessary to operate and enforce such a program efficiently. For merging parties, as the Consultation notes (§ 4.18), compliance costs (just for the initial notification) include the gathering and submission of information, as well as the delay to integration caused by a suspension period. In addition, the overwhelming majority of mergers pose no anticompetitive concerns.[17] A mandatory regime, therefore, would capture mostly competitively

[17] In the United States, mandatory pre-merger notification is pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a ("HSR"). In 2006, the U.S. Department of Justice and Federal Trade Commission said that "[f]or more than 95% of the transactions reported under HSR, the Agencies promptly determine – i.e., within the initial fifteen- or thirty-day waiting period that immediately follows HSR filings – that a substantial lessening of competition is unlikely."

benign or beneficial mergers, and, as to this very high percentage of mergers, the system's costs would not be offset by direct benefits to the public.

Notwithstanding these drawbacks, the Sections believe the benefits of a mandatory notification system can outweigh its costs.[18] The public benefits when mergers that risk a substantial lessening of competition can – before their integration – be identified, investigated, and, if warranted by the facts and by rigorous economic analysis, resolved as to their anticompetitive aspects by a tailored remedy. As the Consultation points out (§ 4.17), mandatory systems are the prevalent type of pre-merger notification regime in the world. Governments, for the most part, have implemented procedures for handling the intake and processing of mandatory pre-merger filings without unduly constraining the dynamic role that mergers play in the global economy. The international business community, moreover, has become accustomed to mandatory pre-merger notification and has adapted to the obligations of such systems.

The reasonableness of any notification regime depends on its details – including, among other things, the content of information that must be reported in the notification, the extent to which files must be searched for responsive information, the notification thresholds and how they must be calculated, the length of any suspension period(s), whether a waiting period can be accelerated in particular cases, standards for compliance, and numerous other issues. Understandably, at this stage of the UK Government's evaluation of the merger regime, the Consultation discusses only certain proposed details (on which the Sections provide comments below). Should the UK Government decide to adopt a mandatory notification regime, the Sections would welcome the opportunity to comment on the proposed particulars of the new framework.

3.2 *Other Issues*

- **Improving the voluntary notification regime. Whether the UK Government should (i) create an automatic statutory restriction on further integration as soon as CMA commences an inquiry or (ii) clarify actions CMA may take in phase 1 or phase 2 to prevent pre-emptive action, including reversal of integration that already took place. (§§ 4.12-4.15)**

Both alternatives have significant shortcomings in a voluntary regime and, if either were adopted, a mandatory filing regime would be preferable. The Sections understand that the Consultation frames this issue in terms of which option better facilitates more effective remedies in a voluntary regime. In that context, the Sections

Commentary on the Horizontal Merger Guidelines at 2. The UK experience would presumably be substantially similar.

[18] See the recommendations regarding pre-merger notification contained in the *Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust* (2000) at 89.

view an automatic statutory restriction to be the better option. It would provide the parties with relative certainty, enabling more effective business planning, and avoid burdensome and time-consuming negotiations over a hold-separate arrangement for each transaction subject to an inquiry. The second option (clarification of CMA powers to prevent pre-emptive action) would, in contrast, foster uncertainty regarding how CMA would proceed in individual cases. The power to reverse prior integration could result in the imposition of punitive costs on the merging parties, at a time prior to the CMA's determining that a substantial lessening of competition has occurred, and ultimately be ineffective as a remedy.

Although, as the Consultation observes, an automatic restriction may deter parties from notifying the CMA until after integration is complete, the drawbacks of the second option raise a similar concern.

- **Penalties for violation of hold-separate obligations. Whether a violation of hold-separate obligations should trigger financial penalties up to 10% of the parties' aggregate turnover. (§ 4.16)**

The Sections believe that this proposal is not necessary to protect the public interest in deterring premature integration and that the amount of the fines could be excessive and inappropriately punitive. In addition, the potential for such high fines would likely exacerbate incentives parties may have in a voluntary regime not to report a transaction until integration is complete.

By comparison, the U.S. experience has been that far smaller penalties (i.e., currently $16,000 per day for an ongoing violation) typically are sufficient to ensure compliance with a strict full-stop no integration rule. Enforcement of the penalty provisions in the U.S. has been rare, as most parties adhere to the statutory requirements. In the few cases in which enforcement has been necessary, it was typically due to the parties' failure to file the mandatory merger notification, and comparatively modest fines followed. (In cases in which the parties were found to have begun integrating their operations prior to the expiration or termination of the mandatory waiting period, more significant fines and other penalties have been imposed.) Reputational concerns coupled with these comparatively modest penalties have proven generally effective in deterring merger parties from integrating their operations during an active government investigation.

- **Suspension on Completion of Merger Pending Clearance. Whether mandatory notification should trigger suspension on completion of the deal until clearance obtained from CMA (§§ 4.18-4.22)**

As discussed above, the Sections agree that in a mandatory system, limited suspensory periods of appropriate duration, during which parties may not complete their notified merger until clearance is obtained from the UK Government, is sensible. Experience from other jurisdictions demonstrates that an initial waiting period of approximately thirty calendar days from the date of notification creates little material burden on parties in most cases. (A shorter initial waiting period, e.g., 10-15 calendar days, should apply to hostile takeovers, given the exigencies of such transactions.) Extended suspension of reasonable duration for mergers subject to Phase 2 inquiry is also appropriate, so long as a process is in place to ensure a reasonable, certain termination date for the extended suspension period.

- **Options for a jurisdictional threshold. Whether either jurisdictional notification thresholds should apply: (i) full mandatory – target UK turnover exceeds £5 million and acquirer worldwide turnover exceeds £10 million; or (ii) hybrid mandatory – target UK turnover exceeds £70 million and CMA retains authority over mergers that are below the turnover threshold but meet share of supply test (i.e., merger results in creation or enhancement of 25% share of supply of goods or services in UK. (§§ 4.27-4.30)**

The Sections respectfully submit that neither proposal should be adopted in the form outlined in the Consultation. In the Sections' view, the UK Government should consider a higher threshold for UK turnover in conjunction with a mandatory suspensory regime. In the Sections' experience, a mandatory merger control system with reasonable and objective jurisdictional turnover thresholds is best suited to identifying and preventing transactions that threaten harm to competition in the UK without imposing unnecessary burdens on numerous transactions that do not present such concerns. Should the UK Government adopt a mandatory regime, it should include clear, objective notification thresholds, together with appropriate regulations and guidance for the calculation of turnover.

3.3 *Option 1 - Full Mandatory Notification*

Although the Sections appreciate that there is no globally accepted turnover threshold, and that each jurisdiction must decide for itself what level of contacts should warrant an assertion of jurisdiction to review a merger, various international organizations and working groups (such as ICPAC, OECD, and the ICN) have advocated objective tests that capture only those transactions with a sufficient jurisdictional nexus to warrant review by the local jurisdiction.[19] Accordingly, the

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[19] See *Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust* (2000) ("ICPAC Report"); OECD Recommendation of the Council on Merger Review (2005) ("OECD Recommendation"); OECD Business and Industry

Sections believe that the full mandatory proposal above is overbroad because (i) the revenue threshold for the acquiring party is based solely on worldwide revenue, and (ii) in any event, the revenue thresholds do not appear to be high enough to minimize unnecessary filings.

Because the threshold for the acquiring party is based solely on worldwide revenue, the proposed threshold threatens to capture a wide range of mergers in which there is no competitive overlap in the UK between the activities of the target and the acquirer and where the acquirer may not even carry on business in the UK. As such, the Sections believe that this threshold would impose significant transactions costs upon parties (and additional burdens upon the CMA) with very little corresponding enforcement benefit. In this respect, the Sections refer the UK Government to the ICN Recommended Practices, which state that:

> Many jurisdictions require significant local activities by each of at least two parties to the transaction as a predicate for notification. This approach represents an appropriate "local nexus" screen since the likelihood of adverse effects from transactions in which only one party has the requisite nexus is sufficiently remote that the burdens associated with a notification requirement are normally not warranted. To the extent that the "local nexus" requirement can be satisfied by the activities of the acquired business alone, the requisite threshold should be sufficiently high so as to ensure that notification will not be required for transactions lacking a potentially material effect on the local economy.[20]

Although the Sections believe that any mandatory threshold should require some minimum level of UK turnover for at least two parties to a transaction, if the UK Government should adopt only a worldwide threshold for the acquiring party, the Sections endorse the ICN Recommended Practices on this point, which state that "If a jurisdiction adopts such notification criteria, the applicable notification thresholds should be set at a very high level. If such thresholds are insufficient to minimize unnecessary filings, other objectively-based limiting filters should be adopted."[21]

In contrast to the proposed mandatory threshold, many other jurisdictions have adopted thresholds that are substantially higher and that require minimum contacts from at least two of the parties to the transaction. For example:

Advisory Committee & International Chamber of Commerce, *Recommended Framework for Best Practices in International Merger Control Procedures* (Oct. 4, 2001) ("OECD BIAC Recommended Framework"); International Competition Network, *Recommended Practices For Merger Notification Procedures*, (2002) ("ICN Recommended Practices"); *International Competition Network, Setting Notification Thresholds for Merger Review, Report to the ICN Annual Conference Kyoto, Japan* (April 2008).

[20] ICN Recommended Practices I.C, Comment 2.

[21] ICN Recommended Practices I.C, Comment 4.

- **France** (combined worldwide turnover of the parties is over €150 million and at least two of the parties involved each has turnover in France of over €50 million);

- **Germany** (combined aggregate worldwide turnover of all participating undertakings was more than € 500 million and the domestic turnover of at least one participating undertaking was more than € 25 million and the domestic turnover at least one other participating undertaking was more than € 5 million);

- **Ireland** (worldwide turnover of at least two of the parties is € 40 million or greater; at least two of the parties must carry on business in Ireland; Irish turnover of one of the parties must be € 40 million or greater).

There are numerous other examples of jurisdictions that have revised statutory notification thresholds to increase the local nexus required to trigger notification and review.[22]

The Sections respectfully suggest, therefore, that the UK Government establish a reasonable mandatory threshold that requires at least two parties to the transaction to derive some minimum level of revenue in the UK. The appropriate threshold should be one that minimizes unnecessary transactions costs (and the workload of the CMA), thus allowing the CMA to focus on transactions most likely to have significant anticompetitive effects in the UK.

3.4 *Option 2 – Hybrid Mandatory Notification*

The Sections believe that Option 2 also has several deficiencies and should not be introduced.

(a) £70 Million Target Revenue Threshold

As the Consultation notes, based on an examination of the UK agencies' past caseload, the £70 million threshold for target UK revenues appears to be too high. As a consequence, many potentially anticompetitive mergers would not be subject to mandatory notification – resulting in many of the practical inefficiencies and potential costs to consumers that occur in the voluntary system. The Sections endorse the Consultation's approach of examining past cases in order to provide a benchmark against which to determine new thresholds.

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[22] Belgium, for example, has raised the local nexus in its jurisdictional thresholds at least five times. In the last decade, the Czech Republic discontinued a combined worldwide threshold. Finland and other European countries have also followed suit.

(b) **The Share of Supply Threshold**

The Sections suggest that the "share of supply test" from the Fair Trading Act 1973 should be abandoned as a jurisdictional test for CMA's ability to review anticipated or completed transactions. The Sections believe that a well-designed merger control process should promote legal certainty. Consistent with this belief, the Sections have long promoted the elimination of "market-share" or "size of market" jurisdictional thresholds in favor of objective, ascertainable criteria such as transaction value, turnover or assets.[23] Other international best practice documents on merger review also reject the use of market shares in notification thresholds.[24]

In the Sections' view, market share or share of supply thresholds have several significant drawbacks. First, such thresholds are inherently uncertain in their application, because the definition and measurement of the relevant market is almost always subject to considerable judgment.[25] This is particularly true of the "share of supply" test, which does not require the delineation of a relevant antitrust market, and for which the agency has historically exercised great discretion in order to determine its jurisdiction. Second, market share or share of supply tests can require the merging parties to undertake extensive fact-gathering and substantive analysis - even for transactions that do not present significant competitive problems – merely to determine jurisdiction. In the Sections' view, this can impose substantial compliance costs on the merging parties with little to no enforcement benefit, and without providing any certainty.

The Sections express no opinion with respect to the CMA's ability to review all non-notifiable mergers, except those qualifying under the proposed "small merger" exception. As the Consultation rightly notes, such an approach is similar to the situation that exists in the United States under the HSR Act. The U.S. antitrust enforcement agencies (both state and federal) have the ability to review virtually any transaction that substantially lessens competition in the United States (or a part thereof), regardless of whether the transaction is notifiable or not. Indeed, the U.S. agencies can initiate non-HSR investigations of transactions even if they were notified and obtained "HSR clearance." As the Sections understand Option 2, however, the

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[23] American Bar Association Section Of Antitrust Law, *Report On Multijurisdictional Merger Review Issues Presented To The International Competition Policy Advisory Committee* (May 17, 1999) at 6 (noting that "notification thresholds based on market-share based tests should be eliminated, or, at a minimum, coupled with an appropriate objectively based *de minimis* local sales threshold").

[24] ICN Recommended Practices II.B.I.; OECD Recommendation at I.A.1.2.2; OECD BIAC Recommended Framework at 6 ("Market share-based tests should be eliminated in favor of objectively quantifiable and readily accessible information....").

[25] See ICPAC Report at 91 ("Many jurisdictions' filing requirements are vague, subjective, or difficult to interpret. Perhaps the biggest culprit in this category concerns notification thresholds based on market share tests….").

CMA would not have a similar ability to review notifiable mergers that have been notified and cleared.

Should the CMA retain jurisdiction to review non-notifiable mergers, then the Sections suggest that the circumstances in which such reviews take place be limited – for example, by a statutorily prescribed time period – to promote certainty for business interests.

- **Material influence and mandatory notification. Whether mandatory notification should be required of mergers resulting in the acquisition of (i) control of policy (broadly equivalent to "decisive influence" threshold in EU) and (ii) a controlling interest; also, should CMA retain jurisdiction over transactions resulting in the acquisition of "material influence." (§ 4.36)**

The Sections endorse the proposal that notification be required only in the case of an acquisition of control. Consistent with international calls to rely on clear and objective criteria to determine whether a merger must be notified,[26] the Sections believe that any control test should be clearly and objectively defined, so that merging parties can know with certainty whether they must notify. Although the Consultation (§ 4.36) refers to the "acquisition of control of policy of the target" as being "broadly equivalent to the EU Merger Regulation decisive influence threshold," the Sections suggest that it would further promote certainty if the UK Government implements a control test that is more clearly and objectively defined. While the existing practice and precedents of the European Commission provide some certainty, the standards for control in the United States are more objective and clear.

Harmonization is an important objective. The Sections note that there are several examples of successful harmonization with the rules adopted under the European Merger Regulation. For example, many national competition regimes have aligned their analysis of joint ventures to those followed by the EC. Similarly, many national agencies have adopted the same methods for calculating turnover as those adopted in the relevant jurisdictional notices from the EC.

With respect to transactions that exceed turnover thresholds and in which the acquirer will not obtain a control of policy or controlling interest in the target, but will acquire a position of "material influence," the Sections endorse the Consultation's proposal that the CMA would have jurisdiction to investigate such transactions if they threaten to substantially lessen competition in the UK.

- **Jurisdictional threshold in a voluntary regime. Whether, in a voluntary regime, the jurisdictional thresholds should be changed, perhaps by**

[26] OECD Recommendation at I.A.1.2.2 and OECD BIAC Recommended Framework at 2.1.1.1.

eliminating both the turnover and share-of-supply tests and granting CMA jurisdiction over all mergers except those between small businesses. (§§ 4.38-4.39)

The Sections agree, for the reasons stated above, that the share-of-supply test should be eliminated, and has no objection to the Consultation's specific proposal.

- **Small Merger exemption. Whether mergers between small businesses should be exempt in a mandatory-hybrid and voluntary regime if the target's UK turnover does not exceed £5 million and the acquirer's worldwide turnover does not exceed £10 million. (§§ 4.40-4.42)**

The Sections endorse appropriately tailored *de minimis* exceptions for small businesses. Further, the Sections have no objection to the Consultation's specific proposal, which is clearly defined and ascertainable with reference to objective criteria.

- **Statutory timescales – Phase 1. Whether the Phase 1 time period should be shorter in a mandatory regime (e.g., 30 working days) than in a voluntary regime (e.g., 40 working days). (§ 4.45)**

The Sections generally support Phase 1 waiting periods of approximately one month's duration, and suggest that calendar days may result in a more harmonized approach than working days.

- **Statutory timescales – Phase 2 (Remedies). Whether the UK Government, without changing the 24-week time limit (and up to 8 weeks' extension) of Phase 2, should establish an additional statutory 12-week period (able to be extended 6 weeks) to implement remedies. (§ 4.46)**

The Sections generally favor enhanced flexibility within Phase 2 to accommodate the exigencies of particular transactions. The proposed new time period for implementation of remedies appears in general to be reasonable in many cases, as long as its availability does not have the effect of unnecessarily delaying CMA's consideration of remedies that would otherwise occur significantly sooner, i.e., within the 24-week period, and provided any extension for a remedies phase is otherwise consistent with an efficient and well-managed Phase 2 process. The Sections recommend that any Phase 2 period should provide an appropriate mechanism for "early termination" of any Phase 2 review, should the CMA conclude that there are no competitive concerns or should the parties and the CMA conclude appropriate undertakings.

- **Extension of Timescales. Whether the following are necessary to ensure the rigor and robustness of the regime:**

(i) the ability to extend time frames for complex cases (§ 4.47);

The Sections' general view is that a thirty-day time period in Phase 1, followed by a 24-week period (and potential 8-week extension) in Phase 2, followed by a potential additional 12-week period (and an optional 6-week extension) for remedies/undertaking all combine to provide more than an adequate time for complex cases, such that an additional ability to further extend time frames is unnecessary. The Sections would be pleased to address this issue in the context of a more detailed description of a new notification regime.

(ii) extend to Phase 1 the powers currently applicable in Phase 2 to obtain information from main and third parties (§§ 4.47-4.49);

In the Sections' experience, parties whose transactions are subject to mandatory suspension (e.g., a 30-day waiting period) have a naturally strong incentive to respond fully to a UK Government information request in Phase 1, since the likely consequence of failing to respond is often a costly extension of the investigation (i.e., a Phase 2 investigation or, in the U.S., a "Second Request"). Accordingly, in such situations, the Sections believe that additional compulsory process powers in Phase 1 are likely to be unnecessary. The Sections would be pleased to address this issue in the context of a subsequent, more detailed description of a new notification regime, which would presumably include a description of the notification form and the factual information it would require.

Parties to transactions subject to a voluntary regime typically face similar incentives to avoid a protracted investigation, such that, in the Sections' view, additional Phase 1 information-gathering powers are unnecessary in those situations as well. The Sections recognize that third parties typically do not share the same incentives as the merging parties to comply promptly with UK Government information requests, such that processes to compel responses by third parties to reasonably limited information requests are justifiable in Phase 1 and Phase 2.

(iii) extending information-gathering powers for main and third parties and stop-the-clock mechanisms during Phase 1 and Phase 2 during the undertakings in lieu of remedies implementation. (§ 4.47)

The Sections incorporate by reference the responses to subparts (i) and (ii) above.

- **Stop the clock on mergers likely to be cancelled or significantly altered. Whether, for anticipated mergers, a discretionary "stop the clock" power should enable a three-week suspension/extension of the review timetable if it believes the transaction will be cancelled or significantly altered. (§ 4.50)**

The Sections observe that a reasonably tailored suspension of the review timetable under such circumstances can in the ordinary case be achieved by agreement

among the UK Government and the parties. Accordingly, it is not apparent to the Sections that a stop-the-clock power is necessary for this purpose. Any such power should be exercised solely to accommodate a good faith request from the parties, or otherwise be reasonably grounded in the facts of the situation suggesting that cancellation or significant alteration of the merger is reasonably likely.

- **Earlier consideration of remedies in Phase 2. Whether CMA may consider remedies earlier in Phase 2 without having to decide whether the merger will result in a substantial lessening of competition. (§§ 4.51-4.52)**

The Sections agree with this proposal. In addition, the Sections respectfully suggest that the UK Government authorize CMA, in appropriate factual situations, to allow the ex-UK aspects of a particular transaction to go forward while remedies applicable to the UK are being addressed. Such a procedure can be practical and effective when the transaction involves a discrete set of UK assets, such as in many retail markets.

*** * * * ***

In addition to the foregoing discussion of issues raised in Chapter 4, the Sections also submit the following comment regarding a topic addressed contained in Chapter 11.

- **Filing Fees. What is the appropriate level and structure for merger filing fees under either a voluntary or mandatory regime? (§§ 11.7 -11.15)**

The Sections agree that all of the several proposals discussed in this section of the Consultation reflect good practices and are consistent with global standards. Although the Sections have in the past expressed the view that antitrust merger enforcement is a law enforcement function, which ideally should be funded from general government revenues, the Sections recognize that most jurisdictions have elected to fund the cost of antitrust merger enforcement in whole or in part from fees assessed on the parties to merger transactions. In this context, the Sections believe that such fees should be set no higher than is required to fund the merger review function and should not be designed to fund other law enforcement activities, including non-merger antitrust enforcement. Further, the Sections believe that the current system of scaling fees to reflect the size of merger transactions based only on domestic (as opposed to global) revenues of the target should be preserved, because domestic target revenues typically have a closer relationship to the burden and cost of merger review within the jurisdiction. As described in the Consultation, each of the alternative filing fee arrangements under consideration complies with these general principles.

Conclusion

The Sections hope that the Department finds these comments useful. We would be pleased to respond to any questions that the Department may have and to provide any further assistance that may be appropriate.

Respectfully submitted,

Section of Antitrust Law

Section of International Law

American Bar Association

Andrews, Patrick

-----Original Message-----
From: Patrick Andrews [mailto:Patrick@patrickandrews.co.uk]
Sent: 12 June 2011 22:29
To: Competition and Markets Authority
Subject: A consultation on options for reform

Dear Mr Lawson,

I am writing in response to 'A competition regime for growth - A consultation on options for reform' consultation questions: "Q.2 The Government seeks your views on the potential creation of a single Competition and Markets Authority; Q.19 The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute; and Q.20 The Government seeks your views on whether the CMA should have a clear principal competition focus.

As a starting point please note that I do not consider myself an expert on competition law but for many years I worked as an in-house lawyer and often had to deal with competition laws. It seems to me that there is room for a far more holistic approach to competition and collaboration. It seems to me that too often competition laws merely serve to protect the most ruthless, rather than to encourage healthy competition. The lack of diversity on our high streets (whether retailers or banks) is proof of the failure of the laws to encourage diversity, which is a key element of healthy competition.

What's more, I find there is far too much emphasis on competition without acknowledging the benefits to society of collaboration. I have sometimes thought that we ought to have a collaboration commission, as well as a competition commission, to make sure businesses are cooperating enough.

I am convinced that the powerful corporations that have huge influence over our society are contributing to our lemming-like rush for unsustainable growth. if the new Authority is able to take a holistic approach, and take into account a broad number of factors including the need for us to combine forces in key areas if we are to make the steps necessary to transition to a low carbon age, then I for one am all for it.

Yours

Patrick Andrews

Anglian Water Services Ltd

BIS | Department for Business Innovation & Skills

A competition regime for growth: a consultation on options for reform.

Response form

Name **Anglian Water Services Ltd**

Address **Anglian House, Ambury Road, Huntingdon, Cambridgeshire, PE29 3NZ**

NB. We have limited our response to sections 7 and 8, questions 14 – 18. We are responding as an organisation.

Return completed forms to:

Duncan Lawson
Department for Business Innovation and Skills
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SW1H 0ET

Telephone: **0207 215 5465**
Fax: **0207 215 0480**
email: cma@bis.gsi.gov.uk

Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.

X	Large Enterprise

Consultation Questions

1. Why reform the competition regime?

No Comment

2. The UK Competition regime and the European context

No Comment

3. A stronger markets regime

No Comment

4. A stronger mergers regime

No Comment

5. A stronger antitrust regime

No Comment

6. The criminal cartel offence

No Comment

7. Concurrency and sector regulators

This chapter sets out three options for improving the use and coordination of competition powers: (1) sector regulators could agree on a common set of factors to take into account when deciding whether to use sectoral or competition powers or competition law primacy could be enhanced; (2) the CMA could act as a central resource for the sector regulators; (3) the CMA could coordinate the use of competition powers across the landscape.

Q.14 *Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?*

Q.15 *The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.16 *The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.*

Comments:

14. We would agree that Ofwat should maintain its concurrent antitrust and MIR powers in parallel to the CMA? The reason for this is that we feel that because the water industry is so heavily regulated by Ofwat at present any antitrust or MIR action should take into account, and be seen in the context of, other regulatory initiatives or opportunities which Ofwat might be considering and their cost.

In addition, the water industry legislation has introduced unique and distinct forms of competition, such as inset appointments, water supply licensing, self laid water mains and service pipes. Each has their own unique, prescribed rules. That same legislation also gives Ofwat a role to play in those regimes, eg. by appointing inset appointees to become an undertaker in an area or by appointing a company as a water supply licensee, by providing statutory guidance in respect of access codes, and by determining disputes in respect of bulk supply or bulk discharge agreements or as to the terms upon which water mains and service pipes can be self laid.

Competition within the sector is also quite distinct because of the areas where Parliament has deliberately restricted competition, eg. in the case of household customers and the fact that water supply licensing regime does not extend to the waste water or sewerage service. Notwithstanding this restriction, some household customers are now being served by new entrants where an inset appointment has been granted on the grounds set out in section 7(4)(b) of the Water Industry Act 1991, namely, that the site was "unserved" at the date of the appointment. However, it may be worth noting that none of those household customers were given any choice as to that appointment, nor can they choose another supplier. Therefore, monopoly by an incumbent has been replaced by a monopoly under an inset appointee, requiring an equal amount of regulation.

In our opinion, therefore, casework should also be handled by Ofwat, although again Ofwat would benefit from the casework skills of the CMA.

As a general rule, therefore, we feel that it would be more appropriate for Ofwat to take action in preference to the CMA since any action should take into account the sector specific regimes. Ofwat has a statutory role to play in those sector specific regimes and will have a good understanding of how they operate. If the CMA had sole jurisdiction or acted independently of Ofwat, it is easy to imagine that conflicts could arise.

15. Having said that, we feel that it would be more efficient for Ofwat to have access to the skills and expertise of the CMA, rather than build up its own skills and expertise. To date, competition within the water sector has been of a limited nature and lawyers and economists wishing to specialise in competition matters may not wish to limit their careers and become specialists solely in competition in the water industry. Therefore, it would be better for Ofwat to have the ability to call upon the expertise of the CMA to investigate a particular matter, whilst keeping close control over the investigation and

assisting the CMA investigators with advice and guidance upon the sector specific regimes and rules.

In the case of the water industry, we do not think that it would be appropriate to require Ofwat to take action under the Competition Act 1998 in preference to other regulatory action which might be taken under the Water Industry Act 1991. In particular, this might lead to cherry picking within those markets which were open to competition. This could adversely affect household customers who are not within the competitive market and might destroy the current regional averaging of standard tariffs and charges, leading to localised tariffs with some winners and some losers.

Therefore, we believe that Ofwat should be able to decide which regime is more appropriate for taking action as they can at present. Again, however, Ofwat might benefit from closer liaison with the CMA in determining whether action under the Competition Act 1998 was appropriate and explaining the criteria which Ofwat (and the CMA) would use in deciding to proceed under the Competition Act 1998.

These considerations may not apply in the case of other sectors which do not have similar sector specific regimes (eg. inset appointments and water supply licensing, which are unique to the water sector) and where all customers are within the competitive market. Therefore, we have limited our consideration to Ofwat and the CMA.

Nevertheless, we would agree that it would be beneficial to make a minor amendment to the Water Industry Act 1991 and to align the water industry to railways, gas and electricity, to a limited extent. In particular, in those sectors, we understand that the sector specific legislation has been amended to relieve the sectoral regulator from taking enforcement action under the sector specific legislation where “it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998. This appears to be an omission in the current Water Industry Act 1991 and could require Ofwat to continue to take action under the Water Industry Act 1991 even in cases where it is more appropriate to take action under the Competition Act 1998. This could lead to Ofwat taking action twice which would be unnecessary and undesirable.

8. Regulatory appeals and other functions of the OFT and CC

This chapter sets out the Government’s view that the sectoral reference/appeal jurisdictions of the CC should be transferred to the CMA. We also propose the development of model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

Q.17 *Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?*

Q.18 *The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.*

Comments:

17. No, we do not feel that the CMA would be the most appropriate body for determining regulatory reference/appeals currently heard by the CC?

In determining regulatory references and appeals, the CC provide an independent review of the decisions made by Ofwat. This independence would be lost if the function was transferred to the CMA and the CMA were working closely with Ofwat upon other matters. Consequently, it is considered that companies would challenge the independence of the CMA and be more likely to appeal their decisions to a higher tribunal.

18. Yes, we would agree that model regulatory processes should be developed.

9. Scope, objectives and governance

No comment

10. Decision making

No comment

11. Merger fees and cost recovery

No comment

12. Overseas information gateways

No comments

13. Questions on the impact assessment

Comments: No comments

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URN 11/657RF

ARNOLD & PORTER (UK) LLP

A competition regime for growth: a consultation on options for reform.

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Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.

✓	Legal

When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

INTRODUCTION AND EXECUTIVE SUMMARY

Arnold & Porter (UK) LLP welcomes the opportunity to comment on the proposals published by the Department for Business Innovation & Skills ("BIS") entitled *'A Competition Regime for Growth: A Consultation on Options for Reform'* (the "Consultation Document").

Our main comments on the proposals presented in the Consultation Document can be summarised as follows:

- In relation to the **creation of a single Competition and Markets Authority**, we are sceptical that such a measure would improve the decision making ability of the current regime or deliver significant cost savings. Furthermore, we consider that the creation of a single competition authority risks weakening the current regime by removing the lauded benefits of the current bicameral system.

- In relation to the proposals for the **markets regime** we agree that allowing the Competition Commission to undertake investigations into practices across a number of markets would be an efficient way to address competition problems that may occur in several sectors. However, such powers would have to be used carefully to avoid simply adopting a 'blanket approach' to competition issues across a range of different sectors, without first understanding the operation of the markets in question.

- Of the options presented for reform of the UK's **merger control regime**, we favour the option to strengthen the existing voluntary regime. We submit that the measure proposed would sufficiently address the concerns of the government. More importantly, we fear that the other options proposed risk substantially increasing the regulatory burden on companies and on the UK authorities.

- In the field of **antitrust**, we are in favour of the government retaining and enhancing the existing procedure of the Office of Fair Trading. In particular, we agree with the government's remarks in the Consultation Document that there are substantial benefits in building on the authority's experience over the last decade.

- As regards the proposed reform the **cartel offence**, we submit that it is important to retain a *mens rea* element for the offence and that the proposal to replace the dishonesty element with a test of 'secrecy' may provide a potential alternative to overcome some of the perceived difficulties of using a dishonesty test under the current regime.

- Our comments on the other sections are set out below also.

RESPONSES FROM ARNOLD & PORTER (UK) LLP

Q.1 ***The Government seeks your views on the objectives for reform of the UK's competition framework, in particular:***

- ***improving the robustness of decisions and strengthening the regime;***
- ***supporting the competition authorities in taking forward the right cases;***
- ***improving speed and predictability for business.***

We broadly support these objectives.

Robust decisions are essential for business certainty and ensure that the UK competition regime promotes a culture of competition law compliance. More importantly, a strong, effective competition regime that produces robust decisions has the effect of deterring undertakings and individuals from engaging in anti-competitive behaviour.[1]

A key factor in establishing robust decisions is the provision of a clear, correct and justiciable basis for the decision, based on EU precedent where available, and on principles that could have been anticipated by the defendant undertakings.

We broadly support the OFT's prioritisation principles. The selection of the "right" cases to take forward is less important than a proper decision-making process based on the law and on observance of the rights of the defendants.

We welcome a commitment to speed. However, speed must not come at the expense of clarity or robustness, and in particularly observance of the rights of the defence.

Q.2 ***The Government seeks your views on the potential creation of a single Competition and Markets Authority.***

In our view, central to the assessment as to whether the creation of a single Competition and Markets Authority ("CMA") would be beneficial for both businesses and government alike is whether such a system is likely to result in: (a) more robust decision making; and (b) efficiencies (and therefore cost savings).

First, in relation to decision making, as noted in the Consultation Document, the UK competition regime is highly regarded internationally and both the OFT and Competition Commission ("CC") are rated amongst the top five competition agencies in the world. In particular, one of the strengths of the current regime is the bicameral system that operates for the investigation of mergers and markets. Under this system, the OFT has responsibility for undertaking a first phase review in order to identify potentially problematic cases, and the CC subsequently undertakes an in-depth investigation of cases that are refer to it by the OFT.

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[1] See in particular the OFT's publication '*The deterrent effect of competition enforcement by the OFT*', OFT963, published in November 2007.

These distinct roles for the OFT and CC have helped ensure that cases considered by the two bodies are done so independently and free from the suspicion of any 'confirmation bias', which has been the criticism levelled against some competition regimes that operate as a single body.[2] In addition to having distinct roles, the OFT and CC operate different systems of investigatory technique; the OFT applying a system of administrative investigation conducted by OFT officials, whereas the CC analyses cases that are referred to it using groups of publically appointed members. As the Deputy Chairman of the CC recently explained "*...there are two major protections against confirmation bias engineered into our system - that the CC does not pick its cases and that the final decisions including remedies decisions are taken by [a] group of external independent decision makers.*"[3]

We acknowledge that the proposals for reform discussed in the Consultation Document contain certain safeguards which are aimed at protecting a new regime against confirmation bias and the potential lack of independence that could result from establishing a combined authority. We provide our comments on the specific safeguards proposed below. However, as an overarching point, we believe that one needs to be alert to the danger that the creation of a single authority risks removing one of the main strengths of the current system - its bicameral nature - which is respected throughout the world. Such a step should not be taken lightly.

We note from the impact assessment report[4] (the "Impact Assessment Report") published alongside the Consultation Document that the costs savings that are likely to be generated as a result of the creation of a single competition authority are relatively small. The Impact Assessment Report explains that the combined annual costs of the OFT and CC in 2009-2010 were approximately £74.2 million.[5] The 'best estimate' of the potential cost savings that will result from the merging of the OFT and CC into the CMA is approximately £4.3 million[6], or 5.8% of the combined annual costs of the OFT and CC in 2009-2010.

Given the relatively small cost savings that are likely to result from a combination of the OFT and CC, and the risks entailed in the removal of the bicameral system, we are not convinced that combination of the OFT and CC would be beneficial for either industry or government. Furthermore, it is not apparent to us why many of the cost savings could not be achieved without such a combination.

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2 See, for example, I Forrester *'Due process in EC competition cases: A distinguished institution with flawed procedures'* The European Law Review (2009) 817.

3 L Carstensen, *'Handling Competition Cases in a Single Authority, Comments by Laura Carstensen'*, 15 March 2011, available at: http://www.competition-commission.org.uk/our_role/cc_lectures/Handling_competition_cases_single_authority.htm

4 *'A Competition Regime for Growth: A Consultation on Options for Reform'* Impact Assessment Report, March 2011

5 Page 21 of the Impact Assessment Report.

6 Page 23 of the Impact Assessment Report.

MARKETS REGIME

Q.3 ***The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime, in particular:***

- ***the arguments for and against the options;***
- ***the costs and benefits of the options, supported by evidence wherever possible.***

Enabling in-depth investigations into practices that cut across markets

We would argue that allowing the CC to undertake investigations into practices across a number of markets would appear to be an efficient way of addressing competition problems that may occur in several sectors. However, a cross-sector review raises questions as to the circumstances in which the relevant features of the respective markets/sectors would be judged sufficiently similar to merit investigation at the same time. Additionally, it would be unusual to find that the problems identified in the markets in question are caused by similar underlying issues or could be resolved through common means. Whilst there is no doubt that adopting such an approach may be a more efficient use of resources, there is a risk that in adopting a 'blanket approach' to addressing competition issues across a number of markets that the individual markets may not be investigated fully, or appropriately - resulting in a failure properly to tackle the underlying competition problems.

In addition to the above, allowing the CC to extend its remit substantially beyond the scope of the initial reference risks reducing business certainty as to the scope of a market investigation and may potentially extend the duration of a CC investigation. We therefore submit that clear guidance should be published explaining when the circumstances in which the CC may take such action.

Giving the CMA powers to report on public interest issues

We agree that the CC should be allowed to report on public interest considerations in anti-trust cases as it does in merger cases. However, public interest issues must not be permitted to drive any differences in interpretation as between Chapter I and Chapter II of the 1998 Act and Articles 101 and 102.

Extending the super-complaint system to SME bodies

We would support the extension of the super-complaint system beyond that of just consumer bodies to SME groups. However, we would urge the publication of clear guidance as to how such a complaint can be made and which bodies would qualify for use of the procedure.

Reducing timescales

A reduction in the length of time taken to complete market investigations is to be welcomed. We would support the introduction of statutory timetables in phase 1 and phase 2 investigations. As noted in the Consultation Document, the length of time taken to process cases through the markets regime is a major cause of concern for business.

Establishing a statutory timetable for market investigations, where the triggering point for a market investigation reference is clearly identified, would also increase certainty for all concerned. This would ensure that businesses, their advisors and the OFT/CC all work towards the same time scale. We note that the Consultation Document proposes granting the authorities the power to extend the timeframes in the case of exceptionally complex cases. If introduced, we would suggest that clear guidance be published alongside this proposal setting out in detail what might constitute an "exceptionally complex case" and ensuring that such a provision is not used to extended the review timetable unnecessarily.

Strengthening information gathering powers

We agree with the proposal that the introduction of formal information gathering powers in phase 1 of a market study would help ensure that market studies are completed more promptly. Moreover, we agree with the position set out in the Consultation Document that if a statutory timeframe was introduced into phase 1 of market studies (which we support) then formal information-gathering powers should be introduced to ensure that the statutory timeframe is met.

Simplification of review of remedies process

We understand the present difficulty under the current markets regime where there must be a change in circumstance before a review of the remedies imposed in a particular case can be undertaken. We agree that in order to ensure the ongoing effectiveness of a set of remedies, it would therefore make sense to allow a review to take place more broadly - subject as always to proper respect for the rights of all undertakings affected by the review.

Updating remedial powers

We support the proposals to allow the CC to make an order requiring parties in phase 2 of a merger or market investigation to appoint an independent third party to monitor and/or implement remedies.

Q.4 ***The Government also welcomes further ideas, in particular, on modernising and streamlining the markets regime, and on increasing certainty and reducing burdens.***

We do not offer views on this.

MERGERS REGIME

Q.5 ***The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular:***

- ***the arguments for and against the options;***
- ***the costs and benefits of the options, supported by evidence wherever possible.***

The Consultation Document identifies two specific "drawbacks" to the UK's current merger regime: first, there is a risk that some anti-competitive mergers escape review, and second, that the regime results in the authorities reviewing a large number of completed mergers, which makes it difficult to apply appropriate remedies where competition concerns are identified.[7]

In relation to the first issue, the Consultation Document notes that "*...the lack of third party complaints indicates that this does not represent a serious failing in the current regime.*"[8] We would agree that this does not appear to be a significant failing of the present merger system in the UK and therefore is not a reason, on its own, to overhaul the current system. It is therefore in relation to the second issue mentioned in the Consultation Document - the problem of reviewing and imposing suitable remedies on completed mergers - that should be the focus of any new proposals.

The Consultation Document presents three proposals: (i) strengthening the existing voluntary regime; (ii) adopting a system of full mandatory notification; and (iii) adopting a hybrid system where the notification regime is part mandatory and part voluntary. Overall, we are in favour of strengthening the existing voluntary regime as this option appears to offer appropriate measures to address the current concerns of the OFT and CC. More importantly, we also favour strengthening the existing voluntary regime over the other options as, in our view, the other options proposed are likely to result in an unnecessary increase to the regulatory burden faced by companies wishing to do business in the United Kingdom. We comment on the specific nature of each of the proposals below.

Strengthening the existing voluntary regime

The first option involves strengthening the existing voluntary regime. Two particular measures are proposed under this heading: first, the introduction of a statutory restriction on further integration that would automatically apply as soon as an inquiry into a completed merger is commenced; and secondly, giving the authorities the power during phase 1 to suspend all integration steps pending negotiation of tailored hold-separate undertakings.

In terms of clarity and expediency we are in favour of adopting the first measure - the automatic suspension of further integration once an investigation is commenced into a completed merger. We think that - so long as (a) there is clarity on what would constitute prohibited integration and (b) this would not prevent the merged enterprise being effectively managed and operated - this offers greater certainty for the parties

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7 At paragraph 4.3

8 At paragraph 4.4

involved and allows the authorities immediately to begin their review of the merger rather than first having to negotiate hold separate undertakings. The Consultation Document notes that a disadvantage of the first option could be that parties would be discouraged from notifying completed transactions until they had already achieved a level of integration. In our view, this risk must be set against the likelihood that parties would not wish to face the task of unravelling a highly integrated completed merger, and would therefore rather notify the arrangement and wait for approval to obtain the comfort that full integration is permissible.

Of all the options presented in the Consultation Document we submit that strengthening the existing voluntary regime represents the most suitable option to address the present concerns of the government. In particular, we note that the voluntary merger system works well in the UK and other countries such as Australia and New Zealand. One of the main strengths of a voluntary regime is that the competition authorities in question are not required to use their limited resources on non-problematic mergers, but instead can focus on those transactions that potentially raise substantial competition concerns. When the government of the day consulted on proposed changes to the UK's competition regime in 2001, it was decided to retain a voluntary merger control regime. Similarly, when a review was undertaken of the voluntary merger regime in Australia in 2003[9], the report concluded that "*[t]he replacement of the informal process with a compulsory formal notification of mergers would greatly increase the regulatory burden both on corporations proposing to merge and on the ACCC.*"[10]

Given these endorsements for the use of a voluntary merger regime we would urge the government to retain the existing merger system, albeit with the safeguards discussed above.

Adopting a full mandatory notification

The second option in the Consultation Document involves replacing the existing voluntary merger regime with a system of mandatory notification. As noted in the Consultation Document, the majority of merger regimes in the world have adopted a system of mandatory notification. The main advantage of a mandatory regime is that it provides certainty for businesses and competition authorities alike - once the thresholds are met, a notification must be made. However, there can be substantial disadvantages in having a system of mandatory notification; in particular the additional regulatory burden and cost that such a system places on businesses.

In our opinion, in order to limit the regulatory burden that a mandatory regime would entail, it is imperative that the relevant jurisdictional thresholds are set a reasonable level such that only transactions that merit review are caught. In the Consultation Document, the BIS suggests adopting thresholds pursuant to which mergers would require notification where the UK turnover of the target exceeds £5 million and the worldwide turnover of the acquirer exceeds £10 million. According to the Impact Assessment Report published alongside the Consultation Document, the introduction

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9 *Trade Practices Act Review*, Chapter 2 - Mergers, available at: http://www.tpareview.treasury.gov.au/content/report.asp

10 Ibid, at page 61.

of jurisdictional thresholds set at this level would result in approximately 1,190 businesses a year having to notify a merger to the OFT.[11] This compares with only 55 businesses having to notify a merger to the OFT under the current system.[12] The proposed mandatory regime would therefore result in 1,135 additional businesses having to notify a transaction to the OFT - representing more than a 2,000% increase when compared with the current situation.

Given the substantial increase in the number of cases that would be caught by the proposed thresholds, and the resulting additional burden that such a system would impose on both businesses and the OFT, we submit that a mandatory regime at the thresholds proposed should not be adopted. Moreover, given that the Consultation Document expressly recognises that the present voluntary system does not result in substantial numbers of anti-competitive mergers escaping review, the likely result of the proposed mandatory regime is that a significant number of non-problematic mergers will be notified to the OFT, resulting in wasted costs for both businesses and government alike.

Adopting a hybrid mandatory notification

Under a hybrid mandatory notification, mergers would require notification to the OFT where the target's UK turnover exceeds £70 million. In addition, the CMA would retain the ability to initiate investigations where mergers fall below this turnover test but meet the share of supply test.

As noted in the Impact Assessment Report, the current share of supply test plays an important role in capturing problematic mergers: since 2004/5, 71 (57%) of the 125 cases meeting the "realistic prospect of a substantial lessening of competition" test for reference at the OFT stage, qualified on the basis of the share of supply test.[13] This test therefore allows the OFT to identify potential problematic horizontal mergers and we support the proposal that this test should remain part of the UK's merger regime.

However, adopting a hybrid system in which part of the merger regime is voluntary and part of the regime is mandatory risks creating uncertainty for business. Whilst this option does retain some of the benefits of the present voluntary merger regime, according to the Impact Assessment Report the introduction of a mandatory notification requirement under the hybrid option would require an additional 292 businesses to notify a transaction to the OFT - a substantial increase in number from the current 88. As mentioned above, we consider that such a requirement is only likely to capture unproblematic mergers resulting in limited resources being diverted away from the more problematic cases.

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11 Impact Assessment Report, at paragraph 121.

12 Ibid.

13 At paragraph 105.

<u>Q.6</u> The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?

As mentioned above, the main disadvantage of the present system identified in the Consultation Document is the fact that the OFT and CC are required to review a number of completed mergers, making it more difficult to impose suitable remedies, should concerns be identified. Whilst the mandatory regime may provide the most definitive way to overcome this issue - in that all mergers meeting the thresholds would require notification - adopting this option risks losing the benefits offered by the present voluntary regime. The success of the present voluntary regime is based on the fact that the OFT is able to focus its resources on the most problematic mergers and is not required to review hundreds of unproblematic transactions. We would therefore urge the government to retain the benefits of the present voluntary regime but strengthen the powers of the OFT and CC to ensure that they are able to extract suitable remedies from the parties should the need arise.

<u>Q.7</u> The Government welcomes further ideas on streamlining the mergers regime.

We do not have further issues to raise.

ANTITRUST REGIME

<u>Q.8</u> The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime, in particular:
Options 1-3 for improving the process of antitrust enforcement;
the costs and benefits of the options, supported by evidence wherever possible.

As explained in the Consultation Document, concerns have been raised that the OFT (and the UK's sectoral regulators) have opened fewer antitrust investigations than other Member State authorities over recent years. Furthermore, when an antitrust investigation has been opened, research has shown that cases take significantly longer to prosecute in the UK than elsewhere. Related to this concern is the view held by some that the limited number of cases and the length of their prosecution is due, in part, to the burden on competition authorities in establishing and upholding a case.

The government therefore proposes three options that seek to improve the process of antitrust enforcement: (i) retain and enhance the OFT's existing procedure; (ii) develop a new administrative approach; (iii) introduce a prosecutorial system. We comment on each of these proposals below.

Retain and enhance the OFT's existing procedure

Under this option the OFT would seek to streamline its procedures by implementing a number of new procedures, many of which have already been introduced in the OFT's recently published guidance on its antitrust investigation procedures.

Of all the three options presented in the Consultation Document, we are most in favour of this option. As mentioned in the Consultation Document, we consider that there are substantial benefits in building on the OFT's experience over the last decade. In particular, the proposals to introduce transparent administrative timetables would provide greater clarity to the parties concerned as to the decision points and stages of the investigation. It would also constitute a commitment by the OFT to progressing the investigation at a certain speed. Other measures, such as the introduction of a Procedural Adjudicator to oversee that procedural disputes and issues are dealt with in an efficient and transparent manner are also welcomed.

Develop a new administrative approach to antitrust procedures

Under this option, an Internal Tribunal would be established within the new CMA, whose membership would include independent persons appointed to adjudicate on cases. 'First phase' decision makers within the CMA (and the sectoral regulators) would then bring all cases before the Internal Tribunal for decision. The Consultation Document states that "*[t]he substantial independence of the decision-maker would guard against confirmation bias.*"[14]

Other variants on a new administrative approach include: (i) decision making could follow the same process as phase 2 of markets and merger cases and be led and determined by panels of independent office holders; and (ii) the introduction of a Hearing Officer role. Should these two variants of an administrative procedure be considered further we would urge the government to carry forward one of the strengths of the CC's current review system, namely that decisions are taken by an independent panel of experts.

Introduce a prosecutorial system

Under this option, the CMA (and sectoral regulators) would not decide on an infringement or penalty but would seek to 'prosecute' cases before the CAT. The adjudicatory function of the CMA would therefore be removed. As noted in the Consultation Document, this would represent a substantial change from the current system of antitrust in the UK.

However, moving away from a competition authority being the centre piece of a competition system leaves open the question as to who would be the driver of competition policy - the authority or the Tribunal. Overall, we consider that a move to a prosecutorial system would be an unnecessary step given that it would involve substantial change to the present system (and require the re-education of the various stakeholders) with few obvious material benefits.

[14] At paragraph 5.31

<u>Q.9</u> The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.57, and the costs and benefits of these.

Of the additional changes discussed in paragraphs 5.48 - 5.57 of the Consultation Document, we support the proposal to introduce administrative timetables for antitrust cases. This will lead to greater certainty and transparency in the prosecution of cases. In relation to offences under the Competition Act 1998 and Enterprise Act 2002 for non-compliance with an investigation, we support the proposal to allow the OFT to impose financial penalties on parties for non-compliance.

Finally, in relation to the powers of investigation, we do not see an immediate need to alter the OFT's existing powers of investigation given that there are safeguards in place to control the exercise of such powers.

<u>Q.10</u> The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.

We do not have further issues to raise.

THE CRIMINAL CARTEL OFFENCE

<u>Q.11</u> The Government seeks your views on the proposals set out in this Chapter to improve the criminal cartel offence, in particular:

- ***the arguments for and against the options;***
- ***the costs and benefits of the options, supported by evidence wherever possible.***

As the Consultation Document explains, the cartel offence was introduced under the Enterprise Act 2002[15] to prosecute 'hard core' cartel activity where an individual dishonestly agrees with another person to make or implement anti-competitive agreements. We agree with the sentiments expressed in the Consultation Document that the cartel offence should be a strong deterrent to individuals considering engaging in cartel behaviour by providing for the imprisonment of persons found guilty of the offence. However, the government recognises that the cartel offence has not developed into a strong tool in the OFT's armoury given that there have only been two cases to date which have reached trial stage, of which only one resulted in convictions. The obvious effect such a limited number of cases and prosecutions is that "*...an offence which has given rise to only one successful conviction in seven and a half years is unlikely to be viewed as a strong deterrent by the target audience...*".[16]

One of the main reasons presented in the Consultation Document for the limited number of prosecutions is the requirement under the Enterprise Act to prove that the

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15 At Section 188.

16 M Furse, '*The Cartel Offence - Great for a headline but not much else?'* ECLR 2011, 32(5), 223

offence was committed dishonestly. As established in *Ghosh*[17], the test of dishonesty encompasses both an objective and a subjective element: first, whether what was done was dishonest according to the standards of reasonable and honest people; and second, whether the defendant realised that reasonable and honest people would regard what he did as dishonest.

Whilst this test may present some difficulty in prosecuting the offence, we would also highlight, as some commentators have argued, that the difficulty in prosecuting the cartel offence may also stem from the problems of helping a jury understand where activities such as price fixing should sit within society's 'moral compass'.[18] In this regard, "*[t]he jury's problem may not be in understanding what happened in the cartel, its organisation and purpose may be well evidenced, but rather they may have little experience of commercial matters and the organisation of undertakings and business relationships. This lack of proximity to commercial culture may make it more difficult for them to come to a decision as to whether the individual cartelist was acting dishonestly, according to the standards of ordinary and honest people. The ... challenge is to create a case which indicates the knowledge of the cartelist and then indicate to the jury that the practice was outside the "norms" of the business community, and that the cartelist knew their actions to be such.*"[19]

Following on from the above, as some other commentators have argued that, the failure of competition lawyers to be able to convince a jury that a person acted dishonestly may also be due to the fact that the competition bar as a whole has failed to alter its traditional mindset when thinking about competition cases. Whilst competition lawyers have traditionally focused on the economic harm that can result from anti-competitive conduct, a successful prosecution of the cartel offence requires the jury to be educated as to the morality of the conduct; "*[t]he shift from the traditional examination is therefore that the economic "harm" of a cartel is not the key question we are trying to address, but rather the harm is evidence that the behaviour is not of the moral standard that society expects of its business leaders, and their behaviour is therefore blameworthy*."[20]

Whilst the nature of the dishonesty requirement may be difficult for juries to understand, it is also the responsibility of the legal profession to properly educate and explain the egregious nature of hard core cartel offences. We submit that these thoughts should also be born in mind when considering a review of the cartel offence.

Four different options are proposed in relation to reform of the cartel offence: (i) remove the dishonesty element and introduce prosecutorial guidance; (ii) remove the dishonesty element and redefine the offence to exclude a set of 'white listed' agreements; (iii) replace the dishonesty element of the offence with a 'secrecy'

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17 2 All ER 689 [1982]

18 A MacCulloch, '*Honesty, Morality and the Cartel Offence'* ECLR 2007, 28(6) 335. See for example "*[t]he central question within the cartel offence does not... appear to be the complexity of dishonesty, but rather the fact that it is essentially a question of morality rather than one of law or economics*." (at page 358)

19 Ibid, page 359

20 Ibid, page 362

element; (iv) remove the dishonesty element and redefine the offence to exclude agreements made 'openly'. Of all the options proposed, we favour option 3: replacing the dishonesty element of the offence with a 'secrecy' element. Our comments in relation to option 3 and each of the other options proposed are set out below.

Removal of the dishonesty element and the introduction of prosecutorial guidance

Under this option, the dishonesty element of the cartel offence would be removed and prosecutorial guidance would be introduced. We are doubtful that prosecutorial guidance would, on its own, provide sufficient clarity to businesses and their advisors as to the type of arrangements that are likely to be prosecuted. In addition, we note the government's fears that the use prosecutorial guidance could potentially be criticised under Article 7 of the European Convention on Human Rights.

Removal of the dishonesty element and the redefinition of the offence to exclude 'white listed' agreements

Under this option the dishonesty element would be removed but a set of 'white listed' agreements would be carved out from the arrangements described as falling within the offence. We submit that in order to provide certainty, such a list would have to be defined clearly and exhaustively, but this may be difficult to achieve. Furthermore, we also consider that there is a risk that producing a list of white listed agreements would ultimately have a restrictive effect on businesses who would seek to narrowly draft their agreements to fall within a particular white listed category.

Replacing the dishonesty element of the offence with a 'secrecy' element

Under this option the dishonesty element would be replaced with a requirement of secrecy. The offence would therefore be committed where an individual 'secretly agrees' with another person to make or implement cartel arrangements. We submit that the cartel offence should retain a suitable '*mens rea*' against which the actions of individuals can be judged. We agree with the government's comments that using a secrecy element instead of a dishonesty element would introduce a less subjective test and one which juries may be more likely to understand.

As noted in the Consultation Document, arrangements that constitute hard core cartels are typically covert and so the introduction of a secrecy element would appear appropriate to capture the kinds of arrangement for which the cartel offence was primarily introduced. This has been termed the "spiral of delinquency" by some commentators[21] where "*companies engaged in determined and conscious collusion aware of its own manifest illegality, have been driven 'underground', and this additional element of furtive behaviour has in effect increased the element of criminality, by adding a dimension of contumacious 'antitrust awareness'. This produces a 'spiral' of delinquency, since it is not simply the anti-competitive behaviour in itself but also the determination to defy the prohibition and take steps to*

[21] Harding C and Joshua J *'Regulating Cartels in Europe'* (Oxford University Press, 2003)

avoid detection which contributes to a heightened perception of delinquent behaviour."[22]

However, whilst we agree that using a secrecy element may provide a workable alternative to the present test we are not certain that the change would make it significantly easier to prosecute the cartel offence. From a prosecutors' perspective, he will still have to prove that the defendant secretly agreed to enter into a cartel arrangement and that the defendant engaged in covert behaviour in an attempt to conceal his actions. In this regard, should the dishonesty element be replaced with a secrecy element we would urge the government to promptly introduce guidance explaining any distinction between active and passive secrecy, and in particular whether passive secrecy would be sufficient to attract prosecution and the type of conduct that would and would meet the required threshold.

Removal of the dishonesty element and redefinition of the offence to exclude agreements made 'openly'

Under this option, the dishonesty element would be removed and the offence would be redefined to exclude agreements that were made 'openly'. We note that this is the preferred option of the government but we respectfully disagree that this would be a suitable reform of the cartel offence. In particular, we note that the policy rationale for proposing such a reform is that ultimately consumers who are informed about arrangements can choose to contract elsewhere. However, we submit that it is not at all clear that consumers would in fact be able to contract elsewhere in such situations, particularly where the cartel is made up of all/the majority of market participants.

Furthermore, we have doubts as to the practicability of announcing anti-competitive arrangements to all customers particularly in large markets. In addition, guidance would have to be given on when such an announcement would have to be made - presumably the announcement would have to give customers enough time to switch supplier, but this timeframe can vary substantially depending on the industry and in some cases may involve significant switching costs. Finally, guidance would also have to be provided to explain whether failure to announce a hard core cartel agreement would in some way provide evidence of criminal intent.

In light of the above, we therefore respectfully submit that this option should be considered as the basis on which to prosecute the cartel offence.

<u>Q.12</u> Do you agree that the 'dishonesty' element of the criminal cartel offence should be removed?

All of the government's proposed options for reform of the cartel offence involve the removal of the dishonesty element. We understand the difficulties surrounding the application on the dishonesty test, although, as noted above, the inclusion of dishonesty test is perhaps not on its own the reason for the limited number of prosecutions.

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[22] Ibid, page 51.

We submit that the cartel offence should retain a suitable '*mens rea*' against which the actions of individuals can be judged. In this regard, we consider that the proposal to replace the dishonesty element with a secrecy element may provide a suitable alternative to the current test.

Q.13 ***The Government welcomes further ideas to improve the criminal cartel offence.***

We do not have further issues to raise.

CONCURRENCY AND SECTOR REGULATORS

Q.14 ***Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?***

Yes, we believe that concurrency is an important way in which to ensure both appropriate expertise and commonality of approach

Q.15 ***The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:***

- ***the arguments for and against the options;***
- ***the costs and benefits of the options, supported by evidence wherever possible.***

We favour the establishment of a consistently strong obligation on all the sector regulators that they will use their competition powers in preference to their sectoral powers wherever legal and appropriate. We agree with the observation that this would encourage the sector regulators to be more proactive in their use of competition powers.

Q.16 ***The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.***

We do not have further issues to raise.

REGULATORY APPEALS AND OTHER FUNCTIONS OF THE OFT AND CC

Q.17 ***Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?***

Yes, and for the reasons stated in the Consultative Document - to avoid unnecessary regulatory complexity and the consequent inefficiencies for the CMA, sector regulators and affected businesses.

Q.18 ***The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.***

SCOPE, OBJECTIVES AND GOVERNANCE

Q.19 ***The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.***

We believe that - in common with the legislation in many other countries - the CMA's duties should be embedded in the legislation. We do not believe that such a requirement would necessarily prove to be less flexible to future changes in the economy, or that it would compromise independent and impartial decision making

Q.20 ***The Government see your views on whether the CMA should have a clear principal competition focus?***

We believe that it is important that the CMA has a clear competition focus in all of its work, in order to promote certainty and predictability for industry and consistency in the interpretation and application of the law.

Q.21 ***The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.***

We do not offer views on this.

DECISION MAKING

Q.22 ***The Government seeks your on the models outlined in this Chapter, in particular:***

the arguments for and against the options;

the costs and benefits of the regime and to business, supported by evidence wherever possible.

We believe that complete separation of phase 1 and phase 2 decision-making is the only realistic means of ensuring effective independence of decision-making. We do not believe that replacing the decision-maker is sufficient on its own. If complete separation is not feasible within the resources of the CMA, then the

number of members of the phase 1 team who remain at phase 2 should be as low as possible and should preferably not be senior members. Ensuring that there is adequate sharing of information should reduce institutional complexity.
However, so far as panels are concerned, we agree that they should be both investigators and decision-makers in phase 2 market investigations (assuming sufficient safeguards as expressed in the Consultation Document).
We also favour a broad role for panels in merger cases, where they have excelled under the current system.

<u>Q.23</u> The Government also seeks views on the appropriate composition of the decision-making bodies set out in this Chapter, and in particular what the appropriate mix of full-time and part-time members is.

In theory, having more members devoting more time to the role should introduce efficiencies. However, it is also important not to exclude panellists of the stature that have been attracted hitherto simply because they feel unable to devote more time to this task (given that they often have multiple public and private roles).

<u>Q.24</u> The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process.

MERGER FEES AND COST RECOVERY

<u>Q.25</u> What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/ mandatory notification regime?

We do not agree that merger fees should be set at a level that ensures full cost recovery. Merger control should be seen as a public process that benefits consumers and industry more generally. Placing the entire cost burden on merging parties is not justifiable in principle, in the same way as other public goods are paid for out of public funds (in whole or in part) and not by one or more natural or legal persons.
The level of fees suggested in the Consultative Document for a voluntary notification regime are, in consequence, out of line with most current merger regimes world-wide.

<u>Q.26</u> Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons.

We do not agree with this in principle. Other investigatory and prosecutorial bodies in the UK do not adopt such an approach. For long-running investigations the burden on defendants could be crippling. Moreover, defendants would likely seek to demonstrate that unnecessary costs had been incurred in the investigation due to inefficiencies. A costs enquiry would therefore be necessary to protect undertakings' legitimate interests. Appeals may also arise where investigations are dropped against

some co-defendants at a late stage, for reasons relating to the effectiveness of the investigation rather than because of serious doubts about the nature of their conduct. This would give rise to serious concerns about fairness of process, and would hinder the discretion of the CMA to organise its investigations and decision-making process effectively.
We believe that the penalties available under the 1998 and 2002 Acts are sufficient deterrent.

<u>Q.27</u> What are your views on recovery where there has been an infringement decision being based on the cost of investigation?

Please see above

<u>Q.28</u> What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?

If costs are to be recovered, we agree that they should be eliminated or reduced in the case of the situations listed in this question.

<u>Q.29</u> Do you agree that this would be an appropriate way to collect the costs, separates the fine from costs in a way that makes appeals clear and that the costs should go to the consolidated fund rather than the enforcement authority?

We agree that costs should go to the consolidated fund, but see above on the other points raised.

<u>Q.30</u> Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?

If costs are to be recovered, we agree with the premises outlined in paragraph 11.27

<u>Q.31</u> Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?

No, for the reasons given above.

<u>Q.32</u> Do you agree that telecoms appeal should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing? If not, your response should provide reasons supported by evidence where appropriate.

We do not offer views on this.

<u>Q.33</u> What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?

For the reasons given above, we do not believe that the CAT should seek to recover its own full costs.

OVERSEAS INFORMATION GATEWAYS

<u>Q.34</u> How well is the current overseas information disclosure gateway working? Is there a case for reviewing this provision?

We believe that there is no case for review, and that the gateway should not be made broader or dependent on reciprocity.

QUESTIONS ON THE IMPACT ASSESSMENT

We do not offer views on this section.

Arriva plc

BIS | Department for Business Innovation & Skills

A competition regime for growth: a consultation on options for reform.

Response form

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Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.

	Small to Medium Enterprise
	Representative Organisation
	Trade Union
	Interest Group
√	Large Enterprise
	Local Government
	Central Government

	Legal
	Academic
	Other (please describe):

When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

This response is provided by Arriva plc, a wholly owned subsidiary of Deutsche Bahn AG. The views expressed herein are the views of Arriva.

Consultation Questions

1. Why reform the competition regime?

This chapter sets out an assessment of the strengths and weaknesses of the UK competition regime and proposes to reform it to: improve the robustness of decisions and strengthen the regime; support the competition authorities in taking forward the right cases; and improve speed and predictability for business.

***Q.1** The Government seeks your views on the objectives for reform of the UK's competition framework, in particular:*

- *improving the robustness of decisions and strengthening the regime;*
- *supporting the competition authorities in taking forward the right cases;*
- *improving speed and predictability for business.*

***Q.2** The Government seeks your views on the potential creation of a single Competition and Markets Authority.*

Comments:

- The consultation paper, at para, 1.5 notes the world-wide high respect of the UK's competition regime. It is important that changes, many of which are welcomed by Arriva, do not compromise that respect.
- Arriva is concerned that some of the changes will reduce the flexibility and dynamism of the UK's competition regime and that more expense will be incurred and more management time might be diverted away from day to day operations of businesses to make accommodation for what may prove minimally faster processes of the competition regime.
- The overall views and purpose expressed in section 1 of the paper are generic and sensible.
- Arriva does not consider that the creation of a single CMA is necessary to deliver the benefits the paper seeks and considers that in certain areas the creation of a unified authority will detract from the high regard for independence in which the UK's competition regime is currently held. The financial benefits anticipated by the Impact Assessment are scarcely substantial in the scale of government spending and some are dependent upon the fragile property market. Arriva suspects that the costs of integration used in assessing the financial benefits are understated.
- In particular Arriva is concerned that
    - no unified competition regime can properly counter the concerns about "confirmation bias[1]" in merger notifications; or
    - permit in MIRs the ability of a Phase II inquiry properly to

[1] As defined in para 10.16 of the Paper

challenge materials or findings in a Phase I Study

- Further Arriva is concerned that the desire for more speed in the processes will not reduce the desire of the competition authority for data or information, with the effect that the pressure on businesses to supply data in similar detail and volume as under the present regime will not diminish and may actually increase at the first stages; thereby causing more time and expense, each of which may be unnecessary to be borne by businesses. Arriva would contrast the much more modest requirements for information to be supplied at Phase 1 of both merger and MIRs under the present UK regime with those of unified regimes both nationally within the Member States with unified regimes and at EU level.
- Arriva is particularly concerned at the expression, in para 4.8, of the government's view that it wishes to ensure mergers add value to the economy. Interference by government in assessing the value of commercial decisions in the private sector is contrary to the concept of a free market and reminiscent of state control. The government should resist totally any desire to impose its views on value.

2. The UK Competition regime and the European context

This chapter sets out the UK institutions that make up the competition regime and their functions, as well as the European context.

Comments:
The summary of the regimes is accepted.

3. A stronger markets regime

This chapter sets out that there is scope to streamline processes and make the markets regime more vigorous. The key options are: enabling in-depth investigations into practices that cut across markets; giving the CMA powers to report on public interest issues; extending the super-complaint system to SME bodies; reducing timescales; strengthening information gathering powers; simplification of review of remedies process; and updating remedial powers.

Q.3 *The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

***Q.4** The Government also welcomes further ideas, in particular, on modernising and streamlining the markets regime, and on increasing certainty and reducing burdens.*

Comments:

Arriva has recent experience of direct involvement in one MIR (the current Local Bus Inquiry by the CC). It views are conditioned by that inquiry. It has also closely followed other MIRs that might affect its commercial interests.

- Arriva sees significant merit in the present separation of the Phase I and Phase II stages between separate bodies. It is unlikely that a unified authority would avoid the perception of "confirmatory bias", which the present independence of the Phase II authority does provide.
- Unification of the current bodies would not significantly reduce the requests for information and would tend to increase requests for information at the first stages. Arriva's experience is that the requests made for the Phase I Study were different from those made for the Phase II investigation. Of necessity Phase II requests will be more detailed than those made for Phase 1. The requests for information at Phase I or Phase II can be for information that is neither readily available nor prepared by the business in the format or style the authorities might request
    - Arriva does not consider that unifying the authorities will reduce the requests for information;
    - Arriva is concerned that unification will increase the requests for information at the first Phase as Phase I investigators try to anticipate what Phase II might require;
    - Arriva notes that the requests for information differed at each Phase and considers that merger of the authorities will not remove the variations in requests at each Phase.
- As regards the time for a full investigation, both Phase I studies and Phase II investigations are usually of complex industries. Of necessity it takes time to consider and investigate thoroughly. Whilst businesses may consider irksome the time taken by the current regime, Arriva considers that shortening the process, probably by a fairly modest time overall, with the consequential demand on competition authority staff for further speed in processing and deliberation, materially risks adverse impact on the quality of decision, with a concomitant increase in appeals. The appearance of time saving is more than likely illusory.
- As regards specific more detailed proposals

    - **Permitting investigations to develop across markets** will de facto add to the time of the initial investigation; both as data is gathered for the additional markets but also by virtue of the fact that it will be unlikely that the authority will recognise at the outset that practices may spread across markets.
    - It must be incorrect for the competition authority to investigate or

make recommendations on **public interest issues**. Its experience and personnels'semit are focused on competition issues. To address public interest as well as competition would require wider and different skill-sets. Arriva does not see that a power to investigate public interest would negate independent inquiry bodies, such as the Banking Commission. Even if such investigatory power was within the remit of the competition authority, independent investigation staff and decision makers experienced in the markets and matters under investigation would need to be co-opted. Funding and resourcing for any competition authority could only be on the basis of its reasonably anticipated workload and unique investigations such as Banking would necessitate separate and additional funding and resourcing.

- **Extending the super complaint system** to SMEs is per se logical. The only concern would be to ensure that super complaints from SMEs were not used as a competitive tool to distract larger incumbents from SME market entry / expansion, thereby wasting the competition authority's resources. It is Arriva's belief that smaller market entrants use the allegation of anti-competitive behaviour to divert an incumbent away from competition and into dialogue with investigating authorities whilst the new entrant tries to consolidate its market entry.
- **Reducing time scales for Phase I investigations** (or imposing time scales for Phase I) risks reducing the quality of decision and increasing costs and strains on businesses.
- **Information gathering powers at the Phase I stage** should be introduced but may prove an illusory advantage. Under the present regime, if the Phase I requests for data are not complied with, the risk of non-compliance for the market operators is a Phase II reference.
- **Prompt referrals to Phase II** Arriva fails to see how creation of a unified CMA would de facto have any impact on the speed of throughput of cases and the paper provides no evidence to support its expectation. Arriva's concern would be that creation of a unified authority would increase the risk of an appeal at the stage where a Phase I study is referred to a Phase II investigation, on the basis that, under a unified regime market, operators would be more concerned at the increased risk of a Phase II investigation not correcting obvious errors, through confirmation bias or otherwise, made in the analysis in a Phase 1 study and would therefore seek alternative modes for correcting perceived errors or bias.
- **Introducing statutory definitions and thresholds**. Unless the government wishes to line the pockets of lawyers and waste the time of the courts in abstract discussions on definitions and thresholds the government should stay with the current flexible and targeted approach. To do otherwise would be to change for the sake of it.
- **Proportionate Remedies**. The proposals in the paper are self

evidently sensible and Schedule 8 should be amended to permit the authority as a remedy to:
    - Require parties to appoint and remunerate an auditor
    - Publish non price sensitive information
- It seems sensible to enable the OFT to vary or amend as, or if, appropriate remedies imposed by or agreed with the CC.
- **Remittal from the CAT.** It is not necessary that upon successful appeal by the CAT the competition authority should rehear the matter as originally formulated. The world may have changed significantly in the time between the start of the MIR and the decision of the CAT, vide the impact of the financial crisis of 2008 or the current UK austerity measures which will substantially change the provision of local bus services in the UK as BSOG and concessionary fares regimes are changed thereby totally changing market dynamics in the supply of local bus services. There should be a duty on the competition authority merely to state within a specified time if it will continue the study / investigation and re-commence if appropriate within a defined period; thus permitting the authority to reflect changes that may have occurred in the relevant market.
- **Remove the duty to consult on decision not to make an MIR.** Arriva agrees with this proposal. If the deciding authority properly takes a view, anything put to it is unlikely not to have been considered already.

4. A stronger mergers regime

This chapter sets out that there is scope for improving the merger regime by addressing the disadvantages of the current voluntary notification regime and streamlining the process. The Government is seeking views on: (1) options to address the disadvantages of the current voluntary notification regime; (2) measures to streamline the regime by reducing timescales and strengthening information gathering powers; (3) introduction of an exemption from merger control for transactions involving small businesses under either a mandatory or voluntary notification regime. We ask:

Q.5 *The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.6 *The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?*

Q.7 *The Government welcomes further ideas on streamlining the mergers regime.*

Comments:
Arriva is seriously concerned that **reducing timescales** for the authority(ies) to decide will just impose even greater burdens on businesses to provide the same, or in the case of unification of the authorities even more, information requested at present in a shorter time scale.
Imposing a mandatory notification process will impact upon other processes of government or its agencies and may have negative competition impacts.

For example in the current UK Rail franchise procurement, application for merger clearance is recommended to be made (at OFT request) after franchise award, a period usually only 3 or 4 months before franchise commencement. If merger clearance were mandatory before commencement there is insufficient time to get the clearance (especially if a Phase II investigation is required) before the franchise commencement. The likely outcome is that the DfT's decision to award would be conditioned to exclude bidders with more material merger issues – which in many cases could exclude most of the present UK Rail franchisees.

Arriva does not consider that there is significant public harm done under the present regime of notification and considers the **2 drawbacks[2] quoted in the paper** as much more theoretical than actual:

1. *"Mergers escaping notification".* This appears unrealistic in any significant market. Competitors in industries know what is going on in their industry. If competitors in the industry are concerned by a merger that has not been investigated it is almost inevitable they will bring it to the attention of the competition authorities. Furthermore mergers in most significant markets attract media interest so are scarcely likely to escape the notice of the competition authorities.
2. *"High proportion of mergers under investigation are completed at the time of reference"*. Given the reliance of industry on specialist advisers it is most probable that such completed investigations were suitable for behavioural or structural remedies rather than prohibition.

Both these concerns can in any event be addressed by a requirement to notify the completion of a transaction rather than await its clearance. Such post completion notification would reduce delays in business' mergers and avoid the, probably theoretical, fear that the markets' supervisory arm of the authorities misses any merger that might be competitively un-desirable.

Arriva would recommend and support a **restriction on further integration measures** when the competition authority initiates an inquiry and the penalty regime proposed of a maximum 10% of turnover for breach.

Mandatory prior notification has no substantial merits and would cost the public purse and businesses far too much. There is no VFM in such proposal. At the proposed turnover thresholds of UK £5M and worldwide £10M the

[2] Para 4.3

increase in costs all round would be ridiculous.

Arriva is concerned at the expression of government wish at para 4.8 of the paper that the merger regime should be used to ensure mergers add value to the economy. It is not the role of government to substitute its views for those of businesses in a free market economy. The role of government, well delivered through the current merger regime, is to preserve a level playing field and protect against public harm.

Arriva is indifferent to stop the clock measures within Phase I as non-compliance with requests would merely increase the likelihood of referral. Arriva agrees that an ability to offer undertakings at the start of Phase II rather than or as well as in lieu of a reference at the end of Phase I has little merit and would probably increase the time taken in Phase II whilst negotiations on an undertaking were pursued and most likely not agreed.

In direct response to **Question 5** Arriva would recommend retention of the voluntary notification regime with the enhancements set out in the paper as commented on above.

Arriva's experience is that any Phase II merger reference will cost material sums, often hundreds of thousands of pounds; such experience will deter any sensible business from risking making a small acquisition (ie around the suggested turnover threshold for mandatory notification of £5M) without due consideration whether to notify voluntarily. No sensible enterprise will risk later adverse orders on a larger transaction where there may be merger issues without seeking clearance when the alternative is to risk a divestment order at fire sale prices.

In response to **Question 6** Arriva suggests retaining the present voluntary notification regime but with the enhancements proposed in the paper – though Arriva considers the enhancements are to guard against risks more theoretically than actually damaging.

In response to **Question 7** Arriva would suggest that regard is had to the OFT's published de minimis tests and would suggest they become mandatory. To prevent merger creep (the acquisition of control by small steps below de minimis) the authority could have regard to acquisitions over a defined prior period, say 3 years, in determining the threshold. Arriva is not persuaded that worldwide turnover has any material relevance in determining competition within the UK.

5. A stronger antitrust regime

This chapter sets out three options for achieving a greater throughput of antitrust cases: (1) retain and enhance the OFT’s existing procedures; (2) develop a new administrative approach; (3) develop a prosecutorial approach. We also ask about the case for statutory deadlines for cases and for civil penalties for non-compliance with investigations, set out considerations

relating to private actions and invite views on the powers of entry and of investigation and enforcement.

***Q.8** The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime, in particular:*

- *Options 1-3 for improving the process of antitrust enforcement;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

***Q.9** The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.57, and the costs and benefits of these.*

***Q.10** The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.*

Comments:
Arriva would suggest the fact that there are fewer anti-trust cases brought in the UK either than originally expected or than brought by a number of other EU Member States does not necessarily imply a weakness in the UK anti trust regime. It may be that the action taken by the UK authorities and the advertising of its powers and concerns means that there is less anti competitive behaviour within the UK. Arriva accepts that the authorities are in a 'Rumsfeldt' scenario, they do not know what they do not know. But suspicion about what they do not know is not evidence of undiscovered anti-competitive behaviour.

Arriva would suggest that the current rate of appeal from infringement decisions may be driven by three things:

- perception that the OFT is too narrow in its assessment of any case because of the lack of business experience of its decision makers compared with the CAT members;
- concern that the appellant has not been given the full facts during the initial decision process or been able to challenge the evidence on which decisions have been made; and
- a hope that any penalty imposed by the OFT will be reduced on appeal.

Logically it would make sense to remove from the OFT (or a CMA which would be open to the same concern of lack of experience) the decision making and penalising powers.

Conceptually it would be wrong to give to what is an appeal body responsibility for making primary decisions. The logic is to have the initial tribunal deciding upon infringement and penalty selected from the CC panel.

The process would also be transparent, so 'accused infringers' would see the facts behind the allegations against it and be able to challenge evidence of wrong-doing at the initial stage. This might per se reduce the number of appeals.

However retaining appeal on the merits to the CAT will always risk a large number of appeals. Arriva questions whether it is contrary to general precepts of UK common law to have a body empowered to make decisions in quasi criminal cases (ie where there is no jury or decision maker on the facts other than the tribunal) on facts that lead to serious penalties where appeal could not be made on the facts. Appeal on the fats should be retained. It would seem sensible to avoid having appeals, whether on the merits of a case or on judicial review grounds, within the Supreme / High Court system (thereby clogging it up further) when appeal could be to the CAT. Appeal should be to the CAT.

Arriva would favour separation of the investigation and decision bodies. This has the appearance of increasing objectivity, even if under the current regime decisions are made scrupulously objectively, and may reduce appeals.

Arriva therefore favours Option 3, a prosecutorial model, but would modify it so that the decision maker is not the CAT but the CC.

6. The criminal cartel offence

This chapter sets out options for making the cartel offence easier to prosecute: (1) removing the dishonesty element and introducing prosecutorial guidance; (2) removing the 'dishonesty' element and defining the offence so that it does not include a set of 'white listed' agreements; (3) replacing the 'dishonesty' element of the offence with a 'secrecy' element; (4) removing the 'dishonesty' element and defining the offence so that it does not include agreements made openly.

Q.11 *The Government seeks your views on the proposals set out in this Chapter to improve the criminal cartel offence, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.12 *Do you agree that the 'dishonesty' element of the criminal cartel offence should be removed?*

Q.13 *The Government welcomes further ideas to improve the criminal cartel offence.*

Comments:
The penalties for criminal cartel offences are (rightly) so severe that the offence should not be a strict offence; the "mens rea" must play a part. The fact other regimes may require any mental element for guilt is irrelevant to fairness and correctness.

Arriva agrees that the use of the word dishonesty is not appropriate. It is not within the ordinary meaning of dishonesty to seek to obtain a business advantage through what are actually improper means but can be regarded by a general public as sharp practice.

Arriva would suggest that use of "secrecy" is also inappropriate. It opens the door to too many devious means of avoiding secrecy, eg publication on obscure web sites.

There may be merit in "white listed agreements" but it is likely that a defined list of acceptability will omit something that on reflection should have been included in the "white list" or vice versa. Therefore it is not the optimum solution.

Arriva suggest that none of the 4 options listed in the paper adequately meets public concern. Of the 4 Arriva considers that Option 2 is the least weak.

Arriva would suggest that guilt of the offence should be related to conduct which an experienced businessman acting reasonably would consider might be damaging or limiting to open competition. Arriva therefore recommends substitution of the word "dishonesty" with language to reflect this mental element.

7. Concurrency and sector regulators

This chapter sets out three options for improving the use and coordination of competition powers: (1) sector regulators could agree on a common set of factors to take into account when deciding whether to use sectoral or competition powers or competition law primacy could be enhanced; (2) the CMA could act as a central resource for the sector regulators; (3) the CMA could coordinate the use of competition powers across the landscape.

Q.14 *Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?*

Q.15 *The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.16 *The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.*

Comments:
Arriva expresses no detailed opinion on this section of the paper. Arriva sees merit in leaving concurrent powers with industry regulators, given their expertise in the relevant industries.

8. Regulatory appeals and other functions of the OFT and CC

This chapter sets out the Government's view that the sectoral reference/appeal jurisdictions of the CC should be transferred to the CMA. We also propose the development of model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

Q.17 *Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?*

Q.18 *The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.*

Comments:
Arriva does not, for the reasons set out in earlier replies, consider that the CC and OFT should be merged into one authority.

If such merger should proceed, it is logical that the CMA should have the powers currently exercised by the CC. As the paper indicates there is no merit in creating a new and different body for hearing appeals from regulators.

Model processes should be developed, with appeals based upon the grounds of appeal raised in pleadings.

To avoid unnecessary cost to the public the appeal body (CC or CMA) should substitute its own definitive decision.

9. Scope, objectives and governance

This chapter sets out that the CMA should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA and proposes that the CMA will: have clear, and potentially statutory, objectives to underpin prioritisation; be accountable to Parliament; and, have an appropriate governance structure for a single decision making body. We ask:

Q.19 *The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.*

Q.20 *The Government see your views on whether the CMA should have a clear principal competition focus?*

Q.21 *The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.*

Comments:
Arriva agrees that there should be focus given to the CMA and this should be on competition.

Arriva does not favour express detailed stipulation of the CMA's duties; flexibility should be preserved. Express stipulation will not avoid uncertainty or make for clarity. It is inevitable that there would be challenges to interpretation of any expressed objective or duty. Arriva commends to this review the 'principles based' approach of the City Code on Takeovers.

A challenge for any definition of "economically important market" is the fact that there is not always (never?) unanimity on the definition of a market; for example does the "soft drinks" market include all or some of: hot and cold drinks; milk; fizzy drinks; squash; etc; or the "transport" market include: local buses; trains; taxis; private cars; walking ; cycling; planes?

If a decision is taken on a unified authority Arriva does not object to the proposal for Supervisory Board and Executive boards.

Arriva considers it essential that there is complete separation of Phase I and Phase II investigations for mergers and market investigations, to preserve perceptions of independence and avoidance of confirmation bias.

As stated in the replies to previous questions, Arriva remains unconvinced that the current UK regime imposes too high a burden on the public purse or public bodies or that the burden is high, given the public benefits, or that the new regime proposed would materially reduce the time taken on or cost involved in inquiries. Arriva questions the robustness of the evidence, as opposed to assumptions and estimates, behind the commentaries implying weaknesses or deficiencies in the present regime

Arriva does not favour the suggestion of transferring to consumer bodies any further authority or responsibility to conduct market studies or investigations

involving competition issues. There is substantial risk both of losing the existing expertise and of incurring unnecessary cost whilst providing the necessary training and expertise to consumer bodies.

Arriva does favour the concept that Trading Standards undertake almost all consumer enforcement cases. They have the existing expertise and experience to fulfil this role.

10. Decision making

This chapter sets out a number of alternative models for decision-making that can deliver robust decisions through a fair and transparent process. The Government considers that a number of alternative models can deliver this, final choices will be guided by considerations relating to: the degree of separation between first and second phase decision making; degrees of difference or uniformity of approaches between tools; and, the role and nature of panels in the different tools available to the single CMA.

***Q.22** The Government seeks your on the models outlined in this Chapter, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the regime and to business, supported by evidence wherever possible.*

***Q. 23** The Government also seeks views on the appropriate composition of the decision-making bodies set out in this Chapter, and in particular what the appropriate mix of full-time and part-time members is.*

***Q.24** The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process.*

Comments:
Arriva considers it essential that there is separation of Phase I and Phase II investigations for mergers and market investigations, to preserve perceptions of independence and avoidance of confirmation bias. For this reason Arriva also considers that there should be no continuity of personnel between Phase I and Phase II investigations.

Arriva remains unconvinced that intermingling of the present 2 authorities will reduce the risk and almost inevitable occurrence of confirmation bias, if staff of the CMA move regularly between Phase I and Phase II work. Keeping staff separate for work on each phase of particular investigations would

presumably negate much of the benefit and cost saving anticipated from merger. However separation of staff from Phases I and II or an individual investigation but permitting staff to move between Phase I and Phase II investigation on different matters has the prospect of increasing the experience of staff and has much to commend it. Under the current regime staff are pigeon-holed to Phase I or Phase II depending upon their employer, absent secondments or transfers.

Arriva is not convinced that merging the two authorities responsible for Phase I and Phase II will reduce significantly the requests for new or additional information at the Phase II stage. Inevitably the Phase II investigators seem to need more and different information and data from those at Phase I, not least as the Phase II investigation is conducted in more depth. It would be unproductive, time consuming and disproportionate for Phase I investigators to anticipate and request what would be needed for Phase II.

In relation to Figure 10.1 Arriva's recommendations would be, by row:
Row 1: Complete separation (left hand column)
Row 2: Commonality of process for tools with similar characteristics (middle column)
Row 3: Panels take full role in the Phase II investigation (right hand column)
Row 4: Large pool of part time panellists (right hand column)
Row 5: Judicial review for all tools and that tools be ECHR compliant (left hand column)

11. Merger fees and cost recovery

Merger Fees

This chapter sets out options to recover the cost of the merger regime either by changing the level of the existing fee bands, introducing an additional fee band or moving to a mandatory notification system. We ask:

12. ***Q.25*** *What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/ mandatory notification regime?*

Recovering the cost of anti trust investigations

The Government is considering introducing legislation to allow the enforcement authorities to recover the costs of their investigations in antitrust cases. This would only apply where there has been an infringement decision and a fine, non-infringement decisions and investigations dropped for any other reason would not be charged. We ask:

13. ***Q.26*** *Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a*

14. ***Q.27*** *What are your views on recovery where there has been an infringement decision being based on the cost of investigation?*

15. ***Q.28*** *What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?*

It is foreseen that any costs to be recovered would be shown on the infringement decision detailing the fine. We ask:

16. ***Q.29*** *Do you agree that this would be an appropriate way to collect the costs, separates the fine from costs in a way that makes appeals clear and that the costs should go to the consolidated fund rather than the enforcement authority?*

It is foreseen that the costs element could be appealed. This raises the question of what happens when the appeal is successful, partly successful or when the appeal is on the method of penalty calculation only rather than the substance of the decision. We ask:

17. ***Q.30*** *Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?*

Currently there is no legislation to allow the enforcer to charge costs so this would mean amending the Competition Act 1998. An alternative introducing cost recovery would be to amend the same Act to allow the level of fine to cover the cost of the investigation. We ask:

18. ***Q.31*** *Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?*

Recovery of CC costs in telecom price appeals

19. ***Q.32*** *Do you agree that telecoms appeal should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing? If not, your response should provide reasons supported by evidence where appropriate.*

Recovery of CAT costs

The Government propose to make a change in the CAT's Rules of Procedure to allow the CAT to recover its own costs following an appeal. The decision whether or not to impose costs will rest with the tribunal who will be able to set aside the costs where the interests of justice dictate e.g. when the appellant is a small business and the costs of pursuing their legal right of appeal prevent them from doing so. We ask:

20. ***Q.33*** *What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?*

Comments:

General comment on cost recovery.

It is only by keeping recovery of costs separate from any substantive penalty and by having an ability to challenge costs to ensure they remain reasonable that proper scrutiny can be kept over, and VFM derived from, the external advisers and experts brought into assist the competition authority on any case. To do otherwise is tantamount to giving external advisers and experts a licence to print money.

Mergers

Q25
It seems inequitable to seek to recover the full costs of a merger investigation if the merger is cleared absolutely and found not to lead to a substantial lessening of competition. BIS' estimate of £9M cost of the regime includes the costs of inquiries / investigations that ultimately find no problem, either because there is no likelihood of an SLC or because the problem is de minimis.

Arriva accepts that it may be in the public interest at large to seek to recover the regimes costs through fees and favours differential banding of fees, but would suggest that if "cleared" mergers are not exempt from fees, at the very least, mergers that are cleared on the basis of no SLC should only incur a reduced portion of the scale fees. It should also follow that a merger cleared on de minimis grounds should also incur reduced fees. However if this were introduced for de minimis clearances there would be an incentive not to apply the de minimis rules, so Arriva therefore accepts a clearance on the de minimis basis should incur full fees.

If the costs of all merger investigations are to be recovered the implication is fees would be higher for cases that do constitute the likelihood of SLCs.

Q26 & Q27

Arriva considers that the competition authority should be able to recover costs from a party found to have infringed competition law.

There should be a system analogous to that of the High Court where excessive fees can be challenged, possibly before the CAT.

Q28

In theory costs should be recoverable in any case involving immunity, leniency, early settlement and commitments on the basis there has been infringement. Again the costs should be subject to review for reasonableness. Whilst there is a risk that the fear of incurring substantial costs may undermine an essentially guilty party from seeking immunity, leniency etc, this risk is slight compared with the possible penalties for not seeking immunity leniency etc.

Q29

Costs recovered should go to the government's consolidated fund to remove any appearance of self interest in decisions taken by the competition authorities.

Q30.

If a party is successful on appeal in whole or part or the facts or against the penalty, its liability for costs in the original decision and appeal should be reduced. To do otherwise is inequitable.

Q31

The recovery of costs should be kept separate from the amount of fine. The two are not related per se. Costs should be separately identified and recovered to enable the reasonableness of costs recovered to be examined.

Q32

Arriva agrees telecom appeals should be treated in the same way as other regulatory appeals by the CC recovering its costs from an unsuccessful appellant.

Q33

In principle the CAT should also have the ability to recover its costs based on the merits of an appeal, starting from the basis that it would not recover costs where an appeal was wholly successful.

The risk that costs recovery would influence a decision of the CAT is too small to negate the principle of the ability to recover costs based on the merits of an appeal.

12. Overseas information gateways

This chapter seeks views on how well the information gateway arrangements are working and whether there is a case for change. In particular, whether there is a case for amending the thresholds for disclosure of merger and markets information to promote reciprocity between overseas regulators and the UK and, if so, how this might be done. We ask:

21. ***Q.34*** *How well is the current overseas information disclosure gateway working? Is there a case for reviewing this provision?*

Comments:

Arriva has insufficient experience of this area to comment.

13. Questions on the impact assessment

Mergers

In this section we outline, and quantify where possible, the costs and benefits of the proposed options regarding strengthening the current voluntary notification regime, introducing mandatory notification, exempting small businesses from merger control, streamlining the merger process and adjusting merger fees.

22. ***Q.35*** *Do you have any evidence about the costs to businesses of notifying mergers to the OFT, in terms of management time and legal fees?*

Anti-trust

In this section we outline the costs and benefits of the options for achieving a greater throughput of antitrust cases including enhancing the OFT's existing procedures, developing a new administrative approach and developing a prosecutorial approach. In addition we review the costs and benefits of retaining the 'dishonesty' element in the criminal cartel offence but exclude the possibility for defendants to introduce economic evidence produced after the events that constitute the alleged dishonest 'agreement'.

23. ***Q.36*** *Under a prosecutorial system, are there likely to be changes to the overall costs of the system?*

The Impact Assessment presents the likely costs and benefits and the associated risks of the policy options. In order to do this it is necessary to understand the costs and benefits of the current system and to make assumptions. Further, the Impact Assessment seeks to show the extent to which the policy options meet the objectives.

24. ***Q.37*** *Do you have better information about the costs and benefits of the current competition regime?*

25. ***Q.38*** *Do you have evidence that indicates better assumptions could be made to estimate the costs and benefits of the proposed options?*

26. ***Q.39*** *Are there likely to be any unintended consequences of the policy proposals outlined?*

Comments:

Q35

Arriva prefers where possible to keep in house the merger notification process on OFT notifications. Where external advice has been taken the costs, including legal and other advisers has often been in the low hundreds of thousands of pounds. Mergers in the transport cases which have involved Arriva are relatively small and in competition terms simple.

Arriva was involved in a merger clearance under the EUMR in 2010 when it was acquired by DB. This was a case involving assessment in detail of markets in 3 Member States as well as at a more superficial level in 9 other countries where there was obviously no material concentration. From Arriva's side, excluding time and cost to DB, the external costs and management time involved were significantly more than under the UK regime.

Whether external advisers are sued or not the cost in terms of management time and incursion into ordinary business activities are broadly similar. Data gathering will involve management in 2 or 3 man-weeks' work and responding to further inquiries and attending hearing will involve senior management in about 1 further man-week's work. These short time involvements are due to the familiarity of Arriva in the UK merger process and the expertise the OFT has developed with members of the transport industry in investigating merger in the industry.

Absent this expertise and familiarity with the UK regime and the industry Arriva would expect the time and costs to be double. Arriva uses as a rule of thumb that the external cost of taking a merger case through to a decision at the CC will be around £500,000 and that one senior manager will be involved on the case almost full time for four months.

Q36

If the prosecutorial system is easier and quicker to use with the result that more cases can be more readily brought, thereby inducing greater fear in miscreants of punishment, it will be necessary to bring the more cases. This will probably result in an initial increase in cost of bringing more (even if cheaper) cases. If the belief that this increased fear will reduce wrong-doing the logical result is that in the medium term fewer cases will need to be brought. This would indicate a reduced cost in the medium term.

Accordingly in the medium term there should be a down trend of costs in such cases under the prosecutorial system

Q37 & Q38

Arriva has neither better evidence as to costs nor better evidence as to assumptions.

Arriva from experience of its own administrative changes and from review of changes brought about in companies it has later acquired would be inclined to believe that costs of change tend to be underestimated and savings over-estimated when modelling is carried out. Arriva would suggest that the allowance made in the Impact Assessment against costs of change being understated is itself too low even after the 50% uplift, the initial costs itself seems low, and that believing the costs of vacated property can be recovered is over-optimistic.

Q38

Arriva considers the largest unintended consequences of the changes and the merger of the OFT and CC are that:

- Confidence in the impartiality of the results of both merger investigations and MIR will diminish as belief in confirmation bias becomes wide-spread; and
- The bureaucracy and additional form filling / data submission at the start of Phase I in merger investigations and MIRs both impacts adversely businesses and the CMA, where more staff will be required than anticipated to process the additional documents / unnecessary data
- The respect in which the UK authorities are currently held within UK business will reduce as the CMA becomes more hide-bound and the present flexibility is reduced.

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ashurst

RESPONSE OF ASHURST LLP TO BIS CONSULTATION ON REFORMING THE UK COMPETITION REGIME

1. INTRODUCTION

1.1 This submission is made by Ashurst LLP in response to the Department for Business, Innovation and Skills' paper "A Competition Regime for Growth: A Consultation on Options for Reform", published on 16 March 2011. It is made on our own behalf and not on behalf of any of our clients that are involved in UK competition law proceedings.

2. GENERAL OBSERVATIONS

2.1 As regards the proposal to amalgamate the OFT and the Competition Commission into a single competition authority – the Competition and Markets Authority ("**CMA**") - we would question whether such a major restructuring of the institutions is necessarily the most effective way to achieve the key reforms to the system that are urgently needed, in particular, in relation to antitrust investigations and decision-making (see further paragraph 3.2 below). In relation to merger control and market investigations, we are concerned that the proposed amalgamation may give rise to potential disadvantages, including (i) the institutional upheaval arising from a period of transition and adjustment during which competition enforcement is likely to be less, rather than more, effective; and (ii) the loss of the "fresh pair of eyes" in merger and market investigation cases as a consequence of losing the separation of powers between the Phase 1 and Phase 2 bodies (although, as noted below, if there is to be a single CMA, we would recommend the adoption of a decision-making structure that would preserve key elements of this second stage review, thereby reducing the risks of confirmation bias).

2.2 We would suggest that the appropriate objectives for the reform of the UK competition system should be as follows:

(a) to reduce unnecessary regulatory burdens - both on UK businesses, which risk losing competitiveness as a result of protracted interventions, and on the competition authorities which need to concentrate their limited resources on the issues that really matter to the UK economy and consumer welfare;

(b) to improve procedural fairness - recognising that the implications for businesses of competition law interventions can be significant and severe; this applies to market investigations, which can result in the imposition of regulatory remedies on entire business sectors, and antitrust processes, which can result in the companies concerned sustaining substantial fines, reputational harm and exposure to third party civil damages claims, as well as having an impact on the careers of senior management (including potentially the disqualification of directors);

(c) so far as is consistent with objectives (a) and (b), to enhance the efficiency and speed of processes; and

(d) to provide an environment and structure in which the UK's competition agencies can operate with authority and be recognised as being world class.

2.3 With regard to the number of cases, we do not consider that the volume of cases, e.g. relative to other countries, is an appropriate measure of the effectiveness of the regime; other factors, such as the actual existence of anticompetitive practices in Britain compared

with other countries, and the way the volume of cases is measured, are also relevant. More specifically:

- We do not consider that there are too few market investigations. Rather, we believe that the increased regulation of hitherto unregulated sectors of the economy, as a consequence of the imposition of market investigation remedies, is by no means an ideal, or even productive, way of enhancing business efficiency, innovation, economic growth or consumer welfare.

- In antitrust cases, whilst we recognise the benefit of establishing a body of precedent through decided cases, both for certainty and for deterrence, in individual cases there are often very good reasons for the parties to reach a settlement with the competition authority.

3. COMMENTS ON OPTIONS FOR REFORM

3.1 Our views in relation to the various options for reform set out in the Consultation Paper are as follows:

3.2 **There should be greater procedural fairness in antitrust**: We endorse the proposals that in relation to Chapter I and Chapter II investigations under the Competition Act 1998, greater fairness could be achieved if there were a proper separation of powers between those involved in investigating an alleged infringement and those taking the final decision and imposing penalties, i.e. both "Option 2" and "Option 3" in paragraphs 5.30 to 5.47 of the Consultation Paper. We see such proposals as being necessary to redress the inherent unfairness of a single group of officials being investigator, prosecutor, judge and jury, ie the problem of confirmation bias. On balance, we favour a modified form of Option 2 - the key features being:

(a) a second phase antitrust investigation should be conducted within the CMA by a group of independent decision-makers who are different and separate from the original investigating team (essentially the independent decision-makers who make the Phase 2 market and merger decisions);

(b) but with no need for a full internal tribunal, which would be costly, time consuming and would replicate the role of the CAT; and

(c) crucially, the retention of a full merits appeal to the CAT. We consider that it is important to maintain the CAT in its current form, given its efficiency and thoroughness in conducting full merits appeals, together with the invaluable support provided by the specialist Registrar and his team, which facilitates informed and active case management and materially enhances the efficiency of proceedings compared with tribunals that do not benefit from such a support structure. In our view, the CAT is an excellent model for a competition court, staffed as it is by expert chairmen supported by experienced and appropriately qualified lay members.

3.3 This significant improvement on the present system is, of course, perfectly achievable whether or not the OFT and the Competition Commission are amalgamated into a single authority.

3.4 As regards time limits for anti trust investigations, as Advocate General Kokott has recently observed in her opinion in the *Solvay* case[1], it is a breach of Article 6 of the ECHR for the administrative part as well as the judicial part of an antitrust investigation not to be heard within a reasonable time. Certain of the OFT's investigations have taken 7+ years. Whilst introducing statutory time limits in relation to OFT investigations (for

[1] Case C-109/101; *Solvay SA v European Commission*

example 2-3 years for issuing a statement of objections and a further 1 year for taking a decision) would undoubtedly ensure that decisions are taken within a reasonable time, it is suggested that the CMA should be given an opportunity to introduce efficient procedures following its creation, but failing which statutory limits should be imposed. Accordingly, it would be efficient for the relevant statutory provisions to be included in the legislation that is adopted to create the CMA, which could be implemented by statutory order if required at a later date.

3.5 **The system of voluntary merger notifications should be retained**. We welcome the Consultation Paper's recognition that mandatory merger notification is not necessarily the right way forward; indeed, we believe that it would be damaging. We also welcome the Consultation Paper's identification of more proportionate, and practical, ways to address concerns about completed mergers (along the broad lines set out in paragraphs 3.12 to 4.16 of the consultation paper).

3.6 We also endorse strengthened interim measures, including the possibility of an order to reverse integration, and we favour the "second option" referred to in paragraph 3.13.

3.7 **Structure of decision-making** - if there is to be a single CMA, we would recommend that:

(a) within a single CMA, the decisions in "Phase 2" of both merger control and market investigations should be made by different individuals from those conducting the initial examination at "Phase 1" - so as to minimise the dangers of confirmation bias that might otherwise arise from an amalgamation of the two existing competition authorities; and

(b) the "Phase 2" decision-makers within the CMA should be senior and experienced individuals to which the companies under investigation have access, and who are of equivalent seniority and experience to those management executives of the investigated companies who appear before them.

3.8 We have a number of **concerns** about some of the proposals - notably:

- those relating to the **cartel offence** - we do not believe that there are grounds, at this stage, to remove the "dishonesty" element of the offence; it is entirely appropriate that criminal prosecution should be reserved for the small number of very serious cartel cases that arise. In any event, we do not believe that juries, properly directed by the trial judge, will have particular difficulties in understanding and applying the concept of dishonesty;

- the possibility of **mandatory merger notification** - we believe that this would represent an unnecessary regulatory burden on parties to mergers raising no competition issues, and would have the perverse effect that innocuous mergers would be caught by the regime, whilst smaller mergers with anti-competitive effects would escape scrutiny;

- the suggestions on **fees for merger control and antitrust investigations** - we consider these to be disproportionate and excessive in the case of mergers, contrary to proper principles of the administration of justice in the case of antitrust investigations, and out of line with international best practice in the case of both;

- **SME "super-complaints" in market investigations** – we believe these would conflict with the focus of competition law and policy as being consumer welfare rather than particular categories of producer and may result in an inefficient allocation of the OFT's resources; and

- proposals on the workings of the **sector regulators' concurrent competition powers** - we believe these are confused, and should be re-balanced so that the CMA has primary in relation to competition matters (ie both in relation to antitrust and market investigations (where the CMA should carry out phase 2 investigations and should have the opportunity to conduct phase 1 reviews within regulated sectors)).

13 June 2011

Association of Chief Trading Standards Officers

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Association of Chief Trading Standards Officers
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Leading Trading Standards Services
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By email to
cma@bis.gsi.gov.uk
For the attention of Duncan Lawson

16th May 2011

Dear Mr Lawson

A Competition Regime for Growth: A Consultation on Options for Reform

The Association of Chief Trading Standards Officers (ACTSO) is the single membership organisation representing Heads of Trading Standards and regulatory services from councils across England and Wales. ACTSO supported by the Trading Standards Institute is focussed exclusively on providing a comprehensive co-ordinated leadership forum at the national level whilst assisting members to lead their services both locally and regionally.

We are pleased to be able to offer you some views on the above consultation. We have focused our responses on issues relating to questions 19 to 21 about the focus of the proposed CMA. Our particular interest relates to the impact this will have with the expected government consultation on changes to the consumer landscape. ACTSO believes that the focus of the CMA should be on competition issues. We accept that they will have a key role in carrying out market studies, but believe these should be focused on issues where there is a structural market issue rather than on generic consumer protection ones.

We understand that the expected consultation on the consumer landscape will provide for an enhanced role for councils' trading standards services to deal with regional and national consumer protection work and we welcome this and are confident that we can work with BIS, CMA, Citizens Advice and other relevant bodies to achieve this.

Should you wish to discuss our views, then I would be very happy to make myself available for a meeting or please feel free to contact our Director of Policy, Wendy Martin on 07982 418423 or by email wendyjmartin@yahoo.co.uk and she will be happy to advise you further.

Yours sincerely

Stephen Greenfield Bsc, DTS, DMS, MTSI
Chairman ACTSO

Association of Convenience Stores

ACS Response: A Competition Regime for Growth

Introduction

1. ACS (the Association of Convenience Stores) welcomes the opportunity to respond to the Government's consultation on restructuring the UK's competition authorities. ACS is the voice of local shops representing 33,500 local shops including multiple chains, groups and thousands of independent retailers.

2. In this consultation response ACS will address the following issues;

    - the Competition and Market Authority's (CMA) responsibility to assess the competitiveness of the grocery market and the functionality of the Grocery Code Adjudicator in the new structure,
    - the role of SME representatives in competition investigations, and
    - a mandatory code of practice for mergers.

3. Overall ACS urges Government to seize the opportunity of these reforms to reframe the approach to competition regulation and free the CMA to take a more holistic view of the impact of concentrated markets on consumers. This will only be achieved if the CMA is allowed to act in the public interest.

4. ACS has been closely involved in the competition scrutiny that has taken place in the grocery industry over the past ten years. This has included providing evidence to a significant number of merger investigations (see timeline at Appendix A.) It was ACS in partnership with Friends of the Earth that called for the OFT to refer the Groceries Market for investigation in 2005. ACS took the decision to appeal the initial decision not to refer the market to the Competition Appeals Tribunal, this action led to a reconsideration and eventual market referral. ACS was a main party to the Inquiry that took place between 2006 and 2008. We have therefore had extensive experience of dealing with both the Office of Fair Trading (OFT) and the Competition Commission (CC).

5. ACS has also played a close interest in the OFT scrutiny of the news and magazine supply chain. The delays and procrastination that characterised the OFTs consideration of the need for intervention and/or a market investigation over a number of years leading up to the 2009 decision are a telling example of where procedures can be improved. This is a decision due for review, as per the OFTs commitment in 2009, and lessons can be learned to ensure a more efficient and decisive outcome this time.

Recent Experiences

Grocery Market Inquiries

6. There have been a number of OFT and CC inquiries into the grocery market over the last decade. The Grocery Market is a highly concentrated industry and any new competition structure should be prepared for the need for this market to be continually reviewed. To ensure that this is handled effectively and efficiently provision should be made for the continual monitoring of industries that are highly concentrated and present a risk of harm to consumers.

7. Since the first grocery market inquiry concluded there have been two further large scale investigations, in 2005 (Safeway merger Inquiry) and 2008 (Groceries Market Inquiry). Given that the pace of consolidation in the market has continued, and that effective remedies to combat the identified adverse effects on competition have still to be effectively delivered, there will be cause for more such investigations in the future. This is not desirable for any of the parties involved and is not a smart way to regulate the industry.

8. The Competition and Markets Authority will continue to be presented with grocery market related concerns in three areas:

a) Mergers and Acquisitions

   a. The OFT has persisted with an untenable position whereby all acquisitions that affect large grocery stores are subject to stringent restrictions and yet large groups of small stores have been acquired without even being referred for investigation by the Competition Commission. Poor application of market definition has been the major cause of these problems. The opportunity presented by the change in regulatory structure around this merger provides an opportunity to put in place a framework that will lead to more satisfactory approach to market definition and ensure that acquisitions by companies with large national market shares being effectively scrutinised when acquiring much smaller businesses.

b) Abuse of Buyer Power

   a. ACS urged the CC to go much further than it did with regard to the remedies necessary for countering the effects of the harmful buying practices. The remedy proposed wholly failed to consider the impact of the identified abuses on the competitiveness of smaller retail businesses, the chosen remedy is therefore of limited benefit to addressing the competitiveness of the grocery retail sector.

   b. The CMA must have the powers to go much further and act far more radically in how it delivers remedies in this area.

c) Anti-Competitive or Predatory Pricing Campaigns

The issue of predatory pricing was largely ignored by the grocery inquiry. The 2008 Inquiry failed to grapple the issue of price variation between stores dependent on location. It also discounted concerns about the use of short and targeted deep discounting. Threat to competition through aggressive pricing remains a live issue as supermarket retailers all engage on aggressive expansion programmes throughout 2011 and 2012.

The OFT is not ideally suited to receiving and reacting to individual concerns and complaints in this area. No effort has been made to gather or collate information about harmful practices. The CMA must put in place more effective and accessible means for individual businesses to register concerns and gain advice.

Supply of News and Magazines

9. Working with the Association of News Retailing (ANR), ACS has called on the OFT to allow a full market investigation of the news and magazine market. The decision in 2009 not to refer the issues for a full market investigation by the Competition Commission, was made to give the industry the opportunity to put in place suitable voluntary arrangements that would mitigate the anti-competitive impacts of monopoly supply agreements.

10. ANR criticised this decision at the time, highlighting the long established record of failure in employing self regulation to promote a more competitive, efficient and consumer focused supply chain. In the two years since that decisions the self regulatory structures put in place have been a failure and have no support from the retail sector.

11. The experience of this case is a cautionary note with regard to the consideration being given in this consultation to the use of voluntary agreements in lieu of market investigations. In the case of news and magazines, the lesson is that self regulatory options should only be considered where there is a clearly demonstrated consensus for such an approach.

Recommended Changes in Approach to Market Investigations

12. The conduct of these recent Inquiries highlights certain specific procedural shortcomings that can be addressed in the creation of the CMA. These are:

    a) Remedies

The experience of the Grocery Market Inquiry shows that the outcomes and recommendations of a market investigation can be subject to significant delay and identified remedies can be watered down substantially post Inquiry. The consultation suggests that the CC delivered remedies with 10 months of the conclusion of the Inquiry. This is only accurate because the CC considers the end of its responsibility to hand over a recommendation; certain remedies identified in the Inquiry were implemented in that time scale but the most substantial remedies (a planning competition test and a Grocery Ombudsman) remain outstanding.

In the case of these two remedies the planning competition test appears to be no longer actively pursued and the grocery ombudsman is making slow progress and has already been substantially altered from the original recommendation.

The effectiveness of the CMA is likely to be severely undermined if its recommendations to Ministers are treated in the same way following future inquiries. A clear working protocol must be in place that ensures a Ministerial response within weeks and a commitment to deliver the proposed remedy within 12 months.

The CMA should also set itself a new standard which is assessing its success in delivering remedies that they lead to material change in anti-competitive practices. The GMI experience demonstrates that the CC saw its responsibilities ended at the point that it handed out recommendations to Ministers.

b) *Structural Deficiencies in Competition*

The Grocery Market Inquiry of 2008 was ultimately flawed because its analysis of local competition failed to challenge the established orthodoxy that consumer interests in the grocery market are served if they have more than one national supermarket chain within a 5 or 10 minute drive of their home. This orthodoxy led to the substantive part of the 2008 Inquiry being a rerun of the Inquiries that took place in 2000 and 2005.

The desire to limit the scope of its assessment of competiveness to a narrow definition of consumer choice ultimately obscured the opportunity to address

the wider structural questions about the ongoing consolidation of the market and its implications for the consumer.

ACS accepts that when faced with a broad ranging industry an investigation team will follow a process that will reduce the scope of the investigation to more tangible specific areas of concern. However in the case of the grocery market this led to a focus that was too narrow.

c) *Protecting Public Interest*

The failings of recent investigations in grocery arise primarily from the constraints imposed by the existing legal framework. The CMA must be empowered to develop its work and make decisions that take into consideration the public interest.

In markets like the grocery market there are considerations that go beyond the narrow confines of existing competition law parameters. In such cases the competition authority must be able to consider whether the wider social impact of market concentration should take precedence over more narrow considerations of consumer interest.

Grocery Code Adjudicator

12. The *Grocery Market Inquiry* recommended the creation of a Grocery Ombudsman to oversee the proposed Grocery Supply Code of Practice. This is a remedy that ACS supported and remains a necessary addition to the regulation of the market.

13. The pace towards delivering an effective regulator has been far too slow. Four years later, a draft Grocery Code Adjudicator Bill has been published. However legislative priorities and the complications arising from the reform of the competition regulators are likely to suggest longer delays in implementation.

14. The CMA must have significantly enhanced powers to impose its recommended remedies and agreed remedies should be subject to legislative fast track so as to ensure that where harms are identified remedy is in place swiftly.

15. The Bill provides for the Adjudicator to perform the following functions:

i. arbitrate disputes between suppliers and retailers
ii. investigate complaints about breaches of the code
iii. report annually on compliance with the GSCOP

16. The Bill also provides the means by which complaints can be registered anonymously. The proposed mechanism is flawed in that it does not allow formal complaints by third parties. We know from the experience of both the OFT and the CC that suppliers suffering from abusive practices are unlikely to raise issues themselves. There is a 'climate of fear' that is presented when considering highlighting a harmful practice by a very large customer. The CMA should in all its functions be open to receive and deal with information about breaches of competition law or regulations, the source should be immaterial.

17. The Bill provides the GCA with 'naming and shaming' sanctions only. This is insufficient given the scale of the problems identified in the CC Inquiry, this review presents an opportunity to revisit the limits imposed on the ability of the adjudicator to use financial sanctions.

Extensions to the Role of the GCA

18. The Grocery Code Adjudicator as proposed in the draft Bill, is far more limited that proposed by the Competition Commission. The reason for limiting the scope and powers of the Ombudsman are unconvincing. Instead there is opportunity for the GCA to provide a crucial role in protecting consumer interests and promoting competition. This can be achieved by decoupling the GCA from just having a role overseeing the GSCOP and provide it with a wider monitoring role.

19. For example in a recent report published by the Think Tank ResPublica they recommended that the GCA should report annually on the competitiveness of the grocery market.

20. ACS supports the use of the GCA to provide an ongoing monitoring function and early warning system of concerns in the grocery market. The continued concern about the risk presented by high levels of concentration make ongoing monitoring necessary to ensure the absence of consumer harm. A proportionate approach to reporting and monitoring will prove cost effective by averting the Inquiries in the scale experienced in the past few years. This presents a viable model for a new approach to be adopted by the GCA and a significant departure from the confusion and frustration of the current system.

SME Bodies

21. ACS supports the proposals to extend the super-complaints power from just consumer groups to SME bodies. However careful consideration must be given to how a small business representative body is identified. There is no one membership form for trade associations or business representative groups. The system must

therefore be set up to be inclusive and outcome focused. The aim is to identify harm and to drive probity in the right areas. This could be quickly frustrated if the scope of who can raise issues is limited from the outset to a very limited number of bodies.

22. ACS is not untypical of the diverse membership types often found in trade bodies. ACS is a representative body with more than 33,500 shops in membership, the majority of our members are small businesses and we see ourselves as a champion of independent retailing. However ACS is a broad church and large national and international companies can also take up membership. This structure could preclude us from being a super complainant and therefore important concerns may not get the opportunity to be aired in the future.

23. The right approach is for the CMA to have scope to decide whether a representative body is bona fide at the same time as considering the content of the complaint brought forward. So long as the compliant is demonstrably about small business harm and the representative body is demonstrably speaking for small businesses then it should be included in the process.

24. The parameters for making these judgements should be a matter for the CMA. There may be scope for a policy to be put in place by the CMA and regularly reviewed to ensure that it remains as current and flexible as possible.

Stronger Mergers Regime

25. ACS supports the proposals to overview the mergers regime. The mergers regime requires greater scope to ensure that it can pick up all anti competitive activities. ACS recommends that a mandatory notification regime is introduced to deliver complete coverage of all mergers within the jurisdictional threshold.

26. ACS would also like to highlight the poor scrutiny of mergers by the competition authorities currently. In each instance of convenience store acquisition ACS has provided evidence outlining the need for action by the OFT. However, limited investigation has occurred or action taken to prevent impact on the grocery market.

Conclusion

27. ACS supports the Government's commitment to restructuring the UK's competition authorities. We believe that it presents an opportunity for a new approach and a shift away from outdated thinking about what constitutes the best interest of consumers. Above all the CMA must be able to make decisions informed by a mandate to act in the public interest.

28. In responding to this consultation the Government must consider carefully how the Grocery Code Adjudicator will fit into a new national competition framework and manage the continual scrutiny of the grocery market. The adjudicator must also have the ability to be proactive to discover anti competitive behaviour and be operationally independent.

29. For further information on this submission please contact Edward Woodall: Edward.woodall@acs.org.uk or 01252 533014.

APPENDIX A

Competition in the grocery sector 1997 – 2010

Apr 1999 The supply of groceries in Great Britain from "multiple" retailers is referred to the Competition Commission (CC) for investigation and report under the monopoly provisions of the Fair Trading Act 1973 (FTA) on account of:

1. A public perception that the price of groceries in the UK tended to be higher than in other comparable European countries and the USA
2. An apparent disparity between farm-gate and retail prices, which was seen as evidence by some that grocery multiples were profiting from the crisis in the farming industry
3. Continuing concern that large out-of-town supermarkets were contributing to the decay of the high street in many towns.

Oct 2000 The Competition Commission's report found the supermarket industry was broadly competitive but identified a number of practices that it considered operated against the public interest.

Oct 2001 The Supermarkets Code of Practice (SCOP) is introduced following the 2000 Competition Commission report as a voluntary agreement regarding the treatment of suppliers

Aug 2005 In response to a marked expansion of supermarkets into the convenience market, the Office of Fair Trading (OFT) releases a review of the Supermarket Code of Practice concluding it "should remain unchanged but be used more effectively" given

May 2006 OFT formally refers the entire UK grocery market to the CC specifically raising four concerns: land banks, the planning regime, buying power and supermarket impact in the convenience store sector

Feb 2008 CC informally releases its 'proposed remedies,' which includes a new 'Groceries Supply Code of Practice' (GSCOP) and an Adjudicator, but fails to come to a resolution concerning planning and land banks

Apr. 2008 CC final report does not find "proof of anti-competitive activities" and defends supermarkets as delivering "a good deal for consumers," despite stating that action is needed to improve competition in local markets.

Feb 2009 CC publishes a draft code in an attempt to reach a voluntary agreement

Mar 2009 Tesco successfully challenges the CC's proposal to introduce a competition test into the planning system.

Aug 2009 CC achieves a voluntary agreement on GSCOP, but not concerning a market Adjudicator.

Aug 2010 Coalition Govt. establishes a 'Groceries Code Adjudicator' within the OFT to proactively enforce the Grocery Supply Code of Practice and curb abuses of power

Association of General Counsel & Company Secretaries

Duncan Lawson
Department for Business Innovation and Skills
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13 June 2011

Dear Sirs

1. INTRODUCTION

1.1 The GC 100 welcomes this opportunity to comment on the Department for Business Innovation & Skills' consultation on the options for reforming the competition regime (the *Consultation*).

1.2 As you may be aware the GC100 is the Association for General Counsel and Company Secretaries of companies in the FTSE 100. There are currently more than 120 members of the group, representing some 90 issuers.

1.3 We commend the wide scope of the Consultation. It is appropriate at this point to take stock and consider how the regime can be improved as a whole. This is a valuable opportunity for reform and must not be missed.

1.4 In this response, we have commented on the key issues that matter to the UK's leading companies, which we believe can transform the current regime in to one that is more effective in meeting the needs of consumers, industry and the economy as a whole.

2. GENERAL REMARKS

2.1 The GC 100 believes that an effective competition regime must be transparent, effective and predictable; and it must produce robust, timely and high-quality outcomes. In this regard, we make the following over-arching remarks.

(a) Careful thought should be given to how best to deliver a fair and competitive environment. Regulatory and private enforcement are obviously key. But these must be balanced with *"sensible, smart guidance and business education"*, as acknowledged by John Fingleton in his speech to the CFC in Mexico on 4 April 2011. Limitations on resources also mean that authorities must use their resources intelligently and effectively.

For these reasons, we believe that the legislation should place greater emphasis on requiring the CMA to provide clear guidance and education as a means of enforcement. By seeking to prevent competition law breaches in the first place, this approach will reduce enforcement cost and also save costs for business.

(b) Greater efficiency can be introduced by improving the process by which cases are selected for enforcement action. Too often, authorities have embarked on lengthy and expensive investigations only to drop them later by which point significant costs have mounted for the authority and the businesses concerned. We believe that this should be addressed by introducing well defined procedural steps to make the CMA's case selection process more rigorous. We note, in this regard, the OFT's recent publication of its investigation procedures in antitrust investigations. This is helpful, but it highlights our concern, because it does not explain with precision or rigour how the OFT will improve its case selection process.

(c) We are concerned that the Consultation should be understood to suggest that the competition regime should be revenue generating for the Treasury or at least self financing, both in terms of merger fees and more generally the ever increasing levels of fines imposed on parties in competition law cases. We believe that this is a dangerous path which will almost certainly give rise to perverse incentives. We urge BIS to carefully consider the implications of the recent CAT decisions in the construction and construction recruitment cases and more generally the risks involved in any element of "user payment" in this particular area, which by no stretch of the imagination can be described as a "public service" provided to its "users".

3. ARCHITECTURE AND GOVERNANCE

3.1 We welcome the proposal to combine the CC and the OFT into a single authority. In so doing, it presents an opportunity to create a paradigm for competition authorities and competition regimes around the world. Fresh ideas should be encouraged in designing the CMA, as opposed to trying to find a compromise between the competing legacies of the OFT and the Competition Commission (the ***CC***). This will ensure that the CMA continues the reputation for excellence established by both the OFT and the CC.

3.2 A common complaint with the OFT and the CC is that the key decision makers within these authorities have almost no opportunity to have a dialogue with the business concerned and vice versa. For example, this is the current position on key decisions such as the opening of an investigation, issuing a statement of objections, issuing an "issues letter" in respect of mergers, referring a merger to the CC, or finding an adverse effect on competition. As a consequence, the authorities appear remote and intransparent to businesses. The decision making processes of the CMA across all its work streams (anti-trust, mergers and market investigations) should therefore be a key area of reform. These should be transparent, consistent and must ensure that stakeholders have adequate access to the case team and decision makers within the CMA.

3.3 One way in which these concerns can be addressed is to change the current decision making system, in which the authorities are able to act as prosecutor and judge (albeit subject to appeal), to a "prosecutorial" system. This would be similar to the process in the USA, where the authorities must present their case to a court to block a merger or order businesses to stop certain activities. This approach should place no greater burden on the CMA because it will be required to produce robust decisions in any event. Moreover, a move to a prosecutorial approach will engender greater transparency and robustness in decision making.

4. ANTI-TRUST ENFORCEMENT

4.1 A major failing of the current system of enforcement under the Competition Act 1998 (the ***CA1998***) has been the time it takes the authorities to conduct their investigation. Some cases, for example, are understood to have lasted in excess of five years. The sheer length of these timescales generates significant cost and uncertainty for businesses, all of which is exacerbated by the nature of the current process which many find to be intransparent and hard to navigate.

4.2 The OFT's recent publication of *"A guide to the OFT's investigation procedures in competition cases"* acknowledges these concerns. Whilst this guidance is welcome, the most effective way in which to address these concerns is to introduce deadlines within the legislation by which investigations must be completed. The statutory mergers and market investigations regime shows how effective legislative deadlines can be; and demonstrates that the existence of deadlines "focuses minds" and encourages efficiency amongst all concerned. Efficiency can be increased further if the CMA were required to 'front load' its investigations and go to court to seek to stop businesses engaging in activities that it considers to be anticompetitive. This in turn will mean that the CMA will be incentivised to take a very focused approach to the conduct of its investigations. Overall, we believe that these measures will result in a material improvement to the conduct of investigations.

4.3 There are two types of deadline which we would recommend, in particular:

(a) an obligation on the CMA to conclude its investigation within three years of commencement e.g. from the issue of the first section 26 notice; and

(b) an obligation on the CMA preventing public enforcement against infringements which ceased more than five years ago. If an infringement has long since ceased, there can be little point, in our view, in expending public resources to investigate because the cessation of the activity in question is evidence in it self that the persons concerned have learnt their lesson. We note that the rights of third parties would not be prejudiced by this proposal because it would still be open to them to seek damages through the courts.

4.4 We are also concerned by the suggestion that the dishonesty element of the cartel offence may be removed or modified. In our view, the 'problem', if there is one, is not with the legal test but rather with the way in which prosecutions are brought. If the Government wishes to improve the prospects of securing prosecutions under this head, it should focus on reforming the internal processes at the CMA and the resources available to it rather than 'softening' the nature of the cartel offence. Moreover, we believe that the dishonesty element of this offence is critical because it plays an important role in distinguishing hard core cartels from other anticompetitive activity. We note that the offence as it currently stands has been found to be workable (as a matter of law) by the House of Lords (as it was then) in the *Norris* case.

5. MERGER CONTROL

5.1 The current merger control regime creates significant legal and commercial uncertainty for the business community because the thresholds are highly subjective. In particular:

(a) The share of supply test gives the OFT a very wide discretion, which in turn means that it becomes almost impossible for merging parties to rule out the application of the Enterprise Act 2002 (the ***EA2002***); and

(b) there is no clear-cut definition for "material influence", which means that businesses face a complex exercise each time they acquire a minority stake to determine whether or not they meet the thresholds in the EA 2002.

This review is an opportunity to address these two highly unsatisfactory elements of the EA 2002.

5.2 Both of these concerns could easily be remedied by the introduction of 'bright line' turnover based thresholds. However, any revised threshold(s) must be set at an appropriate level to the UK economy and the size of the companies that operate within the UK; and should seek to capture only mergers that are large enough to exert a competitive impact on the markets concerned. In our view, the thresholds proposed in the Consultation are well below what is appropriate and would result in a very large number of mergers being notified, an overwhelming number of which we believe would raise no competition concerns whatsoever. Moreover, we note that proposed thresholds would be out of step with other large, industrialised European Members States, for example, France and Italy where the turnover thresholds are significantly higher. Similarly, the proposed hybrid system of thresholds would be seen as an 'outlier' and would, in our view, combine the worst elements of the current proposals.

5.3 The existence of a duty on the OFT to refer cases to Phase 2 under EA2002 should also be reconsidered in view of the proposed merger of the OFT and the CC. Once the merger between these institutions occurs, there is no longer a need for a merger transaction to be referred to a different body; it will continue to be reviewed by the same authority. Accordingly, the 'duty to refer' and lower substantive threshold (compared to the final test for allowing a given transaction) at which this duty operates is no longer required. Instead, the 'balance of probabilities' test, which the CC must currently satisfy, should operate at Phase 1, and in the same manner as it operates at Phase 2. We believe this change is necessary and feasible. For example, the EC Commission applies the same substantive test at both Phase 1 and Phase 2 of its review, and we see no reason why the CMA should not operate in a similar manner in this regard.

5.4 We continue to favour the merger regime being voluntary in nature. This reduces regulatory and cost burdens and it is important that these benefits are not lost. The perceived risk that this leads to a significant proportion of anti-competitive mergers going undetected is low; and we strongly doubt that market participants see the voluntary nature of the regime as a "loophole" to be exploited.

5.5 As regards how the procedure by which mergers are assessed may be reformed, we would recommend the following:

(a) the timescales within which Phase 2 investigations are carried out should be shortened. At present, the UK's Phase 2 process is one of the longest within the international community, especially for a regime with such a well developed enforcement structure. It should be feasible to reduce this period significantly, not

least because by combining the OFT and the CC there will be reduced duplication, which should enable a quicker review;

(b) in line with the comment made at paragraph 3.3 above, consideration should also be given to whether the CMA should be required to make an application to the court to block a merger or impose remedies. At present, the regime creates an "inequality of arms" between the authorities and the merging parties because the authorities are given the legislative means to exert pressure on the merging parties to encourage them to offer remedies. As a consequence of this, we believe that a number of beneficial mergers are abandoned each year; and

(c) in our view, the business community would strongly object to merger fees being increased as proposed in the Consultation. Being subjected to a merger investigation is seen as cost of doing business and, therefore, it is critical that the Government does not further increase the cost to business in this way.

6. MARKET INVESTIGATIONS

6.1 We do not agree with the description in the Consultation of the UK market investigation regime as being "the jewel of the crown" of the UK competition law regime which is "at the forefront of global best practice." We urge BIS to carefully consider the actual purpose of this particular enforcement instrument and whether it s benefits clearly outweigh the significant costs and even detrimental effects we believe these investigations have on the parties involved and the wider economy. Despite having expended considerable resources and time, the authorities have failed to find any serious failings of competition in many cases; and a number of decisions have been quashed by the courts. . At the same time, these inquiries have been hugely expensive for the industries concerned and disruptive in terms of management time.

6.2 In our view, competition failures in markets can be fully addressed by Articles 101 and 102 TFEU and their national equivalents. This is confirmed by the fact that no other jurisdiction, as far as we are aware, has a similar system of market investigations which can result and far reaching remedies. If one were to take the European system, for example, one finds that whilst the European Commission may review markets in a Sector Inquiry, any remedial measures that it considers necessary must meet the threshold for the application of Articles 101 and/or 102 TFEU.

6.3 We would advocate such an approach. Translated to the UK, this would mean allowing the CMA to carry out market studies in order to gather information, in the same way as the OFT/CC do today; and removing their power to impose remedies at the end of the process. To the extent that any competition concerns are identified during a market study, the CMA would be able to use its powers under the CA1998 to impose remedies. Alternatively, one could envisage a system whereby the CMA should be required to go to court to seek to impose remedies.

6.4 There is a further deficiency in the current system which arises out of the fact that the CC's final decision in a market investigation is only subject to review under 'JR' principles. This limits the powers of the court to correct any flaws identified in the CC's decision, and it leads to businesses being subjected to a further investigation if they successfully challenge the CC, which involves further cost and disruption. The only

remedy to this flaw is to change the standard of review from 'JR' principles to a "merits based" review, which is an approach we would advocate.

6.5 In addition, in so far as this Consultation concludes that the existing market investigations regime should remain intact, we do not support the granting of special super-complaint rights to SME associations. SMEs are well resourced and fully informed of the competition regime in the UK. Therefore, they should be treated in the same way as any other market player within the UK.

As a matter of formality please note that the views expressed in this letter do not necessarily reflect the views of each and every member of the GC100 or their employing companies.

If you have any questions, please do not hesitate to contact me.

Yours faithfully,

Mary Mullally
Secretary, GC100

GC100 Group
The Association of General Counsel and Company Secretaries of the FTSE 100
The GC100 Group is an unincorporated members' association administered by the Practical Law Company Limited

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Australian Competition and Consumer Commission

From: Bassi, Morna [mailto:Morna.Bassi@accc.gov.au]
Sent: 06 June 2011 00:23
To: Hannah Priest
Cc: International ACCC; Marje Bynoe; Bezzi, Marcus; Cooper, Bruce; Fleming, Richard; Competition and Markets Authority
Subject: RE: UK Government proposals to revise the UK cartel offence [SEC=UNCLASSIFIED]

Dear Hannah

As promised, please find below background information about Australia's cartel regime ahead of our call on Tuesday 7 June (the information is in response to questions sent to us by Louise Sexton). We have noted some materials in question one dealing with "dishonesty".

Criminal cartel office

1. What considerations were applied in formulating the offence?

The following sources outline some of the main considerations applied in formulating the criminal cartel offence in Australia:

- Senate Committee Report on the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*: http://www.aph.gov.au/senate/committee/economics_ctte/tpa_cartels_09/report/index.htm.
- Explanatory Memorandum to the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2009*: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation/billhome/r4027%22.

We also recommend looking at the following submission to Treasury (on The Exposure Draft Bill, Draft ACCC-CDPP Memorandum of Understanding and Discussion Paper introducing criminal penalties for serious cartel conduct in Australia) prepared by Caron Beaton-Wells of the University of Melbourne and Brent Fisse which looks at some of the proposed considerations in formulating the offence in Australia, including a dishonesty element (see in particular Part 6): http://www.treasury.gov.au/documents/1350/PDF/Dr_Caron_Beaton-Wells_and_Mr_Brent_Fisse.pdf.

2. Does the offence cover matters that could in principle be economically beneficial and therefore non-infringing under the civil provisions?

Generally speaking, the civil cartel prohibition and criminal cartel offence cover the same types of conduct.

Both are centred upon the existence of a cartel provision within a contract, arrangement or understanding (CAU). A 'cartel provision' is a provision in a CAU that either has:

- the purpose or effect of directly or indirectly fixing, controlling or maintaining prices (price fixing), or
- the purpose of directly or indirectly:
  - preventing, restricting or limiting production, capacity or supply (output restrictions)
  - allocating customers, supplier or geographical areas (market sharing), or
  - rigging bids (bid rigging)

by parties that are, or would otherwise be, in competition with each other.

The criminal cartel offence requires additional fault elements to be satisfied, as follows:

<u>Making a CAU containing a cartel provision</u>
It is necessary to establish that a corporation intended to enter into a CAU and that it knew or believed the CAU contained a cartel provision.

Giving effect to a cartel provision
It is necessary to establish that the corporation knew or believed a CAU contained a cartel provision and that it intended to give effect to that cartel provision.

There are a number of exceptions to the civil cartel prohibition and criminal cartel offence, namely:

- conduct subject to a collective bargaining notice or authorisation
- joint ventures
- agreements between related bodies corporate
- collective acquisition of goods or services, and
- 'anti-overlap' provisions.

More information about the exceptions can be found on the ACCC's website: http://www.accc.gov.au.

3. If it does, how do they ensure that such conduct is not penalised criminally?

As part of an investigation into alleged cartel conduct the ACCC will consider whether an exception under the *Competition and Consumer Act 2010* could apply.

For more information about the process for notifying and authorising cartel conduct see the ACCC's guidance material: http://www.accc.gov.au/content/index.phtml/itemId/882118.

The ACCC's Guidelines on its approach to cartel investigations are available here: http://www.accc.gov.au/content/index.phtml/itemId/891982.

4. What has been the experience of enforcing the cartel offence to date?

There have not yet been any criminal proceedings for cartel conduct in Australia.

Civil antitrust enforcement regime

5. Overview of civil enforcement process: investigation, civil proceedings and appeals - who does which bit?

The ACCC is responsible for investigating cartel conduct, gathering evidence, managing the immunity process (in consultation with the Commonwealth Department of Public Prosecutions, or CDPP) and referring serious cartel conduct to the CDPP for prosecution. The CDPP is responsible for prosecuting serious cartel offences in accordance with the Prosecution Policy of the Commonwealth. If the ACCC decides not to refer a cartel matter to the CDPP, or the CDPP advises that a criminal prosecution should not be commenced, the ACCC may decide to pursue the matter by way of civil penalty proceedings. The ACCC does not have any powers to set or impose sanctions – this is a matter for the courts. Civil proceedings are brought at first instance in the Australian Federal Court (usually before a single judge) and may be appealed to the Full Federal Court (usually before three judges). Australia's final court of appeal is the High Court.

The ACCC's Guidelines on its approach to cartel investigations and a copy of the Memorandum of Understanding between the ACCC and the CDPP are available here: http://www.accc.gov.au/content/index.phtml/itemId/891982.

Information about the ACCC's enforcement powers, functions, priorities, strategies and regime is contained in the ACCC's *Compliance and Enforcement Policy:* http://www.accc.gov.au/content/index.phtml/itemId/867964.

6. Do you have any data they could share on length of cases from initiation to final infringement decision?

This depends on the circumstances of each case. A cartel matter may take up to 18-24 months to investigate. Time spent in litigation before the court depends on the facts and complexity of each case.

7. How do civil proceedings interact with the ACCC's ability to offer leniency?

The ACCC's immunity policy confers full amnesty from ACCC-initiated civil proceedings and penalty to the first eligible cartel participant to report its involvement in a cartel and cooperate with the ACCC's investigation and any subsequent action against other cartel participants. Where immunity from criminal prosecution is sought, the ACCC will assess the application prior to submitting it to the CDPP for consideration as to whether it meets the requirements set out in Prosecution Policy of the Commonwealth. If the CDPP is satisfied that an applicant meets these requirements and decides to grant immunity from criminal prosecution, this decision will be communicated to the applicant at the same time as the ACCC decision in relation to civil immunity.

The ACCC's *Immunity Policy for Cartel Conduct* is available here: http://www.accc.gov.au/content/index.phtml/itemId/879795.

The ACCC my also offer lenient treatment under its *Cooperation Policy for Enforcement Matters* which can be found here: http://www.accc.gov.au/content/index.phtml/itemId/459482.

8. Do the civil courts respect ACCC's leniency agreements when setting fines?

The ACCC does not set or impose fines; this is the responsibility of the courts. The ACCC may agree to settle a matter or recommend to the court that a reduced penalty in civil proceedings is appropriate in view of the defendant's cooperation with the ACCC's investigation. More information can be found in the ACCC's *Cooperation Policy for Enforcement Matters* (see above).

An example of how the courts have regard to the ACCC's submissions on penalties is in the Australian Federal Court judgment in *Australian Competition and Consumer Commission v Qantas Airways Limited* [2008] FCA 1976 (11 December 2008): http://www.austlii.edu.au/au/cases/cth/FCA/2008/1976.html.

9. How do civil proceedings interact with the ACCC's ability to settle cases?

The ACCC can settle cartel cases at any point during an investigation, although this normally occurs once civil proceedings have been commenced.

10. What proportion of cases gets settled, and what effect does this have on deterrence?

The majority of the ACCC's cartel cases involve agreement on liability or penalty. To maximise deterrence, penalties agreed by the ACCC are based on court based principle and precedent. The court's approach to penalties and settlement in *Australian Competition and Consumer Commission v Qantas Airways Limited* is a good example. As can be seen from this case, the ACCC settles for amounts that the court will order and there is normally a headline figure which may be discounted for cooperation. The ACCC seeks to maintain high benchmarks for penalties in its cases. In 2007 increased penalties were introduced into the then *Trade Practices Act 1974* (now *Competition and Consumer Act 2010*) and matters attracting these new penalties are currently under investigation and working their way through the courts.

We look forward to speaking with you tomorrow.

Best regards

Morna

Morna Bassi
A/g Director | International

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Berwin Leighton Paisner LLP

BIS | Department for Business Innovation & Skills

A competition regime for growth: a consultation on options for reform.

Response form

Name **Adrian Magnus**

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Return completed forms to:

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Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.

	Small to Medium Enterprise
	Representative Organisation
	Trade Union
	Interest Group
	Large Enterprise
	Local Government
	Central Government
√	Legal
	Academic
	Other (please describe):

When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

Consultation Questions

1. Why reform the competition regime?

This chapter sets out an assessment of the strengths and weaknesses of the UK competition regime and proposes to reform it to: improve the robustness of decisions and strengthen the regime; support the competition authorities in taking forward the right cases; and improve speed and predictability for business.

Q.1 *The Government seeks your views on the objectives for reform of the UK's competition framework, in particular:*

- *improving the robustness of decisions and strengthening the regime;*
- *supporting the competition authorities in taking forward the right cases;*
- *improving speed and predictability for business.*

Q.2 *The Government seeks your views on the potential creation of a single Competition and Markets Authority.*

Comments:

Answer to Q.1:

These objectives are commendable, but care must be taken to ensure that there is no adverse impact on the principles of fairness and due process.

Answer to Q.2:

We are not opposed in principle to the creation of a single competition authority provided that the best features of the existing competition regime are retained. We see the benefits in having a single institutional voice to promote competition policy in both the domestic and international arena; a single competition authority would also nullify any risk of institutional rivalry.

In relation to the regulatory caseload currently undertaken by the CC, which is not presently part of the OFT's work, one of the firm's utility clients has expressed concern that this aspect of the CMA's functions is particularly vulnerable to being downgraded in importance. It is critical that the CMA preserves the expertise to conduct regulatory cases if the Government ultimately decides to proceed with a single competition authority (or arranges for the transfer of these functions to the CAT - see answer to Q.18 below).

2. The UK Competition regime and the European context

This chapter sets out the UK institutions that make up the competition regime and their functions, as well as the European context.

3. A stronger markets regime

This chapter sets out that there is scope to streamline processes and make the markets regime more vigorous. The key options are: enabling in-depth investigations into practices that cut across markets; giving the CMA powers to report on public interest issues; extending the super-complaint system to SME bodies; reducing timescales; strengthening information gathering powers; simplification of review of remedies process; and updating remedial powers.

***Q.3** The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

***Q.4** The Government also welcomes further ideas, in particular, on modernising and streamlining the markets regime, and on increasing certainty and reducing burdens.*

Comments:

Answer to Q.3:

We broadly support the proposals to reform the markets regime. We consider the current markets regime to be duplicative, overly complex and relatively slow. We support measures to promote clarity regarding the objectives and processes used in the markets regime.

We support the introduction of information gathering powers at the phase 1 market study stage and a statutory timeframe in order to expedite the assessment of the features of the market. However, although this is likely to streamline the process and result in timelier market investigation references, this will also clearly place a significant burden on the companies involved at a stage where the competition authority may not have sufficient evidence of a genuine competition concern. We suggest that a combination of staggered/targeted information requests might work to the benefit of not only the parties themselves (who would then be in a position to provide the most accurate and up to date information available) but also the staff team.

We support the introduction of the ability to extend time frames and 'stop the clock' mechanisms in order to build flexibility into the timetable. We believe that the timetable should be sufficiently flexible to allow for significant changes in the CMA's analysis during the course of the investigation.

We support the amendment to Schedule 8 of the Enterprise Act to enable the appointment and remuneration of an independent third party to monitor and/or implement remedies.

We consider that market investigation references should be used sparingly in economically significant markets, given the significant burdens placed on companies and the potential for market distortions through the intervention process.

4. A stronger mergers regime

This chapter sets out that there is scope for improving the merger regime by addressing the disadvantages of the current voluntary notification regime and streamlining the process. The Government is seeking views on: (1) options to address the disadvantages of the current voluntary notification regime; (2) measures to streamline the regime by reducing timescales and strengthening information gathering powers; (3) introduction of an exemption from merger control for transactions involving small businesses under either a mandatory or voluntary notification regime. We ask:

Q.5 *The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.6 *The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?*

Q.7 *The Government welcomes further ideas on streamlining the mergers regime.*

Comments:

Answers to Qs.5-7:

We consider that the relatively small proportion of completed mergers which appear to result in issues when imposing remedies does not in itself justify the adoption of a mandatory merger notification regime. We consider that the current voluntary regime - 'light touch' regulation - has a number of benefits to business, in terms of minimising the regulatory burden and associated costs, although we recognise that the current 'share of supply' test may not be sufficiently objective in order to satisfy the ICN Recommended Practices for Merger Notification Procedures.

If a mandatory merger notification regime were to be adopted, we consider that substantially higher jurisdictional thresholds should be considered: a jurisdictional threshold of £5 million in the UK for the target and £10 million

worldwide for the acquirer is far too low and out of step not only with other national merger control regimes in the EU but also other mature competition regimes worldwide: for example, the jurisdictional thresholds in France require a combined worldwide turnover of greater than €150m and the domestic turnover of each of at least two undertakings to be greater than €50m.

Moreover, there should also be a minimum threshold for the acquirer based on UK turnover as well or instead of a threshold based on worldwide turnover: arguably, the current thresholds do not satisfy the ICN's requirement of a "local nexus" - a material presence and/or activities in the relevant jurisdiction.

The thresholds currently proposed would in our view result in a disproportionate increase in the regulatory burden in terms of the time and costs to business, which we consider would not be consistent with the purported objectives of the consultation to develop a competition regime "*which does not impose disproportionate burdens on business (including cost recovery)*" (p.7). Moreover, if the present scale of filing fees were to be retained, the financial cost to business would also be significant.

We also consider that any mandatory merger regime should include an effective short-form notification process, to avoid imposing unnecessary burdens on parties to transactions that do not present material competition concerns.

We consider the proposed "hybrid" test to represent an unsatisfactory compromise, in terms of increasing the regulatory burden on businesses by imposing mandatory notification on the acquisition of businesses where there may be no competitive overlap but the target's turnover exceeds £70 million, while retaining the power to intervene in mergers which are far below this threshold. Not only would this result in less legal certainty and predictability for business, but it would not address the perceived issue associated with imposing effective remedies in completed mergers in the latter case. Based upon the statistics published in the consultation, one would expect the latter category to result in proportionally more references to the CC and therefore proportionally more findings of an SLC in cases where the OFT would be exercising its discretion to intervene.

In sum, we do not consider that the proposed options achieve a reasonable balance between preventing anti-competitive outcomes and managing the regulatory burden on business. Moreover, in terms of the proposed small merger exemption, as indicated above, we consider that the acquirer's UK turnover is more relevant than worldwide turnover.

We consider that mandatory information powers and stop-the-clock powers in respect of main parties in Phase 1 of the merger review are a logical corollary to the introduction of a mandatory regime and statutory timetable (although, as indicated above, we consider that there is a serious risk that the current proposed thresholds are far too low). However, we consider that imposing such obligations (including the potential penalties for non-compliance) on third parties may lead to a substantial burden on such parties, particularly if the latter are SMEs.

5. A stronger antitrust regime

This chapter sets out three options for achieving a greater throughput of antitrust cases: (1) retain and enhance the OFT's existing procedures; (2) develop a new administrative approach; (3) develop a prosecutorial approach. We also ask about the case for statutory deadlines for cases and for civil penalties for non-compliance with investigations, set out considerations relating to private actions and invite views on the powers of entry and of investigation and enforcement.

***Q.8** The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime, in particular:*

- *Options 1-3 for improving the process of antitrust enforcement;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

***Q.9** The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.57, and the costs and benefits of these.*

***Q.10** The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.*

Comments:

Answers to Qs.8-10:

Each of the three options proposed in the consultation are associated with significant disadvantages:

- Option 1 (retaining the existing system) would not in our view go far enough: we consider that statutory timetables are required in order to expedite the current system.

- Option 2 (develop an Internal Tribunal) would have many advantages, particularly in terms of achieving efficiencies - requiring the case team to bring a fully-reasoned case before an Internal Tribunal within a statutory deadline is likely to improve significantly the pace of decision-making. However, in our view, Option 2 would still carry too much risk of "conviction bias", even if Article 6 ECHR protections are technically respected. Also, we consider that the CAT should retain full merits jurisdiction given the quality and rigour of CAT judgments.

- Option 3 (develop a 'prosecutorial' approach) would in our view represent too radical a change to the existing system.

On balance, we consider Option 1 to be the "least worst" option. However,

although we welcome the appointment of the procedural adjudicator, we consider that existing procedures require significant reform. We consider the existing system to be too opaque in respect of the overbroad discretion afforded to the OFT in conducting its investigation. The OFT is a public body which is subject to the Principles of Good Administration, which include a duty of transparency, subject to Part 9 of the Enterprise Act 2002.

In particular, we believe the fact that there is apparently currently no duty on the OFT in an antitrust investigation to disclose a reasonable amount of information to the company being investigated unless/until a Statement of Objections is issued to be a contributory factor to the slow pace of antitrust decisions. We consider that improving the flow of information to the company being investigated would allow that company to engage in more meaningful discussions to resolve the investigation at an earlier stage, e.g. in terms of getting certain issues "off the table" by seeking to persuade the OFT that there is no case to answer in respect of such issues by providing exculpatory or other relevant evidence.

We consider that the right of such a company to make effective representations to the competition authorities is hampered by the limited disclosure of information on the investigation. This is particularly the case where the OFT is relying upon evidence provided by a third party immunity/leniency applicant which competes with the company under investigation: in such circumstances, it is important that there is a balanced exchange of views early on in the process.

Moreover, we consider that the apparent lack of a duty currently on the OFT to disclose a reasonable level of information to the company before a Statement of Objections is issued to be contrary to such company's rights of defence and potentially an infringement of the right to a fair trial guaranteed under Article 6 ECHR. Article 6(3) ECHR provides that a company charged with a criminal offence is *at a minimum* entitled to be informed promptly and in detail of the nature and cause of the case against it. Not providing such a company with a reasonable level of detail of the investigation against it and by not providing such information within a reasonable period after the commencement of the investigation in our view breaches such a company's ECHR rights. Under the Human Rights Act 1998, it is unlawful for the OFT to breach a company's ECHR rights.

We note that the OFT accepted before the CAT in the *Napp* case that proceedings that may lead to the imposition of a penalty under the Competition Act 1998 Act constitute a "criminal charge" or "criminal offence" for the purposes of Article 6 ECHR and that the CAT agreed with the parties that this was correct.[1] We further note that the current consultation emphasises the "criminal" nature of the potential penalties that may be imposed by the OFT as a result of such an investigation; the current consultation states that such penalties are "*essentially punitive in nature*".[2]

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1 *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1, paragraphs 93 - 99.

2 BIS, *A Competition Regime for Growth: a Consultation on Options for Reform*, March 2011, at page 143.

The current system takes no account of the potential damage to a company's reputation and/or share price which can occur while that company is under investigation for a number of months - or even years - before the decision whether to issue a Statement of Objections is taken. A company under investigation should have the opportunity to avoid further costs, uncertainty and ongoing damage to its reputation by being given more information at an earlier stage in the process.

Accordingly, we consider that the antitrust regime could benefit from incorporating certain features of the merger regime insofar as any decision by the competition authority to proceed to a full antitrust investigation should be a fully reasoned and transparent decision. We suggest that this decision marking the transition from 'Phase 1' to 'Phase 2' should be at the point when the 'reasonable suspicion' is threshold is passed so that a formal investigation can be initiated.

Finally, appropriate safeguards should be put in place regarding documents that are submitted under an application for leniency during a Commission investigation as there is a concern about their protection from disclosure in a collective action anywhere in the EU and/or US.

6. The criminal cartel offence

This chapter sets out options for making the cartel offence easier to prosecute: (1) removing the dishonesty element and introducing prosecutorial guidance; (2) removing the 'dishonesty' element and defining the offence so that it does not include a set of 'white listed' agreements; (3) replacing the 'dishonesty' element of the offence with a 'secrecy' element; (4) removing the 'dishonesty' element and defining the offence so that it does not include agreements made openly.

Q.11 *The Government seeks your views on the proposals set out in this Chapter to improve the criminal cartel offence, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.12 *Do you agree that the 'dishonesty' element of the criminal cartel offence should be removed?*

Q.13 *The Government welcomes further ideas to improve the criminal cartel offence.*

Comments:

Answers to Qs.11-13:

We do not see a good case for removing the 'dishonesty' element of the

criminal cartel offence. 'Dishonesty' has been a recognisable and familiar element of many criminal law offences in England and Wales for at least the past thirty years. Given that no case has yet properly tested the role of the dishonesty element within the criminal cartel offence (and the current consultation admits as such in para. 6.15), we consider that there is no clear justification for its removal. An offence which carries a deterrent maximum (five years' imprisonment) needs to have the requisite mental element to reflect the seriousness of the offence - this mental element is in our view satisfied by the dishonesty ingredient.

Further, we do not consider that any useful precedents on this issue can be derived from the criminal cartel cases that have been brought to date: the *Marine Hoses* case resulted from plea bargain arrangements entered into by UK citizens detained in custody in the US which required the relevant individuals to plead guilty to the OFT indictment - the dishonesty ingredient was not in that case required to be proved; in the *British Airways* case, the difficulty of proving dishonesty was not a contributory factor to the OFT's decision not to offer any evidence in that case.

In any event, any lack of awareness in the general population should be addressed through intensified competition advocacy rather than through removing a constituent element of the cartel offence.

To remove the dishonesty element and narrow the scope of the offence through the introduction of prosecutorial guidance (as to the kinds of agreement that would infringe the cartel offence) and/or white-listed agreements would not in our view achieve the required standards of legal certainty. We doubt whether such an approach would be compatible with the ECHR: in particular, Article 6(3) ECHR, which (as indicated above) provides that a company charged with a criminal offence is *at a minimum* entitled to be informed promptly and in detail of the nature and cause of the case against it.

We also question whether the OFT's role as both criminal prosecutor and responsible for enforcing the civil regime is compatible with the fair trial obligations of Article 6 ECHR, given the clear tensions between the civil enforcement process (particularly in the context of a leniency programmes which requires full co-operation from a company) and the need to respect the individual rights of an accused person.

Finally, in our view, the dishonesty element cannot be simply substituted by a "secrecy" requirement: it would not provide the requisite level of legal certainty as a large number of commercial agreements may be considered confidential - i.e. secret - without necessarily involving the mental element of concealment from the customer typically associated with cartel activity. Any attempt to refine further the "secrecy" element, for example by distinguishing between "active" and "passive" secrecy, would we believe simply result in a redefinition of the dishonesty element, without the advantages associated with employing an established ingredient of the criminal law.

7. Concurrency and sector regulators

This chapter sets out three options for improving the use and coordination of competition powers: (1) sector regulators could agree on a common set of factors to take into account when deciding whether to use sectoral or competition powers or competition law primacy could be enhanced; (2) the CMA could act as a central resource for the sector regulators; (3) the CMA could coordinate the use of competition powers across the landscape.

Q.14 *Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?*

Q.15 *The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.16 *The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.*

Comments:

Answers to Qs.14-16:

Given that there is a perceived problem that the sectoral regulators are not using their competition powers effectively and/or lack the necessary experience to do so, we consider that it may be a more efficient use of resources for the CMA to investigate competition matters involving the regulated utilities, with the sectoral regulators acting in a consultancy capacity. We note that the OFT has begun to increase its work in relation to utilities (e.g. the current market studies into organic waste and off-grid energy).

8. Regulatory appeals and other functions of the OFT and CC

This chapter sets out the Government's view that the sectoral reference/appeal jurisdictions of the CC should be transferred to the CMA. We also propose the development of model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

Q.17 *Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?*

Q.18 *The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.*

Answers to Qs.17-18:

BLP acts for a number of utility clients, whose interests will be substantially affected by the Government's decisions on these points, In particular, we have discussed these questions with a large water sector client. The comments below reflect those discussions, and are therefore focussed on the regulation of water and sewerage undertakers.

At present, the CC is the "appeal body" for Ofwat's price control determinations and licence modification proposals. The CC carries out a full re-determination of the matter (i.e. it can consider all of the issues open for consideration by Ofwat, and is not limited to areas of dispute between the parties).

By contrast, if Ofwat makes a determination that an undertaker has breached its licence or a statutory duty (and Ofwat imposes a financial penalty or makes an enforcement order), then only judicial review is available, and the venue is the (arguably inexpert) High Court. By contrast, if Ofwat makes a decision that an undertaker has breached the Competition Act 1998, appeal is to the (arguably expert) CAT and it is "on the merits" (i.e. the CAT can consider whether the decision was correct, not merely whether it was take properly/lawfully).

We would submit that the current arrangements are less than optimal:

- there is inconsistency between the various appeal routes, with no clear justification for the differences;
- taking a price determination to the CC is viewed as a "roll of the dice" for undertakers, since the CC may re-open a "settled" issue. (as it did in the Bristol Water appeal, reducing the WACC) - the consultation actually asks whether the CC/CMA should restrict itself to areas of dispute, which, if accepted would be a huge improvement for undertakers; and
- there are differences in the ways that these issues are dealt with across regulated sectors, for no apparent reason. For example, telecoms price appeals are dealt with by the CAT (with CC involvement); electricity code modifications are dealt with by the CC under a special procedure; airport price determinations involve the CC making recommendations to the CAA.

The present consultation is an ideal opportunity for Government, in conjunction with the current reviews of Ofwat and Ofgem, to reform the institutional architecture for utility regulation in the UK.

How might the system look ideally?

In our view, government should take this opportunity to create consistency across the regulated sectors by expanding the jurisdiction of the CAT in

relation to regulated sectors.

Under this new regime, price determination appeals and licence/Code modification appeals would all go to the CAT, and the CC/CMA would be involved in the determination of particular economic issues. Ideally, a way would be found for the CAT process to be an appeal (i.e. a determination of matters in dispute), rather than a complete redetermination, although it is acknowledged that to the extent that one element of a price determination is amended on appeal, this could potentially have knock-on consequences for other elements of that price determination. Licence and statutory breach appeals would also all go to the CAT, and be subject to full merits review (same as for CA98 appeals).

We consider that such a reform would allow a body of regulatory precedent to develop, whereby similar issues in different sectors are approached in consistent ways.

If this opportunity to reform regulatory appeals were taken, then it would significantly reduce the need for model regulatory processes, since regulatory processes would follow a standard process, with a common set of institutions performing uniform functions across different sectors.

9. Scope, objectives and governance

This chapter sets out that the CMA should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA and proposes that the CMA will: have clear, and potentially statutory, objectives to underpin prioritisation; be accountable to Parliament; and, have an appropriate governance structure for a single decision making body. We ask:

Q.19 *The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.*

Q.20 *The Government see your views on whether the CMA should have a clear principal competition focus?*

Q.21 *The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.*

Comments:

Answers to Qs.19-21:

We are not persuaded of the need to have two Boards: we note that major UK public limited companies operate with one Board combining both executive and non-executive functions.

We are not persuaded of the need to transfer consumer functions away from the OFT to consumer bodies, such as Citizens Advice (para. 9.28), given the clear overlap between the OFT's competition and consumer functions. Moreover, we do not see the need to transfer such powers to less resourced and/or fragmented consumer bodies and would be concerned about the increased possibility of "turf wars".

10. Decision making

This chapter sets out a number of alternative models for decision-making that can deliver robust decisions through a fair and transparent process. The Government considers that a number of alternative models can deliver this, final choices will be guided by considerations relating to: the degree of separation between first and second phase decision making; degrees of difference or uniformity of approaches between tools; and, the role and nature of panels in the different tools available to the single CMA.

***Q.22** The Government seeks your on the models outlined in this Chapter, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the regime and to business, supported by evidence wherever possible.*

***Q. 23** The Government also seeks views on the appropriate composition of the decision-making bodies set out in this Chapter, and in particular what the appropriate mix of full-time and part-time members is.*

***Q.24** The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process.*

Comments:

Answers to Qs.22-24:

We do not support the loss of the panel in the context of merger control: we consider that the panel performs a valuable function in the decision-making process.

We consider the "sense check" provided by an Internal Tribunal to be valuable, provided that there is the requisite degree of independence, transparent procedures and the ability to take fully reasoned decisions.

11. Merger fees and cost recovery

Merger Fees

This chapter sets out options to recover the cost of the merger regime either by changing the level of the existing fee bands, introducing an additional fee band or moving to a mandatory notification system. We ask:

12. ***Q.25*** *What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/ mandatory notification regime?*

Recovering the cost of anti trust investigations

The Government is considering introducing legislation to allow the enforcement authorities to recover the costs of their investigations in antitrust cases. This would only apply where there has been an infringement decision and a fine, non-infringement decisions and investigations dropped for any other reason would not be charged. We ask:

13. ***Q.26*** *Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons.*

14. ***Q.27*** *What are your views on recovery where there has been an infringement decision being based on the cost of investigation?*

15. ***Q.28*** *What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?*

It is foreseen that any costs to be recovered would be shown on the infringement decision detailing the fine. We ask:

16. ***Q.29*** *Do you agree that this would be an appropriate way to collect the costs, separates the fine from costs in a way that makes appeals clear*

and that the costs should go to the consolidated fund rather than the enforcement authority?

It is foreseen that the costs element could be appealed. This raises the question of what happens when the appeal is successful, partly successful or when the appeal is on the method of penalty calculation only rather than the substance of the decision. We ask:

17. ***Q.30*** *Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?*

Currently there is no legislation to allow the enforcer to charge costs so this would mean amending the Competition Act 1998. An alternative introducing cost recovery would be to amend the same Act to allow the level of fine to cover the cost of the investigation. We ask:

18. ***Q.31*** *Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?*

Recovery of CC costs in telecom price appeals

19. ***Q.32*** *Do you agree that telecoms appeal should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing? If not, your response should provide reasons supported by evidence where appropriate.*

Recovery of CAT costs

The Government propose to make a change in the CAT's Rules of Procedure to allow the CAT to recover its own costs following an appeal. The decision whether or not to impose costs will rest with the tribunal who will be able to set aside the costs where the interests of justice dictate e.g. when the appellant is a small business and the costs of pursuing their legal right of appeal prevent them from doing so. We ask:

20. ***Q.33*** *What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?*

Comments:

Answers to Qs.25-33:

We do not consider that the costs of conducting an investigation should be imposed on the parties involved where there is a finding of infringement. We are not aware of any objective process by which such costs would be taxed (unlike court proceedings) and we consider the imposition of fines to be sufficient financial deterrent.

If such costs are recovered, in our view they should be fair and proportionate to the gravity of the infringement and subject to appeal. We also consider that it would be useful to import well-established civil litigation principles when determining how costs are allocated in the event of an appeal, for example when determining how the CAT is recover its own costs (para 11.55).

We do not consider that it would either fair or proportionate for a company defending only some of a number of infringements in a large cartel investigation to have to pay for the cost of investigating all infringements. Moreover, given that it could create incentives for companies to make misleading allegations in order to secure a competitive advantage, we consider that in such circumstances false allegations should result in a costs penalty.

We consider that the proportionality points made in paras. 11.41 and 11.42 in terms of telecom price control appeals would be equally applicable to the recovery of costs by the competition authority in respect of a competition investigation.

Further, we consider that the imposition of such costs could potentially undermine the policy objectives of the leniency regime, even if the immunity applicant were also given immunity in respect of costs.

We consider that the proposed merger fees set out in paras. 11.11 and 11.12 (£65,000 to £195,000 and £60,000 to £220,000) would impose a disproportionately high burden on small businesses, and act as a disincentive to pro-competitive M&A activity.

We further consider that proposed merger fees in the context of a mandatory merger control regime with relatively low jurisdictional thresholds - which would inevitably catch mergers where there is no competitive overlap (see comments above) - are also disproportionate. We do not consider that the proposal that the current merger regime be amended to achieve full cost recovery is compatible with the stated objective of the proposed reforms to promote growth.

Finally it is important that any fees be clearly set out so as to provide clear guidance on the general costs associated with merger activity.

12. Overseas information gateways

This chapter seeks views on how well the information gateway arrangements are working and whether there is a case for change. In particular, whether

there is a case for amending the thresholds for disclosure of merger and markets information to promote reciprocity between overseas regulators and the UK and, if so, how this might be done. We ask:

21. ***Q.34*** *How well is the current overseas information disclosure gateway working? Is there a case for reviewing this provision?*

13. Questions on the impact assessment

Mergers

In this section we outline, and quantify where possible, the costs and benefits of the proposed options regarding strengthening the current voluntary notification regime, introducing mandatory notification, exempting small businesses from merger control, streamlining the merger process and adjusting merger fees.

22. ***Q.35*** *Do you have any evidence about the costs to businesses of notifying mergers to the OFT, in terms of management time and legal fees?*

Anti-trust

In this section we outline the costs and benefits of the options for achieving a greater throughput of antitrust cases including enhancing the OFT's existing procedures, developing a new administrative approach and developing a prosecutorial approach. In addition we review the costs and benefits of retaining the 'dishonesty' element in the criminal cartel offence but exclude the possibility for defendants to introduce economic evidence produced after the events that constitute the alleged dishonest 'agreement'.

23. ***Q.36*** *Under a prosecutorial system, are there likely to be changes to the overall costs of the system?*

The Impact Assessment presents the likely costs and benefits and the associated risks of the policy options. In order to do this it is necessary to understand the costs and benefits of the current system and to make assumptions. Further, the Impact Assessment seeks to show the extent to which the policy options meet the objectives.

24. ***Q.37*** *Do you have better information about the costs and benefits of the current competition regime?*

25. ***Q.38*** *Do you have evidence that indicates better assumptions could be made to estimate the costs and benefits of the proposed options?*

26. ***Q.39*** *Are there likely to be any unintended consequences of the policy proposals outlined?*

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Bird & Bird LLP

Bird & Bird

RESPONSE OF BIRD & BIRD LLP
to the Department for Business Innovation and Skills' consultation
"*A competition regime for growth: a consultation on options for reform*"

1. Introductory comments and executive summary

1.1 We welcome the opportunity to contribute to the Department for Business and Skills' ("BIS") consultation of 16 March 2011 on the future of the competition regime in the UK.

1.2 We agree that improvements could be made to the regime, both in order to increase its effectiveness and to reduce the burden on business. We note that there may also be some advantages to having a single Competition and Markets Authority ("CMA"). BIS will no doubt be considering carefully the relative advantages and disadvantages of the various options, bearing in mind that the impact of the changes will differ for antitrust, merger and markets cases.

1.3 In summary, our views are:

- *markets* – the regime should be improved, without increasing the burdens on businesses;
- *mergers* – the voluntary system of notification should be retained, with tighter statutory controls and timescales;
- *antitrust* – either a prosecutorial system should be introduced, or the current structure should be retained but with procedural improvements;
- *criminal cartel offence* – either the dishonesty element of the offence should be retained on the basis that judicial clarification will in due course emerge, or Option 3 should be pursued of revising the definition of the offence (to provide clarity) to cover cartel arrangements entered into in conditions of secrecy; and
- *concurrency* – the concurrent competition law powers of the sector regulators should be retained.

2. Markets regime

2.1 Market investigations currently last for years (particularly once appeals and remedy implementation are taken into account) and involve significant costs for the businesses involved. Although there is an inherent cost to businesses that are subject to investigations under the markets regime, the burden should be no more than absolutely necessary.

2.2 The consultation document states that the potential changes to the markets regime are intended to "*address concerns to modernise and streamline the regime and increase clarity and reduce burdens*".[1] We support the intention behind the proposals to reduce burdens on business and streamline the markets regime. However, further consideration is needed to ensure that, by decreasing the timescales for market investigations, the burden on businesses

[1] Paragraph 3.6. All references are to the BIS consultation document of 16 March 2011 unless otherwise stated.

is not inadvertently increased rather than decreased. We note that the current procedure already imposes a significant burden on businesses to provide information, particularly in the early stages of an investigation. We would support an improvement in the extent to which information obtained during the course of a market study is passed on to those carrying out a full market investigation, in order to minimise the burden on businesses. This may be easier to achieve within a single competition authority than under the current regime.

2.3 We agree that there should be a clearer statutory definition of both a market study and the threshold for initiation of the procedure. The introduction of statutory timescales for market studies would also provide further certainty for business. However, the suggestion that statutory timescales could be introduced only for those market studies "*that have the potential to be referred to a phase 2 investigation*"[2] seems confusing and arbitrary.

2.4 The consultation document suggests that the markets regime is being under-utilised. However, the regime has been used extensively in certain sectors, such as financial services. When considering whether the current level of market investigations is sufficient, BIS should also take into account the high burden placed on businesses that are subject to such investigations. Moreover, it should consider what further measures could be taken to ensure that market studies and investigations are directed at sectors of the economy that have not previously been subject to such investigations but which are also not functioning effectively. Any increase in the number of market investigations would of course have significant resource implications for the CMA.

2.5 We do not consider that the suggestion of enabling market investigations to be carried out into particular practices across different markets is a workable one, nor is it in the public interest.

3. Merger regime[3]

3.1 Our view is that the best option would be to retain the voluntary system of merger notification, although potentially with some procedural changes, such as tighter statutory controls and timescales, which would also bring more certainty to the regime. In our experience, the voluntary regime is good for business and provides a degree of flexibility not available in other jurisdictions.

3.2 The introduction of a mandatory merger regime would remove this flexibility. If a system of mandatory merger notifications is introduced, the proposed thresholds of worldwide turnover of £10 million in respect of the acquirer and UK turnover of £5 million in respect of the target should be increased significantly. The implementation of a mandatory system with such low thresholds would be a retrograde step that is not justified by the evidence BIS has put forward of anti-competitive mergers allegedly escaping review. It would also have detrimental effects both for business and for the CMA's resources, as it would result in a significant increase in the number of mergers being notified in the UK, many of which would be uncontroversial in competition law terms. We note that the proposed thresholds are significantly lower than other comparable jurisdictions, and that other such countries (for

[2] Paragraph 3.20
[3] Our comments on merger fees are set out at 7.2 below.

example Germany and Spain) have in the last few years amended their thresholds so as to reduce the number of mergers caught by their regimes.

3.3 We consider that the hybrid system put forward as a further potential option would be likely to introduce further uncertainty for business.

4. Antitrust regime

4.1 As far as Option 1 (retain and enhance the existing procedures of the Office of Fair Trading ("OFT")) is concerned, we agree that, if the current structure is to be retained, there are considerable improvements that could be made to the existing procedures. We note that one of the proposals under consideration is the introduction of administrative timetables for antitrust investigations. In theory, administrative timetables might improve the current regime, as the duration of antitrust investigations is uncertain and varies considerably from one case to another. However, administrative timetables in antitrust cases could lead to further burdens for businesses, by subjecting them to even shorter deadlines for responding to information requests and potentially forcing the CMA either to rush into an infringement decision or close a case prematurely in order to meet the deadline. We also note that administrative timetables for antitrust cases are relatively uncommon in other jurisdictions.

4.2 We support the rationale behind Option 2 (develop a new administrative approach), namely to separate the decision making from the investigative function within the CMA. However, we are not convinced that such a separation within the same body would work in practice. It is arguable that such internal segregations will not be effective and that the decision making body would not be sufficiently free of influence from the investigatory team. The implementation of Option 2 would therefore not improve the present position.

4.3 We support the proposals under Option 3 of moving to a prosecutorial system, removing decision making powers from the OFT and transferring them to the Competition Appeal Tribunal ("CAT"), provided that the system can be established so as to ensure that it runs efficiently and to minimise duplication (as compared with cases that are appealed to the CAT under the present system). Our view is that such a system would mitigate some of the problems of the current regime, ensuring that the decision making process is impartial and that the rights of the defence are respected.

4.4 BIS' view is that antitrust cases do not result in a large enough number of decisions to create a sufficient deterrent effect, and that this "*may be in part due to the overall weight of procedural requirements*".[4] We recognise that the OFT is under an obligation to ensure that it produces high quality and well-reasoned decisions, and that this has an effect on the number of cases it can take. In light of these constraints, the OFT understandably focuses on high impact cases. However, as well as leading to a reduced deterrent effect, the relatively low number of cases investigated by the OFT also limits access to justice for smaller players with more limited resources (which are insufficient either to present the level of evidence required by the OFT or to bear the costs of private enforcement), whose cases are unlikely to fulfil the OFT's prioritisation criteria.

[4] Chapter 5, page 45

4.5 Although an increase in the number of antitrust cases is desirable from a deterrence point of view, we note that BIS does not want to burden businesses unnecessarily and we do of course agree with that sentiment. Improving speed and predictability for businesses is important, but BIS should also take into account the fact that that the system itself is inherently unpredictable, particularly in antitrust cases, as competition authorities do not know at the outset whether they will find an infringement of the antitrust prohibitions.

5. Criminal cartel offence

5.1 The criminal cartel offence is in principal an effective deterrent for both individuals and undertakings, in addition to the general antitrust prohibitions. However, in order to constitute a deterrent in practice, the offence must be prosecuted by the competition authority concerned. There seems to be an assumption on the part of BIS that the reason for the low number of criminal cartel cases is that the dishonesty element of the offence makes it more difficult to prosecute. Practitioners had hoped that the OFT's criminal prosecution of the BA executives would shed some light on the way in which "dishonesty" would be assessed in a competition law context. It is possible and indeed likely that judicial clarification of dishonesty will result from the bringing of prosecutions of the offence in the future. We therefore question whether any present uncertainty surrounding the dishonesty element of the offence would in fact stand in the way of future prosecutions and therefore of an increased deterrent effect. In addition, both Government and OFT officials stated at the time of the introduction of the cartel offence that they regarded cartels as theft.[5] If this characterisation justified the inclusion of the dishonesty element of the offence, it is difficult to see what has changed that would justify its removal. In any event, we do not consider that it is appropriate to widen the scope of the offence merely to make it easier for the OFT to bring criminal cases. Any change should in our view rather be directed at clarifying the nature of the activities which are to be regarded as criminal under the current legislation.

5.2 On this basis, we also consider there would also be an advantage in bringing about legislative clarification of the nature of the offence whilst at the same time respecting the principle underlying the dishonesty element of the offence in the present legislation. Therefore we support the proposal of revising the definition of the offence so as to cover cartels entered into secretly (Option 3). This is on the basis that the secrecy element of such agreements will be indicative of the perpetrators' awareness of the wrongful nature of such arrangements and that amending the statutory definition accordingly will make it more practicable and clearer, so that individuals are provided with certainty as to what behaviour falls within the criminal offence. However, some of the alternatives put forward by BIS would not in our view provide further sufficient clarity compared to the current position, in particular the introduction of guidance for prosecutors (Option 1).

[5] See, for example, the statement by Melanie Johnson MP: "*Dishonesty is an important part of the provision, as I have emphasised and members of the Committee have accepted. I agree with my hon. Friend that cartels are theft. We must not lose sight of that important point.*" (House of Commons Hansard, Standing Committee B, Enterprise Bill, 23 April 2002, column number 169) and Margaret Bloom, Director of Competition Enforcement, OFT: "*This activity is equivalent to theft. It has no redeeming features. Effective deterrence is very important. However, we will select carefully the cartels for criminal prosecutions, concentrating on the serious ones. We expect that there will be a relatively small number of prosecutions – but they will have a significant deterrent effect.*" (*Key challenges in public enforcement*, A speech to the British Institute of International and Comparative Law, 17 May 2002).

6. Concurrency and sector regulators

6.1 We agree with the conclusion in the consultation document that it would be counter-productive to end the current concurrency arrangements.

6.2 While it is true that there have not been a significant number of infringement decisions by the sector regulators, and that this will have an impact on deterrence, a distinction needs to be drawn between the amount of activity in regulated sectors and the number of infringement decisions.[6] For example, Ofcom has investigated a number Article 102/Chapter II cases, but has not taken any infringement decisions. It is of course logical that sector regulators will investigate more abuse of dominance cases than Article 101/Chapter I cases.

6.3 The consultation document suggests that the relatively small number of antitrust cases brought by the sector regulators may be due to "*a lack of critical mass of competition expertise within some sector regulators*".[7] However, it is not clear that this is in fact the case. We also note that there is no suggestion of a lack of competition expertise within the OFT, but there are also criticisms of the relatively low number of cases being taken by the OFT.

6.4 The consultation document suggests that market investigation references are "*particularly suited to identifying ways of improving competition in regulated markets*".[8] However, it is not entirely clear how BIS intends market investigation references to be used for example in the case of communications markets, which are already subject to lengthy market reviews and appeals. The consultation document refers to market investigation references being used in the BT Openreach and BAA cases. However, note should also be taken of cases such as Pay TV/Movies, where Ofcom decided in August 2010 to refer the market to the Competition Commission ("CC"),[9] following a three year investigation by Ofcom into the matter and three and a half years after the complainants had asked for the market to be referred to the CC.[10] This does not appear to be an appropriate and effective use of the market investigation powers given to sector regulators; Ofcom should decide sufficiently early whether to act as a facilitator, referring the matter to the CC for a full investigation, or to use its own competition or regulatory intervention powers, even though experience shows that it may then perhaps have to defend its decision against an appeal in the CAT.

6.5 We do not agree with the statement in the consultation document that abolishing concurrency might lead to more competition cases being brought in the regulated sectors.[11] In our view, it is important to retain the expertise of the sector regulators in their particular sectors; there is a danger that even fewer cases would be taken by the CMA if concurrent powers were abolished.

7. Cost recovery

7.1 We understand why BIS wishes to explore possible options for recovering some or all of the costs associated with the competition regime. We are not,

[6] Paragraph 7.7 refers to a "*comparative lack of activity*" by the sectoral regulators in antitrust cases.
[7] Paragraph 7.10
[8] Paragraph 7.12
[9] Ofcom Premium pay TV movies reference, 4 August 2010
[10] Ofcom Pay TV Statement, 31 March 2010, paragraph 2.8
[11] Paragraph 7.15

however, convinced that the proposals put forward are in all cases justified; in any event, they may have unintended and negative consequences.

7.2 In relation to merger fees, we note that the UK currently has significantly higher merger fees than other comparable jurisdictions. The suggestion that merger fees under the voluntary regime could be increased to £195,000 or £220,000 for the largest mergers is likely to act as a disincentive for companies to do business in the UK.

7.3 BIS accepts that the proposal for the CMA to be able to recover its costs from a party found to have committed an infringement of the antitrust provisions is "radical".[12] We consider that the introduction of such powers would place an additional burden on businesses and may lead to unintended consequences, such as an increased incentive for parties to an investigation to settle the case or offer commitments. Such increased pressure on parties to settle could have implications from a rights of defence perspective. In addition, the closing of cases by means of commitments has a detrimental effect on the body of case law and its subsequent deterrent effect. We are pleased BIS has stated that it is not intended that the CMA's costs would be recovered from a party if they have not been the addressee of an infringement decision.[13] However, if the prosecutorial system is adopted, an undertaking that is found not to have infringed competition law should be able to recover its costs from the CMA.[14]

7.4 BIS envisages that the figure for costs could also be appealed. This would create an economic incentive to appeal and a significant further litigation burden. If such decisions were regularly appealed, this would distract the CMA/CAT from their primary tasks under the competition regime.

7.5 The consultation document suggests that the OFT's penalty guidance could be amended to increase fines to allow for the costs of an investigation. We do not consider that such a move would be appropriate; penalties should be set on the basis of objective criteria, not by reference to administrative costs.

7.6 BIS also raises the possibility of enabling the CAT to recover its costs from the losing party. We would encourage BIS to consider this proposal carefully, and in light of the practice applicable to other courts and tribunals.

Bird & Bird LLP
London, 13 June 2011

[12] Paragraph 11.17
[13] Paragraph 11.19
[14] We note that, as set out in the judgment of the European Court of Justice in Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., now Netia SA*, where a national competition authority concludes that the conditions for infringement of Article 101 or 102 TFEU are not met, it can only find that there are no grounds for action, rather than issue a non-infringement decision.

British Airways

BRITISH AIRWAYS PLC

RESPONSE TO BIS CONSULTATION ON REFORM OF THE UK COMPETITION REGIME

1. GENERAL COMMENTS

Principles of the UK competition regime

1.1 We consider that the following key principles should underpin the reform of the UK competition regime: (i) quality of case selection; (ii) quality and robustness of decisions; (iii) procedural fairness; and (iv) timeliness of processes. Indeed, the success of the regime should be judged on these factors, rather than the quantity of decisions churned out each year.

1.2 In particular, a significant downfall of the current regime is the length of time taken across all areas of the regime, which creates uncertainty and acts as a drain on the time and resources of both the competition authorities and private parties. The efficiency of the regime could be improved in part through the following: (i) improvements in relation to prioritisation and case selection; (ii) a move to a prosecutorial system; and (iii) the application of reasonable deadlines and timescales. That said, it is of crucial importance that the streamlining of processes should not come at the expense of the quality of decisions or of procedural fairness.

Creation of the CMA

1.3 We understand that the Government is highly likely to implement its plans to create a single competition authority – the Competition and Markets Authority ("CMA"). We support the formation of the CMA as a competition law centre of excellence, and recognise that benefits can be attained through the elimination of certain duplication.

1.4 However, in creating the CMA, serious consideration should be given to how the optimal competition authority should look, rather than simply taking existing elements of the OFT and CC (which is likely to result in bias towards the current system). The CMA should fit in with the structure and support the aims of the new regime. In particular, we submit that the set up of the CMA should reflect the following points:

- The move to a prosecutorial system, to apply across the whole regime (see further below).

- The requirement for an independent second stage review across all areas of the regime - a "fresh pair of eyes".
  - A prosecutorial model would offer this, with the CAT acting as a check and balance. Conversely, if second phase review were to be carried out within the CMA, there would be a risk of institutional bias.
  - At the very least, if the Government decides not to adopt a prosecutorial model, we would advocate the creation of an independent panel within the CMA, derived (as the current CC panels currently are) from a wide range of independent experts with broad business, legal and economic experience, rather than from a competition law background only.

- The CMA should be more accessible and transparent, with parties able to engage with staff to a greater extent. At present, the authorities are perceived as remote and intransparent.

Support for a prosecutorial system across the whole regime

1.5 We fully support the development of a prosecutorial approach to be applied across the whole of the competition regime, including antitrust investigations, mergers, and the markets regime. We consider the move to a prosecutorial approach would lead to significant benefits, including the following:

- The independence of the decision-maker from the prosecutor, in turn ensuring greater protection for the rights of the defence and increased accountability.

- Provision for a "fresh pair of eyes" to review cases at a second stage.

- More efficient use of public resources and streamlined processes, with more targeted cases brought before the CAT and a reduction in the number of appeals (at present, we note that a significant proportion of antitrust decisions are appealed before the CAT).

- More robust decisions and efficient outcomes for consumers and business.

1.6 We recognise that the move to a prosecutorial model would be a significant change to the system and would take some time to implement. However, this consultation provides the perfect opportunity to make such a bold change, in order to change the regime for the better.

2. MARKETS REGIME

Strong case to be made against market studies and investigations

2.1 In our view, the current UK market regime is interventionist, going beyond competition law enforcement and bordering on market regulation. Studies and investigations are lengthy, costly and have not been adequately targeted, and remedies have on the whole been ineffective and toothless.[1] Moreover, investigations have been focused to a large degree on consumer issues, which are not subject to the current consultation.

2.2 Overall, we question whether the markets regime is necessary at all. The CMA - as a competition law centre of excellence - might be better suited to address competition failures in markets through its CA98 powers, with pure consumer issues forming part of the separate Government consumer-focused consultation.

Suggested improvements to the current markets regime

2.3 Whilst we question the necessity of the current markets regime, we would suggest the following improvements in the event it is retained:

- The adoption of a statutory set of guidelines setting out (i) the CMA's priorities and (ii) clear and reasonable thresholds for both information gathering and

[1] The structural remedies imposed in BAA are provided as an example of the success of the regime, however this case can be seen as a one-off, attributable to the structural monopoly which had been afforded to BAA.

launching market studies and full investigations. The triggers should revolve around a serious need for investigation based on evidence regarding competition (rather than consumer) issues.

- Remedies to be tried before, and imposed by, the CAT (except where parties agree or accede to certain remedies). At the very least, structural remedies should be put before the CAT (or, if this suggestion is not adopted, an independent panel).

- The CAT to set clear parameters of investigation at the outset.

- The imposition of strict timescales (e.g. 6 months for first phase review, 18 months for second phase investigation, with a back-stop date prior to remedies being put before the CAT).

- As noted above, provision for fully independent second stage review is also of paramount importance.

Comments on specific BIS proposals

2.4 We make the following comments in relation to certain of the proposals set out in the consultation:

- To give the CMA the power to target multiple markets in the same investigation could lead to unwieldy investigations and runs counter to the desire to streamline processes. Further, we note that the authorities have recently struggled with cases involving a number of parties.

- Public interest issues should be for Ministers who are accountable to Parliament, rather than the CMA which is intended to be a competition law centre of excellence. At the very least, the situations in which the CMA could report on public interest issues should be tightly limited.

- Giving SMEs the right to bring super-complaints would send out the wrong message (i.e. that they rather than consumers are the victims). SMEs can readily bring complaints to the competition authority in relation to potential breaches of Chapters I and II of the CA98.

3. MERGER REGIME

Support for the voluntary system

3.1 We see no reason for significant reform of the UK merger regime, which works well and is highly regarded. In particular, the voluntary regime affords flexibility to businesses, and in turn reduces costs to both business and the authorities and avoids unnecessary delays.

3.2 A move to a mandatory system would inevitably result in a higher number of filings, a significant proportion of which would raise no competition concerns. Moreover, there is no evidence that substantial cases with anti-competitive effects are being missed under the current regime, nor that there are adverse effects on the consumer. Any concern that the voluntary system encourages 'gaming' is unfounded - no business wants the uncertainty of completing without clearance if there are competition issues, particularly given the risk of complaints.

3.3 Within the voluntary system, we would support the following:

- The adoption of bright-line, statutory exemptions for both small mergers and small markets. The small mergers exemption should be based on the target's market share alone and set at a reasonable level (e.g. <£15 million); otherwise, entrepreneurship may be discouraged.

- The adoption of framework for independent second phase review. Again, a prosecutorial system would offer this, with cases either put before the CAT for review at Phase II, or reviewed at Phase II by a fully independent panel with remedies then put before the CAT.

- The shortening of timescales for both first and second phase review.

- Clarification of the "material influence" test, and a move away from the "share of supply" test, in order to remove uncertainty.

3.4 As regards the proposed measures to strengthen the current regime, in particular we do not support the introduction of "stop the clock" powers, which would create uncertainty in relation to the timing of transactions.

Comments on the proposal for a mandatory system and the hybrid system

3.5 Our main concern regarding the mandatory system is the very low level of thresholds proposed. A mandatory regime with such unreasonably low thresholds would catch more mergers and create more 'red tape', increasing the burden for businesses; precisely what the consultation seeks to avoid. We would only support the mandatory system if the proposed thresholds are sensible.

3.6 We strongly oppose the proposed hybrid system, which would combine the formality of mandatory notification (with the unreasonably low thresholds proposed) with the uncertainty of the share of supply test.

Merger fees

3.7 We strongly object to any increase in merger fees. The fees in the UK far exceed those imposed by other jurisdictions. Further, the merger regime is for the benefit of society as a whole, rather than a service provided to business, and should thus be largely funded by the Treasury rather than by the business community.

4. ANTITRUST REGIME

4.1 We consider that antitrust enforcement is in clear need of reform. At present, the process for antitrust investigations leads to significant waste of time and resources for both businesses and the authorities. Problems include the inadequate targeting of investigations; the length of time taken for investigations; intransparent processes and a lack of ability to engage with the authorities, and the lack of accountability of decisions in the first instance, leading to costly and time-consuming appeals to the CAT.

4.2 We fully support the development of a prosecutorial approach, which as noted above would bring significant benefits to the regime, including a reduction in time and costs for both business and the authorities. Cases should be tried before - and remedies

imposed by - the CAT, with clear deadlines for investigations. A reduction in timescales could also be achieved by affording parties an opportunity to settle before the case reaches the CAT.

4.3 Further, the procedures for case selection should be strengthened, with clear guidelines adopted. In our view, the CMA should target the most serious infringements of competition law, rather than attempting to simply increase the number of infringement decisions.

4.4 In relation to the proposal for cost recovery, we consider that there is ample scope for costs to be paid out of antitrust penalties. If the Government does move towards cost recovery in antitrust cases, this should be a two way street, with the right for businesses to recover costs in the event of an abandoned investigation or finding of no infringement.

5. CRIMINAL CARTEL OFFENCE

5.1 It is far too early to tell whether the dishonesty element of the criminal cartel offence is working. Only two prosecutions under the Enterprise Act have been brought to date: *R-v- Whittle, Brammar & Allison*, in which there was a guilty plea, and *R v Burns and others*, which resulted in the acquittal of each defendant. To water down the *mens rea* element of the offence on the basis of such limited experience, and seemingly on the back of the collapse of one trial, would be a knee-jerk reaction. Further time is needed before a proper assessment of the offence can be made.

5.2 In response to the suggestion that the dishonesty element makes the offence "harder to prosecute", it is noted that the thresholds are higher in order to distinguish hard care cartel activity from other anticompetitive activity, criminal sanctions from civil. Given the serious nature of the offence, strong evidence is indeed needed for a criminal conviction. It may be that the lack of prosecutions is more due to the fact that many cartels have not been of the hard-core nature the offence is designed to catch.

5.3 Moreover, in our experience, the leniency process does not sit well with the conduct of criminal investigations and the criminal cartel offence. In particular, there is enormous pressure on the leniency applicant to over-admit in order to reap the benefits of immunity from prosecution. This places the reliability of evidence in doubt, and adversely affects the rights of the defence. The authorities should also maintain tighter control over investigations, rather than outsourcing large parts to leniency applicants.

British Airways Plc, 13 June 2011

British Brands Group

A competition regime for growth

Response to BIS consultation

SUMMARY

The British Brands Group endorses the goal of a world class competition regime that ensures vibrant, competitive markets that deliver for consumers and promote innovation, productivity and growth. We urge caution where changes are driven by a desire to economise (particularly if potential economies are small) and suggest focus is placed on ensuring authorities have the tools and quality of staff they need to deliver the intended regime.

1 The British Brands Group welcomes the opportunity to respond to the Department of Business Innovation and Skills' (BIS) consultation on the UK's competition regime.

2 The British Brands Group is a trade organisation that provides the voice for brand manufacturers in the UK. Its role is to help create in the UK the optimum climate for brands to deliver their benefits to consumers. Such benefits include broader choice, ever-better products through innovation, strong value and consumer confidence. A list of members is provided at the end of this response.

3 The competition regime plays a central role in shaping the environment in which brands may best serve consumers. The important enabling features include:

- an environment of vigorous but fair competition which stimulates investment in innovation, quality, diversity and reputation from which a fair return may be earned;
- the ability to launch new and better products on the market without facing undue barriers;
- the ability for companies of all sizes to distribute and present their products and services to consumers through diverse and competitive channels that serve well the hugely diverse needs of shoppers;
- an environment which inhibits free riding on hard-earned brand reputations.

The consultation is therefore directly relevant to branding in the UK and to our members. We confine our input to those areas directly affecting brands.

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4 WHY REFORM THE COMPETITION REGIME?

Improving the robustness of decisions and strengthening the regime
We support this objective overall but have no specific comments on the four proposals.

5 **Supporting the competition authority in taking forward the right cases**
There is value in the competition authority being able to carry out investigations into similar practices across different markets, something we explore further below.

6 **Considering whether the CMA should have a duty to keep key sectors under review**
There would be value in keeping economically important sectors under review, something we again explore below.

7 **Improving the speed and predictability for business**
Speed and predictability need of course to be balanced with rigorous analysis and robust decisions. It is important to strike a balance.

8 **Potential creation of a single Competition and Markets Authority**
While there may be scope to achieve some economies in a combined authority, we suspect these may be limited, being struck by work by Professors Davies and Lyons of the University of East Anglia which estimates savings at some £1.3 million pa or 0.18% of the measured policy benefits[1]. We feel the prime focus should be on an approach that delivers a stronger competition regime and more robust decisions. The delivery of a stronger regime is more a function of quality and depth of analysis, quality of staff, and adequate resource as opposed to the structure of the organisation(s) involved.

9 We would be concerned were a single competition authority to be created primarily as an economy measure, with the consequent competition regime being weaker rather than stronger. This would be bad for consumers and bad for the majority of businesses that seek to play by the rules.

10 As a good example of the value of the current approach, the OFT's review of the groceries market in 2005 dismissed concerns presented to it. It was only after a challenge via the Competition Appeal Tribunal (CAT) that the market was referred to the Competition Commission, resulting in a finding of two AECs accompanied by remedies. While we are encouraged that a two-tier approach would be preserved within a combined authority, it is not clear how a decision at the first stage might be challenged as effectively as it was in this instance.

11 We also have concerns about the effectiveness of remedies. An illustration is the way the OFT allowed the Supermarket Code of Practice that was recommended by the Competition Commission in 2000 to be watered down. This contributed to the remedy's lack of effectiveness. While we do not believe that this particular problem would arise under the new Enterprise Act regime, it demonstrates that currently the competition authorities may not always operate in full harmony and consistency. It would be important for a new single authority to be able to adopt and enforce fully effective remedies.

[1] Centre for Competition Policy, Research Bulletin Issue 21, Summer 2011

12 We strongly endorse an approach to the competition regime that delivers decision-making that is independent of Government, decisions that are high quality, transparent and robust, competition practice that is coherent and predictable, and practices that are efficient, streamlined and rigorous. We support reform that improves efficiencies and reduces costs to business and the public purse where these do not reduce the effectiveness of the regime and agree that authorities should have the right legal powers and tools to address competition problems.

13 A clear example of the problems caused by the current regime where, despite the Enterprise Act reforms, some remedies are still retained by government, is the recommendation by the CC that a Grocery Market Adjudicator (GCA) be appointed to enforce the Groceries Supply Code of Practice (GSCOP). Because the CC had inadequate powers, it had to leave the implementation of this essential part of its two-part remedy to the government which is having problems introducing the necessary measures three years after the CC's report. It now seems unlikely that the proposed GCA will come into being until more than five years after the CC's report!

14 A STRONGER MARKETS REGIME

Enabling investigations into practices across markets

There is merit in the competition authority being able to carry out investigations into similar practices across different markets. There are two areas that illustrate the benefits of such an approach:

- practices by large retailers that transfer excessive risks and unexpected costs to suppliers, found to have an adverse effect on competition in the grocery market, are likely to occur in other markets, for example where large retailers act as gatekeepers to significant numbers of consumers;
- where large retailers sell products under their own brand name (ie own label products) as well as branded products, they perform a dual and conflicting role. They are important retail customers for branded suppliers while at the same time being direct horizontal, product competitors. This throws up a significant anomaly. Commercially sensitive information is required from the supplier by the retailer in order to secure shelf space for a product while at the same time that same information may be freely used to influence that retailer's own label strategy. The sharing of such information between horizontal product companies would normally represent a serious breach of competition law. This arrangement – of retailers being at one and the same time customer and competitor – occurs in a number of different markets, such as clothing, pharmacy, DIY, electrical and electronic products.

15 **Enabling independent reports to Government on the public interest**

There would be value, in an ideal world, in the CMA being empowered to deliver reports on the public interest to Government as there are occasions where a strictly competition-focused analysis may be too narrow. In the grocery market for example concerns have been raised over the diversity of outlets available to shoppers (and planning rules generally), the decline of the high street and some labour practices (prior to the licensing of gangmasters) that fall outside a strict competition analysis but which nevertheless are relevant to the health of the market and the public interest. However, as pointed out in the consultation document, expanding the CMA's remit in this way

should not jeopardise the extent or quality of competition work and therefore will inevitably have resource and cost implications. These may not be affordable in the current economic climate.

16 **Reducing timescales and information gathering powers**
It is hard to be prescriptive over the timescales of investigations when individual cases may be so different. Certainly for businesses, 18 – 24 months of uncertainty can seem a long time, particularly where there may be a prospect of significant ramifications at an investigation's conclusion.

17 In contrast, the groceries market investigation took two years and yet we felt there were some important aspects of the market which were not scrutinised in sufficient depth. The way in which the timescale of the investigation was conducted however, with clear published target dates and regular updates, could not be faulted.

18 We would therefore be nervous were timeframes to reduce where markets are complex and investigations large. Some flexibility should be afforded the CMA, allowing it to determine from the outset of an investigation whether a 24 or 18 month timeframe would be followed, with the flexibility to extend an 18 month investigation if necessary up to a maximum of 24 months.

19 While timescales are an important factor in investigations, appropriate staffing is also a crucial factor. Any analysis should be founded on the true mechanics, customs, practices and experiences of the marketplace under investigation, rather than be a classroom theoretical study.

20 There would be advantages in there being information-gathering powers for Phase 1 studies were this to reduce timescales and lead to more robust findings at this stage.

21 The timescales for the implementation of remedies are most in need of reduction, a point that affects both the competition regime and Government practice. We have already registered our dismay that a remedy to an AEC found in 2008 in the groceries market investigation is still not fully implemented three years later and looks as if it may not be fully implemented for a further two years (we refer to the GSCOP monitored and enforced by a GCA). While there has been an intervening General Election, the Government has demonstrated no urgency in implementing the CC's clear recommendations, has published a Draft Bill that dilutes the remedy recommended by the CC and is inviting further input on a measure that was fully thought through by the CC and has already been subject to numerous consultations. Certainly authorities need to implement remedies quickly but where Government action is required, a greater level of priority needs to be afforded the delivery of recommended remedies.

22 **Statutory definitions and thresholds**
The current regime works well in this respect. The introduction of statutory definitions and thresholds for the initiation of a market study is likely to introduce an obstacle that would run counter to the objective of establishing a more robust competition regime.

23 **Powers to require parties to appoint and remunerate an independent third party to monitor and/or implement remedies**
This would be a significant improvement to the tools available to authorities to remedy AECs and one we would fully support. Such third party monitoring and enforcement of remedies is particularly important in markets where an independent body is required to ensure remedies work and to provide guidance to the market. Were the CC to have had those powers, the GSCOP and GCA remedy would be in place by now, to the benefit of consumers and to the market at large.

24 Where third parties are appointed to monitor and implement remedies, it is important that they have the necessary powers to be effective. Such powers are likely to include (depending on context and market):

- information gathering powers;
- the ability to receive credible information from whatever source;
- the ability to preserve the anonymity of those providing information on the performance of the remedy;
- the ability to provide guidance to the market;
- the ability to publish reports;
- the ability to recommend to parties actions that would lead to compliance;
- the ability to impose reasonable penalties (where appropriate);
- the full support of a public authority, to reinforce and back up the work and decisions of the third party.

25 **The review of remedies to be structured to ensure that they operate as intended**
A broader approach to the current threshold of a "change in circumstances" in reviewing remedies would help in ensuring remedies were effective. An example involves the SCOP which was a watered-down remedy from that recommended by the CC in its 2000 report and which we strongly believed – and which the CC later confirmed – did not operate as intended. The OFT however was unable to instigate a fundamental review of the remedy as there were no sufficient "changes in circumstances" in the market. The ineffectiveness of the SCOP became a contributory factor to the second market investigation, a factor that might have been removed were a full review possible.

26 A STRONGER MERGER REGIME

We have no specific views on the options presented, none of which address the concerns we have over the current merger regime. These relate to the depth and scope of merger analysis, each of which we explore further below.

27 In terms of the depth of analysis, we remain concerned that some mergers have been cleared without a full assessment of the implications. The strongest example relates to Tesco's acquisition of T&S Stores in 2002 which marked the entry of large supermarkets into the convenience sector. This merger was cleared without detailed scrutiny by the Competition Commission, allowing large supermarkets to apply their significant buyer power acquired in the one-stop shopping sector to the convenience sector. Since then other acquisitions have followed, with Tesco now having some 1,600 stores in the convenience sector (source: IGD and William Reed) and other supermarkets following suit. The impact of such acquisitions with the accompanying transfer of buyer power from

one sector to another continues to be felt, with non-affiliated convenience stores declining by 5% in the twelve months prior to April 2010 (source: IGD). Such mergers which represent such a significant shift in the structure of a market warrant detailed investigation and any proposed changes to the merger regime need to reflect this requirement.

28 Since the Competition Commission first found the UK grocery market to be concentrated in 2000, there has been further consolidation, sometimes on large scale as in the case of Morrisons' acquisition of Safeway but also by "creeping" acquisition of one or two stores at a time by the major supermarkets. It is important for authorities to be alert to the implications of grocery retailers increasing market share not by organic growth based on consumer preferences (i.e. shoppers voting with their feet) but by store acquisitions which, in the absence of new market entrants, inevitably reduce competition. At some point, the perceived benefit of any merger or acquisition – a benefit which is seldom tested after the event – will be outweighed by the risk of increased retail margins, increased consumer prices and greater distortion of competition between suppliers. We are also keen that merger analysis considers fully both upstream and downstream factors.

29 In terms of scope of merger analysis, we are keen to see this consider fully both upstream and downstream effects. In the grocery market, an AEC was found in the CC's 2008 market investigation concerning large retailers passing unexpected costs and excessive risks to their suppliers, yet no merger inquiry by the OFT or CC since this finding was made has included a detailed assessment of upstream effects. Consumers' access to a choice of products at a range of differing qualities and to new products is a fundamental aspect of consumer welfare so it is surprising that, where upstream competition problems have already been found (and the chosen remedies not fully implemented and assessed to be effective), merger analysis does not take such aspects into full consideration. Initiatives to improve the UK's merger regime need to take account of such requirements.

30 SCOPE, OBJECTIVES AND GOVERNANCE

Prioritisation

We support the principle that the high level objectives for the single CMA should include keeping economically important markets or sectors under review. The grocery market is a good example where such an approach would be relevant, having been investigated on two occasions since 1998 (excluding the Safeway / Morrison merger) and on each occasion been found to be concentrated and to have competition problems. The market continues to consolidate, with ongoing acquisitions of both a large number of stores (eg One Stop (Tesco)'s acquisition of Mills Group and Asda's acquisition of Netto) and individual stores (ie "creeping acquisition") which have not been subject to detailed scrutiny. Furthermore, the Competition Commission's (CC) remedy following its 2008 report has yet to be implemented in full and faces dilution in the forthcoming political stage of its introduction, raising concerns over its effectiveness. This is one example where a duty (whether statutory or otherwise) to keep important sectors under review is desirable.

31 **National consumer enforcement**

We await the forthcoming consultation on '*institutional changes for the provision of consumer information, advice, education, advocacy and enforcement*'. Suffice it to say at this stage, we have concerns over the concentration of consumer enforcement on the Trading Standards Service which is locally or regionally structured. We fear this would lead to weaker enforcement of consumer protection matters that have a national dimension.

32 We are also concerned that such a measure would weaken a consumer protection regime that is already flawed. A case in point is the enforcement of the Consumer Protection from Unfair Trading Regulations (CPRs), specifically in relation to misleading similar "parasitic" packaging. This is packaging that closely mimics the packaging of familiar brands in order to dupe shoppers and free ride on the hard won reputations of branded goods. On implementation of the CPRs, BIS emphasised the duty on the OFT and TSS to enforce in this area. In practice, neither have been willing to do so, despite being presented with examples and evidence of how such similar packaging misleads consumers. The proposed change to the consumer enforcement regime holds no prospect of improvement in this situation.

J A Noble
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13th June 2011

Members

A G Barr

Akzo Nobel

British American Tobacco

Coca-Cola Nik

e

Diageo PZ

Cussons

The Edrington Group

Philip Morris

Elle Macpherson Products

Procter & Gamble

GlaxoSmithKline Re

ckitt Benckiser

Henkel Red

Bull

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S C Johnson

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CMS Cameron McKenna

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13 th June 2011

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Response to consultation on options for reform: a competition regime for growth

Dear Mr Lawson,

I am writing on behalf of The British Private Equity and Venture Capital Association ("BVCA") to the consultation document issued by the Department for Business Innovation & Skills ("BIS") on 16 March entitled, "A Competition Regime for Growth: A consultation on Options for Reform". For ease of reference, I refer to this document as "the Consultation", and references to paragraphs are to paragraphs of that document.

The BVCA is the industry body for the UK private equity and venture capital industry. With a membership of over 450 firms, the BVCA represents the vast majority of all UK-based private equity and venture capital firms and their advisers. This submission has been prepared by the BVCA's Legal & Technical Committee, which represents the interests of BVCA members in legal, accounting and technical matters relevant to the private equity and venture capital industry.

I estimate that the private equity and venture capital members of the BVCA together undertook approximately 150 transactions in each of the 2010 and 2009 calendar years that could be considered as "mergers" under the UK merger control system.

The BVCA welcomes the open approach being adopted by BIS in its consultation exercise and would welcome the opportunity to discuss with BIS its thinking once the public consultation period has ended. There are the following aspects of the Consultation on which I would like to comment specifically on behalf of the BVCA.

The BVCA has consciously limited its scope in this letter to commenting on the merger control regime aspects of the Consultation (and it has not commented on the other proposed changes to the competition rules being considered) because merger control is the most significant aspect of the Consultation likely to affect the BVCA's membership as a whole.

1. **INSTITUTIONAL REFORM**

1.1 The BVCA would encourage BIS to approach the issue of institutional reform from the perspective of trying to ensure that the UK's principal competition authorities operate as efficiently and transparently as possible, and in a manner consistent with the Government's Growth Agenda.

1.2 In this context, the BVCA would welcome institutional reform if that is likely to lead to more efficient, effective and transparent decision-making and enforcement in relation to the competition rules. The BVCA would not however encourage institutional reform if it would undermine those objectives or if the changes were made simply in order to reduce administrative costs.

1.3 The BVCA would also urge caution to ensure there is no adverse impact on those aspects of the current competition system that are undoubtedly working especially well. In this context, we would draw particular attention to the following:-

1.3.1 The current Panel system of the Competition Commission ("CC"), including for the in-depth review of mergers;

1.3.2 The speed and effectiveness of the judicial scrutiny currently exercised by the Competition Appeal Tribunal ("CAT"), especially in relation to its judicial review of merger decisions and its "On the Merits" reviews of competition enforcement decisions.

1.4 By contrast, for market studies and market investigations the BVCA believes that there is considerable scope, if approached on an open-minded basis, to streamline and accelerate the current system, especially in relation to the stages of fact-finding and consideration of possible remedies. Institutional reform could play an important part in reducing the very onerous burden on business of fact-finding and accelerating the speed of overall decision-taking.

1.5 In all of the above, the BVCA would however be concerned to ensure that any institutional reform is not at the expense of ensuring due process and does not undermine the rights of defence of parties dealing with the competition authorities.

1.6 In conclusion, the BVCA's members do not believe it is necessary to merge the OFT and CC but if it is decided to proceed with a merger of these bodies, the BVCA would urge you to take account of the key principles under which the Competition and Markets Authority ("CMA") should operate as set out above.

2. MERGER CONTROL

2.1 Mandatory vs voluntary notifications: The BVCA's members consider that the current voluntary system of merger notification in the UK works effectively, ensuring that potentially problematic mergers are reviewed appropriately by the Office of Fair Trading ("OFT"). In our opinion, there is very little evidence to suggest that there are material numbers of potentially problematic mergers that are not subject to review by the OFT. The current voluntary system of merger control is, in the opinion of the BVCA's members, generally flexible, efficient, timely and proportionate.

2.2 In fact, we would highlight that, contrary to a supposed drawback of a voluntary merger notification system as identified in the Consultation, for many of the BVCA's members, who have a fiduciary duty to protect investor monies, the potential downsides of completing an anti-competitive merger without prior notification are immense with the risk, should fire sales be ordered, of significant financial loss and reputational damage. We consider that, for similar reasons, most UK listed companies would also be likely to pre-notify potentially difficult mergers to the OFT. Accordingly, in our opinion, the UK's voluntary notification system does not encourage or facilitate the BVCA's members (or other companies) to undertake non-notified anti-competitive mergers.

2.3 Moving to a system of mandatory pre-notification (or even the hybrid system considered in the Consultation) would introduce unnecessary delay and cost (in terms of management time and advisers' fees in drafting notifications and securing merger clearances), and impose an additional burden on the parties involved. The overall impact of such a move would likely be needlessly to complicate and delay the process of efficient rationalisation amongst businesses. The need to create a CMA sufficiently well-resourced to cope promptly with a significant increase in the number of merger notifications (the great majority of which would be unlikely to raise any competition aspects) would of course lead to additional costs that business would in turn be required to pay for through the merger fees.

2.4 Proposed thresholds for mandatory notifications: One proposal being considered (paragraph 4.27) is that there should be mandatory pre-notification of mergers where the target's UK turnover exceeds £5m and the world-wide turnover of the acquirer exceeds £10m. These thresholds would be exceptionally low compared with other European merger control regimes and would capture a very large number of "no issues" acquisitions. In the BVCA's opinion, such a mandatory pre-notification regime would impose delay and heavy costs on doing business in the UK (which would undoubtedly adversely affect the BVCA's members), for little obvious public benefit.

2.5 A mandatory pre-notification system would also disadvantage the BVCA's members compared to the current voluntary notification system, including because:-

2.5.1 companies would lose their current competitive advantage of being able to close acquisitions quickly if there is no competitive overlap between them;

2.5.2 it would dampen businesses' incentives to undertake pro-competitive mergers (for example, transactions that would be efficiency-enhancing);

2.5.3 there would be commercial and financial risks to businesses arising from the mere fact of additional delay, especially in those cases where there is an injection of monies due to take place into distressed businesses.

2.6 Proposed "hybrid system": An alternative proposal ("option 1") is that there should be mandatory pre-notification of mergers where the target's UK turnover exceeds £70m but the CMA would retain the ability to investigate mergers satisfying the share of supply test. Such a proposal incorporates many of the negative features of a mandatory regime (e.g. the additional delay and costs for business) without achieving any of the benefits that such a system could potentially generate (e.g. clarity and certainty on the scope of the competition authority's jurisdiction). Such a hybrid system would not be welcomed by the BVCA's members who need upfront clarity and certainty about when the UK's merger control rules will apply.

2.7 Retain voluntary system but strengthen interim measures: An alternative option ("option 2") considered in the Consultation (paragraphs 4.10-4.16) is to retain, but improve, the current voluntary merger control system (under which there are no automatic bars to completing a merger). For all of the reasons discussed above, of the options considered in the Consultation, option 2 is the strong preference of the BVCA's members. The BVCA's members would consider aspects of this option to be the most proportionate and effective of the merger control options considered in the Consultation provided that in its final form it is discretionary, proportionate and targeted. A blanket restriction of the kind contemplated in option 1 is not proportionate or targeted and should not be imposed.

2.8 The BVCA's members would suggest the following as areas in which the current voluntary system's effectiveness could be improved:-

2.8.1 Granting the CMA the power to require the production of information and documents from the merging parties and interested parties (including customers and competitors), which would allow the CMA to verify the accuracy of comments being made to it by interested parties;

2.8.2 Changing administrative practice so that the CMA engaged in a much more interactive process of seeking to conclude undertakings in lieu of an in-depth investigation;

2.8.3 Removing the share of supply test. The current test is very unclear and leads to upfront legal uncertainty about whether a particular transaction may be subject to the UK's merger control regime. Removing the share of supply test (or even replacing it with a market share test) would help to create clearer, bright-line, jurisdiction tests and would also bring the UK's merger

system into closer alignment with the approach taken to merger control in other OECD countries.

2.9 The BVCA would however suggest (contrary to paragraphs 4.12-4.15) that the CMA should have a discretion to determine whether or not separate undertakings are necessary, rather than there being an automatic statutory bar on integration during a phase 1 investigation. Although hold separate undertakings may obviously be merited in certain cases, there will undoubtedly be many cases where it is equally obvious that they are unnecessary. An example of the latter would be an investment by a private equity or venture capital fund in a company, when there is no horizontal overlap or vertical relationship between the company and other entities in which the fund has investments. To have an automatic statutory bar on integration during a phase 1 investigation for these latter situations would seem disproportionate and unnecessary, and would not be welcomed.

2.10 If the CMA were to retain discretion in relation to hold separate undertakings, the BVCA would not be opposed to the introduction of reasonable and proportionate measures to strengthen the CMA's powers. This could be achieved by giving the CMA the ability to suspend all integration steps where merited pending negotiation of tailored hold separate undertakings (the alternative proposal at paragraph 4.13) and/or implementing the proposals at paragraph 4.15 to clarify the legislation to make clearer the type and range of measures that the CMA could take. Giving the CMA discretion to apply these powers (rather than an automatic statutory bar) should alleviate the concern raised by BIS that parties will be discouraged from notifying a completed deal until a level of integration has already taken place.

2.11 Proposed exemptions for small mergers: There is a suggestion that "small mergers" be exempted from the merger control regime. However, it is proposed (paragraph 4.41) that this exemption would only cover transactions involving a target with UK turnover below £5m and an acquirer with a worldwide turnover not exceeding £10m. The BVCA welcomes the suggestion that there should be a small mergers exemption, because the great majority of the smaller acquisitions undertaken by the BVCA's members do not raise any material competition issues. However, in practice, because these thresholds would be set at such a low level the exemption would be unlikely to benefit a substantial number of mergers involving members of the BVCA, and we would encourage higher thresholds to reduce unnecessary administrative burden and associated costs.

3. MERGER FEES

3.1 The BVCA notes the intention to set merger fees at a level sufficient to recover the full costs of the merger control regime (paragraph 11.9). In certain cases (paragraphs 11.11 and 11.12) this would involve very significant increases in merger fees, to levels that the BVCA would consider to be unreasonable and excessive. Under a mandatory notification system it is envisaged that merger fees would be set at lower levels (paragraph 11.15), but these would be significantly outweighed by the management time and advisers' fees involved in the preparation of notifying and securing clearance for mergers that had to be pre-notified.

3.2 I would also point out that there is no obvious correlation between the UK turnover of the target and the administrative effort required to ascertain whether the transaction merits an in-depth merger review. Consequently, setting merger fees by reference to UK turnover is a blunt and not necessarily fair means of trying to achieve the principle of full cost recovery.

3.3 Finally, the BVCA would in principle support the introduction of statutory timetables for phase 1 and phase 2 reviews, and the periods specified at paragraphs 4.45-4.47 of the Consultation appear reasonable. The BVCA would however be concerned to ensure that the introduction of statutory timetables did not compromise the quality or robustness of the CMA's decisions, especially for clearance decisions at phase 1. An

important aspect of this will be to ensure t hat the CMA has, in practi ce, appropriate levels of ex perienced a nd high -quality sta ff and that its intern al pro cedures an d dealings with the business community are efficient and properly focused.

The BVCA would of course be willing to discuss further this response or BIS' intentions following completion of the public consultation exercise.

Yours sincerely,

Simon Witney
Chairman – BVCA Legal & Technical Committee

British Retail Consortium

BRITISH **RETAIL** CONSORTIUM
for successful and responsible retailing

A Competition Regime for growth: A Consultation on Options for Reform

The British Retail Consortium (BRC) represents the whole range of retailers, from the large multiples and department stores through to independents, selling a wide selection of products through centre of town, out of town, rural and on line stores. The retail industry employs over 2.5 million people, over 10% of the total UK workforce. Our policies and positions are approved by Committees representative of the whole membership.

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A Competition Regime for Growth: A Consultation on Options for Reform

Comments from the British Retail Consortium (BRC)

The BRC wishes to comment on just a few key aspects of the consultation.

The need for change

The consultation itself commends the current Competition regime and notes that it is considered both by domestic and international bodies as among the top 2 or 3 regimes in the world.

Against that background we believe evidence based policy making demands that there needs to be a very good case for change if the Government is to avoid charges of change for the sake of change – especially for such wide ranging changes as those suggested.

Scope

It is a matter of regret that the Consultation on institutional changes for the provision of consumer information, advice, education, advocacy and enforcement' has not been published in time to be considered alongside this document, as was promised.

The relationship between the consumer protection agenda and the competition agenda, as delivered by the OFT, has always been considered a particularly beneficial element of UK competition and consumer policy both locally and internationally. By merging the competition functions of the OFT and those of the Competition Commission into a single CMA there is a danger that this perspective will be lost, especially if the CMA has, perhaps inevitably, a primary competition focus.

It is significant that the Coalition Programme for Government stated; The Government believes that action is needed to protect consumers, particularly the most vulnerable, and to promote greater competition across the economy'. In other words the Coalition statement recognised the effectiveness of a twin, linked approach to competition and consumer protection in the broadest sense. As the document points out, the OFT applies prioritisation principles to assess proposals for market studies against a range of criteria including impact on consumers and the wider economic benefit; strategic significance, risks and resources before initiating a market study and indeed in determining any follow up action. While it could be argued that the CMA could do likewise, as these are no laid down in statute, the difference is that the OFT itself has twin responsibilities so that a concern for the impact on consumers is part of its culture. In the absence of twin responsibilities, this culture will be different – hence the potential need for ensuring in the remit that such interests are taken into account.

We believe it is vital that this twin approach is underlined in the remit of the CMA if it is to survive in the long term and become part of the culture of the CMA. In the absence of such a remit, there is a danger that the focus on pure competition will predominate at the expense of the consumer dimension. For example, market studies may indicate a lack of pure competition but it is the impact on consumer detriment that should also be a focus of decision makers. Competition is not necessarily an end in itself.

Our concern is all the greater because the stated objectives of reform are

- Improving the robustness of decisions and strengthening the regime
- Supporting the competition authorities in taking forward the right cases
- Improving speed and predictability for business

These are all worthy objectives but there is no mention of the consumer dimension in this.

Extension of the super-complaint system to SME bodies

The BRC does not believe that the super-complaint system should be extended to SME bodies.

While we have no problem with an understanding that features that have an impact on competition that significantly harms the ability of SMEs to compete MAY be detrimental to competition and growth, we believe that where such problems are perceived to exist and where they may have such an effect, the CMA would already have the power and desire to investigate. It is not always the case that SMEs are unable to compete because large firms are squeezing them out deliberately as opposed to the market squeezing them out. If SME bodies were given the power to make supercomplaints, there is a danger that there would be pressures on them to do so regardless of the true reasons for such lack of access to the market.

It is perhaps significant that in the grocery supply chain decisions, the Government has chosen not to proceed with third party complaints to the Adjudicator. It is also significant that many of the original complaints by suppliers were found not to be proven. If the Government chose to proceed with supercomplaints of this nature it would be important for the policy in every area to be effectively co-ordinated and that the Grocery supply chain should be excluded to avoid double jeopardy in view of the special arrangements that have been put in place for that sector.

Requirement on parties to appoint and remunerate an independent third party to monitor and/or implement remedies

The BRC notes that something akin to this arrangement has been the most controversial element of the Grocery Supply Chain GSCOP Code,

It raises questions of allocation of costs among the parties – and can be a significant burden on business.

It also raises questions of private enforcement of decisions as opposed to public enforcement.

For these reasons we do not believe the extension is desirable.

BSA

Business Services Association

Response to BIS consultation on a Competition Regime for Growth

Introduction

1. The BSA – Business Services Association – is the industry body that represents companies, and their advisors, delivering outsourced and business services across the private and public sectors. A full list of members is provided as an annex.

2. BSA members are involved across the full range of public service provision – including health, education, defence, environmental, food service, waste management, housing and other local services, IT and digital services, security and transport.

3. Full members have a combined worldwide turnover of c.£80 billion and employ around two million people. In the UK the combined turnover is c.£30 billion and around half a million people are employed across the country. The turnover across all outsourced sectors is in the region of £207 billion – some 8% of total economy-wide output – and the industry employs 10% of the UK workforce.[1]

4. In responding to this consultation we wish to focus on its mergers aspects. The following key points form the basis of our response:

   - There is little need for material change to the competition regime.
   - The proposed thresholds for mandatory notifications are too low.
   - The proposed option of a mandatory-voluntary hybrid merger notification system would introduced many of the drawbacks of a compulsory system with none of its benefits.
   - Proposed exemptions for small mergers would have little practical benefit.
   - Any changes to the competition regime must place a premium on simplicity – a worst case scenario would be for the changes to act as a disincentive for mergers.

Question 5: The government seeks your views on the proposals for strengthening the mergers regime

The BSA's members consider that the current voluntary system of merger notification in the UK generally works effectively in ensuring that potentially problematic mergers are reviewed appropriately. Moving to a system of mandatory pre-notification would in our opinion introduce unnecessary delay and cost, in terms of lost management time and advisers' fees in drafting notifications and securing merger clearances.

[1] Oxford Economics report for the BSA, April 2011: *The Size of the UK Outsourcing Market - Across the Private and Public Sectors.*

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Question 6: The government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime.

One proposal being considered is that there should be mandatory pre-notification of mergers where the target's UK turnover exceeds £5 million and the world-wide turnover of the acquirer exceeds £10 million. Such thresholds would be exceptionally low and would capture a very large number of acquisitions that do not raise competition concerns. Such a mandatory pre-notification regime would impose delay and heavy costs on doing business in the UK.

An alternative proposal is that there should be mandatory pre-notification of mergers where the target's UK turnover exceeds £70 million but the Competition and Markets Authority (CMA) would retain the ability to investigate mergers satisfying the share of supply test. Such a proposal would introduce many of the negative features of a mandatory regime (e.g. the additional delay and costs for business) without achieving any of the benefits that such a system could potentially generate (e.g. clarity and certainty on the scope of the competition authority's jurisdiction).

There is a suggestion that 'small mergers' be exempted from the merger control regime. However, we propose that this exemption would only cover transactions involving a target with UK turnover below £5 million and an acquirer with a worldwide turnover not exceeding £10 million. The principle of a small mergers exemption is welcomed, but these thresholds would be so low that it would be of little practical benefit.

We note the intention to set merger fees at a level sufficient to recover the full costs of the merger control regime, potentially to a level of £220,000. In the BSA's opinion, the revised fee levels in a voluntary notification system would be unreasonably high. The fees proposed in a mandatory notification system would be set at lower levels, but business would also face the additional costs of external advisers, plus the opportunity cost of lost management time.

The BSA would of course be willing to discuss further this response or the department's intentions following completion of the public consultation exercise.

Annex: BSA members

Full Members

Amey	www.amey.co.uk
ARAMARK	www.aramark.co.uk
Babcock Infrastructure Services	www.babcock.co.uk
Balfour Beatty	www.balfourbeatty.com
Berendsen plc	www.berendsen.com
Capita	www.capita.co.uk
Carillion plc	www.carillionplc.com
ClearSprings	www.clearsprings.co.uk
Compass Group	www.compass-group.com
Ecovert FM	www.ecovertfm.co.uk
Enterprise	www.enterprise.plc.uk
G4S	www.g4s.com
Interserve	www.interserve.com
ISS UK	www.uk.issworld.com
John Laing	www.laing.com
Kier	www.kier.co.uk
MITIE Group	www.mitie.co.uk
Morrison Facilities Services Ltd	www.morrisonplc.com
OCS Group	www.ocs.co.uk
Pinnacle	www.pinnacle-psg.com
Rentokil Initial	www.rentokil-initial.com
Serco Group	www.serco.com
Sodexo	www.sodexo.com

Associate Members

3i	www.3i.com
Barclays Commercial	www.barclays.co.uk
Deloitte	www.deloitte.com
Grant Thornton	www.grant-thornton.co.uk
Harvey Nash	www.harveynash.com
KPMG	www.kpmg.co.uk
Lyceum Capital	www.lyceumcapital.co.uk
Metzger	www.metzger.co.uk
Navigant Consulting	www.navigantconsulting.com
Pinsent Masons	www.pinsentmasons.com
PricewaterhouseCoopers UK	www.pwc.co.uk
Reynolds Porter Chamberlain LLP	www.rpc.co.uk
Serco Institute	www.serco.com/institute
Trowers & Hamlins	www.trowers.com

BT

BT RESPONSE

BIS CONSULTATION
A COMPETITION REGIME FOR GROWTH:
A CONSULTATION ON OPTIONS FOR REFORM

EXECUTIVE SUMMARY

BT welcomes BIS' timely and comprehensive consultation on the UK competition regime. BT sets out briefly its comments on the questions of key importance to it in this executive summary. Those questions are examined in more detail in the attached Annexe.

Reform of the institutional structure

BT agrees with BIS that the UK competition regime has to produce high quality decisions and deterrence fairly and efficiently. For these objectives to be delivered, the cases brought under the regime must be:

(a) Well evidenced;

(b) Well analysed;

(c) Clearly articulated;

(d) Impartially decided; and

(e) Subject to substantive appeal.

The availability of an appeal on the merits is crucial both because it is necessary for natural justice and because it ensures authorities make robust decisions that stand up to scrutiny from both a substantive and procedural perspective. Appeal on the merits is necessary for fairness in all institutional arrangements and in respect of all decisions by competition authorities.

The quality of decisions (evidence, analysis and articulation) and procedures depends primarily on the quality and quantity of the resources available to the authorities and less on the particular institutional structure. Ensuring sufficient access to high quality resources should be one of the main aims of any reform.

The impartiality of decisions has to be founded nevertheless on a decision making structure which avoids any risk of conflict of interest and where outcomes are dictated solely by the evidence and the economic and legal analysis.

The Antitrust Regime

In the consultation, great weight is given to the small number of competition cases brought by the OFT and the sector regulators. This is portrayed as a weakness which undermines the deterrent effect of the competition regime. BT does not believe that this is a weakness or a justification for major reform. Nor does the assessment in the consultation reflect BT's own experience – at any one time since Ofcom's formation, BT has been the subject of at least one Ofcom competition law action.

The regime in its current form already discourages unlawful behaviour and encourages business to take positive steps to comply. The incentives to comply are numerous – and in this regard, it is of note that the OFT's own research[1] cites the risk of damage to reputation ('...the message that the business has a dodgy business model…') as the no.1 driver.

Briefly, in relation to the proposals for changes to the antitrust regime, BT favours option 1, the retention of the existing regime.

BT is opposed to option 2, an internal panel within the Competition and Markets Authority ("CMA") deciding antitrust cases with appeals lying by way of judicial review. A key requirement of the present regime is the CAT's power to review administrative decisions on the merits. That power should remain in all institutional arrangements.

One of the main reasons for the time taken to reach decisions is access to adequate resources. That begs the question as to whether more financial resources will be made available and whether or not larger numbers of more experienced personnel will be recruited. For instance, it would not be sensible to choose the prosecutorial approach, option 3, if the CMA had too few lawyers with the necessary litigation experience to perform this function effectively.

Cartels: If created, the CMA might consider following the European Commission's strategy of dedicating its resources to the eradication of cartels. In this context, the CMA would be better placed than the European Commission because it can also bring criminal proceedings against individuals for the cartel offence without having to take an infringement decision under the competition rules. Indeed, a focus on prosecuting the individuals involved in cartels has the potential to save resources and increase the deterrent effect. Again, the success of this approach depends to a material extent on resource. It would be inappropriate in this context to remove the

[1] Drivers of Compliance and Non-cCompliance with Competition Law, OFT Report May 2010. http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft1227.pdf

"dishonesty" element from the cartel offence. This is essential to safeguard the rights of the defence.

Concurrency

BT considers that Ofcom should keep its concurrent powers in respect of the competition rules and of market investigations. Concurrency is a positive feature of the current arrangements. Ofcom is an active user of its competition powers and has expert knowledge of the markets on which it operates. BT has been the subject of at least one competition law action brought by Ofcom ever since Ofcom's formation. Ofcom uses its competition law powers in way which complements its ex ante regulatory powers.

The UK competition regime should not be considered in isolation from or as a substitute for the regulatory regimes which govern communications and the other regulated sectors. Competition law and regulation in the UK complement one another and share the common goal of competitive markets for consumers and business. If there is a failure or infringement which requires the authorities to act, it should not matter which tool they use, competition law or regulation, as long as the outcome is appropriate, fair and proportionate.

There is no need in the communications sector for any further obligation to give primacy to competition law over regulation. Ofcom is already subject to such an obligation and Ofcom can use ex-ante and ex-post powers fairly and in a complementary way.

Market investigations

BT is in favour of retaining market investigations and of the introduction of powers to investigate certain practices across different markets. The concern that market investigation references are not made often enough by sector regulators is unjustified. Significant results can be achieved by means of undertakings in lieu as shown by the undertakings that BT gave to Ofcom in 2005 which have resulted in the functionally separate access network division within BT known as Openreach. The reference by Ofcom of movies on pay TV to the CC is an example where scrutiny of markets across the value chain can be effective in regulated sectors.

Regulatory appeals

The current depth of review by the CC of pricing matters referred to it by the CAT in the communications sector should be retained.

Merger control

The existing voluntary merger control regime should be preserved. This ensures flexibility for business and reduces costs. The threat of a completed merger being unravelled, together with proactive industry monitoring and intervention by the OFT, is sufficient to ensure that undertakings notify whenever a competition question arises.

Merger fees and cost recovery

Please refer to BT's comments in the attached Annexe.

ANNEXE

BIS proposals for reform of the institutional structure

BT Response

The UK competition regime has to produce high quality decisions and deterrence fairly and efficiently. For these objectives to be delivered, the cases brought under the regime must be:

(a) Well evidenced;

(b) Well analysed;

(c) Clearly articulated;

(d) Impartially decided; and

(e) Subject to substantive appeal.

The availability of an appeal on the merits is crucial and must be retained. It is necessary for fairness in all institutional arrangements and in respect of all decisions by competition authorities.

The shape of the institutional structure is less important in achieving high quality decisions and deterrence than making that structure function effectively. The number and quality of decisions depend squarely upon the competence of the authorities taking them, and therefore upon the resources available, rather than upon the structure of those authorities. The availability and skilful management of high quality resources will deliver the speed, robustness and predictability of decisions that BIS seeks and so should be a key focus for any reform.

Investigative and decision making processes can be made to deliver high quality decisions fairly and efficiently across two organisations or within one and the same organisation. There is no guarantee that a single organisation works better. Indeed, it appears easier to ensure impartiality where two independent institutions consider the same case.

As for questions of market structure, namely mergers and market investigations, where there are no grounds for suspecting an infringement at the outset, it is appropriate that there should be a two stage process, where the first stage seeks to

identify whether there are issues worthy of full investigation and the second stage looks at these in more detail from an independent perspective.

The current institutional arrangement with a separate OFT or sector regulator and CC is sound in principle. A potential difficulty is the control which the regime gives the OFT and the sector regulators over the flow of cases to the CC. Indeed, the number of cases referred to the CC is small with the result that the resources at the CC are under-employed. When cases are transferred a lot of time is spent by the CC in understanding and considering matters already analysed in stage one.

Both of these difficulties could be resolved by merging the OFT and the CC into a single organisation with shared resources. This would lead to an efficient work flow and consistent analysis.

If created, the new merged organisation should be in a position to take a corporate view of its policies in applying its responsibilities, which means having a chief executive and a board structure similar to the OFT's (and the sector regulators such as Ofcom). However, the independence of second stage processes in mergers and markets investigations should be underpinned by the use of independent panels, in the manner of the CC's current arrangements, with strict safeguards to ensure the independence of this second stage review.

This independence is an important part of ensuring that the rights of undertakings under investigation to a fair trial can be properly safeguarded. If the two authorities are merged then, however rigorous the internal structures, there is a risk that independence of decision making will be diluted. This is to be avoided at all costs.

Ultimately, quality and rigour in decision making as well as access to justice are vital and these attributes of the current regime should not be sacrificed simply to accelerate procedures or to increase the number of decisions. Any decisions by competition authorities must be appealable on the merits.

A stronger antitrust regime

BIS sets out three options for achieving a greater throughput of antitrust cases: (1) retain and enhance the OFT's existing procedures; (2) develop a new administrative approach; (3) develop a prosecutorial approach. We also ask about the case for statutory deadlines for cases and for civil penalties for non-compliance with investigations, set out considerations relating to private actions and invite views on the powers of entry and of investigation and enforcement.

Q.8 The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime, in particular:

- ***Options 1-3 for improving the process of antitrust enforcement;***
- ***the costs and benefits of the options, supported by evidence wherever possible.***

Q.9 The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.57, and the costs and benefits of these.

Q.10 The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.

The criminal cartel offence

Removing or replacing the 'dishonesty' element

BT Response

The Government's premise

The Government says it is concerned that antitrust cases take too long and result in too few decisions. Thus, there is less of a deterrent effect on anti-competitive activity than there should be. This may in part be due to the overall weight of procedural requirements. Consequently, the Government seeks views on options to lighten these requirements.

BT does not consider that there is a direct link between the number of antitrust decisions taken in the UK, on the one hand, and the deterrent effect on anti-competitive behaviour and the effectiveness of the UK's antitrust regime, on the other. You do not increase deterrent effect simply by increasing the number of decisions and reducing the time taken to reach those decisions. This is not a "numbers game". It is quality rather than quantity that counts. A regime which delivers an impressive number of decisions in record time will lose credibility if the

decisions are poorly reasoned, unfair or an unwarranted intrusion into competitive markets.

It follows that authorities should only bring antitrust cases where they have reliable grounds for doing so. They should not be rushed given the complex questions of fact and law that arise, particularly in the regulated sectors, and the very serious consequences for the defendant of an adverse decision. The quality of the analysis should not be endangered. It is vital that the procedural requirements which protect the rights of the defence and serve the interests of justice should be retained.

A single well reasoned and highly publicised antitrust decision whether from a national competition authority or the European Commission sends a very effective signal. As a result, there is already widespread awareness in the business community of the catastrophic financial consequences and, as indicated above, of the damage to reputation of committing an infringement of the competition rules. Fear of these negative outcomes has a major impact on behaviour. Competition law compliance programmes are ubiquitous and legal advice from antitrust specialists is sought by companies before taking business decisions.

At the same time, BT recognises that the risk of criminal sanctions also plays a significant part in producing a strong deterrent effect. Indeed, if the consultation is correct in suggesting that some businessmen see antitrust fines simply as a cost of doing business then the focus should be less on increasing the number of antitrust decisions and more on prosecuting individuals under the cartel offence.

The options

BT is in favour of the first option, namely retaining the status quo, with procedural improvements which improve speed and efficiency whilst maintaining full and effective procedural safeguards. BT is opposed to option 2: the availability of an appeal on the merits to an independent and impartial body is essential. As for option 3, BT is unconvinced of the benefits and doubts whether it justifies the disruption that would inevitably result. The options are examined further below.

Option 1: The current procedural framework ensures compliance with Article 6 ECHR and does not, in BT's view, mean that fewer decisions are taken or that timescales are too long.

At present, the sector regulator or the OFT examines the facts and law at the administrative stage and, if there is an appeal, the CAT carries out a further review on the merits. This thoroughness, and the balance between judicial scrutiny and the exercise of administrative power, are important strengths of the current regime and should not be diluted under any new structural arrangements.

As well as being thorough, the regime is also efficient. Administrative proceedings give the parties the opportunity to focus on the principal issues before the case reaches the CAT. Complex technical and economic questions are raised, debated and refined at this stage which acts as a filter before appeals are made.

It is a mistake to think that under the current regime all antitrust cases complete the administrative stage and are appealed to the CAT. Sometimes, the sector regulator or the OFT will withdraw its case or make a no infringement decision. For instance, Ofcom in November 2010 issued a no infringement decision to BT under Chapter 2 of the Competition Act and Article 102 TFEU after investigating allegations of margin squeeze in the supply of consumer broadband services. Furthermore, Tables 2 and 3 in Appendix 2 of the consultation document show that a significant number of antitrust decisions is not appealed to the CAT. Sometimes, the opening of an investigation under the Competition Act can result in a change in business practice which satisfies the requirements of the authorities. These are all positive uses of the competition regime.

Moreover, the workload is currently spread amongst the sector regulators and the OFT. If, as is suggested in option 3, the CAT becomes solely responsible for adjudicating all cases brought by regulators and the OFT, its workload will increase significantly and there will be delays in its decision making unless its resources are increased proportionately. A second stage of appeal on the merits of a decision is necessary as an ordinary part of natural justice.

BT also considers it important for Ofcom's regulatory procedures to mirror procedures in the competition law context, to retain the same procedural safeguards and avoid confusion. This is particularly important to the extent that there are types of behaviour (for example, discrimination and refusal to supply) which could be pursued under either competition law or regulation. At present, in most cases, before Ofcom takes a regulatory decision there is an administrative stage during which BT has the opportunity to comment on the regulator's arguments. An appeal against that decision on the merits lies to the CAT. When Ofcom applies its competition law powers, the procedure is similar – an administrative stage closed by a decision and sometimes followed by an appeal on the merits to the CAT. This parallel approach should not be changed.

Option 2: BT believes that implementation of option 2 would be a backward step. Removing the ability of the CAT to review decisions on the merits would alter the balance of power in favour of the proposed internal tribunal. The knowledge that all aspects of an administrative decision can be reviewed by the CAT encourages even greater procedural and intellectual rigour on the part of the administrative authority. The guarantee of independence and impartiality already secured by the availability of an appeal to the CAT on the merits would be removed. Option 2 would reproduce the procedural weakness of the EU's antitrust procedure where the General Court's

powers of review are more limited and represents a threat to compliance with Article 6 ECHR[2].

Similarly, BT opposes the suggestion[3] that antitrust cases should be decided in the same way as mergers and markets investigations by an investigatory and adjudicatory panel with appeals by way of judicial review. BT firmly believes that the advantages of the current competition regime in the UK should be retained by the CAT retaining the right to review administrative decisions on the merits. It is one of the reasons why the UK regime has such an excellent reputation. It is to the UK's credit that it should insist on more exacting standards in this respect than the EU antitrust regime.

Option 3: BT notes that a prosecutorial approach has been used in other jurisdictions, although not always successfully, but it would represent a sea change in the UK and raises many questions. There would inevitably be significant cost and disruption. There would be questions about, for example, the adequacy of the appeals regime – at present an appeal from the CAT to the Court of Appeal is only on a point of law. As noted above, there would be inconsistency with the regulatory procedure.

The OFT and Ofcom at present have the resources to conduct administrative procedures. However, it is not clear that the OFT has or the CMA would have the resources to conduct prosecutions effectively[4]. In light of the inevitable financial constraints this position is unlikely to change. If salaries remain at public sector levels, the CMA will not attract the personnel it requires to carry out the prosecutorial function to the required standard.

The cartel offence

If it is true that the fear of imprisonment and/or unlimited fines has a greater deterrent effect on businessmen than antitrust fines, then it follows that more prosecutions for the cartel offence should be brought. It also follows that prosecutions should be brought by skilled and experienced litigators. Whether the OFT has, or the CMA will

[2] Consultation paragraph 10.43 and footnote 131.

[3] Consultation paragraphs 5.38, 5.39, 5.41 and 10.21 1st and 5th bullets.

[4] The OFT's case under the cartel offence against a number of BA executives involved in a cartel with Virgin in the air transport sector was withdrawn in May 2010 after it emerged that seventy thousand prosecution documents had not been disclosed to BA or reviewed by the OFT, including twelve thousand documents to and from an important prosecution witness, namely Virgin's former head of corporate affairs. One of the questions raised at the time was whether the OFT had the necessary resources to manage large, complex cases of this type involving the collection, analysis and appropriate disclosure of many thousands of documents.

have, those resources is unclear. If not, then successful prosecutions for the cartel offence will be few.

The suggestion that the way to increase the number of successful prosecutions for the cartel offence is to remove the dishonesty element assumes that proving dishonesty is the main obstacle to securing convictions. However, in the BA/Virgin case[5] that was not the reason. Lack of resource seems to have been the main cause. The fact also that the prosecution relied on the evidence of the whistle blower, another participant in the cartel, made commentators question whether such evidence was reliable. The use of evidence made by the OFT has also been criticised by the CAT in other cases[6]. These are the issues that should be addressed. Removing the dishonesty element would transform the cartel offence into a strict liability offence similar to the road traffic context. The consequences of a conviction are far too serious for the threshold to be reduced in this way.

[5] See footnote 4 above.

[6] In its judgment in the construction bid rigging case of 27 April 2011, Case 1122/1/1/09, the CAT decided that statements in transcripts of interviews were not a satisfactory means of proving antitrust infringements against a third party.

Concurrency and sector regulators

BIS sets out three options for improving the use and coordination of competition powers: (1) sector regulators could agree on a common set of factors to take into account when deciding whether to use sectoral or competition powers or competition law primacy could be enhanced; (2) the CMA could act as a central resource for the sector regulators; (3) the CMA could coordinate the use of competition powers across the landscape.

Q.14 Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?

Q.15 The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:

- ***the arguments for and against the options;***
- ***the costs and benefits of the options, supported by evidence wherever possible.***

Q.16 The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.

BT Response

Concurrency: BT agrees that Ofcom should maintain its concurrent antitrust and MIR powers in parallel to the CMA. Ofcom has the necessary in-depth knowledge of the fast moving and technically complex communications industry. It has shown it has the expertise and resources to handle detailed investigations. This may not be true of other regulators.

Generally, concurrency should be retained where the regulator has shown it has the expertise, resources, and sufficient demand for its services as a competition authority to justify it.

Obligation to use competition law in preference to sector powers: BIS reports that, according to some commentators, the paucity of antitrust cases and MIRs in the regulated sectors is a weakness in the competition regime and, therefore, regulators should be under some kind of duty to use competition law rather than regulation whenever permissible.

BT disagrees with this proposal and the contention that underpins it, at least as far as the communications sector is concerned. Even if, which is not in fact BT's experience, Ofcom had brought only a relatively small number of antitrust cases, that would not mean that the competition regime is weak. The important thing is that the regime should promote competition and consumer welfare. It does not matter which tools the regulator chooses to perform this task as long as those tools are effective.

There is plenty of evidence of effective competition in the UK communications sector which indicates that the regulator is using the right tools in the right way. For instance, in 2005 Ofcom accepted undertakings from BT under the Enterprise Act in lieu of a market reference to the Competition Commission which resulted in the establishment of Openreach, BT's functionally separate upstream access division. The undertakings require Openreach to supply network access services on equivalent prices and other terms and conditions to downstream communications providers including BT's own downstream divisions. In this way Ofcom aims to achieve a level playing field in the supply of key network inputs and promotes more vibrant downstream competition.

The principle of functional separation established by Ofcom under the UK competition regime is now enshrined as a remedy in the amended EU communications regulatory package which was due to be implemented into national law by the UK and the other EU Member States in May 2011.

Ofcom has also succeeded in promoting an open and competitive market in broadband services. Ofcom figures for the number of residential and small business broadband connections in 2010 show that BT Retail's market share was only 26.6%, the lowest of any incumbent in the EU.

Markets subject to regulatory obligations and other markets: an obligation on Ofcom to use competition law powers in markets which it is recommended by the European Commission[7] to regulate is unnecessary and disproportionate.

The regulatory framework for communications in any event applies competition law principles to define markets and to assess whether an undertaking enjoys significant market power (which broadly equates to dominance). In this respect, in the Chapter 2 CA98 and Article 102 TFEU context, the regulatory and competition law analyses are very similar. The difference is that, having established significant market power, regulation allows Ofcom to act ex ante to render competition effective on the market concerned without an infringement having taken place.

[7] COMMISSION RECOMMENDATION of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. [2007] OJ L344/65.

Regulatory remedies can be imposed generally speaking more quickly than it takes for a competition law case to be prosecuted. In addition, Ofcom is under a duty derived from the EU regulatory package to promote an open and competitive market for communication networks and services.

Moreover, six of the seven markets which the European Commission recommends for regulation by Ofcom and other NRAs in its Recommendation of December 2007 are upstream wholesale markets. This means that all downstream markets but one and all wholesale markets other than the six identified by the Commission are subject to scrutiny by Ofcom under its competition law powers. Indeed, the Commission Recommendation makes it clear that any market which does not appear on its list can only be regulated if, amongst other things, competition law alone cannot adequately resolve the market failure identified. There already exists, therefore, a rule that Ofcom should wherever possible use its competition law powers on all but seven product markets and no further obligations in this respect are necessary.

Overall, ex ante regulation, ex post intervention and market level intervention are complementary tools designed to achieve the common goal of competitive markets which benefit consumers and business. In BT's view, sector regulators with the necessary experience and expertise should have a free hand to choose the tool they think is best suited to achieve that goal. Certainly, in the majority of cases in the communications sector competition law will be used, as required by the Commission's recommendation, unless market level intervention is necessary and more appropriate.

Sharing of resources[8]: BT believes that Ofcom has significant, relevant competition law experience. Consequently, Ofcom is unlikely to require the CMA to decide or run a case on its behalf or act as an advisor or source of expertise.

On the other hand, more efficient management of existing resources will help in increasing the number of competition law cases brought and in accelerating the procedure. It is sensible, therefore, for the CMA to maintain sufficient resources to be able to make them available to sector regulators and for secondments to be made between authorities in competition cases on request.

BT considers it would be inefficient for legislation to provide for joint Ofcom/CMA antitrust investigations. It would increase the potential for disagreement and tie up resources from both authorities. The current system for coordination led by the Concurrency Working Party ("CWP") works well and there is no valid reason to replace it.

[8] Consultation, paragraph 7.27.

Strategic overview: BT is in favour of maintaining the current rules for the sharing of concurrent antitrust powers by the OFT and the sector regulators[9] under which the Secretary of State resolves jurisdictional disputes between authorities. BT is not in favour of the CMA having the power to take over cases in the communications sector.

BT is not convinced that the CMA would be better placed than Ofcom to take over cases with novel features or wider strategic implications or where there is a need to develop competition policy. There is no reason why Ofcom should not be able to do all these things in competition cases concerning the communications sector provided that there is appropriate coordination within the CWP.

[9] The Competition Act 1998 (Concurrency) Regulations SI 2004/1077.

A stronger markets regime

This chapter sets out that there is scope to streamline processes and make the markets regime more vigorous. The key options are: enabling in-depth investigations into practices that cut across markets; giving the CMA powers to report on public interest issues; extending the super-complaint system to SME bodies; reducing timescales; strengthening information gathering powers; simplification of review of remedies process; and updating remedial powers.

Q.3 The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime, in particular:

- ***the arguments for and against the options;***
- ***the costs and benefits of the options, supported by evidence wherever possible.***

Q.4 The Government also welcomes further ideas, in particular, on modernising and streamlining the markets regime, and on increasing certainty and reducing burdens.

BT Response

BT agrees that the markets regime should be retained. BT also notes and agrees with the Government's intention[10] to maintain the initial phase 1 investigation and the in-depth phase 2 review but to introduce greater speed and efficiency by reducing timescales and sharing resources while maintaining the rigour and robustness of the regime. However, BT is concerned that merging the OFT and the CC into a single authority will over time dilute the independence of thought and action currently displayed by these two bodies and reduce the effectiveness and impartiality of the two phase process.

BT agrees that the CMA should be empowered to launch investigations into practices across markets. For instance, there are common features to the pay tv and mobile communications sectors which are particularly relevant to the public interest.

[10] Consultation paragraphs 3.6 and 10.21.

The use of undertakings in lieu in this context should be considered in the same way that the European Commission is using commitments to free its resources from lengthy administrative proceedings.

BT is not in favour of extending the super complaint system to SME bodies. It is unnecessary and as the consultation points out[11] has resource implications for the CMA. SMEs themselves are quite capable of complaining individually and are not afraid to do so.

BT does not object to information gathering powers in phase 1 where these are used appropriately and proportionately.

BT would want to see more detail about the proposal to allow the CMA to require parties to appoint and pay a third party to monitor and/or implement remedies or to publish certain non-price information. In particular, BT would want assurances about: (i) the trustee's independence, (ii) the powers and role of the trustee, (iii) the proportionality and appropriateness of the trustee's remit, (iv) the trustee's ability to maintain confidentiality over legitimate business secrets, and (v) the parties' ability to have the trustee's findings reviewed.

[11] Consultation paragraph 3.15.

Regulatory appeals and other functions of the OFT and CC

The Government's view is that the sectoral reference/appeal jurisdictions of the CC should be transferred to the CMA. We also propose the development of model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

Q.17 Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?

Q.18 The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

BT Response

At present, when an appeal is made against an Ofcom decision to the CAT and that decision also imposes price controls, the CAT refers the price control aspects to the CC.

BT believes that the CC generally performs to a high standard when considering price control appeals in the communications sector. The CC can call upon skilled and experienced resources, including lawyers, accountants and economists, to investigate and understand the detail of the price control questions referred to it.

Consequently, if a similar independent panel within the CMA continued to hear such appeals that would not be a major organisational change. However, at present, the CC reviews all aspects of pricing control matters in a quasi „on the merits' way by, for instance, sending information requests and holding bi-lateral meetings and multi-lateral hearings with the parties. This depth of review should be retained.

It is not clear how the CAT would replicate this. It would not be acceptable under the new regime for the CAT to refer pricing matters to a body limited to reviewing manifest errors when all other aspects of the same appeal benefit from a review on the merits.

The pragmatic way to resolve this question, and to comply with the European regulatory framework for communications, is to give the CAT power to appoint its own panel of experts to resolve pricing matters, perhaps drawn from the CMA and using CMA resources for that purpose.

The CC staff and the CC panel members have considerable experience of all the regulated sectors and the staff transferring from the CC to the CMA would be a valuable resource which could be used by all the authorities.

A stronger mergers regime

There is scope for improving the merger regime by addressing the disadvantages of the current voluntary notification regime and streamlining the process. The Government is seeking views on: (1) options to address the disadvantages of the current voluntary notification regime; (2) measures to streamline the regime by reducing timescales and strengthening information gathering powers; (3) introduction of an exemption from merger control for transactions involving small businesses under either a mandatory or voluntary notification regime. We ask:

Q.5 The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular:

- ***the arguments for and against the options;***
- ***the costs and benefits of the options, supported by evidence wherever possible.***

Q.6 The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?

Q.7 The Government welcomes further ideas on streamlining the mergers regime.

BT Response

BT's view is that the current voluntary regime should be maintained because of the considerable flexibility that it offers to business. Any perceived disadvantages are far outweighed by the advantages of the regime.

The introduction of mandatory notifications where specific turnover thresholds are met would increase the workload for the CMA. It would also increase costs to business unnecessarily and without any clear benefits since most notifications would raise no competition issues at all.

Moreover, it is a mistake to think that because the current system is voluntary business does not take it into account in deciding whether or not to make a notification. For example, business is well aware that the OFT proactively monitors the press for announcements of planned and completed mergers, and does not hesitate to investigate following complaints from third parties (in particular, customers and suppliers) or on its own initiative if it has competition concerns about a transaction. Given the nuclear outcome of having to unwind a completed merger,

the parties concerned will notify and/or seek guidance before completion if they believe there may be a competition problem.

As for concerns about completed mergers, these could be addressed by improving the CC's powers to restore the status quo ante.

For instance, acquiring company executives might be required to step down from positions in which they might use target information. Acquirers might also be required to divest some of their own pre-acquisition assets as well as, or instead of, those of the target to meet competition concerns arising from temporary ownership.

More resources to do more proactive industry monitoring could be made available to the OFT. This would allow the OFT to intervene more often to require parties to implement a "voluntary" hold-separate if it had concerns.

Merger fees and cost recovery

Merger Fees

This chapter sets out options to recover the cost of the merger regime either by changing the level of the existing fee bands, introducing an additional fee band or moving to a mandatory notification system. We ask:

1. ***Q.25 What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/ mandatory notification regime?***

Recovering the cost of anti trust investigations

The Government is considering introducing legislation to allow the enforcement authorities to recover the costs of their investigations in antitrust cases. This would only apply where there has been an infringement decision and a fine, non-infringement decisions and investigations dropped for any other reason would not be charged. We ask:

2. ***Q.26 Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons.***

3. ***Q.27 What are your views on recovery where there has been an infringement decision being based on the cost of investigation?***

4. ***Q.28 What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?***

It is foreseen that any costs to be recovered would be shown on the infringement decision detailing the fine. We ask:

5. ***Q.29 Do you agree that this would be an appropriate way to collect the costs, separates the fine from costs in a way that makes appeals clear and that the costs should go to the consolidated fund rather than the enforcement authority?***

It is foreseen that the costs element could be appealed. This raises the question of what happens when the appeal is successful, partly successful or

when the appeal is on the method of penalty calculation only rather than the substance of the decision. We ask:

6. ***Q.30 Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?***

Currently there is no legislation to allow the enforcer to charge costs so this would mean amending the Competition Act 1998. An alternative introducing cost recovery awould be to amend the same Act to allow the level of fine to cover the cost of the investigation. We ask:

7. ***Q.31 Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?***

Recovery of CC costs in telecom price appeals

8. ***Q.32 Do you agree that telecoms appeal should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing? If not, your response should provide reasons supported by evidence where appropriate.***

Recovery of CAT costs

The Government propose to make a change in the CAT's Rules of Procedure to allow the CAT to recover its own costs following an appeal. The decision whether or not to impose costs will rest with the tribunal who will be able to set aside the costs where the interests of justice dictate e.g. when the appellant is a small business and the costs of pursuing their legal right of appeal prevent them from doing so. We ask:

9. ***Q.33 What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?***

BT Response

The idea that competition authorities should be able to recover the costs of investigation where there has been an investigation, an infringement decision and a fine runs counter to the goal of better resource management and efficiency. First of all, the authority would have to invest time and resources in justifying its costs before presenting the claim to the defendant. Secondly, there would inevitably be appeals which would consume more time and expense. On balance, therefore, it would not be efficient to allow the enforcer to cover its costs either separately or as part of the fine.

Imposing costs obligations on parties who take advantage of the leniency process, who enter into settlements or give commitments would be counter-productive. It would discourage parties from using leniency or making settlements and commitments. These mechanisms are resource efficient and should be encouraged.

BT does not believe that the CC should be able to recover its costs in communications appeals from an unsuccessful appellant. This additional risk and burden would tend to discourage appeals in meritorious cases as well as in frivolous ones.

Similarly, BT does not believe that the CAT should be able to recover its costs from appellants unless the appeal is frivolous and vexatious. Parties already face considerable risks and costs when mounting an appeal and do not take the decision to do so lightly. The additional risk of covering the CAT's costs may tip the balance against appeals being brought in meritorious cases. This is not in the interests of justice or, in the broader context, in the interests of competition and consumers if poor administrative decisions are less at risk of being appealed.

Building Societies Association

Building Societies Association

A Competition Regime for Growth: A Consultation on options for reform

Response by the Building Societies Association

Introduction and Background

The Building Societies Association (the BSA) represents mutual lenders and deposit takers in the UK including all 48 UK building societies. Mutual lenders and deposit takers have total assets of over £365 billion and, together with their subsidiaries, hold residential mortgages of almost £235 billion, 19% of the total outstanding in the UK. They hold more than £245 billion of retail deposits, accounting for 22% of all such deposits in the UK. Mutual deposit takers account for about 36% of cash ISA balances. They employ approximately 50,000 full and part-time staff and operate through approximately 2,000 branches.

The BSA welcomes the opportunity to respond to the consultation by the Department of Business, Innovation and Skills - *A Competition Regime for Growth: A Consultation on options for reform* (the CP), which is part of the overall exercise reforming the UK's regulatory arrangements for financial services.

We have responded in detail to the various consultations on regulatory reform so far, including *judgment, focus and stability*; *consultation on reforming the consumer credit regime; building a stronger system;* and *product intervention* –

- www.bsa.org.uk/policy/response/hm_treasury_newapproach_fin_reg.htm
- www.bsa.org.uk/policy/response/response_hmt_bis.htm
- www.bsa.org.uk/policy/response/building_a_stronger_system_response.htm
- www.bsa.org.uk/policy/response/DP11_1

We have also responded in full to the recent consultations concerning competition and choice in retail banking –

- www.bsa.org.uk/docs/policy/ICB_BSA1.pdf
- www.bsa.org.uk/docs/circularpdfs/7145.doc
- www.bsa.org.uk/docs/policy/OFT_B2Ebanking.pdf
- www.bsa.org.uk/docs/policy/prudentialandfinreg/BIS_HMT_Fin_priv_sector_recovery.pdf

The CP is of less direct relevance to our members, so this response is quite brief.

Comments

The BSA agrees with the CP that "Competition is the lifeblood of a vibrant economy and fundamental to growth". We support the points set out in paragraph 1.1 and the general objectives included later in chapter 1; namely –

- improving the robustness of decisions and strengthening the regime;
- supporting the competition authorities in taking forward the right cases;
- improving speed and predictability for business.

We support, in principle, the Government's plan to merge competition functions within one body on the basis that a single Competition and Markets Authority to ensure the flexible allocation of scarce public resource to competition issues as they emerge, and for the combined body to be a stronger advocate for pro-competition policy across Government, including in the delivery of public services.

The proposal is also consistent with the implicit Government objective of ensuring that each regulator should have a properly focused objective.

Our support for the proposal implies no criticism of the existing competition authorities. As the CP makes clear (in paragraphs 1.4-1.5), they are very effective organisations, but – as the CP explains - there is a case for consolidation and rationalisation. We strongly support the important points, set out in paragraph 1.12 to which the Government should have regard, including accountability, transparency, cost etc of the proposed merged authority.

As the BSA stated in its response to *Building a Stronger System*, while we agree that the new Financial Conduct Authority should have a remit to promote competition, the regulation of anti-competitive behaviour should, in our view, be left to the competition authorities or to any new, merged authority (see paragraph 58 of the CP).

Business in The Community / Cooperatition Incubator

From: Andrew Dakers [mailto:andrew.dakers@blueyonder.co.uk]
Sent: 13 June 2011 17:31
To: Competition and Markets Authority
Cc: 'Charlotte Turner'; 'Tom Linton'
Subject: Consultation response: 'A competition regime for growth - A consultation on options for reform'
Importance: High

Dear Mr Lawson,

We are writing in response to 'A competition regime for growth – A consultation on options for reform' consultation questions: "Q.2 The Government seeks your views on the potential creation of a single Competition and Markets Authority (CMA); Q.19 The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute; and Q.20 The Government see your views on whether the CMA should have a clear principal competition focus.

We welcome the proposals for a new CMA. We believe it is vitally important that public interest factors are explicitly integrated into the objectives of the CMA, as was the intention of the previous competition regime. A new business unit with the specialist skills to balance public interest factors, supported by guidance, tools and ways of working with other government departments, should be a core objective and function of the new CMA - potentially embedded in statute. The advantages and disadvantages of this unit's recommendations being approved by a minister or an official should be further examined.

The CMA should focus on competition, but also have the capability as described to balance public interest factors, particularly in the case of sector wide voluntary or co-regulated agreements where positive social and environmental impact could be gained. The new approach should build on: the Office of Fair Trading's (OFT's) 2009/10 research in this area; balancing of public interest factors achieved by other UK and international regulators; and the OFT's existing experience in approving 'consumer codes'.

We welcome the Prime Minister's commitment to deal with this problem last December and urge all stakeholders to continue to work together towards a rapid resolution of the issues. The Prime Minister's commitment was in response to a Business in the Community consultation of 500+ businesses which identified this area as warranting further investigation in order to scale up business engagement in communities. The approach set out above would also provide the certainty that greater investment in the UK demands. Investors will know that they can secure the comfort needed *before* they make long-term investments in areas where self-regulation/ collaboration on environmental and social issues is required.

In response to the Prime Minister's call last December, Business in the Community and The Cooperatition Incubator look forward to continuing to work in partnership with the Department for Business, Innovation & Skills and the Office of Fair Trading in the months ahead to better understand and resolve this barrier to business action on social and environmental issues.

Yours sincerely,

Charlotte Turner, Director of Research, Business in the Community - www.bitc.org.uk
Andrew Dakers and Tom Linton, The Cooperatition Incubator - www.cooperatition.org

Canadian Competition Bureau

Submission to the Government of the United Kingdom

Department for Business Innovation and Skills

A Competition Regime for Growth: A Consultation on Options for Reform

Competition Bureau of Canada

June 20, 2011

June 20, 2011

The Canadian Competition Bureau (the "Bureau") is pleased to provide the following submission in response to the issues raised in the United Kingdom's Department for Business Innovation and Skills Consultation Paper, "*A Competition Regime for Growth: A Consultation on Options for Reform*" (the "Consultation Paper").[1]

The Bureau, as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. Headed by the Commissioner of Competition (the "Commissioner"), the Bureau is responsible for the administration and enforcement of the *Competition Act* (the "Act")[2] and three other statutes related to product labelling and precious metals marking.[3] The Act is designed to achieve certain identified objectives including, among other things, maintaining and encouraging competition in Canada in order to promote the efficiency and adaptability of the Canadian economy.

The Bureau's comments in this submission focus on the Canadian experience as it relates to three of the areas set out in the Consultation Paper: (i) the proposals to strengthen the United Kingdom's current merger regime, as set out in Chapter 4; (ii) the proposals regarding changes to the elements of the United Kingdom's criminal cartel offence, as set out in Chapter 6; and (iii) the disclosure of information to foreign jurisdictions through the use of Overseas Information Gateways, as set out in Chapter 12.

It should be noted at the outset that this submission does not presume to make recommendations in any of these areas. Rather, the Bureau's comments are restricted solely to describing the Canadian experiences in the areas identified. It is hoped that the submission is helpful as the important deliberations in the United Kingdom progress.

Background

The Act is a federal law governing most business conduct in Canada. It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace. At a high level, the Act addresses four areas affecting competition. The first consists of the criminal provisions, which deal primarily with cartels and bid-rigging. Cartels include agreements or arrangements among competitors or potential competitors to fix prices, allocate markets or restrict supply.[4] When a decision is made to challenge a matter under the Act, criminal investigations are referred to the Director of Public Prosecutions, who then decides whether to prosecute before the courts.

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[1] Department for Business Innovation and Skills Consultation Paper, *A Competition Regime for Growth: A Consultation on Options for Reform*, available at http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf (hereinafter "Consultation Paper").
[2] R.S.C. 1985, c. C-34.
[3] These acts are the *Consumer Packaging and Labelling Act*, R.S.C., 1985, c. C-38, the *Textile Labelling Act*, R.S.C., 1985, c. T-10, and the *Precious Metals Marking Act*, R.S.C., 1985, c. P-19.
[4] The criminal provisions are set out in Part VI and Part VII of the Act.

Second, under the Act, mergers and proposed mergers of all sizes and in all sectors of the economy are subject to review by the Commissioner to determine whether they have resulted, or will likely result, in a substantial lessening or prevention of competition. The Commissioner must be notified in advance of closing of all proposed transactions that exceed certain monetary thresholds. Failure to notify is a criminal offence.[5]

The third major area is abuse of a dominant position and agreements between competitors or potential competitors that prevent or lessen competition substantially, which are subject to civil review under the Act. These provisions establish the bounds of legitimate competitive behaviour and provide for corrective action when firms engage in anti-competitive activities that damage or eliminate competitors and that maintain, entrench or enhance their market power.[6]

When the decision is made to challenge a merger or other civil matter under the Act, these cases are brought directly before the Competition Tribunal (the "Tribunal") or the courts, depending on the conduct in question and the applicable legal provisions of the Act.

Finally, the Bureau promotes truth in advertising in the marketplace by discouraging deceptive business practices and encouraging the provision of sufficient information to ensure consumers have accurate information when making purchasing decisions.[7]

Recent Canadian Legislative Reforms

As part of the Canadian Government's long-term economic plan, *Advantage Canada*,[8] and *Budget 2007*,[9] it committed to undertake a review of Canada's competition policies and its framework for foreign investment policy. The Government subsequently announced, in June 2007, the creation of the Competition Policy Review Panel (the "Panel") to examine key elements of Canada's competition and investment policies to ensure that they are working effectively. This included two key pieces of Canadian legislation, the *Competition Act* and the *Investment Canada Act*. The Panel issued its final report in June 2008, making a number of specific recommendations regarding amendments to both pieces of legislation, as well as a number of other policy recommendations intended to strengthen Canada's competitiveness, with the goal of making Canada a location of choice for global talent, capital and innovation.

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[5] The merger provisions are set out in sections 91-107 of the Act; the notification provisions are set out in sections 108-124 of the Act, and; the criminal provision relating to failure to notify is s. 65(2) of the Act.
[6] The abuse of dominant position provisions are set out in sections 78-79.1 of the Act; the competitor collaboration provisions are set out at section 90.1 of the Act.
[7] The deceptive marketing and false advertising provisions are set out in sections 52-60 and sections 74.01-74.19 of the Act.
[8] Government of Canada, "*Advantage Canada*: Building a Strong Economy for Canadians" (23 November 2006), available online at http://www.fin.gc.ca/ec2006/pdf/plane.pdf.
[9] Government of Canada, "*Budget 2007*: Aspire to a Stronger, Safer, Better Canada" (19 March 2007), available online at http://www.budget.gc.ca/2007/index-eng.html.

In response to the Panel's recommendations, the Government passed the most significant amendments to the Act in 25 years in March 2009 as part of Bill C-10, the *Budget Implementation Act*. Key among the amendments were:

- The introduction of a two-stage merger review process;
- A *per se* criminal offence prohibiting hard core cartels and a companion civil provision to address potentially anti-competitive agreements on a civil (no longer criminal) standard; and
- An ability for the Competition Tribunal to order administrative monetary penalties in cases where there is a finding of abuse of dominance.

The new amendments immediately came into force upon passage by Parliament, with the exception of the new criminal cartel provision and companion civil provisions, which came into effect in March 2010.

These amendments brought Canada's legislation more closely in line with the competition laws of our trading partners, and were designed to increase the predictability, efficiency and effectiveness of the enforcement and administration of the Act.

A Stronger Mergers Regime: Canada's Experience

Canada's merger notification regime was first introduced in 1986. This coincided with the move to make merger review subject to civil law standards, as opposed to the prior criminal law standard, and the introduction of the Competition Tribunal, a quasi-judicial body that has since been responsible for reviewing such cases under the Act. At the time, the Government made the following comments regarding the importance of adopting a merger notification regime:

> A new merger provision without the adjunct of mandatory prenotification would not be nearly as effective in dealing with potentially anti-competitive mergers. The 1977 Report of the standing Committee on Finance, Trade and Economic Affairs, upon reviewing Bill C-42, commented: "Experience in other jurisdictions and, in particular, the United States, indicates that once consummation occurs, it is often too late to obtain meaningful relief even if the merger is ultimately found to be anti-competitive."
>
> A successful merger law must halt the creation of anti-competitive situations having the potential of increasing price and/or restricting output at less than competitive levels. The purpose of prenotification is to ensure that a thorough and timely review is made of those relatively small number of mergers that are likely to have an adverse effect on competition. If these mergers were allowed to proceed without prior notification, consumers could be placed at a disadvantage through a reduction in choice and potentially higher prices. Dissolution of a merger found to adversely affect competition after it has been completed results in a further misallocation of resources and subjects third parties to the risk of injury. The parties to the merger itself face the risk and uncertainty of costly post-merger proceedings. Subjecting parties to proposed large mergers to a prenotification provision will enable both the buyer and the seller to make

> reasoned decisions at an early point in time and consider the implications of the proposed transaction in light of the merger provision.[10]

In Canada, parties to a proposed transaction are not obliged to fulfill the mandatory notification requirements unless they exceed two thresholds. First, the parties, together with their affiliates, must have total assets in Canada, or total annual revenues from sales, in or from Canada, of over $400 million. The second threshold relates to the size of the proposed transaction itself. Specifically, the Bureau must be given advance notice of a proposed transaction when the assets in Canada or revenues of the target firm generated in or from Canada exceed $73 million.[11]

As noted above, the 2009 amendments to the Act significantly reformed Canada's merger review provisions. The Government noted that assessing, in a timely way, whether a combination of two companies is likely to substantially lessen competition is a fundamental aspect of ensuring that markets remain competitive. This is based on the premise that it is far better to stop anti-competitive mergers than to try to undo one after the fact, or to live with the likely consequences — higher prices, less innovation in products and services and fewer choices for consumers.

Prior to the amendments, parties could close a proposed merger after the expiry of the statutory waiting period (up to a maximum of 42 days), even if they had not provided the Bureau with the information required to determine if the merger resulted in a substantial lessening or prevention of competition. Moreover, the Bureau had to resort to court orders to compel the information from uncooperative parties, a process that was rigid and did not leave the Bureau with sufficient time to responsibly review complex mergers in a timely and informed manner.

The amendments introduced a two-stage merger review process to ensure that the Bureau obtains the information it requires from the merging parties to properly assess the effects of a merger and make the appropriate decision to challenge or clear the merger in a timely manner. Under the new system, merging companies are told within 30 days whether their proposed transaction warrants a supplementary information request. The vast majority of all transactions are cleared within that initial 30-day period, and often in significantly less time. In fact, approximately 80% of notifiable mergers are cleared within the first 14 days.

For the small number of potentially harmful mergers, companies are advised of what supplementary information is required from them in order to complete a more in-depth analysis. The parties must then comply with the supplementary information request, following which a second clock, of 30 days, begins. After that second 30-day period, the parties are free to complete the transaction provided the Commissioner has not successfully sought an injunction preventing closing. A Commissioner challenge to the

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[10] Minister of Consumer and Corporate Affairs, *Competition Law Amendments, A Guide*, December 1985, at p. 19.

[11] This threshold is adjusted annually according to a GDP-indexed formula set out in subsection 110(8) of the Act.

transaction remains possible for up to a year following completion; however, frequently the Commissioner will advise parties at or prior to expiry of the second 30-day period as to whether she has a present intention to do so.

Shortly after the amendments took effect, the Bureau issued the *Merger Review Process Guidelines* (the "Guidelines") that describe the practices the Bureau will follow to ensure the burden on parties in responding to a supplementary request for information is no greater than necessary, while ensuring the Bureau has the information necessary to conduct a sufficiently thorough review. The Guidelines have provided a significant measure of transparency and predictability regarding the Bureau's intentions to those affected by these changes.[12]

As a result of the recent amendments, and by aligning the incentives of the merging parties to provide relevant information with those of the Bureau, the Act now more effectively ensures that a thorough and timely review is made of those relatively few mergers that are likely to have an adverse effect on competition before it is too late to obtain meaningful relief.

The Criminal Cartel Offence: Canada's Experience

Prior to the 2009 amendments, the anti-cartel provision in the Act required the court to consider economic evidence in order to be satisfied, beyond a reasonable doubt, that the effect of the price-fixing agreement in the market resulted in an "undue lessening or prevention of competition."[13] In this sense, the then sole "agreements provision" in the Act was considered to be both over-inclusive and under-inclusive. It was under-inclusive, and an outlier around the world, in that, to convict, the prosecution had to prove not just an agreement between competitors to fix prices, but further, in this context of unambiguously harmful conduct, an anti-competitive effect.

At the same time, the previous cartel provision captured far too much - every business collaboration in Canada was potentially subject to the threat of criminal prosecution. That included vertical agreements, franchise agreements, and research and development agreements. This broad cartel provision had the potential to discourage firms from entering into beneficial alliances and collaborations.

The 2009 amendments repealed the existing criminal cartel provisions and replaced them with (a) a new *per* se criminal offence prohibiting agreements between competitors to fix prices, allocate markets or restrict output (the "Criminal Cartel Provision"); and (b) a new civil provision for all other agreements between competitors or potential competitors that prevent or lessen competition substantially (the "Civil Agreements Provision"). These changes were designed to create a more effective criminal enforcement regime for the

[12] Competition Bureau, *Merger Review Process Guidelines* (18 September 2009), available online at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03128.html.

[13] While there was no "dishonesty" requirement, this economic test posed very significant challenges to successful prosecution, even when unambiguously harmful conduct was in issue.

most egregious forms of cartel agreements, while at the same time removing the threat of criminal sanctions for legitimate collaborations between competitors, in order to avoid discouraging firms from engaging in potentially beneficial alliances. An "ancillary restraints defence" was also introduced with the Criminal Cartel Provision, making it permissible to enter into an agreement if it is ancillary to a broader agreement and is directly related to, and reasonably necessary for, giving effect to the objective of that agreement.

The amendments significantly increased the possible fines for those convicted under the criminal cartel provision from $10 million to $25 million, and increased the maximum jail time for conspiracies from 5 years to 14 years, which mirrors the maximum term of imprisonment available for the offence of fraud in Canada's *Criminal Code*.[14] Under the Civil Agreements Provision, the Tribunal was provided with the power to prohibit any person from doing anything under an agreement or to require any person, with the consent of that person and the Commissioner, to take any other action.

To promote compliance with the amended Act, the Bureau prioritized outreach to, and consultation with, the Bar, the business community, and consumer groups. The guiding principle through this period was to offer maximum predictability and transparency while laying the foundation for Canadians to trust that the Bureau would act responsibly to enforce the new law. During this period, the Bureau updated much of the enforcement-related information on its website and added a new amendment-focussed section to its website. The Bureau also held regular meetings with business and consumer groups across the country, hosted technical roundtables on draft guidelines, including extensive and practical *Competitor Collaboration Guidelines* (the "CCGs") that discuss how the Bureau will assess collaborations between competitors under the amended provisions and exercise its enforcement discretion.[15]

To facilitate voluntary compliance with the Act, and to support business during the transition year of the amendments, Parliament provided parties with an opportunity to apply for transitional advisory opinions at no cost, so as to determine whether existing agreements and arrangements were in violation of the new civil or criminal provisions.

The 2009 amendments also revised the criminal bid-rigging provision at section 47 of the Act, so as to include agreements to withdraw bids and to increase the maximum term of imprisonment on conviction to 14 years.

Canada's amendments were designed with a view to reforming its law so as to find a balance that ensures that the most egregious types of offences are clearly prohibited while allowing for those types of agreements that do not raise any significant competition issues and, in fact, could be efficiency-enhancing. In Canada's case, we seek clarity from a *per se* criminal prohibition of certain types of agreements, and the introduction of a companion provision that allows for all other types of potentially harmful agreements to

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[14] See subsection 380(2) of the *Criminal Code*, R.S.C., 1985, c. C-46.
[15] Competition Bureau, *Competitor Collaboration Guidelines* (December 2009), available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html.

be tested before a civil tribunal with a view to determine whether the agreement substantially lessens or prevents competition.

Overseas Information Gateways: Canada's Experience

As to the ability to disclose information to foreign competition authorities, the Bureau is bound by the confidentiality provisions set out in the Act. The Bureau's policy on the communication of confidential information is set out in the Information Bulletin on the Communication of Confidential Information Under the *Competition Act* (the "Confidentiality Bulletin").[16] The principal section of the Act is section 29:

> 29. (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act
>
> (a) the identity of any person from whom information was obtained pursuant to this Act;
>
> (b) any information obtained pursuant to section 11, 15, 16 or 114;
>
> (c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;
>
> (d) any information obtained from a person requesting a certificate under section 102; or
>
> (e) any information provided voluntarily pursuant to this Act.
>
> (2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

Section 29 prohibits the Bureau from communicating information obtained during an investigation, including information produced voluntarily or obtained pursuant to the exercise of the formal powers set out in the Act, subject to two key exceptions:

(i) communication of such information is permitted "for the purposes of the administration or enforcement of the Act." This allows information that is considered to be confidential under the Act to be communicated to a foreign counterpart where the purpose is for the administration or enforcement of the Act (*e.g.*, where the communication of this information would advance a specific investigation); and

(ii) communication of such information is permitted to a Canadian law enforcement agency.

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[16] The Commissioner of Competition, *Communication of Confidential Information under the Competition Act*, October 10, 2007, available on line at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01277.html#two.

When confidential information is communicated to a foreign agency, the Bureau seeks to maintain the confidentiality of the information. This is accomplished through formal international instruments (e.g., State-to-State Agreements, Agency-to-Agency Arrangements and/or Mutual Legal Assistance Treaties) or assurances from the foreign agency. The Bureau also requires the foreign agency to limit the use of the confidential information to the specific purpose for which it was provided. Similarly, the Bureau is also willing to provide assurances to a foreign agency that the information it provides to the Bureau will be treated confidentially, and will only be used for the administration and enforcement of the Act. The Bureau will provide notice to, and seek consent (i.e., waivers) from, the foreign agency if it intends to use the information for any other purpose.[17]

The majority of information shared with other enforcement agencies is accomplished during the course of parallel investigations of the same or similar cartel conduct or, in the context of multi-jurisdictional merger reviews, of the same proposed merger. While the Bureau does not request waivers to share confidential information with foreign agencies, provided that such information is communicated for the purposes of the administration or enforcement of the Act, the Bureau typically requests that parties provide foreign agencies with the appropriate waivers (where applicable) to permit those agencies to share information with the Bureau. In the vast majority of cases, such waivers are provided.

The Bureau examines a number of factors when it considers sharing information with a foreign agency, or accepts another agency's request for cooperation on a given matter. These include the agency's laws and policies respecting the treatment of confidential information. As noted, the Bureau seeks to maintain the confidentiality of the information through either formal international instruments or assurances from the foreign authority. The Bureau also requires that the use of the confidential information by the foreign authority will be limited to the specific purposes for which it was provided. In the case of immunity and leniency applicants for cartel offences, the Bureau will not disclose the identity or information obtained from an immunity or leniency applicant to any foreign law enforcement agency without the consent of the applicant (i.e., a waiver from the applicant). The Bureau considers providing a waiver to be a sign of cooperation, and in our experience international cartel member applicants routinely grant such consent. The Bureau also encourages immunity and leniency applicants to seek such status in other jurisdictions where the matter is being investigated.

In all cases, maintaining confidentiality is not only fundamental to the Bureau's ability to pursue its responsibilities under the law, but essential to its integrity as a law enforcement agency. The Bureau is accustomed to receiving commercially sensitive information from industry participants, and is careful to ensure that, other than as may be contemplated by the Act (and as described generally in the Confidentiality Bulletin), it does not communicate that information to competitors, customers or the parties that are the subject of the review. As a matter of practice, even when permitted to share confidential

[17] Further information on the Bureau's international agreements, including links to the agreements themselves, may be found at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00128.html

information, the Bureau considers carefully whether disclosure is, in the circumstances, advisable or necessary.

The Bureau enjoys a positive and cooperative working relationship with key foreign competition authorities when pursuing parallel cartel, merger and unilateral conduct investigations under our respective legislative frameworks. In cartel matters, the Bureau will typically cooperate with between two and four foreign agencies during an international cartel investigation. In merger matters, the Bureau most commonly cooperates with up to two foreign agencies and, in unilateral conduct matters, the Bureau most commonly will cooperate with one or two other agencies. The Commissioner believes that future work on this issue is an area where key competition networks, such as the International Competition Network, may be well-placed to support the enforcement work of competition authorities.

Conclusion:

The last three years have been particularly dynamic for Canadian competition law policy and enforcement. We believe that our robust legislation has resulted in increased predictability, efficiency and effectiveness of the enforcement and administration of the Act. Since the 2009 amendments, the work of the Bureau has been focussed on principled enforcement of the Act and providing direction to businesses and stakeholders regarding the manner in which the Bureau intends to enforce these provisions. As the United Kingdom moves through its own transformative process, we hope that Canada's experiences will serve to offer some positive guidance.

CBI

OPTIONS FOR REFORM OF THE COMPETITION REGIME

CBI RESPONSE TO BIS CONSULATION, 13 JUNE 2011

INTRODUCTION

1. The CBI believes that competition has an important role in driving economic growth, through tackling barriers to growth, unlocking investment and reducing costs to business.

2. The UK has one of the most highly regarded competition regimes in the world, being robust, independent and free from political interference. Reform of the competition regime should look to retain and build on the best features of the UK regime and seek further improvements that result in:

   - A more ***efficient and fast-reacting*** regime, critical for business restructuring and creating new jobs;

   - More ***consistent*** outcomes, following robust decision-making, so companies can invest with a high degree of certainty and confidence; and

   - A ***proportionate*** approach, where interventions are commensurate with the scale of the perceived problem, in order to attract new entrants and keep established players on their toes, without having a chilling effect on investment.

3. The CBI believes that the principle of promoting competition should be applied wherever possible, and that in the key areas of mergers, market investigations and sector regulation this principle should be paramount.

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EXECUTIVE SUMMARY

4. The CBI's governing thought is that reform of the competition regime is needed to ensure that it keeps pace with changing business models, to free up business investment and to reduce costs to business.

5. To deliver this, we set out in this submission that:

- **The OFT and Competition Commission should be merged to create a single Competition & Markets Authority (CMA) to increase efficiency and strip out duplication…**

  The CBI supports the proposal to merge the OFT and Competition Commission to create a single Competition and Markets Authority (CMA). The CMA should be a strong advocate for a pro-competition policy across Government, including for the delivery of public services, and have a primary duty to promote competition.

- **The merger regime should be improved by deregulating small mergers, retaining voluntary notification of mergers and providing clearer merger tests to help self-assessment…**

  The CBI is in favour of a simple deregulation of small mergers where the target has a turnover of less than £5m, which goes beyond the OFT "de minimis" and provides a clear "safe harbour" for the merging parties. We think that additional safeguards such as a £10m turnover limit on the acquiring business would neuter the proposal and should be dropped.

  The voluntary notification regime for mergers is one of the strengths of the UK competition system, delivering speed and reduced costs to business, and should be retained. We believe that it should be further enhanced by providing greater clarity to business over the share of supply test.

- **Market investigations are a significant cost to business and must be properly justified on competition grounds, and we do not support any extension of "supercomplaints"…**

  The CBI is sceptical about the need for market investigations in a competition regime. If they are to continue we recommend that the criteria for launching them must be based on clear failures of competition. We oppose the extension of supercomplaints to additional bodies or groups, including to SMEs.

- **The antitrust regime for enforcement of cartels and abuse of dominance cases needs to be significantly reformed to improve the robustness of cases and speed up the decision making process for business…**

  Streamlining the handling of antitrust cases should be an important objective for reform of the competition regime, and we believe there is a strong case for moving towards a prosecutorial model. If the government chooses not to go down this road immediately, we set out further options for reform to keep up the momentum for improvement.

- **Sectoral regulators should place an emphasis on competition over regulation, and need to be better equipped to do so…**

  The CBI recommends that sectoral regulators retain their competition powers and that they should be under a statutory duty to give primacy to competition law. We also believe that in many cases sectoral regulators need to be better equipped with proper levels of competition expertise, which could include utilising resource and expertise from the CMA.

THE PROPOSED COMPETITION & MARKETS AUTHORITY

The CBI supports the proposal to create a single Competition & Markets Authority (CMA) to increase efficiency and cut-out duplication…

6. We believe that there are substantial economic benefits that can be achieved by merging the competition authorities into a single body, which would result in more efficient processes and eliminate duplication.

7. The principal economic benefit from this would be to unlock investment, which is suspended during long-running inquiries, through more efficient processes. Reduced duplication should also result in cost savings to business.

8. As a secondary benefit, and whilst not sufficient to justify the merger in its own right, the merger should deliver synergies and cost savings that are part of a broader public services reform effort to restore the UK's fiscal health.

9. We strongly agree that the CMA should be a strong advocate for a pro-competition policy across Government, including for the delivery of public services. This competition policy should continue to be founded on the modern principles of competition law, not the vague yardstick of public interest.

10. The CBI supports the creation of a single CMA as part of an overall package of reform, which should include an effective governance structure and safeguards for business.

The scope & objectives of the CMA should include a primary duty to promote competition…

11. We support the proposal that the CMA should have a principal focus on competition and to have a primary duty to promote competition. We agree that there are advantages in setting these out as statutory objectives. These objectives should also include the CMA having a primary role in overseeing the application of competition law across the regulated sectors.

12. We do not agree that the CMA should have a statutory objective to keep economically important markets or sectors under review as this would be overly prescriptive and interfere with the CMA's independence in setting its priorities.

13. The consultation paper considers that certain activities of the OFT such as market studies involving consumer issues will need to continue in a reformed competition and consumer landscape. It recognises that there is an issue of how responsibility for these is allocated between competition and consumer bodies. There are questions of the efficient allocation of resource and available expertise to be considered. Also on national consumer enforcement there remains the issue of who should be responsible for enforcing consumer law outside the regulated sectors.

14. In this response the CBI has focused on the competition regime but fully recognises the linkage with the consumer landscape and the valid questions above. We believe the whole landscape of consumer law and competition law enforcement has to be considered before any final decisions can be made on the CMA and we look forward to responding to the Government's forthcoming consultation on the consumer landscape.

CMA governance & decision making should adhere to UK corporate governance principles and work efficiently across all areas of its responsibility…

15. We propose that the following principles should apply:

- The CMA should adhere to the normal UK principles of corporate governance.

- The governance of the CMA should be designed to work efficiently across all areas of its responsibility, market investigations, mergers and CA98 cases.

- Requisite skills at board level are critical. The Board must have credibility and expertise in competition law, so will include economists and lawyers. Experience in specific sectors is also desirable.

- Parties who may be subject to CMA enforcement action, such as the prohibition of a merger or remedies following a market investigation, need to have access to the decision-makers at a hearing of the CMA. This would be at the level of the CMA Board or the Board Executive Committee, depending on the constitution adopted for the CMA.

16. Our initial thoughts on the governance structure itself are that:

- The proposal for a "Supervisory Board" and an "Executive Board" should be dropped. Instead a Board Executive Committee could have delegated responsibility for making prescribed decisions. This would be appropriately constituted with a mix of executive and non-executive Board members.

- There should be a unitary board, the "CMA Board", with a substantial number of non-executives. Non-executives should be well-regarded public figures whose personal involvement in the board would be clearly recognised.

- Powers should be reserved to the CMA Board to decide to launch a market investigation, to propose remedies and to launch a cartel investigation. Alternatively, for ease of convening a quorum of decision-makers, these powers could be delegated to the Board Executive Committee.

- The CMA Board would delegate investigatory functions in specified cases to Board Sub-Committees, co-opting members as needed. Members could be co-opted from sectoral regulators if necessary. The Board, or Board Executive Committee, would then receive a report and recommendations from the relevant Sub-Committee before considering remedies.

THE MERGER REGIME

The merger regime should be improved by deregulating small mergers, retaining voluntary notification of mergers, and providing clearer merger tests to help self-assessment…

17. The government is right to say that the UK merger regime is one of the key strengths of the present competition regime. But we believe there are a number of ways in which it can be improved.

18. Mergers and acquisitions are an important way for companies to achieve scale, drive growth and enable assets to be re-allocated more efficiently across the economy. Merger tests need to be set so that pro-competitive mergers are not stifled. Less than 0.4% of UK mergers present problems of competition[1] and it is important that the remaining 99.6%% are not subject to unnecessary and costly delays.

The CBI supports the proposal for mergers involving small companies to be deregulated…

19. Small companies play an important role in innovation, employment and economic growth. Mergers can be a useful path to these companies achieving sufficient scale and resource to optimise their growth potential and, critically, gain access to international markets. This is often the case for start-up businesses in IT, engineering and biotech, as well as for venture capital and private equity who regard acquisition by larger companies as an important potential exit route for their investments.

20. The CBI favours a simple deregulation of small mergers where the target has a turnover of less than £5m, which goes beyond the OFT "de minimis" and provides a clear "safe harbour" for the merging parties.

21. Whilst we recognise the need to guard against any abuse of deregulatory measures, we do not support the proposed turnover threshold of £10m for the acquirer which in our view would effectively neuter the proposal. On our analysis, none of the mergers reviewed over the past three years would have qualified under this threshold.

22. The CBI believes that at a certain low level of turnover, the costs of reviewing the merger exceed any likely detriment, so we reiterate our view that a reasonable level for this turnover figure is £5m.

23. There is international precedent for this, where in Germany for example there is a threshold figure of €5m for turnover in the domestic market applied under the merger regime. In the UK, by contrast, we have identified examples where the OFT has reviewed mergers where the turnover of the acquired company was around £100,000. Examples of small merger issues are appended to this submission.

[1] Based on the RIA statistics, only 7 cases out of 1,965 mergers in 2009-10 required a remedy at the OFT or CC stage

Small mergers: Examples from the CBI's 2009 study of small mergers

Experiences of a regional law firm…

"My experience is that for very small mergers, the prospect of notifying a merger and potentially facing a stage 2 (i.e. Competition Commission) investigation is often fatal to the deal. I have been involved in two recent cases, where on the basis of the competition advice alone, the merger was abandoned. For the businesses I was dealing with, the potential costs of a reference (running into several hundreds of thousands of pounds with economists involved), the time delay and the management time that they would need to devote to the process (which for a small business is significant) meant that they could not justify proceeding with the transaction, however good the counter-arguments. The potential synergies and savings that could have been realised by the mergers, when set against these potential risks were not enough."

Examples of the disproportionate cost of merger clearance in very small transactions...

"The OFT investigated a transaction in a small geographic area where the target company had a turnover of less than £4m. The price of the acquisition was around £1.3m. The legal fees of the OFT investigation were £200K and the costs of a threatened CC reference were over £1m".

"A merger of two small companies, where the share of supply was narrowly defined and the target company had a turnover of around £500K, incurred legal fees of over £100K in dealing with an OFT investigation".

Voluntary notification of mergers should be retained…

24. The voluntary notification regime for mergers is one of the strengths of the UK competition system, delivering speed and reduced costs to business.

25. Speed is particularly important in the case of auctions where companies have to react quickly to business opportunities. The voluntary system enables acquisitions to be completed quickly, and minimises the risk that key people will leave or other assets be eroded.

26. We believe that companies have a strong incentive to carry out proper self-assessments, as the consequences of getting it wrong are very costly in terms of investment, management time and reputation.

27. We also believe that the voluntary regime is consistent with the government's commitment to better regulation and reducing red tape. The government's own regulatory impact assessment puts the cost to business of moving to a mandatory regime at between £67m-£237m per annum, and these figures were based over three years of depressed merger activity due to the economic downturn.

28. A voluntary approach also retains a sense of proportionality. Concerns about completed mergers posing competition issues are overstated, with only two cases a year, less than 0.2% of mergers being found to be problematic. Moving to a mandatory regime would impose a cost on all mergers, clog up the system and cause delays. The CMA's market monitoring and intelligence gathering should be sufficient to rapidly identify problematic mergers which have not been notified.

Proposals for tightening and additional penalties under the voluntary regime are not justified…

29. The CBI does not believe the proposal of a statutory bar to completing a merger once the CMA has commenced an inquiry is justified. We consider the current powers are sufficient and that it should be for the CMA to take the necessary steps to justify such action.

30. We are concerned that the proposed financial penalty for a breach of the order, amounting to 10% of the aggregate turnover of the enterprises concerned, is entirely disproportionate. If a penalty is considered necessary, we propose that this should not exceed 1% of the turnover of the target company. Any penalty should only apply to intentional, irremediable breaches of interim orders.

The "share of supply test" should be clarified to provide greater certainty to business…

31. It is important for companies to be able to operate with a good degree of certainty under the competition regime, including under the voluntary notification model for mergers. Equally, it is important that pro-competitive mergers should not be inhibited by procedures designed to catch the very few problematic mergers.

32. To meet these objectives the CBI believes that the share of supply test should be improved so that it is easier for companies to determine the goods or services which will be considered to constitute the relevant supply and also what is the relevant geographical area of the supply.

33. We believe that these factors have been applied too narrowly in the past, and do not always reflect changes in the market and the impact of technology. In principle, the test for determining whether a merger is notifiable should be:

    - Clear, understandable and easily administrable so that the parties can readily determine whether a transaction is reviewable;

    - Based on objectively quantifiable criteria: sales turnover, timescale and geographical area; and

    - Based on information that is readily accessible to the merging parties.

34. Greater clarity in defining the parameters for a "share of supply" test would enable companies to carry out more accurate self-assessments, and provide them with greater certainty over whether to proceed with a merger or whether it should be notified to the competition authority.

35. Getting this right is particularly important as since 2004-05, 57% of the mergers reviewed by the OFT have been on the on the basis of the share of supply test[2]. Because of the current lack of clarity over how the OFT will define the test, self-assessment under the voluntary regime is made more burdensome and costly than it need be coupled with the risk that the pro-competitive mergers are being unnecessarily notified.

36. We propose that the present turnover threshold of £70 million should be retained and adjusted annually by increases in the RPI. This would meet the requirements of business for a clear "bright-line" test for self-assessment, which is one of the strengths of the EU merger regime.

37. Setting the jurisdiction test correctly is an important matter for business and we would be very pleased to have further discussions on this point.

[2] RIA

The need for material influence provisions is questionable…

38. We question the need for the material influence provisions which were introduced before the Competition Act 1998 (CA 98). Now that Chapter I deals with co-ordination we suggest that these provisions should now be dropped from a regime which is concerned with mergers, in other words, acquisitions. If concerns emerge about material influence in a particular case these will no doubt be identified by or to the CMA. We also propose that a change of control test should be harmonised with the EU Merger Regulation.

The focus must be on efficient clearing of mergers which are not problematic…

39. Under a voluntary regime, we believe the focus should be on the rapid clearance of the vast majority of mergers that are notified and do not present a problem of competition. So we recommend a timetable for review and authority be granted to CMA senior staff to clear mergers and accept undertakings within a fixed time period. Only if a substantial lessening of competition was clearly identified would the proposed merger proceed through a more intensive review, and again a defined timetable should apply.

40. If this more intensive review recommended that the merger be prohibited, this decision would be taken by either the CMA board or by an executive committee of the CMA board with delegated powers.

Merger fees are already high and should not be further increased…

41. If the voluntary system continues, as we believe it should, we are concerned about the possible increase in merger fees. As the RIA points out [3], "Merger fees have increased six fold over the past four years and they are now high by international standards; many regimes do not charge a fee at all".

42. Under the present three band structure there is a suggestion that the present fees could more than double to levels of £65,000, £130,000 and £195,000 in order to achieve full cost recovery. This would continue the trend for significant increases over the last four years which the CBI does not support.

43. Mergers are one way in which companies achieve growth, and imposing such high fees can put a brake on companies' growth strategies.

44. We challenge the rationale for merger fees to be based on full cost recovery. We support the principle that full-cost recovery should apply to services provided for the benefit of business, but we do not believe this is such a service. Rather, merger control is one of the arms of competition law enforcement and we suggest other principles should apply.

[3] Para. 95

THE MARKETS REGIME

Market investigations are a significant cost to business and must be properly justified on competition grounds…

45. The CBI believes that this review of the UK competition regime should include a fundamental challenge to the need for market investigations and their role in the UK competition regime.

46. Market investigations impose a significant cost to business, including both management time and legal costs, are time consuming with many cases running for over five years, and have a chilling effect on investment whilst they are in progress.

47. International experience supports this scepticism. For instance, the US Congress reined in the powers of the Federal Trade Commission to conduct industry-wide investigations on concerns about creeping regulation and burdens on business. The UK regime also goes much further than the DG Comp system of sector inquiries which is aimed at unearthing anticompetitive practices for subsequent enforcement action.

48. So there should be a high bar to instigating a market investigation. We challenge the assertion that the State should routinely intervene from time to time to examine the operation of markets. And in our view, the scope of the markets investigations regime has gone beyond reasonable boundaries and permits excessive intervention.

49. So we propose that if market investigations are to continue, then the criteria for launching them must be based on clear failures of competition.

Market investigations should be clearly rebased on competition law…

We propose making a key change to ensure that, before a full-scale market investigation is launched, the CMA has more than reasonable grounds for suspecting there is a problem of competition. The present test in Section 131 of the Enterprise Act 2002 needs to be tightened.

<u>Our proposed process is that:</u>

- With a single authority, there should be a single end-to-end process with breakpoints.

- During the first stage, lasting a suggested four months, the CMA would carry out a review of the market to determine if there were competition problems. The trigger for this review would be reasonable grounds to suspect there were problems of competition. The period of four months could be extended once to a total of six months.

- This review would be initiated following an analysis of the CMA's market intelligence, input from consumer associations and other complainants.

- The CMA would have information gathering powers based on it having reasonable grounds for suspecting there existed restrictions or distortions of competition in the identified market

- During this first stage, the CMA would have a duty to consider what measures have been taken or proposed by other authorities which could provide sufficient remedies. This is particularly relevant in the regulated sectors. The market investigation into local buses is an example of launching an investigation in a sector that was in the throes of implementing a major change in regulation. The PPI market investigation reference was made at the same time as the FSA was reviewing the PPI market because of complaints of miss-selling.

- At the end of the first stage, the CMA would make known any concerns so that affected companies would have the opportunity to offer any remedies.

- If the CMA was unable to resolve its concerns, it could then proceed to a full market investigation. This was provided that it had a well-founded belief, based on the evidence it had found, that problems of competition existed across the whole industry. The decision to proceed would be taken by the CMA board under the governance structure proposed below.

- This stage would last 18 months, extendable to a maximum of 24 months, but after 6 months the CMA would be required to provide a full articulation of its case, identifying the problems of competition it was investigating.

- After 12 months, there would be a checkpoint to allow a dialogue with the parties being investigated so that undertakings might be given in order to terminate the investigation at that point.

We do not support any extension of supercomplaints, including to SMEs…

50. The CBI does not believe that supercomplaints play a helpful role in the competition system and should be abolished rather than extended. Supercomplaints distort enforcement priorities, create a privileged class of complainants and add an unnecessary stage to the process of investigating potential failures of competition.

51. Instead we believe that the CMA should have autonomy in deciding which problem areas to investigate, by applying its prioritisation principles, based on its own intelligence work, market monitoring and receiving complaints from a variety of sources.

52. So whilst we fully support the aim of focusing on barriers to entry and promoting growth for SMEs, we do not believe the proposal to extend supercomplaints to SMEs will help to achieve this and we oppose the proposal because:

    - The CMA will already have all necessary powers to collect intelligence and analyse complaints, so this proposal in our view is redundant.

    - Companies are different to consumers and should not be treated as such.

    - The proposal would enable small representative bodies to leap-frog the complaints process and skew the system. This would be inequitable to those with more justifiable complaints, which may include large SMEs.

    - SMEs like other businesses can make their complaints heard by the CMA without creating special privileges; they are well able to complain today to the OFT and are not shy to do so. The system is working without this new measure and there is no evidence of need for it.

53. We also think that defining the “supercomplainant” bodies would be problematic. There is a risk in our view of small single issue bodies being formed with the possible consequence of the CMA having to deal with multiple “supercomplaints” in small local markets. It is questionable whether this would lead to a sensible use of CMA resources.

54. Instead, we propose a more productive route would be for the new CMA to focus on providing advice to SMEs on competition issues, including through a Help Desk, which would provide advice as well as improving the market intelligence available to the CMA.

Transparency and rights of defence need to be enhanced…

55. Market investigations may be viewed by those responsible for them as non-adversarial but that is not the way they are perceived by those being investigated; particularly as companies may be subject to restructuring and divestment at the end of the investigation.

56. It is essential therefore that the CMA case is made absolutely clear to all parties. The rights of defence should be similar to those in Competition Act cases with a presumption of innocence, access to the file, access to decision makers and oral hearings at an early stage.

57. We believe more statutory safeguards are needed because there is too large a margin of appreciation which is presently allowed to the CC on appeal to the CAT.

58. Under a system of Panels, it is important that the Panels take a very active role in scrutinising and challenging the staff analysis. The process of judicial review does not lend itself to testing the quality of econometric analysis and it is essential that there is a sound peer review of this input.

A robust system for appeals is needed…

59. Given the potentially draconian remedies of forced divestiture there needs to be a robust system of judicial review.

60. We consider that the threshold for imposing a remedy needs to be raised. There should be statutory criteria which the CMA has to take into account when proposing remedies; for example, materiality of the detriment, necessity for and proportionality of the proposed remedy. This approach should provide better transparency and ensure good quality in decision making.

61. Compliance with statutory criteria would also provide companies with a more satisfactory remedy on appeal to the CAT and provide for a fuller review. We consider that generally this should provide an adequate system of appeal and be more feasible than a full merits review by the CAT. However, where the proposed remedy is divestiture we consider there is a case for considering a full merits review.

We are concerned about proposals for investigations across markets…

62. We note the CMA could be enabled to carry out in-depth investigations into practices across markets. We are concerned about such an extension to the regime, given the inherent difficulties in identifying practices which cut across markets.

63. It is notable that the Secretary of State had the power to refer anti-competitive practices for review by the Monopolies and Mergers Commission under section 78 of the Fair Trading Act 1973, but only three references were made under this provision during the 26 years it was in force.

64. The examples cited for possible references such as, the costs to consumers of switching suppliers, below cost selling, or the provision of extended warranties and other secondary point of sale practices may cut across industries. But we suggest that they are consumer-facing issues where the method, subject matter and conclusions of investigation would differ according to the conditions of competition, such as the type of suppliers and nature of the product, in each individual market.

65. We question whether such powers need to be enacted because of the inevitably increased burden that such investigations would impose on a potentially very large number of businesses.

THE ANTITRUST REGIME

The antitrust regime for enforcement of cartels and abuse of dominance cases needs to be significantly reformed to improve the robustness of cases and speed up the decision-making process for business…

66. The handling and duration of antitrust cases is one of the biggest sources of frustration for business under the current competition regime. Enforcement cases are currently too protracted, and damage reputation and confidence in business for their duration. So the CBI believes that the streamlining of the handling of antitrust cases is an important objective for reform of the competition regime.

There is a strong case for moving towards a prosecutorial system for the enforcement of cartels and abuse of dominance cases in order to improve the robustness of cases and speed up the decision making process…

67. To address these concerns, we believe that there is a strong case for moving towards a prosecutorial model, whereby the competition body would be required to justify its proposed sanctions on a business in a hearing before the Competition Appeal Tribunal.

68. The arguments in favour of this approach are that it would:

- Speed up cases and lead to earlier settlements, by enabling cases to reach the ultimate decision-maker at an earlier stage;
- Enable evidence to be heard once, rather than first before the CMA and again on appeal;
- Help to achieve greater consistency of fines with those imposed for other statutory offences; and
- Provide an incentive to continually raise the quality of cases being brought, and reduce the likelihood of cases being taken to appeal and subsequently overturned.

The CBI is less persuaded by the other reform options set out in the consultation, but we are mindful this is a significant step…

69. Of the other options set out in the consultation paper, the hybrid option of setting up a new administrative approach involving an internal tribunal would in our view duplicate the process, leading to delay and increased costs, and so should be rejected.

70. We are mindful that the OFT have recently introduced a number of procedural improvements in an attempt to streamline the existing administrative approach, which are welcome. We are sceptical as to whether these improvements will be sufficient to deliver the necessary step-change in process for business, but recognise this can only be proven over time.

71. If the Government is not persuaded to make the move to a prosecutorial approach immediately, we suggest two further options for consideration:

    - The Government could explore whether it would be workable for companies to opt for a prosecutorial approach at an early stage in proceedings under the existing administrative procedure if they wished to do so.

    - The Government could consider including a reserve power in the legislation that will follow this consultation, in order to retain the ability to switch to a prosecutorial approach if the improvements put in place by the OFT do not deliver the necessary streamlining which is being sought.

The CBI does not support the proposal for new powers to impose financial penalties, including daily fines for non-compliance…

72. We do not believe there is sufficient evidence of a problem to justify such new penalties. We also believe it is questionable how these penalties fit within a prosecutorial system, where cases would be managed by the court and the court would have the power to order interim measures.

There is no proven case for amending the criminal cartel offence…

73. In our view there is no proven case for changing the present position by adopting Option 1 and removing the dishonesty test. The evidence base of two prosecutions in the last eight years does not justify such a radical change. In our view, there needs to be better case selection and case management to improve the success rate of prosecutions.

74. We consider Option 2 as unworkable as it is unrealistic for companies to keep a white list. Similarly, we believe Options 3 & 4 are also unworkable since there are legitimate commercial reasons for agreements to be kept confidential.

We are opposed to the proposal to reclaim costs of investigation from the defendant…

75. We are opposed to this proposal on the grounds that it would distort incentives on the CMA. The CMA could incur unnecessary costs which would be imposed on the defendant. Adding costs would also have an impact on fines. We suggest the only possible course is to have the costs award left to the court and for the awards to go in both directions.

SECTORAL REGULATION

Sectoral regulators should place an emphasis on competition over regulation, and need to be better equipped to do so…

76. The CBI believes that the long-term direction of travel should be for regulated sectors to move along the road to full competition, which would ultimately remove the need for regulation. We suggest principles should be developed that could potentially be applied across all sectors, with the objective of seeing the CMA and sectoral regulators working efficiently together to apply competition law.

Sectoral regulators should retain their concurrent antitrust and Market Investigation reference powers subject to certain conditions…

77. Experience is varied across businesses and sectors as to how well concurrency works in practice, much of which is dependent on the experience and current competition skills of the regulator.

78. As an example, OFCOM is often cited as having the technical competence to enforce competition law. Two features stand out: it is the appointed regulator under the EU sector specific regulatory framework, which is founded on competition law principles, and it has a statutory duty to give primacy to competition law.

79. If sectoral regulators retain their competition powers, we suggest there are two essential requirements. First, they should be under a statutory duty to give primacy to competition law. Second, they must have a proper level of expertise, which industry experience suggests is lacking at present.

Competition law should have primacy over sectoral regulation…

80. The CBI supports the proposal for competition law to have primacy over sectoral regulation as an important step on the path to competition law replacing regulation in the longer term. This would require a legislative change whereby the sectoral regulators were required to use their competition powers in preference to their sectoral powers wherever legally permissible and appropriate. We also believe that sector regulators should be encouraged to demonstrate how they have made use of their competition powers, for example by detailing this in their annual reports.

Sectoral regulators need proper levels of competition expertise, which could include utilising resource and expertise from the CMA…

81. We believe the aim should be to develop common high standards of excellence in applying competition law in the regulated sectors. This will help to ensure that common principles of competition law are applied consistently across the various sectors, such as in defining the relevant market, assessing barriers to entry and in determining any requirements and conditions for third party access.

82. To the extent that some sectoral regulators may not be achieving such high standards, then ensuring a pool of expertise including through assigning staff on a short-term basis between the CMA and the sectoral regulators to transfer skills would be beneficial.

Example of the need for reliable competition expertise

A group of companies was encouraged by their sectoral regulator to engage in joint collaboration on a particular matter. The companies had doubts whether this advice could be relied upon as clearing any competition issues, as the regulator appeared to overlook these. The options for the companies were then to discuss this collaboration with the OFT, which did not have deep knowledge of the sector, and could have required considerable time and effort to bring the OFT up to speed; or to take the risk or to abandon any joint collaboration.

But the CMA should not have a high level objective to keep economically important markets or sectors under review or have a duty to review them…

83. We consider that the CMA, as the senior body on competition matters, should be expected to develop its understanding and expertise in all sectors so as to be able to apply competition law as required. However, beyond applying its intelligence gathering in economically important markets or sectors, it should not be under a duty to review such sectors. This could lead to a duplication of roles with the sectoral regulators.

The CMA should be given a bigger role in bringing cases…

84. The CBI believes that the Concurrency Working Party (CWP) is not working as effectively as it could, with ultimate responsibility for applying competition law being unclear.

85. We believe there is a case for looking to apply European Competition Network (ECN) type model whereby the CMA would have a greater role in case allocation and oversight amongst sector regulators.

86. This would overcome the present problem of a lack of ultimate authority within the CWP. For example, the sectoral regulators could be required to consult with the CMA before starting a CA 98 case and to have enforcement cases regularly reviewed for competition law aspects. The CMA would continue to have the right to start cases in the sector areas, in which case the sectoral regulator should be obliged to co-operate.

87. We do not believe it is an ideal situation for the CMA to have to take over cases previously commenced by a sectoral regulator, and we believe it would be preferable for the sectoral regulator to pay sufficient heed to the competition law aspects of the case. An obligation to report regularly on the way in which competition powers have been exercised could well provide sufficient incentive for this.

The CMA could handle regulatory appeals now heard by the Competition Commission…

88. The CMA could potentially handle regulatory appeals now heard by the Compeition Commission, but this would depend on the overall governance structure within the CMA. It is important that appeals are heard by a body with the necessary technical expertise. If the CMA is also acting as an investigator and prosecutor, then the appeal body within the CMA needs to be clearly ring-fenced to overcome any conflict of interest.

CAT costs on an unsuccessful appeal should not be recoverable…

89. We are entirely opposed to this proposal. It is difficult to see the rationale for the costs of a judicial body being recovered from the parties, as distinct from charging a fee to bring proceedings.

OVERSEAS INFORMATION GATEWAYS

The present gateway should not be changed as it provides important safeguards for business…

90. We note that the Government is considering an option to amend the present gateway to allow information to be disclosed to overseas public authorities that has been obtained by the CMA during mergers and market investigations.

91. The present gateway was developed after considerable controversy at the time of the Enterprise Bill. It recognises that in merger and market cases, parties and third parties often disclose the most sensitive information. In merger cases this will include technical information, future corporate strategy, objectives and efficiencies and the likely development of markets. Risks that the information could become available to overseas competitors, who may be state owned or national champions, could undermine the ability to have a frank discussion with the CMA. This could unreasonably affect the process in situations where there is no wrongdoing alleged. Parties will generally consent to the sharing of information, since they want to have their deals cleared, unless they have a serious reason not to and any refusal to consent should be respected.

92. There is also a concern that information disclosed to overseas public authorities can in turn be disclosed to third parties using Freedom of Information requests. This may result in the UK companies concerned being exposed to a risk of private litigation.

93. The CBI's view is that the present gateway should not be changed as it provides important safeguards for business and properly distinguishes information obtained through cartel investigations from other confidential information acquired from companies.

CBI
13 June 2011

Centrica Storage

10 June 2011

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Department for Business Innovation and Skills (BIS) consultation
A competitive regime for growth: A consultation on options for reform.

A Response by Centrica Storage Limited

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Background and introduction

Centrica Storage Limited (CSL) is a wholly-owned subsidiary of Centrica plc and operates the Rough gas storage facility in the southern North Sea and the Easington onshore gas processing terminal in East Yorkshire.

Rough is a partially depleted gas field, located some 29km (18 miles) off the east coast of Yorkshire, which has been converted to a storage facility. It is the largest gas storage facility in the UK, providing approximately 75% of space and able to meet approximately 10% of the UK's current peak day gas demand.

Centrica's acquisition of the Rough gas storage facility on 14th November 2002 was referred by the Secretary of State for Trade and Industry (SoS) to the Competition Commission (CC) for investigation on 25 February 2003, under the Fair Trading Act 1973. The CC concluded that the acquisition could be expected to operate against public interest unless appropriate undertakings were offered to address a number of concerns. The key concerns were that competition in the markets for flexible gas and domestic gas supply would be weakened, with the likely consequence that prices would be higher than in the absence of the merger and that innovation and investment at Rough would be lower than under another owner. In December 2003 the SoS accepted undertakings which provided suitable protection to the concerns identified and the merger was allowed to proceed.

In April 2010 Centrica submitted a request to the Office of Fair Trading (OFT) for a review of the Undertakings stating that, in its view, they were no longer required due to change of circumstance. Centrica's case was centred on two key changes: changes in market conditions, in particular changes to the way the UK sourced its flexible gas requirement and the marked reduction in the level of flexible gas under the control of Centrica and changes in the legal framework brought about by the implementation of EU Third Energy Package.

In September 2010 the OFT agreed with Centrica that there had been a change of circumstance with regard to changes in market conditions and that the impact of the introduction of the Third Package meant that some aspects of the Undertakings would no longer be necessary or proportional. Therefore, the advice of the OFT was that the review request should be granted.

In April 2011, following the publication of two provisional decisions in January and March, the CC published its final report which concluded that it was not persuaded that the Undertakings should be varied or released because of changes in market conditions and that the introduction of the Third Energy Package likewise did not remove the need for the Undertakings. However, the CC did conclude that a number of variations were necessary and work is currently ongoing re drafting the Undertakings to reflect those changes.

This response aims to highlight some of the lessons learnt from the experience of the recent Undertakings review process; it is hoped that this will be of use to those involved in designing the reforms to the competition authorities and help the Government achieve its overarching objective to secure vibrant competitive markets that work in the interests of consumers, promoting productivity, innovation and economic growth.

Finally, it should be noted that the Undertakings require CSL to be physically, legally and financially separate from Centrica Group; accordingly this response is separate from, and does not seek replicate, the Centrica Group's response which we understand will provide more comprehensive views on the issues raised in the BIS consultation.

General comments based on the Rough Undertakings Review

The process has proven to be extremel y lo ng; the anticipated con clusion of t he review is now forecast to be some 16 months from the request being su bmitted to the OFT and would have included t hree public consultatio ns on the CC's variou s proposals. However, in reality it w as much lo nger, before the ca se fo r review was submitted to the OFT, several mont hs were sp ent in discu ssion with Ofgem on h ow Rough facility would ope rate under a common 3 rd Package nTPA regime such that it was not just a 16 month process.

The length of time involved has le d to increa sed commercial risk an d has require d specific derogations to be agreed by the So S, Ofge m and the OFT to re move conflicting p rovisions co ntain within the existin g Undertakings to tho se contained within the 3 rd Energy Regulation w hich becam e directly a pplicable in March 2011. The uncert ain outcome has also created a dditional in vestment b arriers for new storage and hence has potentially had a negative impact on the UK's energy securit y of supply. This uncertainty has not been helped by th e continuin g delay in the legislative process requ ired for the t ransposition of the 3 rd Energy Dire ctive into U K law.

There is scope for pha ses 1 and 2 of the mer ger process to be streamlined. In our experience there seemed to be a significa nt lag between the OF T making its recommendation and the CC commencing its investigation.

The CC seemed to start completely from scratch, a pparently not using t he considerable amount of information submitt ed to the OFT including re sponses to the OFT's infor mation requests. It also appeared that the CC did not d o any warm-up work so that it could launch Phase 2 as soon as the OFT made its recommendation.

The timelin es the CC imposed were very tight and ther e was litt le engagement regarding the structure of the proce ss with key stakeholders. Whilst it is recogn ised that an Undertakings Revie w p rocess is a relatively infrequent event it felt unnecessarily ad hoc. In addition, the se lf-imposed deadlines seemed to limit the CC's ability to speak with a range of stakeh olders whe n reaching its prelimina ry decision. Given that the CC did not change its position in a ny substantive wa y fro m the preliminary decision , it is conce rning that more time was not dedicated to t hat stage of the process.

The formalised nature of all communications with the CC (i.e. t ranscribing all meetings not just formal Panel sessions) limited the potential for open and frank discussions with stakeholders. Whilst accepting the importance of accurately recording meetings, a g reater level of open discussion cou ld have facilitated better information sharing and process management.

It is important to be abl e to have meaningful bilateral discu ssions with the case team: some of th e issues raised are technical and cannot realistically be dealt with in a formal panel session with everybody present (given the time constraints and the large number of people from a wide variety of roles in attenda nce). Under the current system this means that technical issues are often left to be dealt with in writing, and often there is simply not enough time to have a s many "rou nds" of discussion as can be needed to really bottom out the drivers of difference in view on comp lex topics. A face-to-face meeting can in principle get much further much faster (an d is something that e.g. the European Commission regularly does on tech nical econo mic issues) – but in th e UK it depe nds on t he particular case team whether they are happy to actually engage verbally or prefer to be "in listening mode" o r "in spe aking mode" but not both at the same time. It would be good if any new structure cou ld encourag e real verbal dialogue du ring the pro cess, which is a much quicker way to exchang e

views and ideas in an informal way. Key points that emerge from the informal process can then be reinforced (or if necessary corrected) formally through the written process, as today.

In phase 2, the CC frequently requested additional information. The deadlines they provided were often extremely tight which made it difficult to appropriately check information or run it through internal clearance processes.

The embargo periods were also very short with very little notice, allowing little time for briefing senior management and those involved with managing external stakeholders of the outcomes before the information was made public.

A desire to hit self imposed deadlines made the process feel inflexible and very last minute.

There was limited capacity within the process to critically review the CC's econometric modelling and to challenge the conclusions that the CC took from that analysis. In particular we found that the CC's reluctance to clearly set out the theories of harm at an early stage unnecessarily hampered meaningful and constructive dialogue. Whilst recognising that it takes time for the authorities to collect data and come to preliminary conclusions on where any harm is likely to arise, it is important that the theories of harm are clearly set out as early as possible.

Proposals to streamline the process

- Early engagement with the sectoral regulator

A sectoral regulator may well possess a greater level of technical competence than the Competition and Markets Authority (CMA) particularly at the onset of a review / investigation. Therefore, early and full engagement between the CMA and relevant regulator would be beneficial to consider competition issues, identify and agree the key areas of concern and provide focus for the initial phase of the process. Further, there may the case for the sectoral regulator to engage with other stakeholders to help expedite the review process by establishing a common level of understanding. For example, before Centrica submitted its request to the OFT for the Rough Undertakings Review it attempted to engage with Ofgem to identify the key areas of concern and work through potential remedies; unfortunately this met with a disappointing response from Ofgem. Centrica believes that the lack of willingness to engage early in meaningful discussion prior to the Review led to a more adversarial process during Phase 1 and Phase 2 than was necessary.

Further, the decision by the CC not to allow Centrica to see Ofgem's submissions contributed to the disjointed feel to the process and did not help in resolving the different positions.

- Powers to request information in Phase 1

In relation to the review of the Rough Undertakings, it would seem that additional powers to require information would have had little impact on the overall process. CSL had an incentive to meet the OFTs information requests and other information was made available from the regulator or is publicly available.

Once Phase 1 and 2 a re managed by the one entity, the need to pro vide additional information collecting p owers at P hase 1 ma y be redun dant, as st akeholders will know that they will be required to provide the information in Phase 2.

- Statutory deadlines and stop the clock provisions

Statutory de adlines are important for ensuring that the inve stigation pr ocesses are conducted in a timely manner. In the case of the Rough Undertakin gs Review, the proposed st atutory timeframe of 24 to 32 we eks would have been sufficien t fo r conducting the analysis.

Similarly 30 working d ays for Pha se 1 should have bee n sufficient for making a decision as to whether the Review of the Rough Undertakings should go to Phase 2.

However, th ere is a sign ificant risk t hat if the CMA does no t have a sufficient level of resourcing (i.e. staff) th ere is a high risk that tightening statutory deadlines will constrain the quality of the analysis.

Having a slightly longer statutory deadline, with an incentive for the CMA to potentially agree a tighter reporting timetable with the relevant stakeholders would have t he benefit of e nsuring that the stakeh olders are a ppropriately engaged in the plannin g process (a nd therefor e aware of all key milestones and pote ntial resour ce implications for them) an d provide sufficient cert ainty. In such cases the CMA would still require the appropriate powers to stop the cl ock or take other actions if it took the view that the stakeholders were trying to game the process. In the case of the Rough Undertakings Review, i t would have been u seful to ad opt stop the clock type mechanisms to reassess time lines for the final decision so that th ere could be greater clarity regarding the legislation that the Govern ment is proposing for implementing the 3 rd Package, a nd to en sure that all parties ha ve the sa me information (i.e. only the CC, DECC and Ofgem had seen and could co mment on t he potential implications of the Government's draft legislation fo r the Rou gh Undertakings).

- Continuation of Parties Advocate Role

It would be useful if the "parties' advocate" role, already established at the OFT, could be carried through the second pha se process. It is very useful for the parties to know that there will be somebody in int ernal meetings well ve rsed in the materials th ey have supplied, able to raise evidence submitted at relevant points in the internal debate process. This w ould also give parties greater confidence in th e process, as not all members of the case te am may be familiar with the materials alre ady submitted. Presumably in case s with intereste d third parties it cou ld be valuable to have a similar role tasked with a thorough awareness of their submissions/materials.

Centrica/British Gas

Centrica plc response to BIS consultation:

A competition regime for Growth – A consultation on options for reform

1 Introduction

Centrica welcomes this opportunity to comment on the Department for Business, Enterprise and Skills' consultation on the proposed reform of the UK competition regime.

Centrica is supportive of the Government's overarching aim to maximise the ability of the competition authorities to secure vibrant, competitive markets that work in the interests of consumers and to promote productivity, innovation and economic growth. We also welcome the Government's review of scope for improvement of the regime, in particular with respect to achieving efficiencies in the process and improving speed and predictability for business.

We welcome, in particular the proposal to merger the OFT and CC into a single CMA and would support the introduction of a prosecutorial regime for antitrust enforcement. However, we consider that other areas of the existing regime work relatively well and that to the extent improvements are required, these are capable of being achieved by refining and streamlining existing processes rather than introducing major reform. On that basis, we are not in favour of a mandatory merger control system and strongly oppose proposals to extend the existing market investigation regime, in particular by granting super-complaint powers to SMEs.

It is clear that some of the proposals for reform entail significant cost to business, in particular in the area of merger control, but also in relation to antitrust investigations and CAT appeals. Requiring business to bear the cost of the competition regime in future years has onerous implications and risks undermining the Government's objective of encouraging economic growth.

2 Creation of a single Competition and Markets Authority (CMA)

We welcome Government's proposal to combine the OFT and CC into a single CMA. The creation of a single authority provides an opportunity to achieve significant efficiencies while also harnessing and building the key strengths of the current regime by combining the skills and world-renowned expertise of both authorities.

In order to ensure that the transparency, robustness and consistency of decision-making is also strengthened rather than compromised, careful consideration will need to be given to the appropriate checks and balances that need to be incorporated into the decision-making structures of the new CMA. It will be of particular importance to ensure objective and independent decision-making at the first and second phase of review, as well as to ensure that stakeholders have adequate access to the case team and decision-makers throughout the process. We consider a move to a prosecutorial system for antitrust investigations would bring improvements to that process.

Ensuring the independent status of the CMA, free from political influence, will also be fundamental to the effectiveness of the new authority. Similarly, appropriate safeguards will be required to ensure that CMA board members are independent of political influence, for example by limiting their terms.

The CMA should also be subject to assessment by the National Audit Office to ensure it is performing in line with its objectives.

Duty to promote competition

While we agree in principle that the CMA's role should be primarily focused on competition, we are not in favour of introducing a statutory duty to promote competition. As well as potentially distorting the prioritisation of cases (in particular if the CMA is also granted powers to investigate wider consumer and public interest issues), such a duty would also conflict with the CMA's need to take into account other factors (e.g. efficiencies and countervailing benefits) when assessing the net harm arising from anti-competitive effects.

Duty to keep economically important markets under review

We do not support the proposal for the CMA to have a specific objective or duty to keep economically important markets under review – in particular where this encompasses the regulated sectors. Such a duty would risk undermining the independence of the CMA. Further, regulated sectors are already under the scrutiny of the relevant regulator therefore this proposal would create duplication of effort and resources as well as potentially increasing the burden for business. Centrica responded to over 50 requests for information last year (from Ofgem and Consumer Focus), at considerable cost in terms of effort and resource. Many of those RFIs were identical in substance, but required a response in different formats. With their sector-specific experience, we consider sector regulators such as Ofgem to be better placed than the CMA to perform a monitoring role in specific sectors, while the CMA's resources would, in our view, be more effectively focused on monitoring competition across (all) non-regulated sectors.

We note that BIS proposes to consult in due course on the appropriate authorities for dealing with consumer enforcement, and accordingly reserve our position on the role of the CMA and other bodies in consumer enforcement until that consultation. However, we would encourage Government to be mindful of the consumer protection powers which sector regulators enjoy as part of their regulatory remit and therefore the need to avoid duplication and inefficiencies in the enforcement of consumer powers across a number of separate bodies. This is a particular concern in light of the significant burden which responding to numerous RFIs places on business, as highlighted above.

3 Markets regime

By way of preliminary observation, we do not share Government's view that the markets regime is a key strength of the UK competition regime. Rather, we question the merits of the regime, which is almost unique to the UK, relative to the significant costs and resources which it entails for business and authorities alike. The time taken for investigations, and uncertainty for business during that period as well as during subsequent remedies reviews, also calls into question the benefits of the regime relative to alternative enforcement tools. In the regulated sectors in particular, the markets are under constant review by the relevant regulator, who has a range of tools at its disposal to address any concerns.

Cross-market investigations

If the CMA is to retain the power to carry out market investigations, we strongly oppose extending those powers to enable investigations into practices across several markets. This would risk investigations being launched into markets in which no specific concerns

have been identified as well as undermining the importance of assessing practices in the specific context of the market in question. At the very least, there would need to be a high threshold to trigger the power of the CMA to launch a cross-market investigation, such as the existence of market power across more than one market (although, we can envisage practical difficulties in establishing that this threshold is met).

Public interest issues

We also question the need for the CMA to report on public interest as well as competition issues, given how rarely the need for an independent inquiry into public interests issues has arisen in this context in practice. If introduced, the triggering of those powers would need to be strictly limited to avoid expanding the scope of the CC to a general investigatory body.

Super-complaint powers for SME bodies

We strongly oppose the proposal to grant super-complaint rights to SME bodies. In our view, this runs counter to the policy objectives of competition law and risks creating inefficiencies and a poor use of CMA resources rather than promoting targeted competition law enforcement. Further, we consider this will impose a disproportionate burden for business relative to the consumer benefits which can be expected to arise from such measures.

We are concerned that this proposal will distort the prioritisation of cases, given that the super-complaint system takes priority over other investigations. While the power of consumer bodies to bring super-complaints is designed to promote consumer benefits (a key objective of competition law), seeking to protect individual or specific groups of competitors primarily promotes the commercial and competitive interests of those individuals rather than competitive markets that work in the interests of consumers. Given these incentives, we also envisage that the system would give rise to a significant number of super-complaints which are ultimately found to be unfounded.

As well as diverting CMA resource which could be better employed elsewhere, thereby undermining Government's efficiency objective, the proposal would also increase the already significant burden for companies facing RFIs from a wider number of representative bodies. By way of example, Centrica responded to 28 RFIs from Consumer Focus in 2010 at considerable cost in terms of time and resource. Against this background, we would caution against any extension of super-complaint powers. To the extent that SMEs have competition concerns, they will retain the right to raise complaints with the CMA in the same way as any other company. We see no reason to prioritise such complaints over those of any other company.

Strengthening and streamlining the regime

We support the introduction of the following safeguards to the process, given the disproportionate burden on business in the absence of such protections: (i) an objective statutory threshold for launching a market study (although we recognise that one of the risks with this approach is extending the overall timing via the OFT making informal information requests in advance of launching a market study in order to gather sufficient information to establish whether the statutory test is met); and (ii) raising the existing threshold for making a reference.

We also support the following streamlining measures: (i) a time limit (e.g. 6 months) for market studies, subject to extension for undertakings in lieu; and (ii) reduction in timeframe for phase II from 24 to 18 months.

We would also support the streamlining and shortening of the process under which market investigation remedies are reviewed as well as further clarification of the trigger events for remedies reviews.

Decision-making structure

It is essential that appropriate checks and balances are introduced within the CMA to ensure that the decision to refer is independent and objective. In particular, phase I and II decision-making structures must be sufficiently independent from one another so as to ensure objectivity. We recognise potential continuity and efficiency benefits in incorporating some members of the phase I case team into the phase II case team, however question how this would work in practice, in particular where the first phase review is carried out by a sector regulator. While this would have the advantage of bringing sector expertise into the phase II case team, we would be concerned that sufficient measures are introduced to ensure the robustness and independence of phase II decisions.

4 Mergers regime

Mandatory versus voluntary regime

We consider the voluntary nature of the UK merger regime to be a key strength of the regime. This allows greater flexibility for businesses than under a mandatory regime as well as for the OFT in targeting resources at those mergers which merit close review. We believe that the system generally works well and does not require radical overhaul in this regard.

On that basis, we are strongly opposed to a mandatory regime, whether a full or hybrid version, and in particular a suspensory mandatory regime. This would be disproportionate to addressing the concern about the few anticompetitive mergers which escape review, in particular given the low thresholds proposed in the consultation paper. The impact assessment notes that the problem of unscrambling completed mergers has only arisen in a handful of cases. In our view, the commercial and reputational risks involved in implementing a merger that gives rise to competition issues, provide a strong disincentive to companies from taking any such steps.

We also question whether a mandatory regime would lead to efficiencies as the authority would be required to review many mergers which have no impact on competition. This would entail a significant increase in CMA resource in order to avoid compromising the quality of review, which is currently internationally recognised to be high. It would also entail an increased burden on businesses who would be required to notify many unproblematic transactions.

Measures to improve the voluntary regime

Strengthening interim measures

We do not consider it necessary to strengthen powers to impose interim measures. The authorities already have extensive powers to take such action where it is required.

Parties should not be prevented from implementing non-problematic mergers and we would not favour automatic prohibitions on integration. This would contradict some of the

underlying principles of a voluntary regime and limit the efficiency and flexibility benefits of the regime. It is important that these powers are only triggered where there is a genuine issue of pre-emptive action which prejudices the CMA's ability to address an anti-competitive merger. On that basis, we would favour maintaining the current statutory threshold for imposing interim measures.

If fines are to be imposed for breach of interim measures, the appropriate checks and balances should be introduced to ensure that such fines are reasonable and proportionate. In our view it would be inappropriate to impose fines for minor breaches, and in cases where the merger was ultimately cleared.

Jurisdictional thresholds

We welcome Government's acknowledgement that business would support a more objective test than "share of supply". However, lowering the threshold to capture all mergers where the target has £5 million UK turnover and the acquirer has £10 million worldwide turnover is, in our view, too restrictive and will bring many mergers with no impact on competition within the jurisdiction of the CMA. We do not believe that this will achieve the efficiencies and effective prioritisation of cases which Government is intending to achieve and will result in significant uncertainty for business.

Time limits

We would welcome imposing a time limit for phase I review as proposed. However, sufficient flexibility would need to be built in to the process to avoid compromising the quality of review and to allow sufficient time for the negotiation of undertakings in lieu.

If information gathering powers are extended at phase I, there would need to be clear guidance as to how these would be exercised in practice to ensure certainty for parties.

Decision-making process

As with the markets regime, appropriate checks and balances would need to be introduced within the CMA structure to ensure independent decision-making at phase I and II, in order to preserve the benefits of the current regime. However, we recognise potential efficiency benefits in incorporating members of the phase I case team into the phase II team, provided the above protections can be ensured.

Merger fees

We consider that it is inappropriate and disproportionate for business to bear the full cost of the merger regime. This risks undermining one of the key objectives of the reforms, i.e. to encourage growth, in particular given that UK merger fees are already high relative to many other jurisdictions. If the CMA has the ability to call in all mergers above the small mergers exemption, and a fee is payable in each case, we would be concerned to ensure there were genuine substantive reasons for doing so.

We do not support the proposal to increase merger fees to almost double their current level. This risks creating disincentives for parties to notify, (in particular when added to other transaction costs, including legal fees) which would undermine the strength of the regime.

As regards applying fee bands according to the size of the deal, we note that the size of the transaction does not necessarily indicate the level of resource that will be required to review it, which will be driven more by the extent of any competition issues.

5 Antitrust regime

Procedural model

Of the three options proposed by Government for antitrust enforcement, we favour the prosecutorial model, whereby the CMA and sector regulators would prosecute Competition Act cases before the CAT, which would decide on infringement and penalty. Parties would have a right to appeal to the Court of Appeal.

We accept that this would involve a radical overhaul of the current system. However, we consider extensive reform in this area is justified taking into account the time which antitrust investigations take in the UK (considerably longer than in other EU Member States) and the fact that the majority of cases end up being appealed to the CAT in any event, meaning that the case is effectively run twice. This gives rise to a considerable period of uncertainty for companies, for whom there is a great deal at stake. This system should also ensure consistency in the application of the Competition Law across sectors, and certainty for business.

As regards the alternative options, we have particular concerns about a model under which the CMA would prosecute cases before an internal tribunal. It is not clear how the independence of the tribunal and compliance with the ECHR could be ensured under this model.

We acknowledge that the OFT has taken steps to streamline its processes under the existing system, and that enabling the CMA to build on past experience could result in some improvements to the current system while minimising the risks associated with radical change. However, on balance, we consider the prosecutorial system, which works effectively in a number of other common law jurisdictions, is likely to bring the greatest opportunity for improvement in light of the challenges inherent to the current regime.

We would also favour introducing deadlines into the process in order to further streamline investigations and to give companies certainty at an earlier stage as to the case to be addressed.

As regards private actions, we note that Government is developing its thinking on the appropriate way forward and we reserve our position until further details are published.

Enforcement powers

We do not believe there is a compelling case for introducing fines for non-compliance with investigations as the OFT's existing power to impose criminal penalties is sufficiently strong deterrent against such breaches.

Cost recovery

We disagree with the principle of requiring cost recovery for antitrust investigations from companies found to have infringed competition law. This would give rise to double jeopardy, with parties being subject to substantial fines as well as the CMA's costs. It is also unclear how such costs would be calculated and what means the relevant parties would have to challenge those costs, for example, where they considered there to have been inefficiencies in the procedure. This proposal would also undermine parties' incentives to whistle blow or settle proceedings, unless such parties were automatically immune from such costs. Finally, we are not aware of any precedent for this model in other jurisdictions.

We also strongly oppose the proposal to recover the CAT's costs from losing parties in an appeal. We see no justification for requiring business to fund the activities of the CAT and are concerned that this has the potential to act as a deterrent to parties from bringing appeals, the costs of which are already significant.

6 Criminal Cartel Offence

We do not consider there to be a strong case for changing the criminal cartel offence, and in particular for removing the "dishonesty" element. The offence was introduced in 2003, and as such is a relatively new area of law. Although concerns have been raised about whether the dishonesty test is fit for purpose, this is somewhat speculative at this stage as the test has not yet really been tested by the courts in this context. We are not aware of evidence that the criminal cartel offence is not functioning as an effective deterrent for businesses and their employees.

We consider that the offence should be limited in scope to the most serious cartel infringements by individuals and are not in favour of broadening the scope of the existing offence. This risks blurring the boundaries between criminal and civil liabilities, which must be clear to businesses and their employees in order to ensure effective compliance by both. The dishonesty test, by incorporating an element of *mens rea* or knowledge on the part of the individual, provides an important distinction between civil and criminal liability under the current regime.

7 Concurrency and Sector Regulators

Concurrent Competition Act and Market Investigation Reference powers for sector regulators

We agree that the CMA would be better-placed than Ofgem to enforce competition law given its greater technical expertise in this area, and that there are arguments in favour of removing Ofgem's concurrent Competition Act powers. However, we are also concerned that placing competition law with one regulator, while leaving sector regulation with another, could result in the energy industry finding itself under the scrutiny of two separate authorities, with different approaches and objectives. This would be a concern in particular if the CMA were to have a duty to actively monitor the energy sector from a competition perspective (a proposal which we strongly oppose). This would place a considerable burden on business. As mentioned elsewhere in this document, Centrica responded to over 50 RFIs last year alone in addition to around 40 consultation responses. If the CMA were to actively monitor the energy sector, for example by carrying out market studies in the sector, this number could be expected to increase even further.

Therefore if competition powers were to be removed from Ofgem, this would need to be accompanied by other measures to ensure the energy industry does not end up with active regulation by Ofgem in parallel with competition enforcement (including market studies) by the CMA. Furthermore, in a sector where industry knowledge is at a premium given the technically complex nature of energy markets and energy prices, there are arguments in favour of retaining Ofgem's involvement in competition cases.

On the basis of the above, we consider there to be good arguments for the CMA to have primary responsibility for enforcement of competition law under the Competition Act, provided Ofgem would retain a role in identifying potential infringements, and contributing industry-specific expertise to any subsequent investigation. We also consider there to be

good reasons for retaining Ofgem's concurrent power under the Enterprise Act to make market investigation references to the CC. In particular, this should reduce duplication, inefficiencies and burden for business which could be expected to arise from scrutiny of the market by two authorities. Ofgem already monitors the functioning of the energy markets as part of its regulatory duties therefore any market studies which the CMA may carry out in order to identify whether there were grounds for a reference would overlap with Ofgem's activities in this regard.

Duty to prioritise competition powers

If Ofgem retains its concurrent competition powers, then we oppose there being any obligation to use those powers in preference to sectoral powers. Ofgem has a range of tools at its disposal for addressing perceived problems in the energy markets. Regulatory tools often provide a quicker and more effective way of addressing a perceived problem than competition powers. We don't consider a lack of competition precedents to be a legitimate justification in itself for imposing such a duty. Further, Ofgem is already restricted from taking enforcement action under the sector-specific Acts if it is satisfied that it would be more appropriate to address the issue under the Competition Act. Fundamentally, a requirement to prioritise competition law powers would also undermine Ofgem's role as an independent regulator.

CMA to act as a proactive central resource for sector regulators

In principle, we support the proposal for regulators to work with the CMA in competition cases. This could help to achieve efficiencies as well as ensuring robust assessment and consistency of approach by drawing on the expertise within the CMA. However, this could also result in longer, less efficient cases so measures would need to be introduced to ensure that there were clear processes for case management. We can see potential benefits of a model whereby Ofgem reports or refers suspected Competition Act infringements to the CMA for investigation. However, we would not favour a model whereby the CMA is required to act if a sector regulator demands it, as this could distort the prioritisation of CMA cases and would undermine the independence of the CMA. We do, however, see merit in the CMA being responsible for running the case, or acting jointly with the regulator, while drawing on the latter's industry-specific expertise.

In a prosecutorial model for Competition Act cases, which we would favour, the decisions for Competition Act cases would be taken by the CAT rather than either the CMA or the sector regulator. If an alternative model were implemented, then it would seem appropriate for responsibility for decision-making to lie with the authority responsible for leading the investigation.

Giving the CMA a bigger role in the regulated sectors

We are, in principle, supportive of proposals for the CMA to play a more significant role in competition cases in the regulated sectors, either through taking responsibility for competition cases, or, if concurrency powers are retained, collaboration with the sector regulators and sharing of expertise, as outlined above. However for the reasons outlined elsewhere in this response, we do not believe that it is necessary or desirable for the CMA to have a duty to keep economically important markets, including regulated markets, under review.

If the sector regulators were to retain concurrent powers, then it is not clear to us that it would be beneficial for the CMA to play a formal case allocation role, with the power to

step in and take over a competition case where it feels it is better placed and has concerns about the regulator's approach. This could undermine the independence of the sector regulators and result in the regulators bringing fewer, rather than more, competition cases. It could also create uncertainty for business.

8 Regulatory Appeals

If the CMA were to take over the existing jurisdiction of the CC to hear regulatory appeals, then it would be essential to ensure that it would be able to provide an independent, transparent and objective review. We agree in principle that the CMA would have the expertise, resources and procedures in place to take over the CC's role in this regard. The CMA's decision would also need to be subject to appeal to the CAT or to the High Court.

In our view, it is fundamental that any regulatory appeal process allows a rehearing on the merits rather than being restricted to a judicial or more limited review. For example, under the current energy licence modification regime and price control modification regime, the CC considers whether the subject matter of the appeal gives rise to public interest issues and whether the proposed modification remedies those issues. Under the proposed reforms to the licence modification regime, the CC will apply a merits review of Ofgem's decision. Similarly, in Energy Code appeals, the CC applies a merits-based review of Ofgem's decision.

We recognise, conceptually, that there are potential benefits in introducing model processes setting out high level procedural requirements for future regulatory reference/appeals processes, in terms of reducing procedural complexity. However, it is not clear to us that the same procedural requirements will necessarily be appropriate for each and every appeal process. Ensuring that the appeal process is appropriate in the specific regulatory context should, in our view, take priority over consistency of process. On that basis, if a model process were to be introduced, it would need to be sufficiently high level and flexible to allow for variations where these were considered appropriate (taking into account views on consultation of the specific proposals), as well as to accommodate the requirements of EU legislation.

We would also have concerns about any proposal to reduce or remove any existing defence rights and procedural protections available to companies under current or proposed appeal processes in the energy sector. We note that the model processes would not be intended to revisit any recent changes to reference or appeals processes (presumably the Energy Code appeals process) or the licence modification appeals processes which have been subject to separate consultation.

9 Business Information Gateway

We do not consider there to be compelling case for amending the thresholds for disclosure of merger and markets information to overseas regulators and therefore are not in favour of broadening the scope of the existing provisions.

CHARLES RUSSELL

A COMPETITION REGIME FOR GROWTH: A CONSULTATION ON OPTIONS FOR REFORM

COMMENTS ON THE CONSULTATION

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1 INTRODUCTION

1.1 Charles Russell LLP welcomes the opportunity to comment on the Department for Business Innovation and Skills' consultation "A competition regime for growth: a consultation on options for reform" published on 16 March 2011 (the Consultation).

1.2 Please note that the comments in this response represent the views of Charles Russell LLP and do not represent the views of our clients. References to paragraph numbers are references to the Consultation.

1.3 For further information in relation to these comments, please contact Paul Stone, Head of Competition and Regulation.

2 POTENTIAL CREATION OF A SINGLE COMPETITION AND MARKETS AUTHORITY

2.1 One of the significant benefits of the current system is that the Competition Commission stage of merger and market investigations constitutes a fresh look at the case, which, in our experience, is greatly appreciated by businesses subject to investigation. In effect, there is a strong sense that those being investigated begin with a "clean slate" before the Competition Commission.

2.2 If the Government is minded to pursue the option of a single Competition and Markets Authority, it is important that this benefit is retained in any new organisational framework.

3 A STRONGER MARKETS REGIME

Enabling investigations into practices across markets

3.1 We question whether introducing powers to enable horizontal investigations of practices that affect more than one market would be a useful development. This is on the basis that it is usually important to analyse the effects of a particular practice in the context of the specific market in which it operates.

Extending the super-complaint system to SME bodies

3.2 We would note that a feature of a market that harms the interests of SMEs may not always have a negative impact on competition. On that basis, if the Government is minded to pursue this option, the criteria for making a super complaint would need to take account of this issue.

Streamlining the review of remedies

3.3 We believe it would be appropriate for the Government to introduce a more flexible trigger than "change of circumstances" for reviewing remedies.

4 A STRONGER MERGER REGIME

Strengthened interim measures

4.1 We question whether it would be appropriate to introduce interim measures in phase 1 that could require reversal of action that that had already taken place (see paragraph 4.15), given that this is not even a power that the Competition Commission currently has during phase 2 in relation to completed mergers.

Mandatory notification

4.2 If the Government is minded to introduce a mandatory notification regime, we consider that a system which would allow notified mergers to be completed without waiting for clearance would be the most appropriate model. In our view, such a system should allow for simultaneous notification and completion, so that the notification process would not delay completion of the merger. In addition, we consider that a simple notification of the fact that a merger is taking place should be sufficient to allow completion to take place.

Jurisdictional thresholds in a mandatory regime

4.3 If the Government is minded to introduce a mandatory notification regime, of the options set out in the Consultation, we consider that Option 2 (hybrid mandatory notification) would be the most appropriate. This is because the share of supply test can be difficult to apply in practice – and so there would be a considerable burden put on business if this test was made the basis of a mandatory notification requirement.

Small merger exemption

4.4 We believe that this is would be a welcome development and would help reduce the burden of the merger regime on small business.

Statutory timescales

4.5 One of the reasons that the statutory merger notice route is currently seldom used is a fear that the OFT will run out of time in reviewing a merger and potentially have to make a decision on reference with limited information. Any consideration of introducing statutory timescales for phase 1 therefore needs to bear this issue in mind.

4.6 We would also note that the effect of a relatively short phase 1 timescale under the EU merger regulation has been to lead to a lengthy pre-notification period prior to formal notification. There is a

Information gathering and stop the clock powers

4.7 We question whether it would be appropriate to extend information gathering powers in phase I to enable the imposition of penalties on third parties that do not comply with an information request.

Anticipated mergers in phase 2

4.8 We believe that the introduction of a stop the clock power where cancellation or significant alteration to a merger is likely would be a welcome development.

Enable single CMA to consider remedies earlier in Phase 2

4.9 If the Government is minded to pursue a single CMA, we believe that allowing the CMA to consider remedies early in phase 2 would be a welcome development and introduce further flexibility into the system to the benefit of business.

5 A STRONGER ANTITRUST REGIME

Option 1: Retain and enhance the OFT's existing procedures

5.1 The benefits of this option are that it would continue the evolution of the regime – and mean that the experience the OFT has built up since the Competition Act 1998 came into force in 2000 would not be wasted.

5.2 The difficulty with this option is that, as yet, it is unclear how great an impact the recent changes instituted by the OFT will have in practice on the timescale and efficiency of investigations. That said, the early signs seem to be promising.

Option 2: Develop a new administrative approach

5.3 We believe that there are a number of challenges with this approach. In particular, there would appear to be a number of practical difficulties with seeking to make an internal tribunal sufficiently independent to be able move away from a full merits appeal to the CAT.

5.4 We can see that there might be benefits in introducing a two phase approach for antitrust cases, similar to that for merger and markets cases. However, if that approach were to be pursued, we believe it would be important to retain a full merits appeal to the CAT to ensure a fair trial.

Option 3: A prosecutorial system

5.5 This option would represent a radical change to the system of antitrust enforcement in the UK. Our concerns with this approach would be that it may dissuade the competition authorities from pursuing difficult or ground breaking cases. We are also concerned that such a system may make it more

6 CRIMINAL CARTEL OFFENCE

6.1 We believe that it would be premature to make any changes to the scope of the cartel offence given the limited number of cases that there have been to date.

Charles Russell LLP
10 June 2011

Citizens Advice

Evidence

A competition regime for growth: a consultation on options for reform

Response from Citizens Advice to BIS

June 2011

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Introduction

Citizens Advice welcomes the opportunity to respond to the BIS consultation on options for reform of the competition regime.

The Citizens Advice service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination. The service aims:

- To provide the advice people need for the problems they face.
- To improve the policies and practices that affect people's lives.

The Citizens Advice service is a network of nearly 400 independent advice centres that provide free, impartial advice from more than 3,000 locations in England and Wales, including GPs' surgeries, hospitals, community centres, county courts and magistrates courts, and mobile services both in rural areas and to serve particular dispersed groups.

In 20010/11 the Citizens Advice service in England and Wales helped over two million people with over seven million problems, including:

- 2.3 million enquiries about debt,
- 134,000 about consumer goods and services
- 123,000 about financial products and services
- 94,000 about utilities

In 2009/10, 14 per cent of CAB clients were from Black, Asian and Minority Ethnic backgrounds, and 23 per cent identified as disabled or having a long term health condition. Our statistics and case studies are drawn from the diverse communities we serve.

Our experience of the current competition regime mainly relates to referrals of super-complaints to the Competition Commission. We have therefore only answered questions which are relevant to our experience.

Chapter 1: why reform the competition regime?

Q1: The Government seeks your views on the objectives for reform of the UK's competition framework, in particular:

- Improving the robustness of decisions and strengthening the regime;
- Supporting the competition authorities in taking forward the right cases;
- Improving speed and predictability for business.

Citizens Advice welcomes the proposals the government is making to reform the processes for dealing with market investigations and competition issues so as to speed up the process. We have made a number of super-complaints and from a consumer perspective have found the current process unduly long, which seems partly due to the multiplicity of organisations involved. For example, in the case of payment protection

insurance as the consultation paper highlights, this took overall more than five years for the whole process to complete from the day we first made the complaint to the appeals after the Competition Commission confirmed its proposed remedies. The Competition Commission identified consumer detriment of more than £1 billion per annum at an early stage in their investigation and the OFT identified a range of business practices harmful to consumers. In future, we hope that similar cases should not take so long to investigate and resolve.

Q2: The Government seeks your views on the potential creation of a single Competition and Markets Authority.

We agree with this proposal. As we highlight above, we believe that the current approach is too lengthy and duplicates effort and resources. For example, in its inquiry into payment protection insurance, the Competition Commission insisted on redoing research which had already been undertaken by the OFT in its market study.

However, we are concerned that this consultation does not address the issue of what would happen if the CMA has a purely competition basis and identifies non-competition issues in the market.

Chapter 3: A stronger markets regime

Q3: The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime, in particular:

- The arguments for and against the options
- The costs and benefits of the options, supported by evidence wherever possible.

We agree with the following proposals:

- Enabling the CMA to provide independent reports to Government
- Facilitating prompt referrals to phase 2

We have the following comments to make about the proposals in this chapter

Enabling investigations into practices across markets

We agree with this proposal. However, we believe that it is vital to consider how the CMA would deal with issues that raise concerns about fair trading as well as competition issues.

Extending the supercomplaint system to SME bodies

Whilst we do not object to this proposal, we believe that the implications need to be considered, aired and resolved before implementation.

First of all, how would SME bodies be defined? We believe that this would need to be tightly defined to ensure that organisations representing large national or multi-national firms would need to be excluded from being designated as super-complainants.

Secondly, there might be tension between SME bodies and consumers. What would happen if SME bodies might want to make a super-complaint about regulation which provides vital consumer protection measures? This could end up being used by SME bodies who are designated super-complainants as a blocking measure for regulation. We believe that this tension could be resolved by keeping the grounds in section 11 Enterprise Act 2002 that the features of the market that affect them are significantly harming the interests of consumers. Therefore SME representative groups should be able to submit a super-complaint but they would need to demonstrate that the issues affecting their members relate to the interests of consumers, and not just to their business sector interests. For example an SME body might complain about the lending practices of banks on the basis that these restrict credit to SMEs, but the act of restricting credit to SMEs means that consumers have reduced choice and reduced benefit of competition.

Thirdly, have the government considered the resource implication for the new CMA if they open up market investigations to a new sector? We are concerned that consumer issues might end up be downgraded as a result.

Fourthly, have the government considered about balancing consumer protection needs against the demands of SME bodies who are keen to enter the market? For example, SME bodies might want to reduce regulation because they want to provide a product which could cause detriment to consumers.

We believe that the government need to provide further justification and clarification of this proposal in a cost-benefits analysis.

Reducing timescales

We agree with the proposed timescales for phase 1. However, to achieve this, the CMA needs to be properly resourced. We also believe that phase 2 implementation should also be shortened. We are unsure why, if there is to be a single competition authority, why two stages are needed.

Ensuring remedies in mergers and market investigations are proportionate and effective

We agree with the proposals in paragraphs 3.31. 3.32 and 3.34.

We strongly support the proposal in paragraph 3.36 to enable the CMA to be able to review and revise its remedies to ensure that they operate as intended. Currently the Competition Commission cannot review its remedies unless there has been a change of circumstances.

We have raised concerns before about the remedies implemented as a result of the Competition Commission's inquiry on home credit, all of which relied on the willingness an ability of home credit users to shop around and use price comparison websites to find the cheapest deal. Whilst the website *Lenders Compared* provides adequate information for

consumers to use to compare and choose home credit products, we believe it has had little impact on the market to encourage competition. We believe this is because many home credit customers do not use the internet for price comparison purposes.

Another example would be extended warranties on electrical goods where a review found that the Competition Commission remedies had had a limited effect and we note that the OFT has recently launched a further study into competition in this market.

We believe that the new CMA should be given a mechanism to review inquiries when the remedies have not worked to improve competition and choice in the market.

Introduce statutory definitions and thresholds

We are concerned that the government is considering weakening the definitions set out in section 11 of the Enterprise Act 2002. We do not consider that there is anything wrong with these, and restricting the definitions and thresholds could weaken the ability of consumer groups to make super-complaints.

Chapter 7: Concurrency and the sector regulators

Q14: Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?

Yes. We believe that the CMA should not be the only competition authority because sector regulators need to have a mixture of competition and fair trading powers to tackle consumer detriment arising from business practices in the markets they cover. For example, there were two main causes of consumer detriment in the case of payment protection insurance. Firstly the market structure enabled it to happen, and secondly, firms did not comply with rules relating to sales. For this reason, we believe that the proposed Financial Conduct Authority should have greater powers concurrency.

The government will need to consider where the boundaries and level of expertise lie when deciding which body should look into issues. Sector regulators need to look at practices that diminish competition as part of their consumer protection duty.

Q15: The Government also seeks views on the proposals set out in this Chapter for improving the use and co-ordination of concurrent competition powers in particular:

- The arguments for and against the options
- The costs and benefits of the options, supported by evidence wherever possible

We do not support the option set out in paragraphs 7.20 – 23 to strengthen the primacy of competition law over sector regulation. We believe that sector regulators should be able make competition interventions to intervene in their markets when appropriate. We would

point out that tackling practices that diminish competition are part of the consumer protection duty of sector regulators.

We support the option set out in paragraphs 7.24 – 27 for the CMA to act as a proactive central resource for sector regulators. Overall, we believe that the CMA is better placed to deal with issues which are purely competition-based, and sector regulators those which are a mixture of competition and consumer protection issues. It would be of benefit to sector regulators to be able to draw on the expertise of the Competition Commission for issues which have a competition aspect. This is our preferred option.

We consider that the option set out in paragraphs 7.28 – 34 would be acceptable as an alternative.

Chapter 9: Scope, objectives and governance

General comments

The consultation proposes at paragraph 9.28 that following the proposed consumer landscape changes, if Citizens Advice were to have sufficient resources and the expertise to do so, we could take on the role currently undertaken by the Office of Fair Trading to undertake market studies which are largely about consumer protection issues. We believe that we are well placed to do so, given sufficient resources. We believe that we have the necessary expertise, as we already undertake in depth research, advocate solutions and work with business and government to secure agreement to these solutions.

The Government needs to ensure that issues raised in market studies not conducted by the CMA that are mainly about consumer protection are taken forward. This is because the CMA will have powers and indeed duties to remedy detriment identified in any market investigation it carries out, but no such powers are proposed for primarily consumer protection related market studies.

Q19: The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.

We believe that the objectives of the CMA should be set out in statute. We believe that the CMA should include the objectives set out in the Enterprise Act – ie to investigate practices or features of the market that are detrimental to interests of consumers. The objectives should also include the following requirements::

- to deal with consumer detriment as far as is reasonably practical
- dealing include a requirement on time limits.
- Ordering redress for competition failure. We believe that the CMA should have the power to order firms that have made excess profits from competition failure to have to compensate consumers accordingly.

Q20: The Government seeks your views on whether the CMA should have a clear principal competition focus.

We agree that the CMA should have a clear principal competition focus, but the consultation does not set out how they would deal with an issue that raises both competition and consumer protection. We believe that the CMA should involve the relevant statutory regulator, if there is one, in these issues. Where there is no statutory regulator, they should refer the matter to us, should the proposal set out in paragraph 9.28 be implemented. Similarly, we should be able to make a reference to the CMA for a market investigation if a market study sent to us proves to have a competition issue.

Q21: The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.

We agree with the proposed governance structure for the CMA. We believe that consumer interests need to be represented in the membership of the supervisory board. Firstly the OFT has a strong consumer protection focus that needs to be carried into the oversight structure of the new organisations. Secondly, we note that the Competition Commission investigations into consumer markets such as PPI and various retail credit products has not necessarily focussed on the best outcomes for consumers. Rather it tends to focus on making the market work better. But the experience of these reviews suggests that these are not necessarily the same thing as competition and consumer protection issues may be intertwined and competition may not deliver good results for all consumers as studies like the OFT investigation into personal current accounts demonstrate. We also believe that the supervisory board needs to ensure that the authority takes proper account of the aims, objectives and duties of the Equality Act 2010.

Civil Aviation Authority

Regulatory Policy Group
Group Director's Office

20 June 2011

Dear Sarah

A competition regime for growth: a consultation on options for reform

The CAA's response

I am grateful for the chance to respond to your department's consultation regarding your proposals to reform the competition regime.

As the UK's specialist aviation regulator, with concurrent competition powers, the CAA welcomes BIS' review of the competition landscape, and shares your objective to make markets work better for consumers. Indeed, the CAA has recently confirmed its strategic plan for the next five years, which includes an objective "to improve choice and value for aviation consumers now and in the future by promoting competitive markets, contributing to consumers' ability to make informed decisions and protecting them where appropriate". The CAA also makes clear its commitment to meeting Better Regulation principles.

The CAA is the economic regulator of air traffic services in the UK, with concurrent competition powers for this sector. While it does not hold concurrent competition powers for airports[1], the CAA has sector specific powers[2] to investigate anti-competitive conduct by airports and impose remedial conditions. The use of these competition enforcement tools is covered by a Memorandum of Understanding (MoU) with the OFT, with the CAA playing an active role in the OFT's Competition Working Party. Furthermore, the Department for Transport (DfT) is currently preparing legislation that will reform the regulatory framework for airports, and has announced its intention to extend the CAA's concurrent competition powers to include airports.

Below I have provided a summary of the key points raised by the consultation. I have also attached an annex that sets out the responses to a number of the questions posed by your consultation, focusing on: the markets and the antitrust regimes; concurrency; and regulatory appeals.

Recognition of the complementary nature of competition, consumer and regulatory tools

In addition to consulting on the competition landscape, BIS has also been reviewing the principles of economic regulation, consumer empowerment and the consumer landscape. I welcome BIS' acknowledgment of the important linkages between these different areas, and how each contributes to improved market outcomes for consumers and to economic growth.

[1] The CAA is the economic regulator of airports under Part 4 of the Airports Act 1986.
[2] These powers are provided by section 41 of the Airports Act 1986

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In the aviation sector, we have experienced a number of issues where outcomes might be improved in a range of different ways, and could involve a combination of regulatory intervention, and competition and consumer enforcement. For example, service standards at airports might be improved by greater information transparency, incentive-based regulation, or through steps to improve competition between airports. Coordination between the different areas of competition, consumer and regulatory tools - irrespective of the bodies responsible for them - appears crucial to creating a credible and stable system that provides sufficient clarity and certainty to owners and investors, minimises regulatory burdens, and that ultimately supports growth.

We previously responded to your call for evidence on the principles of economic regulation, and we are also looking forward to engaging further with you on the issues of consumer empowerment and the consumer landscape.

The need to create a stable regime with credible institutions

The antitrust and markets regimes fundamentally affect the nature of property rights and have the potential to significantly affect the value of companies and the potential returns to investment. This puts a particular premium on the need for a credible and stable regime, both in terms of the overall regime and its individual elements. This does not argue against the need for reform. Rather, it argues for reforms that improve transparency and consistency.

Arguably this is particularly the case in many of the regulated sectors, where outcomes for consumers – and the contribution of the sectors to growth – rely upon investment in large, long-lived investment projects by the private sector, with the return on capital often relying on revenues generated years, and even decades, in the future.

This implies that the institutions equipped with these powers should have powers and obligations that deliver an appropriate balance between the rights of the owners of businesses to a fair process and the need for timely interventions that act as a credible deterrent against anti-competitive behaviour and that address market structures that are not delivering appropriate outcomes for consumers. The statutory framework obviously plays a large part in delivering an appropriate balance. However, the governance of the agencies tasked with deploying the competition and regulatory tools is also an important consideration. Indeed, modern governance structures that provide a degree of consistency and continuity of approach, combined with the independent scrutiny of non-executive board members would appear likely to support an effective competition and markets regime. Over time, the sector regulators – including, relatively recently, the CAA – have adopted a governance structure with a Board comprising a mix of executive and non-executive members. We see considerable benefit in a structure for the new Competition and Markets Authority (CMA) that reflects a similar governance structure.

A recurrent theme in your consultation is the time it takes for investigations to conclude for both the market and the antitrust regimes. This is an issue that appears to be of great importance, both in terms of providing certainty to market participants through the timely resolution of investigations and providing competition and regulatory agencies with an efficient tool that reduces the barriers that might discourage them from using their concurrent powers. We discuss the detail of BIS' proposals in the annex, but see some attraction to greater use of self-imposed public and/or statutory timetables.

Retaining the benefits of concurrency

I welcome very much BIS' clear commitment to the system of concurrency. The original rationale for concurrency for sector regulators was to facilitate the promotion of competition in the regulated sectors, allowing regulators to balance sector specific powers and more

Continued (2 of 4 pages)

general competition powers, in order to gradually withdraw from sector-specific regulation while retaining the backstop of concurrent competition powers.

The aviation sector has made significant progress towards competition and away from detailed regulation, most notably in airline markets. However, the UK airports sector is also moving towards a more competitive environment, prompted by greater commercialisation, private ownership and – following the review by the Competition Commission – structural reforms to increase competition. These moves are supported by a regulatory framework that recognises the interplay between the extent of competition and the need for detailed regulatory intervention, including the role that competition law can play in disciplining conduct. For example, the recent EU regulation[3] on airport charges will require the CAA to review the market power of airports and to inform its decision as to whether and how airports should be regulated. In addition, the Government has proposed reforms to the framework of economic regulation which would ensure that airports will only be subject to detailed economic regulation if they enjoy a high degree of market power and that competition law is insufficient to address the potential harm to consumers. In such a regime concurrent competition powers would be highly complementary to regulatory powers, ensuring that where competition develops the CAA can place greater reliance on – and devote greater resources to – monitoring compliance with and enforcement of competition law.

This potential evolution away from heavily regulated markets would be supported by improvements to the processes governing the general antitrust and market regime. The annex discusses the options set out in your consultation document in more detail.

I also support BIS' recognition of the value that the newly created CMA could bring to antitrust investigations carried out by sector regulators. The sector regulators already collaborate with the OFT in a number of ways, and I believe that the sector regulators could benefit even more from the CMA providing expertise on the management of often complex antitrust investigation. The annex discusses BIS' proposals in this regard in more detail.

Regulatory references and appeals

A functioning reference and appeal process is an essential element of a robust, credible and accountable regulatory regime. While the appeals regime might have the same general objectives for each sector, the operational design might justifiably differ to take account of the particular requirements of each sector.

In the airports sector this is currently being reviewed as part of the Government's wider reform of the regulatory regime for airports. The current regime requires a mandatory reference to the Competition Commission before the CAA takes its final decisions as part of its five-yearly price control reviews, and the affected parties only have recourse to Judicial Review[4]. Compared to the other regulatory regimes, this process is time consuming, blurs the accountability for regulatory decisions and involves a degree of duplication between two regulatory bodies with very different governance structures.

In designing a new appeal regime for airports, the CAA previously emphasised the importance of creating a workable system that ensures the regulator is held to account by the affected parties, but avoids a quasi-automatic appeal of every decision by individual parties furthering their vested interests, rendering the process costly and inefficient and making the appeals body the de facto regulator. We are working with the DfT to develop an appeals regime that is fit for purpose for the particular requirements of the airport sector.

The governance arrangements for the authority hearing regulatory references and appeals can also contribute to creating a stable system that provides a degree of consistency and

[3] EU Airport Charges Directive.
[4] Since the current regulatory system was introduced in 1986, there has been one Judicial Review in 2008.

continuity of approach across cases and over time. As I mentioned above, I would see considerable benefit in a Board structure comprising a mix of executive and non-executive members that combines consistency and stability with independent scrutiny.

I hope you find this response helpful and I am looking forward to engaging further with you in the next stages of this important project.

Yours sincerely

Iain Osborne

Group Director
Regulatory Policy Group
[sent electronically]

The CAA's detailed response to BIS' consultation on options for reforming the competition regime

1. In this annex we discuss in more detail BIS' proposals regarding the following elements of its consultation:
    - a stronger markets regime;
    - a stronger antitrust regime;
    - concurrency and sector regulators; and
    - regulatory appeals and other functions of the OFT and CC.

A stronger markets regime

2. We agree with BIS that the market investigation regime (MIR) is an important part of the UK's competition regime, and one that sets the UK regime apart from other EU countries. It allows the competition authorities to address cases in which the market "does not seem to work well", for reasons other than individual or a group of companies breaching antitrust law. Often these competition issues are closely related to consumer issues, and the framework of the MIR regime has in the past produced a range of remedies with strong elements of consumer-oriented measures, for example the provision of specific information to consumers. In addition, the MIR regime has supported some important structural reforms, going beyond the types of remedies that would be possible through the anti-trust regime. This has allowed markets in the UK – notably the UK airport market – to be reformed and restructured in a way that results in more competitive outcomes, acts to reduce the need for detailed economic regulation and benefits consumers and UK growth. In general terms, therefore, the MIR framework complements the more narrowly framed antitrust legislation, and the powers granted to sector regulators.
3. Nevertheless, we agree with BIS that there remains scope for improving this regime, particularly the process and scope of MIRs. We are particularly interested in BIS' suggestions regarding the reduction of timescales and the broadening of the scope of MIRs to cross-market references. Improving the process in these two areas is likely to make it a more attractive tool for competition authorities, including the sector regulators, that can be applied more effectively. Creating the Competition and Markets Authority (CMA) as a single body that carries out stage 1 and stage 2 investigations might also facilitate some streamlining of the existing processes within the existing framework.
4. The following sections discuss the individual proposals set out in the consultation document in turn.

Modernising the markets regime

5. We support BIS' proposal to <u>enable investigations into practices that involve more than one market</u>. The spirit of the markets regime is to address issues that adversely affect competition. As a number of markets might be affected by the same issues, enabling MIRs that involve multiple markets could improve the effectiveness of the MIR regime.
6. BIS' proposal to <u>extend the super-complaint system to SME bodies</u> aims to facilitate access to recourse for smaller companies whose interests might be harmed by the conduct of larger market players. We agree in principle that providing a less resource-intensive route to smaller companies could help to ensure that some market features that particularly affect smaller companies are addressed appropriately. However, for such a system to work the right to make super-complaints would have to be very carefully defined, to avoid individual or groups of companies using the system to harm their competitors, and to ensure that any changes were genuinely improved the

representation of SMEs. In this respect, it might be important to consider the role of trade and business associations, where it might be difficult to distinguish between the interests of SME and non-SME members (and where the latter might hold particular influence). Without such safeguards we are concerned that the potential costs of the system could easily exceed its benefits, or even achieve the opposite of what was intended.

Streamlining the markets regime

7. We support BIS' proposal to review the scope for reducing the current timescales, and we also note the ongoing work undertaken by the OFT and the Competition Commission (CC) in this area.

8. The length of investigations can impose significant additional burdens on the market players involved in the investigation, and act to discourage public bodies from devoting resources to this course of action. For example, the MIR of BAA airports started in 2006, and due to the number of appeals has yet to be completed. Over these years, the review has placed additional burdens and uncertainty on BAA, its competitors and its customers. Arguably, the delay to the implementation of the remedies (namely the divestment of Stansted and either Edinburgh or Glasgow airport[1]) has delayed the realisation of the associated expected consumer benefits and benefits to competition and growth. However, this is not to argue that there should not be an effective and efficient appeals system for market investigations, particularly in light of the very significant changes that the CC can require businesses to make. Rather, we think that it is timely to consider whether the balance has been struck between the need to implement remedies in a timely manner and the rights of affected parties to scrutinise and challenge decisions.

9. Tightening the timescales for stage two (MIR) investigations could be appropriate in many cases. Given the regulatory burdens associated with a market investigation that lasts 24 months it could be argued that the time and costs of a stage two investigation acts to discourage the OFT and sector regulators from using this process, particularly for issues in smaller markets or where other sector-specific powers might provide an alternative remedy. It might also be argued that companies might also be discouraged from accepting a market investigation, and be more willing to accept undertakings at the market study stage. Shortening the timescales for market investigations might therefore lead to more cases – and more smaller cases – being referred for a market investigation.

10. However, it is difficult to set a one-size-fits-all timescale for all types of cases, as the complexity and scale of some cases may require a longer timescale[2]. Within the given statutory maximum timescales, there might be scope to require the authorities to define a timescale at the outset of an investigation that appears appropriate to the individual case.

11. Introducing information gathering powers at stage 1 (the market study phase) could support a shorter overall timeframe. In particular, it might allow some of the evidence gathered in stage 1 to be relied upon in stage 2, as it would be backed by stricter obligations on the accuracy of the information provided. Arguably, bringing the two stages into a single organisation might also deliver efficiencies in terms of the information gathering, reducing burdens on affected parties. However, such changes would need to consider whether providing formal powers for the market study phase might change the character of a market study, including by requiring a statutory test and definition of a 'market study' (see next section).

1. _____

[1] Gatwick airport was sold to a consortium led by Global Infrastructure Partners in 2009.

[2] The recent Groceries and BAA Airports investigations might be examples for more complex cases that could be expected to take longer.

Increasing certainty and reducing burdens

12. We agree that a markets regime that fosters consumer welfare and growth needs to provide sufficient certainty to market participants and keep regulatory burdens to a minimum. This requires the regime to be transparent, consistent and efficient.

13. Introducing statutory definitions and thresholds for market studies might provide certainty to stakeholders regarding the start of a formal process, and having such formal definitions and thresholds might also be appropriate (and potentially necessary) when considering granting formal information gathering powers at the market study phase. However, the flexibility of the market study has provided the OFT and the regulators with the opportunity to explore whether it was more appropriate to take a case forward under sector specific powers or under concurrent competition law powers. Introducing a legal threshold might, in practice, create a new informal stage preceding the formal stage 1 investigation, effectively drawing out the process rather than making it more transparent and effective. In addition, this proposal would create a new legislative threshold and consequently a clearly reviewable decision by the regulator. This could lead to further legal challenges by one or more parties aggrieved with the application of the relevant test in a given case, potentially adding to the timescales rather than shortening them. Such considerations would need to be taken into account in weighing up the net gains of the proposed change.

14. We support BIS' proposal to review the process by which remedies can be reviewed and revised. Setting too high a threshold for reviewing remedies might lead to remedies remaining in place for too long, or remedies failing to reflect changing circumstances, creating additional disproportionate burdens on businesses. On the other hand, to ensure the full benefits for consumers are realised, there needs to be certainty that remedies will remain in place as long as is necessary.

A stronger antitrust regime

15. We agree that there is scope to improve the procedures and in particular the timescales involved in antitrust cases. The length of antitrust cases is well documented and arguably affects the effectiveness of the regime and may act as a barrier that discourages competition authorities from commencing an investigation.

16. We support BIS' efforts to address these shortcomings of the current regime. If successfully addressed, antitrust law might become a more attractive and effective tool, not only for the CMA but also for the sector regulators. Indeed, addressing the issues associated with the length – and cost – of antitrust cases would appear to address many of the other issues identified by BIS regarding the concurrency regime, such as the perceived over-reliance by concurrent regulators on sector specific powers (see also the section *Concurrency and the sector regulators* below).

Identifying the problem

17. While we agree with a large part of the problems that BIS identified, we are concerned that BIS' characterisation of the issues does not take sufficient account of other factors affecting the performance of the antitrust regime in the UK.

18. We agree that the current procedural requirements could be improved. As the consultation document notes, a balance needs to be struck between the need to ensure a fair process that fulfils the requirements set out in Article 6 ('right to a fair trial') of the European Convention on Human Rights (ECHR) and an efficient and expedient process that requires a proportionate burden of proof. The current process does not seem to have strong incentives on either the investigating authorities nor on the businesses being investigated to reach conclusions quickly: faced with the possibility of an appeal on full merits to the Competition Appeals Tribunal (CAT), the authorities might spend longer than necessary to develop their arguments, while businesses might use their rights to challenge the process (for example on information requests) to delay a possible negative finding and a potential fine. Equally the appeal stage can stretch over a very long time, with significant costs to businesses, and potentially delay changes that would benefit consumers and growth.

19. The cost and risks associated with an anti-trust investigation are likely to be significant factors when competition authorities, including regulators, prioritise issues and identify how best to resolve issues. Lightening the procedural burdens, and in particular shortening the overall timescales, would be expected to make antitrust investigations a more attractive tool to be used by both the newly formed CMA and the sector regulators with concurrent competition powers.

20. The consultation document also suggests that there have not been as many cases as could have been expected. We do not feel this fairly reflects the experience and circumstances in the airport sector[3]. In particular, the existence of detailed price control regulation of major airports and of other sector-specific regulations are likely to be factors that reduce the expected number of antitrust cases in the UK airports market. Indeed the UK's largest airports have been regulated since their privatisation in 1986[4]; regulation that was designed to prevent these airports from abusing their market power in a way that would have merited an antitrust investigation. In comparison, in other

1.

[3] The CAA also regulates air traffic services, but the judgement in SELEX Sistemi Integrati SpA v Commission and Eurocontrol [2009] ECR 1- 0000, Case C-113/07 "Eurocontrol II" indicates that any competition authority will face considerable hurdles in establishing that the providers of air traffic services are undertakings for the purposes of CA98/Articles 101/102 TFEU.

[4] BAA was privatised in 1986. Its three largest airports Heathrow, Gatwick and Stansted have been designated for the purposes of price control since then. Manchester airport, owned by local councils, was also designated from 1986 until 2009.

jurisdictions there have been a number of significant antitrust cases taken against airports.

21. Further, the structure of the aviation sector is different from some other utility sectors and is not as vulnerable to some of the more common breaches of competition law, in particular the risk of exclusionary conduct is limited by the way that slots are allocated to airlines, and the rules governing ground-handlers' access to airport facilities (both of which are subject to EU regulations/directives), and ownership models have typically avoided significant vertical integration.

22. In the absence of concurrent competition powers, the CAA has addressed a number of competition issues through the use of its sector-specific powers, including section 41 of the Airports Act (to investigate discriminatory and abusive behaviour by airports) and European Ground Handling Regulations (to ensure access for third party Ground Handling agents to airports). While these were not investigations under the Competition Act 1998, they did, in line with the CAA's standard approach, involve analysis rooted in competition law principles. It is perhaps notable that the procedural burdens under these provisions are significantly lower than for antitrust investigations, allowing the CAA also to hear smaller-scale cases than might have been appropriate under antitrust law. In each case where the CAA has considered action under its sector specific 'competition-like' powers, it has first contacted the OFT to identify whether it wished to take forward the case. In practical terms, therefore, the fact that the CAA has enjoyed sector-specific competition powers – mirroring the concurrent powers offered to other regulators – has led to more competition cases being taken.

Option 1

23. The consultation document suggests that three key objectives of a review of the current processes are:

    - lighten the procedural requirements;
    - shorten the timescales (either at investigation or at appeal stage); and
    - retain fairness and robustness of decisions.

24. Option 1 builds on the work already commenced by OFT that looks at improving and tightening the current process in order to achieve the objectives set out above. We are particularly interested in the possibility of introducing self-imposed timetables, which is also being considered by the OFT. Given that the current system is well understood by stakeholders and practitioners, the implementation costs are likely to be significantly lower than for a more significant change of the system as proposed under options 2 and 3. This suggests that the expected benefits of options 2 and 3 would need to be carefully scrutinised, to understand whether they would be significantly larger than under option 1.

Option 3

25. Option 3 would introduce a prosecutorial system in which the CMA or the sector regulators would 'prosecute' cases before the CAT. We can see some possible advantages in this system, in that it might be more flexible in the time it takes to come to a decision. Removing the burden from regulators and the CMA to come to a fully balanced decision might also reduce the timescales involved in taking a case to the CAT.

26. However, regulators and the CMA might be reluctant to take cases forward without a very thorough investigation so as to avoid defeat in front of the CAT with its attendant reputational risks. It is also not clear how the regulators would combine a prosecutorial approach (with an assumption that a fully balanced decision might not be needed) with decision-making processes that require a balanced decision to be reached. Indeed,

regulators – and the CMA – might, in practice, feel compelled to reach a balanced decision, removing the efficiency gains that might be delivered by this option. Furthermore, there might be a greater incentive for parties to settle outside of the CAT to avoid full trial, which might not lead to a larger body of precedent case law.

27. However, there appears to be some merit in exploring this option further, and we would be interested in a more detailed review of the costs and benefits associated with this option.

Option 2

28. Option 2, that involves the creation of a two-stage process with an independent tribunal/panel within the CMA that would hear and decide cases brought forward by both the regulators and the CMA, attempts to retain the advantages of the administrative process but reducing the appeals stage to JR. We have a number of reservations with such a proposal:

    - We are concerned that establishing an internal tribunal system that fulfils the requirements of Article 6 of the EHRC might and is also integrated into a single competition authority might be difficult in practice. To satisfy Article 6, there would have to be a stringent separation between the tribunal and the investigation teams, effectively requiring some duplication and reducing the efficiency benefits of retaining the process within one organisation.
    - An internal tribunal or panel might not ensure sufficient consistency in the CMA's decision making over time, if separated from the more general governance structures within the CMA. In particular, panels of independent office holders might not lead to a consistent approach across cases and over time.
    - Even though the CMA and the sector regulators' burden might be somewhat reduced by handing the case over to the tribunal/panel at stage 2, it is likely that they continue to be highly involved in stage 2 investigations as the tribunal/panel will require extensive briefing on the case.
    - Transferring the decision making powers for all antitrust cases to the CMA effectively leads to a lessening of the powers of the sector regulators. This might reduce the attractiveness of antitrust powers as a tool for regulators as they would no longer be able to increase their resourcing of competition enforcement activity and would not be able to consider taking action with a range of different tools. Having the decision transferred to another body with less sector-specific expertise might also risk lessening the confidence of regulated industries in the antitrust process. More generally, reducing the scope of concurrency might be expected to reduce, rather than increase, the number of anti-trust cases being taken forward.

Enhanced use of timescales and timetables

29. Independent of the approach that is ultimately chosen, we strongly support the consideration of making more use of predefined timetables. We do not think that statutory timetables are necessarily the best option as they might not be suitable for all cases (see also paragraph 9 in the context of market investigations). One possible alternative could be a statutory obligation for the investigating body to set a timetable at the outset of the investigation, allowing for the timetable to be tailored to the specific circumstances of each case. Equally guidelines might include an expectation that the regulator will set out a timetable.

30. When designing timescales, it is important that these are realistic: if they are too short, they might either jeopardise the robustness of the outcomes or become obsolete as they

routinely need to be extended. If on the other hand the timescales are too long, it is possible that the authorities will make use of the full time available even if a decision could have been reached at an earlier stage.

31. In addition, it is important to have sufficient flexibility to extend the process in exceptional circumstances. For example, the duration of a cartel investigation is highly dependent on the evidence found, which may not be known at the outset. But the threshold for extensions needs to be sufficiently high as timetables otherwise lose their credibility.

Offences under the Competition Act 1998 and the Enterprise Act 2002 for non-compliance with an investigation

32. We note that any move to allow the imposition of financial penalties would clearly have to sit within the broader government policy on civil sanctions, and its viability may therefore depend on the outcome of the current discussions on the future direction of this policy. Any new sanction will require a robust cost-benefit analysis and much may depend on how much evidence of historical non-compliance with investigatory measures exists.

Powers of investigation including powers of entry

33. We would endorse the reasoning supporting retention of these powers. The challenges in uncovering evidence of conduct which is, by its nature, covert requires a strong – but proportionate – set of investigatory powers. We are not aware of evidence to suggest that competition authorities have used these powers in a draconian or indiscriminate way. By contrast, a number of significant cases could not have been developed without evidence obtained by use of these powers.

Concurrency and the sector regulators

34. We very much welcome BIS' proposal to keep the concurrency regime. As set out in the letter, we believe that the original rationale for giving regulators powers to apply competition law in their regulated sectors (to balance regulatory powers with competition powers to facilitate a move towards greater competition in the regulated sectors) is still valid, and that the cases brought forward by regulators to date evidence its effectiveness.

35. The airport sector has been experiencing many changes over recent years (in particular the divestment of airports by BAA following the CC's market investigation) that, in future, are expected to lead to more competition in this sector. The DfT is currently preparing a new regulatory regime giving the CAA more flexibility in its regulatory approach, an explicit duty to promote competition where it is appropriate to further consumers' interests and explicit consideration of the sufficiency of competition law before deciding if an airport should be subject to detailed (*ex ante*) economic regulation. Having concurrent competition powers to balance against regulatory powers in this context is necessary to deliver on these new objectives. Without it, there might be less confidence to remove ex ante regulation in reliance on general competition law.

36. We believe that the overall effectiveness of the concurrency regime would be improved by the reforms to the antitrust and markets regimes, discussed above. In particular, it seems likely that a significant barrier to regulators making more use of their competition powers is the high procedural burdens and long timescales involved, relative to the more timely processes associated with the use of sector specific powers. Improving the processes of the competition regime might therefore also make it a more attractive tool for regulators to use where they have legislative freedom to do so.

Identifying the problem

37. BIS expresses the view that regulators appear not to make sufficient use of their competition powers but prefer their regulatory powers, resulting in insufficient numbers of cases in particular in the regulated sectors. In paragraph 20 we discussed why we have doubts as to whether this is a valid concern in the airport sector.

38. The consultation document also suggests that in addition to procedural barriers other reasons for the perceived reluctance of using concurrent competition powers might be

    - a lack of specialist skills and resources to take competition cases; and
    - the availability of easier to use sector-specific powers.

39. While we agree with the latter (which can also be addressed by reducing the procedural burdens of the competition regime), we are not convinced that the former is a deterrent for regulators to consider using its competition powers, and the CAA currently employs a number of individuals with some expertise on competition matters. Resources and specialist skills and expertise can be brought in for specific cases, either through close cooperation with the OFT, secondments from other authorities or from private consultancies and legal practitioners. Given the intensity of competition cases, such an approach would be more cost efficient than retaining the necessary staff in-house on a permanent basis.

Make competition powers easier for the CMA and sector regulators to use

40. We strongly agree with this proposal. As set out above, we consider this to address the most pertinent barrier to the more frequent use of competition powers by both the competition authorities and by the regulators. We discussed the detail of the proposals in the sections on the markets and the antitrust regime.

Strengthening the primacy of competition law over sector regulation

41. We share the ambition to promote competition and, where appropriate, reduce the need for detailed, sector-specific regulation. In principle, taking steps to give competition law clear primacy over regulation might be support this ambition.

42. Indeed, in the airport sector, this principle has already been widely recognised and put into practice. The Government established criteria for deciding whether or not an airport should be designated for the purposes of price control, including a criterion that competition law would be unlikely to be sufficient to address potential harm to consumers. For the new regulatory regime it is proposed (subject to further review and legislative drafting) that this be formalised in law so that airports will only be subject to detailed *ex ante* regulation, through a licence, where competition law is not sufficient to protect consumers from the potential for airports to abuse high degrees of market power. It is proposed that the decision as to whether an airport meets the criteria and should attract an economic licence would be subject to a merits-based appeal.

43. This approach requires the regulator to demonstrate that there is a clear incremental benefit to the application of detailed economic regulation. However, we have some concerns if a similar obligation were placed on regulators to consider competition law first in each individual case. In particular, there might be a significant risk that this could introduce undue additional burdens on regulators – notably through the introduction of a further route for legal challenge – and might impede timely and effective regulation. As noted above, an approach based on improving the effectiveness of the competition tools appears an appropriate alternative approach.

The CMA to act as a proactive central resource for the sector regulators

44. We fully support the need for and benefits of close working relationships not only between the CMA and the regulators but also across the network of sector regulators. There are already a number of ways in which the OFT and the sector regulators have regular exchanges and work in a joined-up manner, including the Joint Regulators Group and the Concurrency Working Party chaired by the OFT. In addition, staff are seconded between the regulators and the OFT, both on a long term basis as well as for specific issues on short notice. Under the MoUs cases are shared and discussed between the OFT and the sector regulators. The benefits of the existing network between the OFT and the sector regulators should be fully retained and maximised with the newly created CMA, in particular regarding the discussion of questions of strategy and prioritisation.

45. We also consider that given its expertise in managing large and complex antitrust investigations, there could be a larger role for the newly created CMA in providing a central resource of expertise to regulators, in particular on case management. As the consultation document notes, this could maximise the use of the existing knowledge accumulated by the CMA that sector regulators might not be able to develop to the same degree, given that the case throughput is likely to be smaller for most regulators than for the CMA. This would build upon the successes of the Concurrency Working Party, and deepen the degree of cooperation and sharing of resources. This has potential to increase the capability and effectiveness of the regulators, bringing together knowledge of their sectors, the competition expertise in the regulators, and the breadth of experience that the new CMA would have in terms of case management, legal analysis, economics and analytical techniques.

46. However, if the cooperation between the CMA and the regulators were to be extended further, with the CMA providing a main source of expertise to carry out investigations on behalf of the regulator, there would have to be clear lines of communication with the affected parties, to ensure there is transparency about who carries out the work and who takes decisions. Such a system could come under strain on appeal if the regulator had to defend a case that was effectively constructed and reasoned by the CMA. In addition,

'outsourcing' the competition expertise solely to CMA might risk reducing the expertise in competition questions within the regulators themselves even further, potentially risking that regulators would be less able to identify potential cases in the first place, reducing the number of competition cases and the effectiveness of the overall regime.

Giving the CMA a bigger role in the regulated sectors

47. The objective of the proposed changes appears to be to generate a larger number of cases in the regulated sectors and to bring more competition-specific expertise to bear. We are not convinced that the proposals giving the CMA a bigger role in the regulated sectors would best achieve that. Instead, close cooperation between the different authorities might be a more effective way to encourage more involvement of the CMA in the regulated sectors. Again, we recommend that emphasis be given to reducing the barriers to taking forward a competition cases; making best use of the knowledge and expertise of the regulators and their ability to prioritise cases within their sectors in a way that promotes competition and supports regulatory withdrawal.

48. Giving the CMA powers to call in cases from regulators might create additional uncertainty for the sector in that it effectively faces two regulators with the attendant risk that if activities are not carefully coordinated the two authorities could take inconsistent approaches. It would also lessen the regulators' powers to define the regulatory strategy for their sector as a whole, and to use a mix of competition and regulatory tools to promote more competitive outcomes. Again this could potentially result in regulatory uncertainty for the sector which in turn can have a negative effect on investor confidence.

49. We agree that there could be situations in which the CMA might be better placed to take a specific case, for example in an area where there is no overlap with regulation. However, such issues would best be discussed at the outset of cases, when the CMA and the regulators discuss the case allocation under their MoUs. Calling in a case at a later stage might, if anything, create confusion and uncertainty.

50. We agree that it is useful to keep key sectors of the economy under regular review, and indeed most regulators already carry out this function for their sectors, either in support of their regulatory functions or because they have a legal obligation to do so (Ofcom). It is not clear why it might be more beneficial for the CMA also to carry out similar reviews, or for which purpose they would be used. Indeed, the combination of Parliamentary scrutiny, periodic price control reviews, other regulatory initiatives and reviews by the CMA might leave a sector in a near-permanent state of review, undermining the stability that is needed to support long-term infrastructure investment.

Regulatory references and appeals

51. In the letter we describe how the current appeals regime in the airport sector is designed and the prospective reforms that the DfT is currently considering as part of the new regulatory framework for airports. Having a robust and transparent appeals regime is crucial to hold regulators accountable for their decisions and to give appropriate recourse to affected parties.

52. In the context of the review of the airports regime, we previously argued that the design of an appropriate appeals regime involved a tension between the number of parties being equipped with rights to appeal (breadth) and the scope on which regulatory decisions can be challenged (depth).

53. Breadth ensures full accountability to all parties, but on the other hand could risk generating appeals for every decision if the parties being granted appeal rights have diverse and sometimes conflicting commercial interests. This could result in a prolonged and inefficient system, with the de facto decision making body becoming the appeals body rather than the regulator.

54. Depth ensures that the entirety of a regulatory decision can be reviewed on its merits, but on the other hand could risk generating appeals on comparatively minor elements of a decision, so that the appeal would be only of limited value.

55. On balance we consider that it might be preferable to ensure accountability to all affected parties (breadth) but at the same time give a greater degree of appreciation to the regulator's decisions and reduce the depth of appeals to whether there have been 'material errors in judgement' (or similar formulation) by the regulator, to retain a robust and efficient appeals system that is able to address any significant potential harm that could result from an erroneous regulatory decision. This recognises that in a majority of licence modifications and regulatory decisions – most obviously price control decisions – there is a range of reasonable outcomes and the regulator will need to apply a degree of judgement when reaching a final settlement. An appeal body will face a similar range of reasonable outcomes, and there is a strong case for avoiding a framework whereby the appeal body is required to substitute its assessment for the regulator's when the two are not materially different and fall within the bounds of what is reasonable.

56. There are a number of other ways in which the design of the breadth and the depth of an appeal can be supported, for example through awarding costs to the party losing the appeal or through establishing appropriate filters to disallow vexatious appeals and appeals of insignificant issues.

57. We agree with BIS' proposal to retain the current appeal arrangements and transferring the appeals functions of the CC to the CMA. In principle it might be possible also to transfer these functions to other bodies, for example the CAT, but providing that the CC's expertise in these areas is transferred to the CMA it appears most appropriate to leave transfer these functions to the CMA.

58. The consultation document is clear that BIS does not intend to change the current arrangements of any of the regulated sectors, or prospective new arrangements that are currently being debated in a number of sectors, including airports. Instead it proposes the design of model processes that could be applied whenever a sector's regime is being reviewed. Given the diversity of the approaches that have developed in different sectors over time, it could be useful to set out clearly what "good" looks like, and which objectives and principles the design of an appeals regime should follow. However, given the diversity of the different sectors and their specific requirements that are also noted in the consultation document, including EU obligations and the nature of the different sectors and their regimes, we are not convinced that model processes would be useful, as different approaches might be required for different sectors to achieve the same objectives.

Cleary Gottlieb Steen and Hamilton LLP

BIS | Department for Business Innovation & Skills

A competition regime for growth: a consultation on options for reform.

Response form

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Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.

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When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

Consultation Questions

1. Why reform the competition regime?

This chapter sets out an assessment of the strengths and weaknesses of the UK competition regime and proposes to reform it to: improve the robustness of decisions and strengthen the regime; support the competition authorities in taking forward the right cases; and improve speed and predictability for business.

***Q.1** The Government seeks your views on the objectives for reform of the UK's competition framework, in particular:*

- *improving the robustness of decisions and strengthening the regime;*
- *supporting the competition authorities in taking forward the right cases;*
- *improving speed and predictability for business.*

***Q.2** The Government seeks your views on the potential creation of a single Competition and Markets Authority.*

Comments:

Summary

- We support the Government's objectives in seeking to reform the competition regime. In particular, we believe the Government should use this opportunity to minimise the burdens placed on business by the regime.
- In reforming the regime it is important that the Government preserve the advantages and benefits of the current regime (such as the "fresh pair of eyes" approach in phase II merger cases and Market Investigations).
- We are not persuaded that a compelling case has been made in favour of merging the Office of Fair Trading (the "OFT") and Competition Commission (the "CC").
- If the OFT and CC are merged into a single Competition and Markets Authority (the "CMA"), additional safeguards will be needed to preserve the benefits currently achieved by having two separate authorities with different legal remits.

Government's objectives

Cleary Gottlieb supports the Government's objectives in reforming the UK competition regime. However, it is important that the Government recognise and protect the strengths of the current regime. In particular, the quest for speed and cost-savings should not be allowed to detract from parties' legitimate rights of defence, nor from the guarantee that decisions will be subject to proper administrative and, where appropriate, judicial scrutiny. For this reason we welcome the proposals to retain panel decision making in phase II merger cases and Market Investigations, as well as introducing greater separation of investigation and decision making in antitrust cases.

The success of the regime, and its contribution to the functioning of the UK economy as a whole, depend also on minimising burdens on businesses wherever possible. A key element of this is the UK's voluntary merger regime. As developed further in our response to questions 5 to 7, the voluntary regime has proved successful in addressing mergers that raise (or might reasonably be expected to raise) substantive competition concerns, while minimising unnecessary burdens on firms in cases where no substantive questions arise.

For the same reason we do not support the Government's proposal to give the OFT/CMA the power to require the production of information for the purposes of Market Studies (questions 3 and 4). This proposal would place an additional burden on businesses, and the threat of sanction, without any obvious justification.

Proposed creation of the CMA

We do not oppose a merger of the OFT and CC in principle. In our view, the benefits derived from the current intuitional structure – such as the "fresh pair of eyes" in phase II cases and panel decision making – could be preserved within a single body, provided appropriate safeguards are in place (as set out in our responses on each of the specific proposals below).

However, we are not persuaded that there are benefits in merging the two bodies. The Government has argued that the creation of the CMA would improve consistency and streamline decision making. However, it has adduced little evidence of cost or efficiency savings expected to derive from merging the bodies. While we accept that consistency of decision making between comparable cases is important, we do not accept a need for consistency between phase I and phase II decisions (or between the respective decision-making processes). A virtue of the current "inconsistent" structure is improved robustness of decision making – since phase I decisions are subject to a fresh pair of eyes.

So, while we accept that (with appropriate safeguards) the benefits of the current regime could be retained within a single CMA, we are not persuaded of a positive case for merging the OFT and CC.

2. The UK Competition regime and the European context

This chapter sets out the UK institutions that make up the competition regime and their functions, as well as the European context.

Comments:

Summary

- We believe there are inefficiencies deriving from the treatment of all concurrent regulators as national competition authorities ("NCAs") for the purposes of European competition law.

Concurrent regulators as NCAs

We make one observation on the role of the UK institutions in the European context. Currently the UK has seven concurrent regulators (section 54 CA98, treating the NIAUR as a single authority comprising the Directors General of Gas and Electricity for Northern Ireland), all designated NCAs for the purposes of European competition law. It is possible that other bodies, such as Monitor, will also be given concurrent powers. One of the implications of being an NCA is membership of the European Competition Network and the right to attend Advisory Committee meetings.

We would question whether it is efficient for all of the concurrent regulators to act as separate members of the ECN, with the right to attend meetings and make representations on behalf of the UK. A more cost-effective solution might be for the OFT/CMA to act as the UK's single representative at European level, having sought input (where relevant) from the concurrent regulators through the Concurrency Working Party. This would also strengthen the UK's voice in the European Competition Network. (See also our response to questions 14 to 16.)

3. A stronger markets regime

This chapter sets out that there is scope to streamline processes and make the markets regime more vigorous. The key options are: enabling in-depth investigations into practices that cut across markets; giving the CMA powers to report on public interest issues; extending the super-complaint system to SME bodies; reducing timescales; strengthening information gathering powers; simplification of review of remedies process; and updating remedial powers.

Q.3 *The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime, in particular:*

- *the arguments for and against the options;*

- *the costs and benefits of the options, supported by evidence wherever possible.*

***Q.4** The Government also welcomes further ideas, in particular, on modernising and streamlining the markets regime, and on increasing certainty and reducing burdens.*

Comments:

Summary

- We support the proposal to allow Market Investigations into practices that cut across markets, provided the CC/CMA is obliged to consider the effects of those features on each relevant market.
- We do not support the proposal to enable the competition authorities to report on public interest considerations unrelated to competition law.
- We do not support the extension of super-complaints to SME bodies.
- We support the proposal to shorten the duration of Market Investigations
- We do not support the proposal to formalise OFT/CMA Market Studies, which could place significant additional burdens on businesses.
- We are concerned that the proposal to allow Market Investigations to incorporate antitrust enforcement action could undermine the effectiveness of the markets regime.
- We believe that allowing the CC/CMA to require the publication of non-price information would enhance its ability to impose effective remedies.
- We are not persuaded of the need to amend the CC's/CMA's remedy powers in any of the other ways proposed.
- We would support removing the OFT's/CMA's duty to consult on a decision not to make a Market Investigation reference where the possibility of a reference has already been the subject of public consultation (for example, as part of a Market Study).

Market Investigations into practices that cut across markets

We support the proposal to allow Market Investigations to consider features that are common across different product markets. We believe this approach has the potential to create efficiencies and could, if exercised appropriately, reduce the burdens on business that might otherwise be subject to multiple investigations. It might also streamline the consideration of remedies, by

removing the need for separate consultations and hearings in relation to each relevant market.

However, in order for this approach to operate consistently with an effects-based approach to competition law, it would still be necessary for the CC/CMA to consider the features in question in relation to **each** relevant market. Any approach which sought to short-cut the need for a proper assessment of market definition and analysis of effects would lack legal and economic legitimacy. By way of illustration, it would have to be possible for the CC/CMA to conclude that the features under investigation resulted in an adverse effect on competition in one market but not in another. Moreover, remedies that are intended to address concerns across several markets would need to be justified (and proportionate) in relation to each.

A Market Investigation into more than one market would also require a significant investment of resource by the CC/CMA and, unless sufficiently resourced, could impact on the quality of analysis of each relevant market.

Enabling reports on public interest issues

We do not support the proposal to allow the competition authorities to report to the Government on matters of public interest alongside competition issues. Our opposition is based on two concerns.

First, the strength of the UK's competition regime, and its benefits to the wider economy, stem in large part from its independence from central government in matters of technical assessment. In our view, it could damage the integrity of, and public confidence in, a competition authority's assessment if it is required to balance its technical analysis with other policy considerations. It is for Government to weigh up the potential harm to competition against other policy considerations. Thus, for example, in the review of the *Lloyds/HBOS* merger the OFT was able to issue its advice to government on a purely technical basis, which ministers were able to use to inform a policy decision. It would have been inappropriate, and would have caused delay, if the OFT had been required to assess the wider impact of the merger on the UK banking sector as part of its merger review, as well as its expected impact on competition.

Secondly, the OFT and CC are staffed by competition specialists (both lawyers and economists). Notwithstanding the Government's proposal to "*ensure industry knowledge and expertise is available to the CMA*", the range of issues which might conceivably fall to be assessed as public interest considerations is likely to fall outside a competition authority's expertise, and fall more appropriately to other parts of Government. At the very least, it would be an inefficient use of a competition authority's specialist resources for it to investigate and decide on matters outside its expertise.

Extending super-complaints to SME bodies

We do not support this proposal. Super-complaints can place significant

burdens on the OFT/CMA and on the targets of complaints. This is because the OFT is bound by a strict time limit in responding to a super-complaint and has no discretion whether to pursue the matter as an administrative priority. Despite this, there is no formal requirement that the super-complaint itself satisfy minimum legal or evidential requirements.

We understand that the principle behind super-complaints is to give weight to the views of consumers, who might not otherwise have the ability to make their voices heard. The same does not apply to businesses, which are already well represented by business and trade associations (such as the Federation of Small Businesses).

Any extension of this power to bodies representing SMEs (or to those representing "small" enterprises) would, in the first instance, subject businesses to the administrative burdens of an investigation in circumstances where the authority has not decided an investigation is merited. Secondly, it would disrupt the efficient operation of the competition authority, who would be obliged to delay case work that has satisfied minimum legal and prioritisation criteria, in order to address super-complaints (that have not). Thirdly, it would dilute the voice of consumer bodies. Finally, it could allow smaller competitors to "game" the system, by initiating super-complaints against larger competitors for their commercial advantage, rather than as a result of any genuine grievance.

Time limits for Market Investigations

We support the proposal to shorten the statutory maximum duration of Market Investigations to 18 months (from two years), and we note that the CC is already taking steps to meet this target.

A two year Market Investigation (in addition to the time taken for a Market Study or other "phase I" investigation) places a significant burden on the firms involved. In addition, there is a risk that market developments during the course of a Market Investigation, particularly in relation to information technology or media markets, make the CC's/CMA's conclusions obsolete by the time the investigation is completed. Thus, for example, the Competition Commission's current Market Investigation into *Movies on Pay-TV* began with an Ofcom study beginning in March 2007 and is not expected to conclude until the end of 2011 or in 2012. Over this period of almost five years there have been numerous, and significant, market developments.

Market Studies

We do not support the proposal to formalise Market Studies through the introduction of time limits or formal information-gathering powers.

Over recent years the OFT has carried out a large number of Market Studies (having opened seven in 2010 and five already in 2011) as well as other similar activities (such as its "*Infrastructure ownership and control stock take*"). These studies (which may be initiated without the need for any

suspicion of competitive harm) necessarily place burdens on businesses. While businesses are under no legal obligation to respond to information requests issued as part of a study, in our experience firms do devote significant resource in doing so and we are not aware of the OFT being prevented from carrying out a Market Study effectively due to a lack of co-operation by the parties. Indeed, in our experience, businesses realise the importance of assisting the OFT to gain an accurate understanding of the market in which they operate. They are also aware of the potential consequences of the OFT's conclusions. Put another way, the potential for a Market Investigation, antitrust or consumer law investigation itself provides a significant incentive to firms to co-operate with an OFT study. Without evidence that the OFT's ability to carry out Market Studies is being hampered, there would appear to be no justification for the introduction of formal requests for information, which carry the threat of sanctions.

Moreover, there is a tension between allowing a competition authority to use formal information-gathering powers for the purposes of a study when (rightly) it is unable to use such powers in an antitrust investigation without reasonable suspicion of an infringement (s.25 CA98).

For similar reasons we would not support the introduction of statutory deadlines for Market Studies. We accept and agree that, in general, it is beneficial for businesses, and more efficient for the competition authority, for Market Studies to be completed as quickly as possible. We note in this regard that the OFT is already making efforts to reduce the length of Market Studies, with some being as short as five months. However, it is vital that the quality of Market Studies is not diminished, given the potential consequences for businesses, including a Market Investigation reference or an antitrust investigation (as in the case of the OFT's *Outdoor Advertising* Market Study). As stated above, a Market Study is essentially a voluntary process (albeit with strong incentives on parties to engage) which can be initiated without any suspicion of wrong-doing or anticompetitive harm. We therefore believe that administrative timetables would be more appropriate than a statutory deadline in Market Studies. This would impose a discipline on the OFT/CMA, while at the same time allowing flexibility that recognises the burdens placed on businesses.

For the reasons above, we do not support the Government's proposals to formalise Market Studies. However, if this approach is adopted, we agree it would be appropriate to introduce a minimum legal threshold that had to be satisfied before the OFT/CMA could use formal information-gathering powers. To be meaningful, such a test could be no lower than the (already low) threshold for opening a CA98 investigation, i.e. that of "reasonable suspicion". As a minimum, therefore, we would propose that the OFT/CMA have to demonstrate "a reasonable suspicion of an adverse effect on competition".

We would also propose that any legal threshold for opening a Market Study include a de minimis exclusion, preventing studies into markets worth less than £50 million per year, where the cost of a study might be considered disproportionate to any potential consumer benefit.

Interaction of Market Investigations and antitrust enforcement

We do not support the proposal to allow the CC/CMA to investigate suspected CA98 breaches (including Articles 101 and 102 TFEU) as part of a Market Investigation. A CA98 investigation is by its nature an adversarial process, and one which can involve suspected infringements "by object" as well a consideration of competitive effects. It carries the threat of substantial financial penalties as well as reputational harm, follow-on actions and consequences for individuals. There are also procedural safeguards in a CA98 investigation designed to protect parties' rights of defence. By contrast, a Market Investigation focuses on adverse effects on competition and is intended to address "features" of market, rather than assessing the legality of individual firms' conduct.

The effectiveness of a Market Investigation depends to a significant extent on parties co-operating above and beyond their strict legal obligations. In our view, if parties to a Market Investigation feel at risk of enforcement action based on the evidence they submit, this will make them reluctant to provide information above and beyond that which is legally required; may increase legal costs; and could cause delay. In short, it would likely have the effect of making a Market Investigation a more adversarial, and less useful, process.

We therefore believe it is important for the effectiveness of the Market Investigation regime for these powers to remain separate and for parties to have the assurance that evidence collected in the context of a Market Investigation cannot be used for the purposes of an antitrust investigation.

Remedies

We do not support the proposal that would allow the CC/CMA the power to require parties to pay for an independent remedies monitor in Market Investigations and phase II merger cases. In our view it is necessary to distinguish between undertakings that are voluntarily offered by the parties, where it is reasonable for parties to offer to pay the cost of monitoring, and those that are imposed. It would be contrary to one of the stated objectives of the reforms (that of "proportionate and predictable actions that limit burdens on business") to require firms that have had remedies imposed on them to pay for the policing of those remedies.

We support the Government's proposal to allow the use of remedies that require the publication of non-price information.

We do not support the Government's proposal to introduce formal information-gathering powers or statutory timescales for the review of remedies. In our experience, parties that are subject to remedies have sufficient incentives to co-operate fully with any review of those remedies.

The Government is also considering removing the requirement to show a

"change in circumstances" before a remedy may be reviewed (with a view to it being revoked, varied or replaced). In our experience this threshold has not prevented the competition authorities from reviewing remedies in appropriate circumstances, and it is difficult to conceive a situation when it might be appropriate to vary remedies without a change in circumstances. For these reasons we do not support the proposal.

Duty to consult

Finally, the Government has proposed limiting the obligation on the OFT/CMA to consult on a decision not to make a Market Investigation reference to those cases where a reference has specifically been requested.

Where the possibility of a Market Investigation has already been the subject of a public consultation process (for example, where a reference is considered as part of a Market Study or super-complaint), we agree that a requirement to hold a further consultation on a decision not to refer is duplicative and causes unnecessary delay and expense. Such an approach places an additional, and unjustified, burden on businesses that have already been subject to competition scrutiny and a public consultation process. However, where the OFT/CMA is considering a reference and there has been no prior public consultation exercise, we would not support removing the duty to consult, whether or not a reference has been specifically requested.

4. A stronger mergers regime

This chapter sets out that there is scope for improving the merger regime by addressing the disadvantages of the current voluntary notification regime and streamlining the process. The Government is seeking views on: (1) options to address the disadvantages of the current voluntary notification regime; (2) measures to streamline the regime by reducing timescales and strengthening information gathering powers; (3) introduction of an exemption from merger control for transactions involving small businesses under either a mandatory or voluntary notification regime. We ask:

***Q.5** The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

***Q.6** The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?*

***Q.7** The Government welcomes further ideas on streamlining the mergers regime.*

Comments:

Summary

- We strongly support the retention of the voluntary notification regime.
- The introduction of a mandatory (or hybrid) regime would place a significant additional burden on business, without any clear benefit.
- We would advocate the introduction of a binding de minimis threshold as part of the voluntary regime, which would reduce burdens on business in cases where a merger review would be disproportionate.
- If the Government decides to introduce a mandatory (or hybrid) regime, we would strongly advocate the introduction of short form notifications for small transactions and transactions that do not raise competition issues.

Retain a voluntary notification regime

We support the retention of a voluntary merger regime. Our principal reason for opposing the introduction of a mandatory regime (including the suggested hybrid approach) is that it would increase burdens on businesses without any clear benefit either for individual businesses or for the economy as a whole.

Under a mandatory regime a notification would be required in all qualifying transactions – entailing cost, delay and payment of a merger fee for the large number of transactions that do not raise substantive competition concerns. Currently there are around 80 to 90 merger decisions in the UK each year. While it is difficult to predict how many additional mergers would be caught under a mandatory regime, it is realistic to expect the increase to be significant. The consultation document itself anticipates that a flat fee of £7,500 would be sufficient to recover the costs of the regime (estimated at £9 million). That equates to approximately 1,200 decisions. Put another way, the Government's proposals could create around 1,100 additional notifications.

We do not accept that a mandatory regime would create greater certainty for businesses: those businesses who seek legal certainty are already able to notify their transactions under the voluntary model.

The Government's justification for proposing the introduction of a mandatory regime is to prevent the possibility of having to unwind completed transactions that are subsequently found to result in a substantial lessening of competition. However, the evidence of this being a real concern in practice is limited. We note that the OFT already monitors merger transactions and has become increasingly efficient at using this approach to target its limited resources at those cases that have the potential to raise competition concerns. Moreover,

this approach has created a virtuous circle, whereby advisers to parties whose mergers are expected to raise competition questions advise their clients to notify their transactions.

In addition, the OFT has shown a willingness to require hold separate obligations from parties to completed transactions. Note in this regard that the prospect of lengthy hold-separate undertakings and possible unwinding of a completed transaction is expensive and burdensome for the parties involved. Where such a prospect is realistic, it is our experience that parties do seek the assurance of OFT/CC clearance before integrating their businesses.

De minimis threshold

We support the introduction of a binding de minimis threshold in merger cases. Without such a threshold, it is possible for the cost of an investigation (to both the parties and the taxpayer) to outweigh any potential harm to competition. This, we believe, was the reasoning behind the introduction of section 22(2) EA02, which gives the OFT a discretion not to refer a merger to the CC where "*the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Commission*".

While we recognise that the OFT has issued Guidance on this exception to its duty to refer (OFT1122), this Guidance still allows the OFT significant discretion, such that parties to small transactions are unable to assess with confidence whether CC reference is a possibility. Nor do the Guidelines prevent a phase I OFT investigation in the first place, meaning that parties must undergo an OFT investigation even in circumstances where a reference (and therefore any outcome other than a phase I clearance) would be disporoportionate.

However, we do not accept that it is necessary to introduce a mandatory regime in order to achieve a binding de minimis exception. A de minimis exception could readily be introduced as part of the current regime. Moreover, it is counter-intuitive that small mergers which would not qualify for review under a mandatory regime should be susceptible to review under a voluntary regime.

Additional points

If the Government nevertheless decides to move to a form of mandatory (or hybrid) notification regime, we would advocate the following points.

First, the de minimis thresholds (below which no notification is required or possible) must be set at a realistic level not to stifle those corporate transactions where a competition investigation would be disproportionate. The Government's proposed thresholds (target turnover of £5 million in the UK and acquirer turnover of £10 million worldwide) would not only rank amongst the lowest thresholds anywhere in the world, they would also

potentially capture transactions between businesses with no overlapping activities in the UK.

Secondly, it is vital that small transactions that nevertheless satisfy the jurisdictional thresholds not require a lengthy notification and review process. Rather, it would be possible to introduce a short-form notification (requiring only simple information about the parties involved), on the basis of which the OFT/CMA could decide whether a full notification is required. Where the OFT/CMA does not request a full notification within a defined period (we would suggest no more than two weeks), the parties would be free to complete the transaction. We would suggest that the current turnover test (target turnover of at least £70 million) would be an appropriate cut-off point for such short-form notifications.

Such an approach would be equally appropriate for larger transactions that do not raise substantive issues (for example where there is no material overlap in the parties' activities). This approach has been adopted under the European Merger regulation, which allows a short-form notification and simplified procedure in cases where there is no material overlap between the parties' activities, and has been successful in reducing the burdens imposed on merging parties.

5. A stronger antitrust regime

This chapter sets out three options for achieving a greater throughput of antitrust cases: (1) retain and enhance the OFT's existing procedures; (2) develop a new administrative approach; (3) develop a prosecutorial approach. We also ask about the case for statutory deadlines for cases and for civil penalties for non-compliance with investigations, set out considerations relating to private actions and invite views on the powers of entry and of investigation and enforcement.

***Q.8** The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime, in particular:*

- *Options 1-3 for improving the process of antitrust enforcement;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

***Q.9** The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.57, and the costs and benefits of these.*

***Q.10** The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.*

Comments:

Summary

- We do not support the introduction of a prosecutorial model, which has the potential to increase burdens on business, the OFT/CMA and the CAT without obvious benefit.

- We believe there are advantages to the proposed internal tribunal model, in particular a greater separation of investigation and decision making, and a reduced risk of confirmation bias.

- We believe it is essential to the robustness of decision making that the Government retain parties' rights to full-merits appeals.

- We support the introduction of administrative timetables in antitrust cases.

- We support the proposal to create a statutory hearing officer to resolve procedural disputes in antitrust cases.

The prosecutorial model

We do not support the introduction of a prosecutorial system (option 3). There are a number of reasons for this view.

First, it is our experience that litigation is typically a burdensome exercise for business, it is generally expensive (even for a winning party) and it is time-consuming. The likely need to involve barristers to a greater extent (and earlier) under a litigation-based system would also increase costs for most firms that face investigation.

We do not accept that a prosecutorial model would make it simpler or quicker for the OFT/CMA to bring cases. It is likely that a litigation-based process would increase costs and create delay for the OFT/CMA itself as well as for the parties to its investigations. Moreover, in order to operate efficiently under a litigation-based approach the authority would have to recruit or develop staff with litigation experience. It is interesting in this respect to consider the OFT's record in bringing cases in those areas of competition law where it does operate under a prosecutorial model: (i) criminal cartel cases; and (ii) competition disqualification orders. The OFT has never successfully brought a contested case under its criminal powers and has never made any applications to the court for disqualification orders. This is not a criticism of the OFT - we accept that these cases raise particular challenges. However, it does serve to illustrate the difficulty for a competition authority in bringing cases before the UK courts.

There may, in addition, be practical difficulties under a prosecutorial model in offering leniency and settlement discounts. While it is possible for a competition authority to exercise prosecutorial discretion not to pursue a case

against immunity applicants, the position is more difficult when dealing with reductions in the amount of a fine. If the tribunal were to operate on a genuinely independent basis, it would not be possible for the OFT or CMA to bind the discretion of the tribunal in imposing penalties.

The administrative model

We accept that there may be benefits from maintaining and streamlining the existing administrative model. We recognise that the period since the introduction of the Competition Act 1998 has been a period of considerable legislative change: in additional to the Competition Act itself the period has seen Modernisation of EU competition law, the introduction of criminal cartels and director disqualification orders, the introduction of leniency, the development of early resolution (settlement), the introduction of a formal commitments process and the introduction of intrusive surveillance techniques. We accept that these changes require time to "bed-down" and for efficiency to improve. We also recognise the merit in a model that unites decision making and policy making in the same body, as this provides greater certainty and predictability for business.

However, in our experience the administrative model has failed to provide sufficient separation of decision making and investigation for business to have confidence in the robustness of OFT decision making. In particular, there has been a lack of transparency as to who the decision maker is in OFT cases and, as revealed by the OFT's Procedures Guidance (OFT1263), in most cases the same individual acts decision maker and Senior Responsible Officer (responsible for case "delivery"). We believe decision making would be improved by introducing greater separation of the two roles.

The internal tribunal model

An internal tribunal could combine the best elements of the existing administrative model with improved independence and robustness of decision making.

We believe the key advantage of option two is that it provides a clearer separation of investigative functions from decision making, which reduces the risk of confirmation bias. It could also introduce transparency into the process of decision making: under the current OFT model the roles of substantive decision maker and Senior Responsible Officer are blurred. Separating these roles would not only improve the robustness and perceived impartiality of decisions, it would also allow Senior Responsible Officers to focus on case delivery more efficiently.

At the same time, an internal tribunal could (and should) be established without the formalities of a court process. This would minimise any additional costs for business and for the OFT/CMA itself. It would also minimise the need for changes to existing case procedures.

Rights of appeal

For the reasons set out below, we do not accept that introducing an internal tribunal should allow the Government to remove parties' rights of appeal in competition cases, leaving only the possibility of judicial review.

We understand that the principal perceived advantage of introducing either a prosecutorial model or an internal tribunal is that it would allow the Government to limit parties' rights to challenge the first instance decision to one of judicial review, rather than a right of full merits appeal.

Under the current model parties who are subject to an infringement decision have the right to have that decision reconsidered by the CAT. There is then the possibility of appeal to the Court of Appeal (see, for example, *Replica Football Shirts* and *Toys*). The right of appeal to the CAT has served a primary purpose of ensuring parties are not wrongly found to have infringed the law. It has also served a secondary purpose of improving the quality of first-instance decision making, requiring the OFT to produce strong and compelling evidence of an infringement. We are concerned that removing the right of appeal not only limits parties' rights of defence in an area that can have significant consequences for businesses and individuals, but also removes an important discipline on the first-instance decision maker. In particular, it is to be expected that matters of economic assessment are unlikely to be seen by the Administrative Court as sufficient grounds when considering applications for judicial review. And yet such assessment is fundamental to many competition law decisions. Without the potential for crucial elements of a first instance decision to be challenged, there is no check on that decision.

Similarly, as has been shown by the recent CAT judgments in the OFT's *Construction* and *CRF* cases, there is potential for excessive fines to be imposed unlawfully at first instance. It is therefore critical that there remain a meaningful way of challenging the amount of any fine imposed.

A further disadvantage of a judicial review model (as opposed to an appeal on the merits) is that where a decision is successfully challenged, that decision would, in most cases, have to be remitted to the OFT/CMA, requiring further investigation and the possibility of a new first instance decision. This entails further costs and delay for all parties involved (including the authority). By contrast, under an appeal model the court is able to substitute its own decision directly.

Finally, we are not persuaded that an internal tribunal that is sufficiently "independent" for the purposes of Article 6 ECHR would achieve the efficiency benefits identified.

For the reasons above we believe that parties' current rights of appeal are critical in ensuring the robustness and fairness of decision-making. However, if the Government decides to reduce parties' *automatic* right of appeal, we believe that, as a minimum, parties should have the right *to apply for*

permission to appeal. Such an approach would likely reduce the number of appeals from the current number (since one might expect permission to be given only in cases raising prima facie issues). At the same time, however, it would allow parties some ability to challenge decisions on a full merits basis.

Administrative timetables

We would support the introduction of administrative timetables for antitrust cases. Under the present regime cases frequently run to many years, the most striking example being the OFT's *Tobacco* case, which began in 2003 reached a decision in 2010 and is still before the CAT. However, we acknowledge that the nature of antitrust cases means that statutory deadlines are likely to be unrealistic and could be counter-productive to achieving robust decisions. They could also require cases to be dropped purely on the basis of being time-barred, encouraging "gaming" of the system. We note that under the current mergers regime the OFT uses a 40 working day administrative deadline for reaching decisions in "informal submission" cases. In our experience this approach has been a successful discipline for achieving timely decisions while retaining some flexibility in exceptional cases.

In order to monitor the effectiveness of administrative deadlines, we would also suggest that the OFT/CMA be required to publish statistics (perhaps as part of its Annual Review) showing how long cases take against these deadlines.

Hearing Officer

We support the introduction of a mechanism for settling disputes over procedural matters in competition cases (for example, deadlines for responding to information requests and the scope of confidentiality redactions). In this respect we welcome the OFT's initiative to introduce a Procedural Adjudicator on a trial basis. In particular, we welcome the fact that the Procedural Adjudicator uses a streamlined process aimed at achieving quick decisions. Further, we have every confidence that the current Adjudicator will reach robust and unbiased decisions. As a longer term solution, however, we believe the proposed reforms of the competition regime present an excellent opportunity to establish this role on a formal statutory, and fully independent, basis.

6. The criminal cartel offence

This chapter sets out options for making the cartel offence easier to prosecute: (1) removing the dishonesty element and introducing prosecutorial guidance; (2) removing the 'dishonesty' element and defining the offence so that it does not include a set of 'white listed' agreements; (3) replacing the 'dishonesty' element of the offence with a 'secrecy' element; (4) removing the 'dishonesty' element and defining the offence so that it does not include agreements made openly.

Q.11 *The Government seeks your views on the proposals set out in this Chapter to improve the criminal cartel offence, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.12 *Do you agree that the 'dishonesty' element of the criminal cartel offence should be removed?*

Q.13 *The Government welcomes further ideas to improve the criminal cartel offence.*

Comments:

Summary

- We strongly oppose the proposal to lower the standard of criminal liability in cartel cases by removing the requirement to prove dishonesty.

- We are not persuaded that any of the Government's proposals for recasting the offence meet the objectives of clarifying the offence and of criminalising only the most serious conduct.

Requirement to prove dishonesty

We strongly oppose the proposed removal of the requirement to show dishonesty in criminal cartel cases. A requirement to show a *mens rea* is a cornerstone of UK criminal law.

We do not accept the desire to make it easier to prosecute individuals to be sufficient justification for lowering the threshold of criminal liability. When the cartel offence was introduced, the requirement to show dishonesty was recommended as a way of ensuring the offence applied only conduct that was sufficiently serious to warrant criminal liability, and to preclude defendants from putting forward defences based on complex economic justification, which may be difficult for juries to understand.*

Dishonesty is key component of a number of similar types of offence (notably under the Theft Act 1968), known as the "dishonesty offences". In this context the requirement to show dishonesty is a necessary element used to differentiate criminal conduct from innocent conduct.

In the context of competition law, this way of distinguishing between criminal and innocent conduct is perhaps even more important. Under civil competition law any agreement between firms is potentially capable of exemption (albeit that it is in practice difficult for certain types of restriction to satisfy the criteria for exemption). Put simply, whereas the victim of a theft or fraud might always be said to have suffered harm, the same is not necessarily

true in a competition law context.

Dishonesty is also an effective way of distinguishing the conduct of an individual (for which that individual might justifiably be held liable) from the conduct of the firm (for which he should not). This principle is consistent with the Court of Appeal judgment in *Safeway Stores et al. v. Twigger et al.* ([2010] All ER (D) 245 (Dec)), in which the court held that individuals should not be held responsible for the fines imposed on undertakings under competition law.

While the Government criticises the application of the *Ghosh* test in the cartel context, its reasoning is unconvincing. The consultation paper says (at paragraph 6.14) that because a significant proportion of the population do not believe price fixing to be dishonest, "*this suggests ... that there is only moderate support for a criminal cartel offence defined around dishonesty*". On the contrary, this evidence might suggest that there is limited support for treating cartel behaviour as a criminal offence, rather than that the standard of criminal liability should be reduced.

While we recognise that the Government is considering various options aimed at differentiating criminal cartel activity from civil competition law, we are not persuaded that any of these options would be as effective at achieving this objective as maintaining the current definition.

Introducing procedural guidance

Under this proposal a range of legitimate commercial agreements could potentially result in criminal conduct on the part of individuals, albeit the OFT/CMA would be subject to guidance not to prosecute in certain cases. Specifically, there would be no prosecution where the underlying agreement is (or might be) exempt under civil competition law. Far from distinguishing the conduct of the individual from the firm, this approach would rely on the prosecutor having to carry out an economic assessment before deciding whether to prosecute. Moreover, it would not prevent juries from having to consider economic arguments put forward in defence.

White list

Under this proposal, the Act itself would define a category of agreements that were not criminal, intended "*to avoid wherever possible having to consider economic argument*" [emphasis added]. The consultation paper also acknowledges that it would be difficult to define a category of agreements that should be criminalised and those that should not. We agree that it is difficult to see how this proposal could create greater clarity for defendants or how would serve to differentiate individual conduct from the assessment of the firm under civil competition law.

Secrecy

In paragraphs 6.42 and 6.43 of the consultation paper the proposal to replace dishonesty with "secrecy" is explained as a way of criminalising the covert

activities of perpetrators who "*know that what they are doing is wrong*", and that in this respect secrecy "*might be a good substitute for dishonesty*". The proposed definition of "secretly" would capture circumstances where the individuals took "*measures to prevent the agreement or the intended arrangements becoming known to customers or public authorities*".

On this basis secrecy would appear to be a poor substitute for dishonesty. Not only is it likely that many legitimate commercial activities would satisfy the test of secrecy (where they are commercially sensitive), but it is also the wrong test for determining whether individuals were doing something they knew to be wrong.

Excluding agreements made openly

We do not accept that excluding agreements made openly from the scope of the cartel offence would achieve the objective of separating wrongful conduct from legitimate commercial conduct. First, there may be legitimate commercial reasons why agreements are not publicised. Secondly the decision to publicise an agreement is not necessarily taken by the individual who made the arrangements in the first place, meaning that the criminality of that person's conduct could depend on the subsequent actions of others.

In summary, we believe it is appropriate for the law to distinguish serious conduct on the part of individuals from civil competition law as it applies to firms. To achieve this it is necessary to provide some means of determining conscious wrong-doing by individuals. We believe that the established test of dishonesty (which is widely understood in criminal law) achieves this objective while being consistent with other dishonesty offences. Moreover, we are not persuaded that the alternative options proposed in the consultation paper would achieve the same objective.

* See, for example, "Proposed criminalisation of cartels in the UK, a report prepared for the Office of Fair Trading by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM", November 2001, at paragraph 1.10: "*We recommend instead that the definition should incorporate the concept of individuals **dishonestly** entering into agreements with each other in order to implement 'hard core' cartel arrangements*."

7. Concurrency and sector regulators

This chapter sets out three options for improving the use and coordination of competition powers: (1) sector regulators could agree on a common set of factors to take into account when deciding whether to use sectoral or competition powers or competition law primacy could be enhanced; (2) the CMA could act as a central resource for the sector regulators; (3) the CMA could coordinate the use of competition powers across the landscape.

***Q.14** Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?*

Q.15 *The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.16 *The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.*

Comments:

Summary

- We would welcome greater co-operation between the OFT/CMA and the sectoral regulators in antitrust cases.
- We believe that the OFT/CMA and the sectoral regulators should use common investigation procedures wherever possible.
- We believe that treating all concurrent regulators as NCAs is inefficient.

Greater co-operation between the OFT/CMA and sectoral regulators

The sectoral regulators have issued relatively few infringement decisions under their ex post competition powers on very few occasions (*EWS* and *National Grid* being the notable exceptions), although we acknowledge that the regulators have issued more "no grounds for action" decisions.

We understand why the use of ex ante powers may, on a case by case basis, appear to offer more attractive, and more immediate, solutions to market failures. However, a propensity towards the use of ex ante powers is at odds with the development of regulated markets into fully competitive markets over time, since ex ante restrictions on businesses can stifle innovation.

We also understand that bringing competition enforcement action requires resources and expertise, and that it may be inefficient to maintain the critical mass needed to bring ex post enforcement action in each of the concurrent regulators. We would therefore support greater co-operation between the OFT/CMA and the sectoral regulators to bring enforcement cases on a collaborative basis. This approach would not only allow the sectoral regulators access to the greater resources and competition law expertise of the OFT/CMA, it would also allow the OFT/CMA to benefit from the highly specialist sectoral knowledge within the regulators.

Standardisation of procedures

We would also see this as an opportunity to standardise the competition investigation procedures across the different competition authorities/

regulators, given the inefficiency of the current approach (under which each of the seven concurrent regulators uses similar but different processes). There would appear to be no justification for the current range of procedures in place for enforcing the same underlying prohibitions, and this lack of consistency could hinder collaborative working.

In particular, if the Government is minded to change the way in which decisions are reached in competition cases brought by the OFT/CMA (for example, by the introduction of an internal tribunal model), it would seem logical for such changes to apply consistently across the regime. Indeed, in regulated sectors, where regulators necessarily develop ongoing working relationships with a small number of regulated companies, the case for a separation of investigator and decision maker is likely to be stronger.

Sectoral regulators as NCAs

Finally, as set out in our response to question 2, we believe there is inefficiency in the current model under which all concurrent regulators are NCAs for the purposes of Regulation 1/2003. Under a model where suspected competition infringements are investigated jointly by the OFT/CMA and a sectoral regulator, but the decision on whether there has been an infringement is taken by an "internal tribunal" within the OFT/CMA, we believe the sectoral regulators would not need to be designated as separate NCAs.

8. Regulatory appeals and other functions of the OFT and CC

This chapter sets out the Government's view that the sectoral reference/appeal jurisdictions of the CC should be transferred to the CMA. We also propose the development of model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

Q.17 *Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?*

Q.18 *The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.*

Comments:

Should the CMA hear regulatory appeals?

If the Government decides to merge the OFT and CC into a single authority, we agree with the Government's proposal that this body (the CMA) is best placed to consider regulatory references and appeals currently heard by the CC.

Standardisation of processes

We also agree that, to the extent possible, the processes for regulatory references and appeals should be standardised. However, we note that the underlying regulatory regimes vary between sectors and that there may therefore be instances where standardisation is inappropriate.

9. Scope, objectives and governance

This chapter sets out that the CMA should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA and proposes that the CMA will: have clear, and potentially statutory, objectives to underpin prioritisation; be accountable to Parliament; and, have an appropriate governance structure for a single decision making body. We ask:

***Q.19** The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.*

***Q.20** The Government see your views on whether the CMA should have a clear principal competition focus?*

***Q.21** The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.*

Comments:

Summary

- We are not persuaded of the need for statutory objectives for the OFT/CC/CMA.
- We would not support any move that would introduce political influence into the OFT's/CMA's case selection and prioritisation.

Statutory Objectives

We are not persuaded of the advantage of introducing statutory objectives for a future CMA. In particular, it is not clear what objectives might be introduced that do not already form part of the OFT's strategy and/or the OFT's and CC's

work more generally.

Similarly, we are not persuaded that introducing an obligation to keep "significant" markets (however defined) under review would be beneficial. In particular, we oppose any suggestion that the Government should define which markets politically independent competition authorities should review or investigate.

In our experience the OFT already concentrates its resources at markets where the potential for consumer impact is greatest. A statutory obligation of the type suggested could have the effect of skewing prioritisation decisions away from those markets where intervention might yield the greatest benefit. It might also send a confusing message to participants in smaller markets: that they are less susceptible to potential enforcement action.

10. Decision making

This chapter sets out a number of alternative models for decision-making that can deliver robust decisions through a fair and transparent process. The Government considers that a number of alternative models can deliver this, final choices will be guided by considerations relating to: the degree of separation between first and second phase decision making; degrees of difference or uniformity of approaches between tools; and, the role and nature of panels in the different tools available to the single CMA.

***Q.22** The Government seeks your views on the models outlined in this Chapter, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the regime and to business, supported by evidence wherever possible.*

***Q. 23** The Government also seeks views on the appropriate composition of the decision-making bodies set out in this Chapter, and in particular what the appropriate mix of full-time and part-time members is.*

***Q.24** The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process.*

Comments:

Summary

- It is essential that the role of decision maker be separate from that of investigator, to avoid the risk of confirmation bias.

- We strongly support retaining the "fresh pair of eyes" approach in phase II mergers and Market Investigations.

- We support the introduction of a two phase investigation in antitrust cases, as this would allow the OFT/CMA to target its resources more efficiently on those cases where an in-depth investigation is merited.

- We believe that all panel and/or tribunal members should be experienced lawyers or economists with antitrust experience, with a preponderance towards senior lawyers in antitrust cases.

Separation of investigation and decision making

As set out in our response to questions 8 to 10, it is critical that there be visible separation between decision maker and case team in all types of investigation. While the identity of the decision maker(s) (and the degree of separation of the decision maker from case team) is clear in merger cases and Market Investigations, it is currently far less so in antitrust cases. While we welcome the recent transparency initiatives by the OFT, we remain concerned that there is insufficient separation of decision maker from Senior Responsible Officer (who, in the OFT's words, is "*accountable for the delivery of the case*"). In most cases they will be one and the same person, i.e. the same person is responsible for delivering results for the OFT and for taking a dispassionate and unbiased opinion on the merits. For this reason we would therefore support the introduction of an internal tribunal in antitrust cases.

Mergers and Market Investigations

It is critical that, whatever overall governance structure is adopted in future, the Government retain the current "fresh pair of eyes" approach in Phase II merger cases and Market Investigations. This approach provides an important quality control on the regime as a whole, and ensures more robust decision-making. The counterfactual to the "fresh pair of eyes" is a regime under which the same case team and/or the same decision maker undertakes both phases of the investigation. In this scenario the risk of confirmation bias is significant.

The current regime, particularly in the context of mergers, is widely regarded as one of the best in the world. It results in robust decision making and, just as importantly, the appearance of robust decision making. Parties who are subject to adverse findings or remedies have the confidence that their case has been heard by two separate bodies.

We are not aware of any convincing arguments why this approach should be changed. In particular, it is far from certain that the duration of an investigation would be materially reduced and, in particular, whether the key procedural steps would be (or indeed could be) removed while retaining parties' rights of defence. Removing the "fresh pair of eyes" would therefore affect only the identity, and pre-conceptions, of the decision maker and case team. If one uses the European Merger Regulation process as a comparator, there would appear to be little time-saving to be gained from moving away from the "fresh pair of eyes approach" – phase II decisions under the Merger Regulation

typically taking around the same time as a CC merger investigation.

For the reasons set out in response to questions 8 to 10, we support the introduction of an internal tribunal as decision maker in antitrust cases. If the Government decides to merge the OFT and CC following this consultation, in our view this same tribunal could act as decision maker in phase II merger cases and Market Investigations (effectively replicating the role currently played by a panel of CC Members).

Antitrust cases

An antitrust investigation is a significant undertaking for the OFT and for the parties involved. While we recognise that the OFT seeks to apply its prioritisation principles to ongoing cases as well as to new cases, there may nevertheless be incentives on the OFT/CMA not to close cases once resources have been committed.

For the regime as a whole this provides a disincentive against opening cases. It results in greater hurdles for complainants and, for parties, it means that the burdens of an investigation are increased. As a result, under the current regime the case-opening process is itself used as a quasi-phase I screen. This is sub-optimal for two reasons. First, it has prevented the OFT from opening cases quickly (with its Procedures Guidance (OFT1263) stating that the OFT will "*aim to communicate to the complainant*" within four months whether it has decided to open an investigation). Secondly, the preliminary analysis on which the case-opening decision is based is carried out without the use of information-gathering powers (and therefore based on incomplete information).

Overall we believe that resources could be better targeted, and the regime better enforced, if the OFT/CMA were able to review cases on a preliminary basis, opening an "in depth" investigation only if certain minimum thresholds of evidence and administrative priorities are met. We would therefore support the introduction of a two-phase process in antitrust cases, that would allow the OFT/CMA to examine cases on a preliminary basis before deciding whether to open an in-depth investigation.

We also understand that it is developing practice within the OFT to take informal "stop/go" decisions at stages throughout the life of a case, as a way of avoiding cases becoming entrenched. We would welcome this initiative being formally recognised as part of the OFT's/CMA's procedures in future.

Identity of tribunal members

In our view the increasingly technical nature of competition law enforcement (including the greater use of economics) requires that all CC panel or OFT/CMA tribunal members should be experienced in either competition law or economics.

We believe it is particularly important in antitrust cases that tribunal members

have sufficient legal training and experience to reach robust decisions. While recognising that merger control and Market Investigations are both legal processes, in practice these decisions depend as much on an economic and practical assessment of the market in question as on a strictly legal assessment. The same cannot be said of antitrust cases, where decisions almost always depend on legal analysis and a forensic assessment of the evidence, and fines must be assessed according to legal precedent. We would therefore propose that the majority of tribunal members in antitrust cases should be senior lawyers with antitrust experience.

11. Merger fees and cost recovery

Merger Fees

This chapter sets out options to recover the cost of the merger regime either by changing the level of the existing fee bands, introducing an additional fee band or moving to a mandatory notification system. We ask:

12. ***Q.25*** *What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/ mandatory notification regime?*

Recovering the cost of anti trust investigations

The Government is considering introducing legislation to allow the enforcement authorities to recover the costs of their investigations in antitrust cases. This would only apply where there has been an infringement decision and a fine, non-infringement decisions and investigations dropped for any other reason would not be charged. We ask:

13. ***Q.26*** *Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons.*

14. ***Q.27*** *What are your views on recovery where there has been an infringement decision being based on the cost of investigation?*

15. ***Q.28*** *What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?*

It is foreseen that any costs to be recovered would be shown on the infringement decision detailing the fine. We ask:

16. ***Q.29*** *Do you agree that this would be an appropriate way to collect the costs, separates the fine from costs in a way that makes appeals clear and that the costs should go to the consolidated fund rather than the enforcement authority?*

It is foreseen that the costs element could be appealed. This raises the question of what happens when the appeal is successful, partly successful or when the appeal is on the method of penalty calculation only rather than the substance of the decision. We ask:

17. ***Q.30*** *Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?*

Currently there is no legislation to allow the enforcer to charge costs so this would mean amending the Competition Act 1998. An alternative introducing cost recovery would be to amend the same Act to allow the level of fine to cover the cost of the investigation. We ask:

18. ***Q.31*** *Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?*

Recovery of CC costs in telecom price appeals

19. ***Q.32*** *Do you agree that telecoms appeal should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing? If not, your response should provide reasons supported by evidence where appropriate.*

Recovery of CAT costs

The Government propose to make a change in the CAT's Rules of Procedure to allow the CAT to recover its own costs following an appeal. The decision whether or not to impose costs will rest with the tribunal who will be able to set aside the costs where the interests of justice dictate e.g. when the appellant is a small business and the costs of pursuing their legal right of appeal prevent them from doing so. We ask:

20. ***Q.33*** *What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?*

Comments:

Summary

- It is difficult to reconcile the proposed increases in merger fees with the objective of reducing burdens on business.

- An increase in merger fees of the magnitude envisaged under a voluntary regime could discourage notifications.

- The proposal to introduce fees under a mandatory regime would result in a cost being imposed on parties to mergers that raise no substantive issues, for an entirely unnecessary review.

- It is a false premise that antitrust enforcement is a cost to the public purse. The financial penalties recovered far exceed the cost of the regime.

- We also foresee a number of practical difficulties with introducing cost recovery in antitrust cases.

- The proposed recovery of CAT costs could discourage legitimate judicial challenges (with a knock-on effect on first instance decision making), in return for minimal financial gain.

Merger fees

The Government's various proposals fall broadly into two categories: (i) increasing significantly the merger fees payable under a voluntary regime; and (ii) introducing fees at lower level for all transactions under a mandatory regime.

The proposed increases under a voluntary regime could result in the highest merger fees in the world – with the top band set at £220,000. We believe that such fees are not only disproportionate, but would also provide a material disincentive to merger activity. They may also discourage parties from making a voluntary notification in some cases.

Under a mandatory or hybrid merger regime, merger fees of lower amount (of up to £12,500 under a mandatory regime) would be charged on all qualifying mergers. This approach is at odds with the objective of the consultation of reducing burdens on business, since it would impose merger fees on a significant number of transactions that raise no substantive competition concerns. It would also result in a larger number of uncomplicated transactions subsidising the cost of reviewing those that do raise competition issues.

The premise used to justify such increases merger fees is a desire for the merger regime to operate at no net cost to the public purse. It is by no means clear that this premise is appropriate. The combined cost of the OFT's and

CC's merger functions is less than £15 million per year, much of which is already recovered in merger fees at their current levels. The OFT's website lists 81 decisions in 2010. Assuming that the fees paid in these cases were, on average, the middle band (£60,000), the total fees paid would have been approximately £5 million.* Given the wider economic benefits deriving from a vibrant corporate environment, it does not seem to us unreasonable, or inappropriate, for a portion of this relatively small budget to be publicly funded.

It should also be borne in mind (as set out below) that the competition regime as a whole is expected to be a net contributor to the public purse.

* *This is likely to be a conservative assumption given that any transaction meeting the Enterprise Act turnover threshold will give rise to fees of £90,000.*

Antitrust cases

We are not persuaded that seeking to recover costs in antitrust cases is appropriate or practicable. Firms that are found to have infringed competition generally face financial penalties. These penalties typically run into several millions of pounds. For example, the OFT's *Tobacco* decision in 2010 involved fines of around £225 million. The fine in its 2011 decision against Reckitt Benckiser (in the *Gaviscon* case) was £10.2 million. These figures far exceed the cost of the enforcement regime (£19 million), and indeed exceed the OFT's and CC's combined budgets. It is therefore a false premise to suggest that the enforcement regime is a cost to the public purse.

Against this background there are a number of disadvantages to the proposal to recover costs in addition to the imposition of fines.

As the consultation acknowledges, it is far from clear whether it would be appropriate for a leniency party to benefit from immunity from, or a reduction in, costs. The same question applies in settlement cases.

There are also significant practical difficulties with the Government's suggestion. First the OFT/CMA would be required to record and measure costs. While this is clearly possible (albeit requiring investment in time-recording systems), it is more difficult to understand how the costs associated with a single investigation would (or could) be allocated between the different parties to that investigation.

For example, would a party who decides not to contest the OFT's statement of objections have to pay a share of the OFT's costs incurred considering other parties' written and oral representations? Similar issues arise where an investigation begins into a large number of parties but subsequently focuses on a smaller number. In these circumstances, it would be necessary somehow to allocate the common costs incurred during the early stages of the investigation.

The OFT has publicly stated that cost recovery might discourage parties from "frustrating" its investigations. Parties who are passive throughout the course

of an investigation would necessarily expect to face lower costs than those who actively exercise their rights. However, in our view it is inappropriate for parties to be discouraged (or "charged") for exercising their legitimate rights of defence. This approach would create perverse incentives on parties and, in addition, could ultimately impact on the robustness of decision-making.

Moreover, we would expect at least some parties to challenge the OFT's/CMA's costs before the CAT, itself adding cost and delay to cases. This might be expected in particular in circumstances where all or part of the OFT's/CMA's infringement decision is itself challenged before the CAT or court.

Finally, it would seem inequitable for the OFT/CMA to recover costs from parties found to have infringed the law, but not itself to be accountable for the costs incurred by firms who are subject to an investigation but against whom there is no finding of infringement (or who successfully challenge an infringement decision before the court).

In our view this proposal is not only impracticable and inequitable, it is entirely unneeded in a regime that already imposes financial penalties on those found to have infringed the law, which far exceed the cost of enforcement.

CAT costs

We are concerned that the potential to face an order for CAT costs (in addition to the other party's costs) in CAT appeals could have the effect of discouraging legitimate challenges. The cost of litigation is already significant for parties and can act as a disincentive to litigation. We do not accept that it is appropriate to discourage appeals in the context of competition law, where vexatious litigation is not a feature, and where it is appropriate that infringement decisions - based on the economic and factual assessment of the OFT/CMA decision maker - be subject to scrutiny. The recent CAT judgments in the OFT's *Construction* and *CRF* cases (where the OFT's decisions were found wanting in a number of important respects) demonstrate the importance of ensuring parties to have the ability to challenge the authority's decisions.

The consultation paper estimates the CAT's costs at £4 million per annum. The Government acknowledges that only part of this amount might be recovered. This sum is in any event relatively insignificant in the context of the regime as a whole and particularly against the far greater sums recovered in antitrust fines. We would therefore question whether the limited cost recovery expected justifies the potential detrimental impact on parties' incentives to challenge the OFT's /CMA's decisions, and the potential knock-on effect on the robustness of first-instance decisions.

12. Overseas information gateways

This chapter seeks views on how well the information gateway arrangements are working and whether there is a case for change. In particular, whether there is a case for amending the thresholds for disclosure of merger and markets information to promote reciprocity between overseas regulators and the UK and, if so, how this might be done. We ask:

21. ***Q.34*** *How well is the current overseas information disclosure gateway working? Is there a case for reviewing this provision?*

Comments:

Summary

- We see no justification for an expansion of the overseas information disclosure gateway in the way proposed.

Overseas information disclosure gateway

We do not support an expansion of the authorities' powers to exchange information with other agencies in merger or markets cases.

In this context it is important to recognise the distinction between antitrust cases (where a firm is suspected of breaking the law) and mergers and Market Investigations, where there is no suspicion of unlawful conduct. Where there is no suspicion of wrong-doing, it would seem disproportionate for parties not to be protected from the disclosure of their commercially sensitive with authorities in other jurisdictions.

In addition, the OFT and CC currently rely on parties submitting information voluntarily – beyond that which they are legally obliged to submit. This is especially relevant in Market Investigations. It could discourage parties from co-operating with investigations beyond their legal obligations if they have no protection against their information being shared in this way.

Moreover, in our experience it is practically unheard of for parties to refuse to grant waivers that allow the exchange of information with specific competition authorities, and for specified purposes, when requested. In our view, there is therefore no case for changing the existing legislation in this regard.

13. Questions on the impact assessment

Mergers

In this section we outline, and quantify where possible, the costs and benefits of the proposed options regarding strengthening the current voluntary

notification regime, introducing mandatory notification, exempting small businesses from merger control, streamlining the merger process and adjusting merger fees.

22. ***Q.35*** *Do you have any evidence about the costs to businesses of notifying mergers to the OFT, in terms of management time and legal fees?*

Anti-trust

In this section we outline the costs and benefits of the options for achieving a greater throughput of antitrust cases including enhancing the OFT's existing procedures, developing a new administrative approach and developing a prosecutorial approach. In addition we review the costs and benefits of retaining the 'dishonesty' element in the criminal cartel offence but exclude the possibility for defendants to introduce economic evidence produced after the events that constitute the alleged dishonest 'agreement'.

23. ***Q.36*** *Under a prosecutorial system, are there likely to be changes to the overall costs of the system?*

The Impact Assessment presents the likely costs and benefits and the associated risks of the policy options. In order to do this it is necessary to understand the costs and benefits of the current system and to make assumptions. Further, the Impact Assessment seeks to show the extent to which the policy options meet the objectives.

24. ***Q.37*** *Do you have better information about the costs and benefits of the current competition regime?*

25. ***Q.38*** *Do you have evidence that indicates better assumptions could be made to estimate the costs and benefits of the proposed options?*

26. ***Q.39*** *Are there likely to be any unintended consequences of the policy proposals outlined?*

Comments:

Our assessment of the costs and benefits of the Government's proposals is set out in our responses to the specific questions above.

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RESPONSE OF CLIFFORD CHANCE LLP TO BIS CONSULTATION ON OPTIONS FOR REFORM OF THE UK COMPETITION REGIME

1. INTRODUCTION

1.1 Clifford Chance LLP welcomes the opportunity to comment on the consultation of the Department for Business, Innovation and Skills ("**BIS**") on the options for reform of the UK competition regime (the "**Consultation**").

1.2 Our comments are based on the experience of lawyers in our Antitrust Group. With offices in sixteen countries worldwide, and having advised on competition law in all major jurisdictions, that experience is substantial and wide ranging. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

1.3 The Government's initiative to scrutinise and seek improvements to the UK's competition regime is laudable. It is clear that much careful thought has gone into developing the options that are described in the Consultation, and we have endeavoured to respond with a corresponding degree of consideration.

2. CHAPTERS 1 AND 2: WHY REFORM THE COMPETITION REGIME?

Question 1. The Government seeks your views on the objectives for reform of the UK competition framework, in particular:

- improving the robustness of decisions and strengthening the regime;
- supporting the competition authorities in taking forward the right cases; and
- improving speed and predictability for business.

2.1 We consider that the objectives outlined in the consultation are appropriate, subject to the following observations:

2.1.1 improved speed and predictability should not be at the expense of robust decision-making and the parties' rights of defence;

2.1.2 the contribution of competition policy, and its effective enforcement, to the growth of the UK economy must not be underestimated. While the proposals rightly focus on efficiency, in their implementation BIS should be wary of the false economies that could arise if there is an excessive transfer of costs of enforcement to the private sector, and an excessive reduction of the resources for enforcement of the relevant regulators; and

2.1.3 as noted in the Consultation, the UK regime and its enforcement agencies are highly respected, globally. BIS should therefore seek to ensure that its justifications for change are not just reasonable, but compelling.

Question 2: The Government seeks your views on the potential creation of a single Competition and Markets Authority

2.2 We agree that the benefits of a single CMA in terms of efficiency and avoidance of duplicated efforts should outweigh the disadvantages, provided its institutional structure incorporates sufficient measures to mitigate the increased risk of confirmation bias. We do, however, have concerns in relation to the markets regime that the structural combination of case selection, investigation and decision-making into one body carries a particularly strong risk of confirmation bias (notwithstanding the proposed models for internal separation of these functions). Consequently, our view is that the Government should consider further strengthening due process in respect of the markets regime, particularly in the absence of any right of appeal involving a full review on the merits.

2.3 We have commented in the remainder of this response on the measures that we consider to be most appropriate in this respect.

3. CHAPTER 3: A STRONGER MARKETS REGIME

Question 3: The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime, in particular:

- the arguments for and against the options;
- the costs and benefits of the options, supported by evidence wherever possible.

3.1 We note that the Government regards the markets regime as one of the key strengths of the UK competition regime, and that it is "at the forefront of global best practice". While we recognise that there is a place for expert analysis of market distortions that cannot adequately be resolved by competition law infringement proceedings, and recommendations for how these may be resolved, we do not share the Government's enthusiasm for the ability of regulators to impose legally binding behavioural and structural remedies on businesses that have not broken any law. That there is only one other country (Israel) that confers such powers on its regulators suggests that this feature is not universally admired. We consider the EU system – whereby sectoral inquiries are used to gather information that may form the basis of either targeted antitrust investigations or proposals for legislative reform – to be preferable.

3.2 In our experience, the market investigation regime is excessively interventionist. Investigations impose onerous costs and administrative burdens on businesses and carry considerable risks of chilling competition. Moreover, they often fail to take properly into account the possibility that future market dynamics will render intervention unnecessary, or counter-productive. Over-reliance on the market regime risks reducing incentives to invest in UK markets that are under investigation, or which might become subject to an investigation. Accordingly, we consider that in many cases legislation – with attendant Parliamentary accountability - would have been a more appropriate means of achieving reform of a given market, than remedies imposed by regulator who may be subject to confirmation bias, and whose decisions cannot be reviewed by the Competition Appeal Tribunal ("**CAT**") on their merits.

3.3 As noted above (paragraph 2.2) we consider that the coupling together within a single CMA of the power to select market investigation candidates with the determination and imposition of remedies gives rise to due process concerns and increased risk of confirmation bias. This is particularly troubling in the absence of a full review on the merits in appeals of the CMA's decisions in market investigations or its decisions on remedies.[1]

3.4 Finally, we are concerned by the statement that the fact that there are fewer market investigation references than the "*the 4 references per year initially anticipated… suggests that the markets regime may be being underutilised*".[2] For the reasons set out above, our view is that the market investigation regime is used far too much. Moreover, seeking to increase its use by reference to preconceived "initial anticipations" seems to us to be incorrect (see also our comments in paragraph 5.1 regarding the justifications for reform of the antitrust regime).

3.5 Our comments on the proposed options for reform, in light of the above considerations, are as follows.

Enabling investigations into practices across markets

3.6 We doubt that cross-market investigations will result in efficiencies. In a cross-market investigation, the feature or practice under investigation would need to be understood in the context of a number of different relevant markets, each with different structures, market players, customers barriers to entry, etc. Take, for example, two of the circumstances in which the Consultation suggests that a cross-market investigation might be appropriate: switching costs and below-cost selling. Switching costs exist in almost every market, and below cost-selling can be a rational and pro-competitive strategy for any good or service sold, depending on the circumstances and market conditions. The only way that a cross-market investigation could achieve significant efficiencies would be for it to formulate an analysis and set of possible remedies that is common to a number of markets, notwithstanding their differences. In our view that would be dangerous. The results of market investigations would become a form of *ex post* regulation that businesses would need to consider, alongside general competition law, wherever their markets share features with those that were subject to the cross-market investigation. For example, if a hypothetical market investigation covering a number of retail markets imposed a prohibition on below-cost selling, that would be likely to cause suppliers in a large number of other consumer-facing sectors to also cease that practice. The very value of the market investigation regime lies in

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[1] The financial consequences of some remedies imposed by the CC (divestment remedies in particular) are so onerous for the parties that the Government should consider carefully whether there may be grounds for parties to argue that they amount to criminal penalties for the purpose of human rights legislation (on the basis of the criteria set out by the European Court of Human Rights in *Engel v The Netherlands* (1979-80) 1 E.H.R.R. 647 ECtHR, para. 82.) If such remedies were considered criminal penalties then case law of the European Court of Human Rights is clear that decisions imposing them should be open to appeal before a judicial body of full jurisdiction with "*the power to quash in all respects, on questions of fact and law, the decision of the body below*" (*Janosevic v Sweden* (2004) 38 E.H.R.R. 22 ECtHR, para. 81), regardless of whether they are "administrative" or "hardcore" criminal penalties. The fact that the parties are not accused of infringing any law would appear to be an insufficient reason for affording them inferior protections than are available under antitrust infringement investigations.

[2] Paragraph 3.5 of the Consultation.

its ability to produce expert and detailed analysis of a *particular* market. It should not become a substitute for general competition law, or for Government-led policy making.

3.7 In any event, it seems to us that the problem that is identified with the current system – that it may be difficult to limit the scope of multiple investigations to a single practice – could be cured by a much simpler reform: allowing the scope of a market investigation to be determined and limited from the outset by reference to a particular practice or issue. Imposing a statutory curb on the possibilities for "scope creep" (which would in any event be required in order to implement the wider proposal in the Consultation) would, in our view, be a sensible and reasonable reform.

Enabling the CMA to provide independent reports to the Government on issues of public interest

3.8 We do not have a strong objection to the use of the investigative *model* of the CC / CMA being used to consider non-competition issues. However, we are concerned that if such investigations are frequently undertaken by the CMA, it would lose its competition focus, which is, as the Consultation points out, a key strength of the UK regime. There would need to be very strong safeguards to protect and prioritise the resources of the CMA that are committed to competition related investigations. We would also point out that the investigative model of the CC / CMA could be replicated within a separate body – possibly even with some sharing of resources with the CMA - without requiring the CMA itself to engage in matters wholly unrelated to competition.

Extending the super-complaint system to SME bodies

3.9 We oppose this proposal. The over-riding interest of SME bodies is the profitability of the SMEs that they represent. In our view, these interests do not coincide with those of consumers sufficiently frequently to justify allowing SMEs to divert regulatory resources away from consumer-focused issues of competition. Moreover, it would risk creating outcomes that favour regulation of supply chains over and above the more efficient consolidation of those supply chains, with resultant harm to the economy.

3.10 In any event, the proposed reform seems to us to be unnecessary. SME bodies can, under the present system, prevail on the competition authorities to investigate anticompetitive practices where they have sufficient evidence for their claims, and have successfully done so, for example in the groceries market inquiry, which was triggered by a complaint from the Association of Convenience Stores.

Reducing timescales/streamlining

3.11 While we cautiously welcome the proposal to impose a statutory Phase I timescale, and to reduce that which applies in Phase II, we are concerned that this may be difficult to achieve without erosion of due process. Consequently, we consider that it would need to be accompanied – in addition to the information gathering and "stop the clock" mechanisms described in the paper – by:

3.11.1 appropriate guarantees of resources;

3.11.2 reforms to certain working practices (see paragraph 10.1.2 below);

3.11.3 appropriate thresholds for initiation of investigations (see paragraph 3.15 below);

3.11.4 curbs on possibilities for "scope creep" during the investigation (see paragraph 3.7 above); and

3.11.5 measures to mitigate possibilities of confirmation bias (see section 10 below).

3.12 In addition, we do not favour the statutory limitation of the remedy implementation stage. The variety and complexity of remedies that may be considered by the CMA does not, in our view, lend itself to an expedited procedure, and such a process would greatly increase the risk of inefficient or counter-productive remedies being imposed.

Information gathering powers at Phase I

3.13 If the Government opts not to introduce binding Phase I timescales and a statutory threshold for initiating investigation, we do not consider that the proposed Phase I information gathering powers would be justified.

Facilitating prompt referrals to Phase 2

3.14 We would not object to a "fast track" referral procedure, similar to that which currently exists in the context of mergers - i.e. a procedure that can be instigated at the initiative of all the parties that may become subject to remedies as a result of the referral – although we doubt that it would be used very frequently, if at all. Conversely, we do not envisage any circumstances in which it would be appropriate or desirable for the CMA to have the power to initiate such a fast track referral, without the consent of, at least, those parties likely to be affected by any remedies that may ultimately be imposed.

Introducing statutory definitions and thresholds

3.15 We consider that a statutory threshold for the initiation of Phase I market studies is desirable. In our view, the current test for a market investigation reference to the Competition Commission under section 131 of the Enterprise Act 2002 should be the gateway threshold for initiation of a Phase I investigation, in order to curb excessive and unwarranted use of the market investigation mechanism, with a more stringent test applied for initiating a Phase II investigation. If the Government is not minded to maintain the section 131 threshold as the test for initiating a Phase I investigation, then we suggest a test for commencing a Phase I process could be: "*where there is reasonable evidence to suggest that* any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom."[3]

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[3] See also Article 17(1) of Regulation 1/2003 which sets out the test of EU sector inquiries by the European Commission: "Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the

Ensuring remedies in merger and market investigations are proportionate and effective

3.16 These proposals appear to us to be sensible.

Clarifying powers following remittals of mergers and markets

3.17 These proposals appear to us to be sensible.

Removing the duty to consult on decisions not to make an MIR

3.18 These proposals appear to us to be sensible.

4. CHAPTER 4: A STRONGER MERGER REGIME

Question 5. The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular:

- the arguments for and against the options;
- the costs and benefits of the options, supported by evidence wherever possible.

Question 6. The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?

Question 7. The Government welcomes further ideas on streamlining the mergers regime.

4.1 The UK's voluntary regime is widely respected and, in our view, works well in its current form. It has the benefit of avoiding the use of both government and private resources in the consideration of mergers and acquisitions that clearly raise no competition issues. A feature that is particularly valued by businesses is the absence of a standstill obligation, which allows efficient allocation of transactional risk between the parties and, ultimately, allows a considerable number of transactions to take place that would not otherwise have been possible, or would have been achieved on a slower timescale or with creation of less value for the parties.

4.2 We do not consider that any of the reasons for reform that are set out in the Consultation are sufficiently strong to justify a change. In particular:

4.2.1 the anecdotal evidence from the Deloitte report regarding the ratio of undetected problematic mergers to those reviewed does not chime with our experience. Moreover, as the Consultation notes, it predates the introduction of the merger intelligence unit within the OFT, which has been very effective at identifying potentially problematic mergers, and creating incentives to notify such mergers;

4.2.2 we do not consider there to be significant concerns regarding the ability of the authorities to remedy completed mergers. The evidence for this appears to be anecdotal and one-sided – we are not aware of any independent empirical

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Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors."

research or analysis identifying cases in which remedies imposed by the UK merger control authorities on completed mergers have failed to address effectively the identified competition concern, as a result of the earlier completion of the transaction. In our experience, the UK authorities are sufficiently sophisticated and experienced to deal with the complexities that can arise when dealing with completed mergers, and the ability to avoid delays and apportion transactional risk is seen by the business sector as one of the most attractive features of the current system. Moreover, there are more proportionate ways of addressing those complexities, such as the options for strengthening the voluntary regime that are set out in the Consultation;[4]

4.2.3 the Impact Assessment (paragraph 143 and Table 23) indicates that the estimated additional costs of the full mandatory regime for business and for the CMA (£83.2 million) outweigh the additional benefit for the economy (£77.5 million), even when the cost to the economy of *de minimis* mergers is excluded. Moreover, these figures:

(a) assume that a mandatory regime would capture 25% more SLC cases per year, or would capture a higher percentage of SLC cases, but with each having lower direct benefits for the economy.[5] In our experience, this over-estimates the number of potentially problematic mergers that escape review under the current system;

(b) do not take into account the very substantial costs for businesses – both in terms of transaction costs and lost efficiencies - that would result from delays, abandoned deals or terms that are less value-maximising as a result of the introduction of a standstill obligation and/or a filing requirement. Given that merger-related efficiencies are usually passed through to consumers in the form of lower prices to some degree, these costs would also translate into substantial costs for the economy; and

(c) the estimated costs for business are based an estimate of the additional number of notifications that would be generated by a full mandatory regime. However, we consider that this estimate is likely to be too low. While the Zephyr database used by BIS to calculate these estimates is one of the most comprehensive available, it is unlikely to be complete. More importantly, lower value transactions (involving targets with relatively low UK turnover) are more likely to be omitted than those involving a target with a higher turnover. In addition, the assumption that the distribution of transactions by UK target turnover mirrors that

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[4] Another measure which we consider would be useful to parties assessing the risks of completing prior to clearance would be a comprehensive case study of one or more past cases in which a completed merger was reviewed and subject to hold separate undertakings in both OFT and CC phases of investigation, including details of how those undertakings were implemented, any disputes that arose regarding such implementation, and the costs to the parties of complying with the hold separate measures. While this would clearly require cooperation from the parties involved, we believe it would go a considerable way to addressing an occasional tendency of merging parties to underestimate the costs and burdens associated with complying with hold separate undertakings throughout the review process (in contrast to the risks relating to the imposition of remedies that are widely understood).

[5] See paragraphs 140 and 146 of the Impact Assessment.

for which turnover data is available is unlikely to be accurate, as transactions involving a target with a lower turnover are likely to account for a disproportionate number of the transactions for which no turnover is available from public sources. Consequently, the very low turnover thresholds that are proposed in the Consultation will capture significantly more than the 1,190 that are estimated in the Impact Assessment, so creating (even) higher costs for the private sector and public purse than anticipated.

4.3 BIS should also bear in mind that the abolition of the voluntary regime in the UK would have a substantial adverse impact outside the UK for multinational companies, including those based in the UK. At present, businesses engaged in cross-border mergers and acquisitions face a multitude of merger control regimes: over 100 at present, and that number increases every year. Countries requiring mandatory notification and suspension of the transaction pending clearance impose very significant costs on the parties to international transactions, in particular those with poorly-conceived notification thresholds that trigger a notification requirement even where there is no substantive overlap between the parties, or any significant presence of either in the jurisdiction in question. The UK's regime is influential as an international example of a voluntary system that works efficiently and effectively. Its loss would be likely to result in fewer governments opting to adopt a voluntary system when introducing a merger control regime, and in some governments following the UK's lead by converting their own system to a mandatory filing regime.

4.4 In light of the factors outlined above, we favour the retention of the voluntary regime (appropriately strengthened, as covered below) or, at least, a notification regime with no standstill obligation. To the extent that the Government is minded to introduce some form of mandatory regime, we favour the option that preserves as much as possible of the existing regime, i.e. the "hybrid" mandatory filing regime (although, for the reasons set out above, we consider this to be significantly less attractive than retaining a fully voluntary system, strengthened as appropriate).

4.5 If the Government were to opt for a full mandatory system, we urge BIS to reconsider the proposed filing thresholds, for the reasons set out in paragraphs 4.12 to 4.18 below.

Strengthening the voluntary regime

4.6 As explained above, we support the retention of the voluntary regime, appropriately strengthened, over the introduction of a mandatory regime. However, we are concerned by the proposal to implement a statutory restriction on further integration as soon as the competition authority commences an inquiry into a completed merger. As BIS is aware, initial undertakings impose very substantial costs on businesses. Accordingly, we consider that initial undertakings should be sought, as present, on a case-by-case basis. If, however, a statutory prohibition were to be implemented, we suggest that the Government incorporates a provision allowing for the parties to apply for the restriction to be released during the Phase I review period, where it becomes clear to the CMA at an early stage that the transaction is unlikely to give rise to competition concerns.

4.7 The second proposed option – strengthening the CMA's powers so that it can order the reversal of implementing steps, and not just the prevention of further integration –

seems to us to be sensible, as it will eliminate the incentives that exist currently to implement as much integration as possible before the OFT has the opportunity to negotiate initial undertakings. Such powers will, however, need to be very carefully considered. In particular, it should be clear that the CMA would not have the power to require that steps relating to the actual completion of the sale are reversed (for example, it should not be possible to force a purchaser of a retail store to retain the seller's fascia branding if it has not acquired the rights to use that brand).

4.8 As regards the proposed penalty of up to 10% of aggregate turnover for breaches of hold separate obligations, we consider that this level is excessive and disproportionate. In our view any penalty should be limited to 1% of the turnover of the target company and should be subject to an exception for breaches that are not intentional or negligent.

4.9 See also our comments in paragraph 4.18 (regarding the need to strengthen the share of supply test) and paragraph 4.23 (regarding the need to clarify the material influence threshold), which apply equally in relation to the current voluntary regime.

Mandatory notification regime

4.10 We do not favour a mandatory notification regime for the reasons set out above. If the Government decides to implement a mandatory regime, it is imperative that the turnover thresholds that trigger a filing are appropriate. For the reasons set out in paragraphs 4.12 to 4.17, our view is that the thresholds that are proposed in the Consultation are: (i) unusually and excessively low; and (ii) likely to capture a unnecessarily large number of unproblematic transactions.

4.11 As regards other potential features of a mandatory filing system:

4.11.1 for the reasons set out in paragraph 4.2.2 above we strongly support the absence of a standstill obligation. A mandatory filing obligation coupled with the ability of the parties to complete prior to clearance (subject to powers of the regulator to suspend the implementation of the transaction in certain circumstances) works well in Italy, for example, and could be easily implemented in the UK, given the authorities' existing experience and expertise in this area;

4.11.2 the Consultation suggests that the costs for business of a mandatory regime could be limited through the design of an effective short form notification process. In order for that to be the case, we suggest that the model for such a filing should be that of Hart-Scott Rodino filings in the Unites States, i.e. requiring basic information about the proposed deal (names of the parties, description of the industry sector in which they operate, and the products or services that they sell) along with certain board documents prepared in connection with the deal. While the short form notification regime under the EU Merger Regulation reduces the administrative burden of the European Commission, the volume of information that it requires for unproblematic transactions means that it creates few costs savings for notifying parties; and

4.11.3 the Government proposes a penalty of up to 10% of aggregate turnover for failure to notify, similar to the EU merger regime. In our view, such a high

level of penalty seems inappropriate and again, we suggest it is limited to 1% of the turnover of the target company.

Jurisdictional thresholds in a mandatory regime

Option 1 – Full mandatory notification

4.12 As BIS will be aware, the proposed turnover thresholds are unusually low in comparison with other jurisdictions having a comparable economy to that of the UK. As we understand that BIS has received information on international thresholds from a number of sources we will limit our response on this point to two of the most salient examples of similar thresholds to those proposed in the Consultation, in similar European economies, that were amended because they gave rise to an excessive number of notifications of unproblematic transactions:

4.12.1 In Germany, legislative thresholds were subject to two successive amendments:

(a) first, to increase in 1998 the worldwide turnover threshold from DM 500 million to DM 1 billion (now €500 million). The reasons given by the legislature for having a substantial worldwide turnover threshold, and for its subsequent doubling, were: (i) to ensuring functioning competition;[6] (ii) minimizing the number of transactions which have to be notified to those with a significant effect on competition;[7] (iii) exemption of transactions that are unlikely to raise competitive concerns; (iv) effective and efficient management of the Federal Cartel Office's resources, and those of the undertakings concerned, by reducing the number of notifications and focusing on cases with substantial economic relevance; [8] and (v) lowering costs of bureaucracy;[9]

(b) second, in 2009 to add a second domestic threshold of €5 million (in existing to the existing threshold of €25 million). The German federal government estimated that by implementing the second threshold nearly one-third of the transactions which formerly needed to be notified would not have been subject to merger control,[10] and that this would result in: (i) a reduction in the expenditure of time and transaction costs, especially for small and medium sized enterprises;[11] and (ii) ensuring that only transactions with a material nexus to the jurisdiction concerned are caught, and screening out transactions with

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6 Explanatory Memorandum to the Draft Act of the Federal Government in Deutscher Bundestag Drucksache VI/2520, 1971, page 31

7 Deutscher Bundestag Drucksache VI/2520, 1971, page 32

8 Explanatory Memorandum to the Draft Act of the Federal Government in Deutscher Bundestag Drucksache 13/9720, 1998, page 42

9 Deutscher Bundestag Drucksache 13/9720, 1998, page 46

10 Explanatory Memorandum to the Draft Act of the Federal Government in Deutscher Bundestag Drucksache 16/10490, 2008, page 15

11 Deutscher Bundestag Drucksache 16/10490, 2008, page 15

only marginal domestic effects, e.g. transactions involving foreign parties without substantial effect on domestic competition.[12]

4.12.2 In France, the domestic turnover threshold (which must be satisfied by each of at least two parties to the transaction) was raised in 2004 from €15 million to €50 million.[13] The reported reason for this move was that the €15 million threshold had resulted in an influx of notifications of transactions with no significant impact on the market. In practice, raising the threshold to €50 million in 2004 is reported to have resulted in a significant fall in the number of notifications and a reduction in transaction and administrative costs benefitting the regulator, the taxpayer and the business sector alike.[14]

4.13 Given the difficulty in predicting the impact of introducing a mandatory filing regime in the UK with reference to publicly available statistics (see paragraph 4.2.3 above), we consider that these practical examples should be persuasive of the need for much higher domestic and worldwide turnover thresholds.

4.14 As regards the propensity for the proposed thresholds to capture a unnecessarily large number of unproblematic transactions, one key concern is that a transaction involving a UK target with a turnover of £5 million may be notifiable *even if the seller has no turnover in the UK*. While we recognise that competition authorities in some other countries have implemented thresholds that can be triggered by only one party to a transaction, the justifications for doing so invariably turn on highly unlikely and hypothetical scenarios (as explained in paragraph 4.12.1 above, this one of the reasons why Germany moved away from such a system). This of course does not matter if the regime is voluntary, but it matters greatly if filing and standstill obligations are introduced, with high penalties for breach. In our experience, the only merger control decisions that actually identify concerns in respect of such mergers are in jurisdictions in which the merger control regime also acts as a form of foreign investment control, and non-competition factors therefore play a prominent role. It is our sincere hope that the UK does not become one of those jurisdictions. As noted by the ICN Working Group on Recommended Practices for Merger Notification Procedures:

> *"Many jurisdictions require significant local activities by each of at least two parties to the transaction as a predicate for notification. This approach represents an appropriate "local nexus" screen since the likelihood of adverse effects from transactions in which only one party has the requisite nexus is sufficiently remote that the burdens associated with a notification requirement are normally not warranted. To the extent that the "local nexus" requirement can be satisfied by the activities of the acquired business alone, the requisite threshold should be sufficiently high so as to ensure that notification will not be required for transactions lacking a potentially material effect on the local economy."*

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[12] Deutscher Bundestag Drucksache 16/10490, 2008, page 18, 19. See also the statement of one of the FCO's heads of division, Andreas Bardong, in an article recently published in WuW 04/2011, page 356

[13] Ordinance n°2004-274 of 25 March 2004, amending Law n° 2001-420 of 15 May 2001.

[14] P. Arhel, "Concentration", in Répertoire Sociétés Dalloz, mai 2009, pt 33, p. 9.

4.15 Accordingly, we consider that any mandatory filing thresholds should require turnover of each of at least two of the parties to a transaction (and should also expressly exclude the creation or acquisition of joint ventures having no actual or likely future sales in the UK). If the Government were to consider it appropriate to impose filing obligations on transactions with only a remote possibility of a nexus with the UK then we urge it to revise the £5 million domestic turnover threshold to a more sensible level.

4.16 Taking the above considerations into account, and by reference to our experience of considering and applying filing thresholds throughout the world, we consider that appropriate filing thresholds would be where each of at least two parties to the transaction has turnover in the UK of more than £40 million[15] (for joint ventures, one of those two parties must be the joint venture).

4.17 Should the Government opt to implement thresholds that can be satisfied even if only one party has sales in the UK, we consider that the appropriate thresholds would trigger a filing where: (i) the target has UK turnover of more than £40 million; and the parties have a combined worldwide turnover of more than £300 million[16].

Option 2: Hybrid mandatory notification

4.18 As explained above, we do not favour the hybrid mandatory regime option, but do consider it preferable to a full mandatory regime, on the grounds that it preserves at least some of the existing voluntary regime. Given that the share of supply threshold would continue to apply only to the voluntary aspects of the hybrid regime, retaining it should not create more business uncertainty than already exists under the current regime. However, we observe that many of our clients express dissatisfaction with the subjectivity of this test and, in particular, the scope of the OFT's discretion to select the categories of goods and services on which the share of supply test is deemed to apply. We suggest that BIS considers strengthening the economic scope of the test so that it resembles more closely a market share test. While we recognise that it would not be appropriate for the CMA to be required to analyse complex economic arguments regarding market definition purely for the purpose of asserting jurisdiction, the framework for determining relevant economic markets should nonetheless form the basis and rationale for the jurisdictional assessment. So, for example, the CMA might be required to have a reasonable belief that the markets on which it bases its jurisdictional assessment are likely, upon closer analysis, to be the relevant economic markets, having regard in particular to any previous decisions it has published in relation to the markets in question.

Material influence and mandatory notification

4.19 We agree with the proposal in paragraph 4.36 of the Consultation that, in a mandatory notification regime, the notification requirement should only apply to mergers which result in, at minimum, acquisition of "de facto" control of the target. In the interests

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[15] I.e. roughly commensurate with the domestic turnover thresholds which apply in EU countries with similar economic sizes to the UK, such as France and Germany.

[16] I.e. a rough average of the worldwide turnover thresholds that apply in EU countries with similar economic sizes to the UK, such as France and Germany.

of business certainty and consistency with other EU Member States, we suggest expressly linking this test to the EU Merger Regulation threshold of decisive influence (rather than simply leaving it to be described as "broadly comparable" to that test).

4.20 While we note that the Government is minded to retain a power for the CMA to review acquisitions of material influence that fall below the decisive influence threshold, we consider there to be a strong case for reforming this test. Decisions and case law in this area have made very difficult to advise with any certainty whether material influence exists in any given case, even where very low shareholdings are involved. In particular, as confirmed by the Court of Appeal's ruling in the *BSkyB/ITV* case,[17] the OFT and CC are entitled to base their assessments on highly subjective factors, such as:

4.20.1 whether the acquirer's industry knowledge and standing would allow it to influence other shareholders, notwithstanding that it does not exercise material influence over those shareholders; and

4.20.2 whether the ability to veto certain types of decision – of a type that are considered normal minority shareholder protections under the test for decisive influence under the EU Merger Regulation – might affect the target's ability to engage in hypothetical competitive strategies at some point in the future.

4.21 This legal uncertainty could be easily remedied by introducing objective, statutory criteria for determining whether material influence arises.

Jurisdictional thresholds in a voluntary regime

4.22 We consider that the current turnover threshold should be maintained as it works well in practice.

4.23 As regards the share of supply test, we suggest that this could be improved by a statutory requirement to assess whether the test is met by reference to the framework for assessing relevant economic markets and market definition (see paragraph 4.18 above).

Small merger exemption in both mandatory (hybrid) and voluntary regimes

4.24 We consider that the proposed "small merger exemption" should not, in its current form, act as the sole jurisdictional threshold under a voluntary regime, and should not replace the share of supply (or market share) test as the threshold at which the CMA could review a transaction that does not meet the turnover threshold. It is much too low, and accordingly likely to capture far too many unproblematic mergers (even if the CMA focuses on those that appear to give rise to potential concerns, such a low threshold would still cause a large number of precautionary notifications by merging parties of unproblematic deals).

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[17] *British Sky Broadcasting Group Plc v The Competition Commission* ([2010] EWCA Civ 2), judgment of 21 January 2010.

4.25 We do, however, consider that such an exemption could have a place as an *additional* statutory threshold under either of the voluntary of hybrid regimes, i.e. even where the share of supply test is met, the CMA would not have jurisdiction to review a merger that satisfies the small merger exemption.

Statutory timescales

4.26 We support a statutory time limit for Phase I of 30 working days (mandatory regime) and 40 working days (voluntary regime), provided that this does not compromise the quality and robustness of decision-making.

4.27 We agree that the 24 week statutory limit for Phase II should be retained.

Information gathering and "stop the clock" powers

4.28 These powers should be extended to Phase 1 only if there is a statutory time limit for Phase 1 investigations (in either a voluntary or mandatory regime). In these circumstances we agree that these powers should be accompanied by stop-the-clock powers if the main parties did not comply. However, we do not consider it would be justified to impose a penalty on third parties who do not supply information.

Anticipated mergers in phase 2

4.29 We do not object to the proposal to introduce a discretionary stop the clock power to allow the authority to suspend or extend its review timetable for 3 weeks if it believes that a merger will be cancelled or significantly altered. However, we consider it important that this power cannot be exercised without the consent of the parties (i.e. to save them administrative and legal fees while they consider whether to proceed with the transaction). In addition, the fact that the clock is stopped for these reasons should not be made public until after the merger has indeed been abandoned or, if it is not, then until a sufficiently late stage in the review process. Releasing that information at too early a stage could create market uncertainty that would be harmful to the merger itself, notwithstanding that the parties had decided to proceed with it.

Enable single CMA to consider remedies earlier in Phase 2

4.30 We support this proposal. The lack of flexibility in the current regime creates substantial inefficiencies in cases where the parties are prepared to accept an SLC finding in order to secure a quick resolution, but are unable to finalise undertaking-in-lieu negotiations at the OFT stage. In such cases, there seems to us to be little purpose in forcing the parties to undergo a full reassessment by the CC of the competitive effects of a merger, even in respect of product markets which have been found to be clearly unproblematic at the OFT stage. Accordingly, a reform to allow early consideration and discussion of remedies would, in our view, be sensible.

4.31 In the same vein, we also consider that substantial procedural efficiencies could be achieved if the Phase I decision maker within the CMA were able to exclude from the scope of the Phase II investigation certain markets in which the merging parties are active, but which are clearly unproblematic.

5. CHAPTER 5: A STRONGER ANTITRUST REGIME

Question 8. The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime, in particular:

- Options 1-3 for improving the process of antitrust enforcement;
- the costs and benefits of the options, supported by evidence wherever possible.

Question 9. The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.57, and the costs and benefits of these.

Question 10. The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.

5.1 We are concerned by the suggestions in the Consultation that reform of the antitrust regime should be determined according to a pre-conceived notion of a "desirable" number of cases. The appropriate level of enforcement is a function of the number and seriousness of actual infringements in the UK, in relation to which the Consultation and the Impact Assessment offer no useful evidence (indeed, as noted in paragraph 5.8, this is unknown and unknowable). Comparisons with the number of cases in other jurisdictions is not, are our view, probative. In particular, the number and seriousness of infringements is inevitably strongly influenced by the degree to which competition compliance is national trait. It is reasonable to assume that the UK, which is one of the few jurisdictions listed in Table 5.1 of the Consultation to apply criminal penalties (including imprisonment) across the entire range of cartel activity, has an above-average culture of compliance. This is also borne out by our own experience of advising UK businesses on competition compliance.

5.2 We also observe that the number of UK "cases" that is used for the purpose of this comparison appears to treat as a single case the very large number of companies (over 100) that were investigated as part of the construction bid-rigging cartel. Taking these as separate cases would push the UK to second place in the table for case investigations for new case investigations. Instead of focusing on the volume of cases, the Government should seek instead to ensure that the reforms encourage robust decision making and the appropriate targeting of resources to serious infringements. Above all, the aim of "easing the competition authorities' task in bringing cases (paragraph 5.11 of the Consultation) must not be achieved at the expense of due process. The focus should be on outcomes, not outputs.

Options

5.3 We agree with the assessment of the OFT that the measures it has recently introduced are helping to deliver significant improvements in speed and efficiency of case management and procedures, and recognise that there remains significant scope for improvement of case selection and streamlining of procedures within the current system (Option 1), without incurring the cost of a more wide ranging and fundamental reform. However, we also recognise the substantial potential for the prosecutorial model (Option 3) to strengthen due process, inject greater discipline into case

selection and management and shorten the overall timeframe of cases. We therefore consider the advantages of Options 1 and 3 to be finely balanced.

5.4 We strongly disagree that Option 2 – the "internal tribunal" model – would mitigate the possibility of confirmation bias to a sufficient degree to warrant the introduction of appeals on the "judicial review" standard. Given this, and the additional layer of procedural complexity that this Option would introduce, we do not consider that it has merit.

Timetables

5.5 We do not favour the introduction of statutory, binding timetables for antitrust investigations. Given the volume and complexity of evidence that can arise in such investigations, it would in our view be extremely difficult to devise a meaningful deadline.

5.6 We do, however, see merit in having some form of administrative timetable (this could perhaps be set on a case-by-case basis, at the outset of the investigation), with a corresponding obligation on the CMA to use reasonable endeavours to meet that timetable.

Offences under the Competition Act 1998 and the Enterprise Act 2002 for non-compliance with an investigation

5.7 These proposed reforms appear to us to be sensible, provided that the circumstances in which such penalties can be imposed is appropriately and carefully defined (it should not, for example, extent to unintentional, non-negligent breaches)

6. CHAPTER 6: THE CRIMINAL CARTEL OFFENCE

Quesiton.11 The Government seeks your views on the proposals set out in this Chapter to improve the criminal cartel offence, in particular:

- the arguments for and against the options;
- the costs and benefits of the options, supported by evidence wherever possible.

Quesiton.12 Do you agree that the 'dishonesty' element of the criminal cartel offence should be removed?

Quesiton.13 The Government welcomes further ideas to improve the criminal cartel offence.

6.1 In our view it is too early to consider changing the law on criminal cartels. There has not been enough time for the offence to be properly bedded down. It has not been shown that the dishonesty element makes the offence harder (or unduly hard) to prosecute. Rather, as seen in the *British Airways/Virgin* case, the competition authority should focus on improving its internal procedures for prosecuting criminal cartels and focus on clear hardcore cartels.

6.2 Equally, we do not consider that it is appropriate, in the name of efficiency and deterrence, to remove a key element of *mens rea* in the offence. Individuals should not be sent to prison unless they knew, or should have known, that what they were

doing was wrong. For the same reason, we disagree that an intention to enter into a given type of agreement constitutes an appropriate or sufficient test for *mens rea* in criminal cartel offence cases.

6.3 Moreover, we disagree that the perceived unwillingness of juries to conclude that price fixing is criminally dishonest is a sound justification for reform. The laws of the UK should seek to reflect, not pre-determine, the views of its citizens. If there is "*only moderate support for a criminal cartel offence defined around dishonesty*" (paragraph 6.14 of the Consultation), it seems to us that there must be even less support for criminalising behaviour that cannot be shown to be dishonest.

7. CHAPTER 7: CONCURRENCY AND SECTOR REGULATORS

Question 14. Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?

Question 15. The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:

- the arguments for and against the options;
- the costs and benefits of the options, supported by evidence wherever possible.

Question 16. The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.

7.1 We consider that there is cause for concern regarding the quality of some competition law-related decision making of the sector regulators and that, accordingly, conferring powers on the CMA to allocate and oversee cases (the European Competition Network model described in paragraph 7.29 of the Consultation) would have merits, in terms of improved quality and consistency of decisions. In particular, unless the CMA is given formal responsibilities and powers to oversee allocation and transfer of cases, and to review and comment on proposed decisions of sector regulators, we consider it likely that increased consistency of decision making between sector regulators and the CMA will fall foul of the natural tendency of regulatory authorities to avoid intervening in another's perceived sphere of competence.

7.2 Any system of allocating cases should be complemented by an appropriate mechanism for pooling expertise, including through short-term secondments between the CMA and the sector regulators.

7.3 In relation to market investigations, we consider that a sector regulator that is considering making a market investigation reference should continue to have a statutory requirement to consult with the CMA prior to making such a reference, in order to seek the CMA's view as to whether it is an appropriate use of the CMA's resources, and whether some sector-specific mechanism may be a more appropriate way to address any concerns identified.

7.4 As regards strengthening the primacy of competition law over sectoral regulation, and in particular the proposal that regulators have a duty to apply competition law in preference to sectoral powers, we counsel caution.

7.5 All sectoral regulation is fundamentally about access to some form of essential facility or service, the terms and pricing of that access, and resolution of disputes relating to access. We recognise that it is appropriate and desirable for the need for such regulatory mechanisms to be reviewed from time to time.[18] However, where it is clear that sectoral regulation is justified, we do not see the purpose of promoting the use of mechanisms under general competition law as a means of resolving issues and disputes. While the use of competition powers will often deter a greater range and volume of anticompetitive conduct from happening in the first place, sectoral regulation has the substantial advantage of being a typically faster and more efficient means of resolving disputes relating to such conduct when it does arise.

7.6 Moreover, general competition law is much less suited than sectoral regulation to determining details of terms and pricing of access that are appropriate for the sector in question. Consequently, applying the competition rules risks creating generally-

7.7 applicable precedents that are not appropriate to other business sectors and, in particular, are not appropriate for markets in which there is not some form of long-term essential facility necessitating *ex ante* regulation. In other words, instead of encouraging the application of general principles of competition law to regulated sectors, promoting the primacy of competition law could result in the body of competition law decisions becoming tainted by inappropriately detailed and sector-specific requirements.

7.8 Finally, creating statutory duties to favour general competition law would risk creating an additional stage of decision making which could become subject to judicial review, as well as legal uncertainty over how such challenges could be brought.

7.9 Consequently, we favour the development (as described in paragraph 7.22 of the Consultation) of a common set of factors for deciding which powers to use. That framework could then require sector regulators to assess the appropriateness of applying general competition law by reference to factors such as the costs, timing, deterrent effects and likely precedent value or relevance for other sectors or business practices.

[18] As, for example, happens under the "market analysis procedure" of Article 16 of Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (as amended by Directive 2009/140/EC and Regulation 544/2009).

8. CHAPTER 8: REGULATORY APPEALS AND OTHER FUNCTIONS OF THE OFT AND CC

Question 17. Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?

Question 18. The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

8.1 We agree that the CMA will be the most appropriate body for considering regulatory references/appeals that are currently heard by the CC. It is the body with the appropriate expertise, resources and processes. It would be counter-productive and inefficient to transfer responsibilities. As is the case at present, the model for regulatory appeals should be appropriate to the appellate functions being exercised by the CMA, and accordingly different to that which applies in a market investigation reference.

8.2 As regards creating model regulatory processes, we agree, in principle, that it is sensible for learning and best practices in one area to be adopted in other areas, to the extent that this is not prevented by EU legislation.

9. CHAPTER 9: SCOPE, OBJECTIVES AND GOVERNANCE

Question 19. The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.

Question 20. The Government see your views on whether the CMA should have a clear principal competition focus?

Question 21. The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.

9.1 We agree that the CMA's primary duty should be to promote competition. We consider that this objective would be undermined if the CMA were also required – by way of a statutory duty or objective - to keep "economically important markets or sectors under review". The economic importance of a sector is no doubt a factor that can, and should, be taken into account by the CMA when determining whether to prioritise a study of perceived competition issues in market of economic importance. However, requiring regulatory resources to be focused on such markets, regardless of the seriousness of potential competition concerns identified by the CMA, would be wasteful and counterproductive.

9.2 While we recognise that the Government does not propose to seek a power to specify individual markets (and agree that it should not), it seems to us likely that certain sectors – such as the energy and financial sectors – would bear the brunt (and costs) of such monitoring. Given that these sectors are already heavily regulated, and already attract regular scrutiny from the existing competition authorities, we do not see what purpose would be served by subjecting them to constant, and potentially pointless, review.

9.3 As regards the institutional design of the CMA, our comments are contained in the parts of this response that address each of the various different areas of the CMA's activities.

9.4 As regards governance, we consider that the CMA should adhere to the normal UK principles of corporate governance, and that its supervisory and executive boards should include economists, lawyers and individuals with sector-specific expertise and business experience. In all areas of the CMA's work, parties who may be affected by a remedy or adverse decision of the CMA must have access to the decision-makers (e.g. the Executive Board, under the model proposed in the Consultation) at a hearing of the CMA.

10. CHAPTER 10: DECISION MAKING

Question 22. The Government seeks your on the models outlined in this Chapter, in particular:

- the arguments for and against the options;
- the costs and benefits of the regime and to business, supported by evidence wherever possible.

Question 23. The Government also seeks views on the appropriate composition of the decision-making bodies set out in this Chapter, and in particular what the appropriate mix of full-time and part-time members is.

Question 24. The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process.

10.1 We consider the "fresh pair of eyes" approach to be an essential feature of the UK merger control and market investigation regimes. In order to mitigate the increased risk of confirmation bias that will result from the creation of a single competition authority, we consider that effective independence between Phase I and II investigations must retained, and subject to appropriate safeguards. Accordingly, we have no objections to the proposed base cases for each of the mergers and markets regimes, subject to the following:

10.1.1 it is not obvious to us that simply having a larger investigatory team in Phase II would "balance out the potential for confirmation bias" (paragraph 10.33 of the Consultation). Indeed, it seems to us inevitable that new case team members would rely on the Phase I case team to explain the relevant markets and perceived issues to them, and would consequently be likely to adopt any misconceptions or biases that were developed during the Phase I investigation. However, we recognise that allowing the knowledge of the case and market of the Phase I team to be preserved during Phase II is one of the key areas in which the creation of a single CMA would be able to generate efficiencies, and to address business concerns relating to the delays involved in explaining a market afresh to a new case team after initiation of a Phase II investigation. If the Government is minded to allow case teams to "flow" from Phase I to Phase II, we consider that a more adjudicative model (e.g. as

described in paragraph 10.39 of the Consultation) may be required to sufficiently balance out the potential for confirmation bias within the case team.[19] There should also be flexibility to allow the parties and the CMA to agree a greater flow of case team members to Phase II, where appropriate to the circumstances of the case (for example, this may be particularly desirable where there is a proposal to "fast track" remedies in Phase II merger investigations (see paragraph 4.30 above)); and

10.1.2 we strongly support the proposal to ensure that a higher proportion of panellists are full time, or subject to a significantly greater time commitment. In our experience, the potential benefits arising from the diversity of experience and expertise that are available from part time panellists is greatly outweighed by the difficulties that this creates for coordinating availability for hearings and other procedural steps, and the risk of inconsistent approaches between differently-constituted panels.

10.2 As regards decision-making in each of the CMA's areas of activity, see our comments on the sections of this response that deal with those areas.

11. CHAPTER 11: MERGER FEES AND COST RECOVERY

Merger fees

Question 25. What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/ mandatory notification regime?

11.1 We do not consider it appropriate for the Government to seek full cost recovery from the merger control regime. The merger regime does not provide a service to business but rather a service to society and it is the general public that ultimately benefits from merger control. As such, the regime should at least be partly paid for by the taxpayer. We consider that any decision to raise merger fees should be made with the overriding objective that fees charged are fair and proportional, and do not act to deter efficiency-enhancing mergers and acquisitions.

11.2 A move to full cost recovery would be harmful for a number of reasons. In particular:

11.2.1 only a relatively small number of mergers are potentially anticompetitive. The vast majority of mergers are neutral, and indeed most create efficiencies that are beneficial to society and the UK economy. The introduction of filing fees at the levels proposed in the Consultation would inevitably deter at least some of those mergers, particularly smaller mergers, and those for which clearance is required before the parties enter into any binding agreement. For example,

[19] The suggested drawbacks of a more adjudicative model that are referred to in paragraph 10.39 of the Consultation seem to us to issues that could be addressed through: (i) procedural mechanisms (such as provisions to ensure that panel members receive sufficient information on the case team's evidence and analysis at certain stages in the process, with an opportunity to raise queries); and (ii) ensuring that case teams are led by sufficiently experienced staff.

it is reasonable to assume that very high filing fees would result in fewer bidders in auctions for a company (and fewer trade bidders in particular);

11.2.2 as noted at paragraph 95 of the Impact Assessment, the current levels of filing fees are high by international standards. Those proposed in the Consultation for the voluntary and hybrid regimes are excessively out of line with those applicable in the vast majority of other jurisdictions, particularly if the proposed fees under a voluntary system are adopted;

11.2.3 the Government's estimate of the total annual cost of the merger control regime in coming years (around £9 million) is in our view likely to be substantially too low. In the 2008/9 and 2009/10 annual periods – during which merger and acquisition activity was unusually low – the actual costs were £14.5 million and £10.4 million respectively. Consequently, if the Government were to insist on full cost recovery, it is likely to require much higher fees, further exaggerating the harm described above; and

11.2.4 in relation to voluntary notifications (under the voluntary or hybrid regimes), the proposed level of fees will deter companies from making notifications, and so increase the risk that some SLC cases escape review (with each resulting in a cost to the economy of the magnitude described in paragraph 137 of the Impact Assessment).

11.3 As regards the fee options in a mandatory regime, we do not consider that a flat fee would be appropriate for either a full mandatory or hybrid regime. It would cause costs to fall disproportionately on smaller mergers and be liable to deter some smaller transactions. The Government recognises this as a concern in respect of a voluntary regime and in our view the same concern equally applies to a mandatory regime. Consequently, if a mandatory system is adopted, we would favour Option 2 (retention of differentiation of fees by turnover instead of a flat fee).

The possible introduction of a power to reclaim the cost of antitrust investigations

Question 26. Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons. Question 27. What are your views on recovery where there has been an infringement decision being based on the cost of investigation?

11.4 We are opposed to the principle that the competition authority should be able to recover the costs of an antitrust investigation arising from a party that is found to have infringed competition law:

11.4.1 first, given that antitrust penalties typically exceed (usually very significantly) the cost of the OFT's investigation, it seems to us that there is already a very high degree of cost recovery;

11.4.2 second, the objective of antitrust penalties is deterrence, so imposing a higher penalty than is required to achieve this objective would result in penalties that are disproportionate to that aim;

11.4.3 third, parties under investigation should be free to challenge any finding or conclusion of a regulator that they consider to be unsupported or incorrect. Imposing upon them the costs that a regulator incurs in addressing weaknesses in its case that are identified by the parties would be inconsistent with their fundamental right of defence; and

11.4.4 fourth, even if costs were to be paid into the consolidated fund, it remains the case that regulators face fundamentally different incentives to manage costs to the parties under investigation, or parties to a litigation process (the latter having to bear in mind taxation of their costs by the court). For example, if a regulator decided to devote a significant part of its budget to pursuing a relatively minor infringement, the parties under investigation will be effectively unable to control the costs that the regulator will eventually impose upon them.

11.5 If the Government is minded to make such a move, then the ability to recover costs should not be limited to the CMA, but should also allow parties to an investigation to recover all or some of its costs arising from the competition authority abandoning an investigation or taking a non-infringement decision. Alternatively, if there is a non-infringement decision, or if a case is abandoned, following an investigation that arose out of a third party complaint which was found to have been based on erroneous or misleading information, the CMA should seek to recover its costs from the complainant rather than the non-infringing party.

Immunity, Leniency, Settlement and Commitments

Question 28. What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?

11.6 As indicated in our response to Question 26, we do not support the proposal that the competition authority should have the ability to recover its costs from the infringing party - the costs of the investigation should already be covered by the penalty for the infringement.

11.7 However, if the Government decides to adopt a mechanism for cost recovery, we are particularly concerned that this could create disincentives to seek immunity, leniency, or settlements, or to offer commitments. These options could appear much less attractive to companies that have infringed competition law if they will nonetheless have to pay for the costs of the antitrust investigation. We therefore consider that immunity and leniency parties, as well as parties to settlements and those who offer commitments, should not be required to pay for the costs of the investigation by the competition authority.

Payment of Fines

Question 29. Do you agree that this would be an appropriate way to collect the costs, separates the fine from costs in a way that makes appeals clear and that the costs should go to the consolidated fund rather than the enforcement authority?

11.8 If costs are recovered, we agree that they should go to the consolidated fund and not to the CMA. Otherwise, the power to recover costs would not only create incentives

to reach infringement decisions (as noted in Paragraph 11.25 of the Consultation) , but also create disincentives on the part of the CMA to maximise efficiency in its investigations.

Costs on Appeals

Question 30. Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?

11.9 If the Government adopts a cost recovery approach, we agree that a successful appeal on the substance of the infringement decision should mean that the appellant is not liable for the costs element. A successful appeal on substance implies that the competition authority should not have incurred the costs of an investigation in the first place because there was no anticompetitive infringement. As regards recovery of costs for partially successful appeals, the proposal that the CAT will decide on the level of costs to be deducted as attributable to points on which the appellant was successful seems to us to be the only workable way of achieving this.

Question 31. Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?

11.10 As indicated above, we oppose cost recovery powers in principle and in any event consider that the penalty imposed should already be sufficient to cover the costs of the investigation, without the need for a cost recovery power or amending legislation. Should such legislation be introduced, it should provide that: (i) the fine may only be increased if it would not otherwise cover the costs of investigation; (ii) the fine may not be increased to a level that exceeds those costs; and (iii) the CMA must indicate in the decision the level of fine that it would have imposed, but for the cost recovery (this last point would prevent issues arising during the appeal process from the lack of separation of fine from costs).

Recovery of CAT costs

Question 33. What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what effect, if any, would there be on CAT incentives?

11.11 Allowing the CAT to recover its full costs would be a clear contradiction of the principle of access to justice. Potential appellants would be deterred from exercising their rights of appeal if they may have to cover the costs of the CAT. Allowing the CAT a discretion not to recover costs would not, in our view, address this concern adequately.

Clifford Chance LLP

June 2011

Commercial Council for Water

13 June 2011

Duncan Lawson
Department for Business Innovation and Skills
3rd floor, Orchard 2
1 Victoria Street
Westminster
London
SW1H 0ET

Dear Duncan

BIS Consultation on a Competition Regime for Growth

Having reviewed your consultation on options for reform of the competition regime, there is one proposal specifically falling within the Consumer Council for Water's remit on which I would like to comment. This relates to your proposal about whether the super-complaint system should be extended to SME bodies.

As you will be aware, under Section 11 of the Enterprise Act 2002, the Consumer Council for Water has been designated by the Secretary of State as a consumer body that is able to bring super-complaints. Although we have not yet exercised these powers, we have considered bringing a super-complaint, but were unable to do so as the complaint related to businesses rather than individual household customers.

Given this experience, we believe that the super-complaint system should be extended so that there is a mechanism to address features in a market that significantly harm the interests of SMEs. As the consumer representative for the water industry, we feel that we would be best placed to bring water related super-complaints on behalf of this group of customers. We are already skilled at handling complaints from a range of customers, including businesses, and by extending our existing super-complaint powers, this would help to keep the number of designated bodies at a manageable level.

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Since we were set up in 2005, we have handled over 85,000 complaints and achieved £12m in compensation for water customers. In 2010/11 alone, we investigated over 11,000 complaints, 10% of which were from business customers. Our experience in the water industry is that business customer complaints, across a range of business sizes, can often generate quite complex issues, which is why we believe that there is a real need for the interests of business customers to be appropriately represented.

The Consumer Council for Water already works closely with business customers and holds business customer meetings three times a year where businesses can discuss water related issues, share best practice and seek our help with issues of concern. Membership of this group covers a cross section of business customers and representatives of all sizes, including multi-site businesses, medium and small businesses. Over the last year, we have also been building links with organisations such as the Federation of Small Businesses and the National Farmers Union.

I note that you are also considering whether only the super-complaint issues of small businesses should be able to be brought as super-complaints, rather than those of small and medium businesses, in order to minimise the resource implications for the new Competition and Markets Authority. We would be concerned if the decision about whether or not to represent business customers came down to a resource decision rather than on the needs of those customers.

I agree that in order to keep the level of super-complaints manageable, a simple solution would be to limit the number of organisations that are designated as able to bring super-complaints. This would enable initial enquiries and complaints from SMEs to be filtered through a small number of designated bodies, before being sent to the OFT or sectoral regulator to investigate. I believe that the Consumer Council for Water is best placed to investigate potential super-complaints brought by SMEs in relation to water industry matters.

The other way that we consider the number of super-complaints could be kept manageable is for consumer bodies to continue using all of the tools available to them to resolve issues, rather than automatically utilising the super-complaint system. In the water industry, we frequently negotiate successful outcomes on behalf of customers, even where a significant number of customers have been affected by the same issue. One example of this was when villagers in Staffordshire discovered they were being erroneously charged for surface water drainage and applied for rebates. The water company was initially only prepared to provide a rebate for one year, and only for residents who made a specific application. We intervened and in a landmark case got a backdated rebate of over £400,000 for 700 homes.

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Regardless of whether a decision is taken to extend the super-complaint system to SME bodies, rest assured that we will continue to investigate all customers' complaints and continue our representation of all business customers, whatever their size.

If there are any points you wish to discuss further, please contact Christina Blackwell in the first instance on 0121 345 1042 or at christina.blackwell@ccwater.org.uk

Yours sincerely

Tony Smith
Chief Executive

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Compass Lexecon

BIS | Department for Business Innovation & Skills

A competition regime for growth: a consultation on options for reform.

Response form

Name _____**Ciara McSorley and Zita Vasas**

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Return completed forms to:

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Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.

	Small to Medium Enterprise
	Representative Organisation
	Trade Union
	Interest Group
	Large Enterprise
	Local Government
	Central Government

	Legal
	Academic
X	Other (please describe): **Economic consulting**

When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

*This response was prepared by Ciara McSorley and Zita Vasas of Compass Lexecon. We thank our colleagues who provided comments including Justin Coombs, Lorenzo Coppi, Urs Haegler, Wim Koevoets and David Shaharudin.

Consultation Questions

1. Why reform the competition regime?

This chapter sets out an assessment of the strengths and weaknesses of the UK competition regime and proposes to reform it to: improve the robustness of decisions and strengthen the regime; support the competition authorities in taking forward the right cases; and improve speed and predictability for business.

Q.1 *The Government seeks your views on the objectives for reform of the UK's competition framework, in particular:*

- *improving the robustness of decisions and strengthening the regime;*
- *supporting the competition authorities in taking forward the right cases;*
- *improving speed and predictability for business.*

Q.2 *The Government seeks your views on the potential creation of a single Competition and Markets Authority.*

Comments:

We understand that the Government has strong preferences for merging the OFT and the CC and seeks views not only on the establishment of a single competition authority but also on its future operation.

We believe that a single competition authority can function successfully, provided that it handles the conflict between continuity and objectivity. We are not aware of another country in the world where there are separate phase I and a phase II authorities.

Under the current regime, the OFT refers market and merger investigations to the CC if more in-depth analysis is required. This can be burdensome for companies under investigation for two reasons. First, members of the case team change, which may lead to a loss of information and may mean that companies have to submit effectively the same information twice. Second, the CC may take an approach to the case which is different from the approach of the OFT. This means that companies go through two different investigations. We believe that this burden on companies will decrease if a single authority carries out the entire investigation.

However, there is a conflict between providing continuity and preserving fair and objective investigations. Case handlers who work on a case from the beginning may find it difficult to accept that a merger they decided requires further investigation should be cleared at phase II. For example, once they took an approach to the investigation, they may be reluctant to change it even

if the results suggest that this is not the right way to approach the case. The current system with separate OFT and CC investigations ensures that a “fresh pair of eyes” corrects for this potential bias. We believe that it is important to keep the two distinct phases for market and merger investigations to preserve this correction mechanism.

In general, we also support the tools suggested in the Consultation. We believe that the following four options (either on their own or combined with each other) can be useful to deal with this issue:

Case handlers in Phase I are a subset of the case team in Phase II. One option is that case handlers who do the day-to-day work on the case remain the same while the senior manager changes from Phase I to Phase II.

At the CC parties have hearings in front of the decision makers. At the OFT the decision maker is typically not present at issues meetings. We believe that Phase II hearings at the CMA should also be in front of the decision makers.

A “devil’s advocate” is appointed to review and criticize the reasoning before a decision is made. This system is already at place at the OFT and similar to the system used at the European Commission.

Case handlers present the case to a panel of more senior officials who have not been involved previously. The timing of this presentation must be set such that case handlers can incorporate the comments received (or possibly change the direction of the investigation) before it gets to the decision-making stage.

2. The UK Competition regime and the European context

This chapter sets out the UK institutions that make up the competition regime and their functions, as well as the European context.

Comments:

3. A stronger markets regime

This chapter sets out that there is scope to streamline processes and make the markets regime more vigorous. The key options are: enabling in-depth investigations into practices that cut across markets; giving the CMA powers to report on public interest issues; extending the super-complaint system to SME bodies; reducing timescales; strengthening information gathering powers; simplification of review of remedies process; and updating remedial powers.

***Q.3** The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

***Q.4** The Government also welcomes further ideas, in particular, on modernising and streamlining the markets regime, and on increasing certainty and reducing burdens.*

We disagree with the following proposed changes:

- Enabling investigations into practices across markets;
- Enabling the CMA to provide independent reports to Government.

We support the following proposed changes:

- Introducing statutory timescales for Phase I investigations;
- Giving information gathering powers at Phase I;
- Removing the obligation to consult on decisions not to open a Phase II investigation.

Investigations into practices across markets

We acknowledge that in some cases it may be easier for the CMA to carry out a market investigation on a practice across several markets. However, we note that the fact that a certain practice is potentially harmful in one market does not necessarily mean that it raises a problem everywhere. It is not clear from the proposal how the CMA would deal with divergent impacts of a practise across different markets.

Independent reports submitted to the Government

The Consultation states that currently the CC can advise the Secretary of State on public interest issues in merger investigations but not in market investigations. The Government proposes to expand this option to cover market investigations.

We do not agree that competition authorities should consider public interest issues. Competition authorities' resources are limited. Including public interest considerations into market investigations would require additional resources and time, which would further lengthen procedures. The 'public interest' can

be a vague concept. It requires the competition authorities to reach conclusions on wider public policy issues which other public sector bodies may be better placed to advise on, or which are more appropriately decided by Ministers.

Introducing statutory timescales for Phase I investigations
Introducing statutory timescales for Phase I is necessary to ensure that investigations are not unduly long. If there is a time limit in Phase II only, the CMA may be reluctant to refer investigations from Phase I to Phase II.

Giving information gathering powers at Phase I
We believe that this is necessary to ensure fast and efficient investigations.

Removing the obligation to consult on decisions not to open a Phase II investigation
We agree with the view expressed in the Consultation that this obligation imposes a disproportionate burden on competition authorities, distracting resources from those markets where significant competition issues are believed to exist, and should be removed.

4. A stronger mergers regime

This chapter sets out that there is scope for improving the merger regime by addressing the disadvantages of the current voluntary notification regime and streamlining the process. The Government is seeking views on: (1) options to address the disadvantages of the current voluntary notification regime; (2) measures to streamline the regime by reducing timescales and strengthening information gathering powers; (3) introduction of an exemption from merger control for transactions involving small businesses under either a mandatory or voluntary notification regime. We ask:

***Q.5** The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

***Q.6** The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?*

***Q.7** The Government welcomes further ideas on streamlining the mergers regime.*

Comments:

Regarding the notification thresholds, we make the following points:

- Notification thresholds should be evidence-based, i.e. set by using evidence on turnover distribution in the whole UK economy.
- We believe that it is more appropriate to look at the turnover realised within the UK rather than worldwide. If the notification criterion is based on worldwide turnover, the CMA will have to investigate all the instances when a large firm enters the UK market through acquisition. Given that the new entrant has not been present in the UK, and the transaction therefore does not increase concentration, the investigation places an additional burden on the firms and the competition authority without any likely benefit to consumers.
- We agree with the proposal to set a turnover threshold for both the target and the acquirer. We consider that the two criteria should be symmetric i.e. the same turnover threshold should apply to both firms. This would help to avoid a situation where notification depends on which company obtains control over the other.
- We also point out that full mandatory notification involves the highest administrative burden on both the competition authority and firms. Therefore, it is very important to implement changes to notification fees and administrative processes that take this increased burden into account.

Furthermore, we support the following proposed changes to the merger regime:

- Introducing statutory time limits in Phase I;
- Increasing information gathering powers in Phase I; and
- Allowing remedies earlier in the investigation process.

5. A stronger antitrust regime

This chapter sets out three options for achieving a greater throughput of antitrust cases: (1) retain and enhance the OFT's existing procedures; (2) develop a new administrative approach; (3) develop a prosecutorial approach. We also ask about the case for statutory deadlines for cases and for civil penalties for non-compliance with investigations, set out considerations relating to private actions and invite views on the powers of entry and of investigation and enforcement.

Q.8 *The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime, in particular:*

- *Options 1-3 for improving the process of antitrust enforcement;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.9 *The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.57, and the costs and benefits of these.*

Q.10 *The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.*

Comments:

We understand that the Government wants to change the antitrust regime because it is concerned that there are too few antitrust cases in the UK. The Consultation claims that one reason for the low number of cases is that the process is too burdensome. Therefore, it proposes changes to the investigation and decision-making process to ease this burden, which is ultimately expected to trigger more cases.

We are not convinced that the concern that there are too few antitrust cases is valid. We agree with the Consultation that it is impossible to tell what proportion of anti-competitive behaviour is tackled in any particular jurisdiction. Awareness of competition law, structural industry features and institutional design are different in different countries, which implies that a simple comparison of the number of investigations may not be meaningful. For example, in the UK, criminalisation may deter firms from engaging in cartels, which may result in fewer cartel cases than in other countries that deal with cartels under civil law. Similarly, abuse of dominance cases in other countries often involve former state monopolies which may be less of an issue in the UK.

Consequently, there does not appear to be a sound evidence base for concluding that there should be more antitrust investigations in the UK. As such, we believe that there is no need for a radical change in the system to trigger more cases. However, we agree that improving the efficiency of the antitrust regime would be beneficial. Therefore, we favour continuing with the current regime and to build on the procedural modifications that the OFT has already started to implement (Option 1).

Regarding the administrative approach (Option 2), we do not support the change in the grounds for appeal. In particular, we believe that the full merits appeal is more appropriate than the review standard applied by the General Court. The standard of manifest error or misuse of power is too high and we believe the CMA's decision should be robust to a full appeal on the merits.

Regarding the prosecutorial approach (Option 3), we make the following points:
As mentioned above, we are not convinced that there is sufficient evidence to show that there should be more antitrust investigations. In any case, we believe that introducing the prosecutorial approach would not achieve this goal. We are not convinced that there is less work involved for a prosecution before the CAT than for a Statement of Objections. Such a radical change would also mean that the CMA's existing experience in managing

administrative procedures would no longer be applicable to antitrust cases. It would need to acquire new skills and expertise in order to successfully manage prosecutions. This institutional change could in fact delay the pursuit of cases.

6. The criminal cartel offence

This chapter sets out options for making the cartel offence easier to prosecute: (1) removing the dishonesty element and introducing prosecutorial guidance; (2) removing the 'dishonesty' element and defining the offence so that it does not include a set of 'white listed' agreements; (3) replacing the 'dishonesty' element of the offence with a 'secrecy' element; (4) removing the 'dishonesty' element and defining the offence so that it does not include agreements made openly.

Q.11 *The Government seeks your views on the proposals set out in this Chapter to improve the criminal cartel offence, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.12 *Do you agree that the 'dishonesty' element of the criminal cartel offence should be removed?*

Q.13 *The Government welcomes further ideas to improve the criminal cartel offence.*

Comments:

We understand the Government is aiming to amend the criminal cartel offence because it is concerned that the offence in its current form does not provide sufficient deterrence. The Consultation suggests that it is the dishonesty element of the offence which makes it hard to prosecute. However, the simple removal of the dishonesty element may broaden the scope of the offence such that it would be capable of capturing agreements that are not anti-competitive under antitrust law. Thus, the Government seeks views on how to facilitate prosecution and preserve the narrow scope of the criminal cartel offence at the same time.

We are against the proposal to amend the criminal cartel offence for the following reasons:

The dishonesty element has not yet been properly tested in court. In the BA/VAA passenger fuel surcharge case, the case collapsed early partly due to the uncovering of new evidence which had not been disclosed to the Defence. Therefore, there is no evidence from actual contested cases to suggest that a jury would not be able to understand the concept of dishonesty or judge economic evidence. As such, it seems to be a presumption rather than a fact that the dishonesty element hinders prosecution.

We understand that the Government is aiming to make sure that the criminal cartel offence does not capture agreements that do not cause harm to the economy. As such, it is not clear why it is reluctant to link the offence to antitrust prohibitions. Antitrust is designed to establish whether a particular agreement is anti-competitive or not, with the presumption that anti-competitive agreements are detrimental. In any case, we consider that it is very difficult to sustain the narrow scope of the offence without having regard to the competitive assessment of the agreements concerned.

To us, it does not seem to be an appropriate solution to replace dishonesty with secrecy or exclude agreements which are made openly.

- First, it may also be complicated to prove whether customers were aware of the agreement or not, and if not who is responsible for this absence of awareness.
- Secondly and more importantly, we believe that an otherwise unlawful act could be justified by making it public. The argument that customers have the ability and option to switch supplier if they are informed about the agreement is not always valid. At the extreme, if all firms are engaged in a cartel in a particular market, customers have no outside option at all. Of course, these agreements are likely to attract the competition authority's attention. Still, we believe that it is not theoretically correct to exempt agreements on the ground that firms concluded them openly.
- Furthermore, we believe that it is necessary to consider the effects of an agreement when determining the penalty. Agreements that are, in principle, unlawful but had no effect on the economy whatsoever should not entail as severe a punishment as highly detrimental

agreements. Therefore, we propose that even if the Government decides to remove the dishonesty element from the offence, it ensures that effects of the agreement are properly taken into account in the relevant stage of the procedure.

7. Concurrency and sector regulators

This chapter sets out three options for improving the use and coordination of competition powers: (1) sector regulators could agree on a common set of factors to take into account when deciding whether to use sectoral or competition powers or competition law primacy could be enhanced; (2) the CMA could act as a central resource for the sector regulators; (3) the CMA could coordinate the use of competition powers across the landscape.

Q.14 *Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?*

Q.15 *The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

Q.16 *The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.*

Comments:

The Government is concerned that there are too few Competition Act decisions in the regulated sectors. This suggests that the Government must be concerned that there are anti-competitive agreements or abuses of dominance in these sectors which are not adequately dealt with. Although these sectors often have dominant firms, it is not clear to us that abuses of competition law are in fact prevalent in these sectors or not adequately dealt with through regulatory intervention.

We agree with the government that it is appropriate for sector regulators to maintain the ability to undertake antitrust cases in their sectors. The sector regulators have a detailed in-depth knowledge of the specifics and dynamics of their markets. It makes sense that this expertise is also deployed in antitrust cases.

As the boundary between regulation and competition law can be blurred, the maintenance of concurrent powers makes it clear that the sector regulators are responsible for their sector. If the responsibility for the enforcement of competition law was shifted to the CMA, then there would be a real risk that it would no longer be clear which authority was responsible for investigating a particular allegation. This could lead to either duplication of effort, or a vacuum where each authority believes that the responsibility lies with the other.

As is noted in the consultation, most of the regulators are already required to use the Competition Act if it is considered more appropriate than their sector-specific powers. The consultation suggests that the sector regulators could reach common guidelines on when to use their competition powers, or have a statutory duty to use their competition powers whenever legal and appropriate.

Competition powers are designed to deal with ex-post abuses by dominant firms. Given the nature of the regulated sectors, ex-ante regulation will in many cases be preferable to remedy an issue. It avoids a competition problem arising rather than waiting until an infringement has actually occurred before intervening. It is thus important that sector regulators retain some discretion as to which tool to use to deal with a particular practice.

We share the view that competition powers should be used by sector regulators, where appropriate. This would have the benefit of increasing the body of case law and of increasing the deterrent effect for breaches of competition law. However, given that the final decision as to whether competition law is “appropriate” would remain with the regulator, we are sceptical whether the proposals would materially change the current situation.

The government has proposed that the CMA could act as a central resource for the sector regulators for competition cases. Some of the sector regulators have relatively limited experience in undertaking Competition Act cases. Increasing the linkages between the CMA and the sector regulators could help to ameliorate this issue.

The consultation makes a number of suggestions as to how this sharing of resources could work. These include: the CMA running the case and the

regulator making the decisions, permitting joint regulator/CMA decisions and increasing the number of secondments between the CMA and the regulators.

We believe that the last of these – increasing the movement of staff between the CMA and the regulators – makes clear sense and should be implemented. Such an approach would benefit both authorities.

While we can see the theoretical benefit of joint investigations, we query whether such joint investigations would be able to proceed satisfactorily in practice. Moreover, we are concerned that if the sector regulator is obliged to hand over all or part of a Competition Act investigation to the CMA, then this would reduce the incentive for the regulator to use competition powers. Regulators may instead prefer to use sector-specific powers than lose control over the investigation.

8. Regulatory appeals and other functions of the OFT and CC

This chapter sets out the Government's view that the sectoral reference/appeal jurisdictions of the CC should be transferred to the CMA. We also propose the development of model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

Q.17 *Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?*

Q.18 *The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.*

Comments:

We agree that the CMA is the most appropriate body for the regulatory references and appeals which are currently heard by the CC. The CMA will have the appropriate mix of skills (legal, economic, accounting etc) required for such appeals.

9. Scope, objectives and governance

This chapter sets out that the CMA should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA and proposes that the CMA will: have clear, and potentially statutory, objectives to underpin prioritisation; be accountable to Parliament; and, have an appropriate governance structure for a single decision making body. We ask:

Q.19 *The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.*

Q.20 *The Government see your views on whether the CMA should have a clear principal competition focus?*

Q.21 *The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.*

Comments:

The consultation proposes that the CMA should have a principal focus on competition. We think that consumer protection can be as important as competition, so that if the CMA has consumer responsibilities it should have a dual focus. Otherwise consumer protection may be overlooked. We are concerned that in some cases consumer protection concerns may be addressed as competition concerns and result in unfocused market investigations when a focused consumer protection approach would be more appropriate.

We note that it is proposed that consumer enforcement responsibilities are moved to the Trading Standards network. As Trading Standards is organised on a local basis, we are concerned that this may mean that cases with a national dimension are overlooked. We note that there will be a forthcoming BIS consultation on this issue.

10. Decision making

This chapter sets out a number of alternative models for decision-making that can deliver robust decisions through a fair and transparent process. The Government considers that a number of alternative models can deliver this, final choices will be guided by considerations relating to: the degree of separation between first and second phase decision making; degrees of difference or uniformity of approaches between tools; and, the role and nature of panels in the different tools available to the single CMA.

Q.22 *The Government seeks your on the models outlined in this Chapter, in particular:*

- *the arguments for and against the options;*

- *the costs and benefits of the regime and to business, supported by evidence wherever possible.*

***Q. 23** The Government also seeks views on the appropriate composition of the decision-making bodies set out in this Chapter, and in particular what the appropriate mix of full-time and part-time members is.*

***Q.24** The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process.*

Comments: See response to Q2.

11. Merger fees and cost recovery

Merger Fees

This chapter sets out options to recover the cost of the merger regime either by changing the level of the existing fee bands, introducing an additional fee band or moving to a mandatory notification system. We ask:

12. ***Q.25** What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/ mandatory notification regime?*

Recovering the cost of anti trust investigations

The Government is considering introducing legislation to allow the enforcement authorities to recover the costs of their investigations in antitrust cases. This would only apply where there has been an infringement decision and a fine, non-infringement decisions and investigations dropped for any other reason would not be charged. We ask:

13. ***Q.26*** *Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons.*

14. ***Q.27*** *What are your views on recovery where there has been an infringement decision being based on the cost of investigation?*

15. ***Q.28*** *What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?*

It is foreseen that any costs to be recovered would be shown on the infringement decision detailing the fine. We ask:

16. ***Q.29*** *Do you agree that this would be an appropriate way to collect the costs, separates the fine from costs in a way that makes appeals clear and that the costs should go to the consolidated fund rather than the enforcement authority?*

It is foreseen that the costs element could be appealed. This raises the question of what happens when the appeal is successful, partly successful or when the appeal is on the method of penalty calculation only rather than the substance of the decision. We ask:

17. ***Q.30*** *Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?*

Currently there is no legislation to allow the enforcer to charge costs so this would mean amending the Competition Act 1998. An alternative introducing cost recovery would be to amend the same Act to allow the level of fine to cover the cost of the investigation. We ask:

18. ***Q.31*** *Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?*

Recovery of CC costs in telecom price appeals

19. ***Q.32*** *Do you agree that telecoms appeal should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing? If not, your response should provide reasons supported by evidence where appropriate.*

Recovery of CAT costs

The Government propose to make a change in the CAT's Rules of Procedure to allow the CAT to recover its own costs following an appeal. The decision whether or not to impose costs will rest with the tribunal who will be able to set aside the costs where the interests of justice dictate e.g. when the appellant is a small business and the costs of pursuing their legal right of appeal prevent them from doing so. We ask:

20. ***Q.33*** *What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?*

Comments:

As a general principle, we agree that in some cases most of the costs of the competition regime should be borne by the associated firms, provided that this does not conflict with access to justice or the safeguards in the scheme. We also note that as there are expected to be significant public benefits to an effective competition regime, it is also appropriate that some of the cost be borne by the public purse.

1. **Merger fees**

As most mergers will not lead to competition problems, we believe that it is important that the fees are not set too high.

2. **Reclaiming the costs of antitrust investigations**

The Government is consulting on whether the costs of antitrust investigations should be recovered from the costs of firms found to have infringed competition law.

As there is a public benefit to antitrust enforcement, it is not unreasonable for the taxpayer to pay for some of the costs.

Firms who are found guilty of a competition law infringement are penalised by fines. The OFT has fining guidelines which it applies to calculate the fine appropriate for a particular infringement. We consider that it is appropriate for the costs of the investigation to form one component of such a fine. That is, the costs of the investigation should be part of the decision as to what the optimal fine should be in a particular case. However, we would be concerned if the costs of the investigation were additional to such a fine. If the fine has already been calculated at an 'optimal' level, increasing the fine through the addition of costs would, by definition, lead to a fine which is not at the optimum level.

3. **Immunity and leniency**

Under the leniency programme, 'whistleblowers' on a cartel are immune from fines, provided that they cooperate with the CMA. This leniency programme gives firms a powerful incentive to report cartels to the authorities, which may otherwise go undetected. In addition, the cooperation of the leniency applicant

significantly reduces the burden of investigation.

We believe that it is important that leniency applicants continue to have incentives to bring cartels to the attention of authorities. We therefore consider that such leniency applicants should be exempt from bearing the CMA's costs.

12. Overseas information gateways

This chapter seeks views on how well the information gateway arrangements are working and whether there is a case for change. In particular, whether there is a case for amending the thresholds for disclosure of merger and markets information to promote reciprocity between overseas regulators and the UK and, if so, how this might be done. We ask:

4. ***Q.34*** *How well is the current overseas information disclosure gateway working? Is there a case for reviewing this provision?*

Comments:

13. Questions on the impact assessment

Mergers

In this section we outline, and quantify where possible, the costs and benefits of the proposed options regarding strengthening the current voluntary notification regime, introducing mandatory notification, exempting small businesses from merger control, streamlining the merger process and adjusting merger fees.

5. ***Q.35*** *Do you have any evidence about the costs to businesses of notifying mergers to the OFT, in terms of management time and legal fees?*

Anti-trust

In this section we outline the costs and benefits of the options for achieving a greater throughput of antitrust cases including enhancing the OFT's existing procedures, developing a new administrative approach and developing a prosecutorial approach. In addition we review the costs and benefits of retaining the 'dishonesty' element in the criminal cartel offence but exclude the possibility for defendants to introduce economic evidence produced after the events that constitute the alleged dishonest 'agreement'.

6. ***Q.36*** *Under a prosecutorial system, are there likely to be changes to the overall costs of the system?*

The Impact Assessment presents the likely costs and benefits and the associated risks of the policy options. In order to do this it is necessary to understand the costs and benefits of the current system and to make assumptions. Further, the Impact Assessment seeks to show the extent to which the policy options meet the objectives.

7. ***Q.37*** *Do you have better information about the costs and benefits of the current competition regime?*

8. ***Q.38*** *Do you have evidence that indicates better assumptions could be made to estimate the costs and benefits of the proposed options?*

9. ***Q.39*** *Are there likely to be any unintended consequences of the policy proposals outlined?*

Comments:

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Competition Commission

COMPETITION COMMISSION

A Competition Regime for Growth: A Consultation on Options for Reform

Response by the Competition Commission

13 June 2011

Website: www.competition-commission.org.uk

Summary

The Competition Commission (CC) wholeheartedly supports the Government's aim of enhancing the world class calibre of the UK's competition regime. A strong competition regime helps ensure that firms compete to deliver choice and good-value products and services for consumers while encouraging innovation and productivity improvement, thereby supporting economic growth.

A merged competition authority with a clear focus on competition issues can:

- bring increased clarity and authority to competition policy and advocacy;
- deploy skilled staff flexibly across the full range of competition tools; and
- streamline and speed up processes to reduce burdens on business.

But the merger must preserve the characteristics of the existing system that have given it its high reputation and credibility with business; in particular:

- clear separation between phase 1 screening of cases (including case selection) and thorough and objective phase 2 investigation and decision-taking;
- the use of panels of independent expert members to conduct the phase 2 investigation; and
- fair and transparent processes governed by statutory timescales.

Together, these institutional design features ensure that the most important issues get the appropriate level of scrutiny and that the decisions of the authority are based on the evidence in each case, on sound economic analysis and on processes that withstand challenge.

Two substantial advances that could come from reform are:

- extending the system of phase 2 decision-making by member panels to antitrust cases, for which it is well suited; and
- extending statutory timetables more widely, particularly to include phase 1 of merger and market investigations, and antitrust cases.

A merged authority needs a system of governance that preserves the separation between phase 1 and phase 2 decision-making and between strategic oversight and decisions on cases.

An authority built on these principles and focused on promoting competition will be able to evolve appropriate rules and processes, capture the benefits of merger without losing the strengths of the existing system and further enhance the effectiveness and world leading reputation of the UK competition regime.

Introduction

A world class competition regime requires institutions which make decisions that:

- rest on sound economic analysis; and
- are reached using fair, transparent processes.

Careful analysis and transparent processes allow competition agencies to reach sound decisions which businesses and consumers can be confident are just, credible and well founded. A body of sound decisions provides clarity and predictability for businesses about how the law will be interpreted and enforced.

The UK regime and its institutions are well regarded, but there is always room for improvement to ensure that the practical application of competition policy delivers its full potential for the UK economy.

To achieve benefits from reform, **the characteristics of the current system which have generated its high reputation need to be built upon in the new regime**. These characteristics are:

- **the separation between phase 1 and phase 2 decision-taking**;
- **the use of panels of independent expert members to conduct phase 2 scrutiny**; and
- **fair and transparent processes governed by statutory timescales**.

These characteristics and a governance structure for a merged competition authority need to be reflected in the legislation establishing the regime. An authority designed on these principles and focused on promoting competition can then develop appropriate rules and processes for its work.

Competition inquiries naturally have two phases, an initial phase 1 screen for a wide range of cases and a phase 2 investigation for the smaller number of cases which merit detailed scrutiny and may lead to significant economic intervention. A merged authority will have the incentive to ensure that only the cases that meet the thresholds for phase 2 investigation receive it. The thorough, objective, fact-based scrutiny involved in phase 2 investigations can consume significant time and resource, for the authority and for businesses. To avoid imposing unwarranted burdens on business, they need to be confined to the most economically or legally significant cases.

Separation of decision-making between phase 1 and phase 2 avoids both the risk that decisions at phase 2 simply confirm the initial decision to investigate and the charge that a single body is both prosecutor and judge. While a merged authority can minimize duplication of staff work in the two phases, it must not jeopardize the benefits of a two-phase system by compromising this separation.

Currently the CC carries out phase 2 investigations into mergers and markets, using **panels of independent expert members**. This is acknowledged as an effective model which provides expertise, balance and objectivity. The CC has recruited a wide pool of high-calibre members, with backgrounds in economics and accountancy, in law and in business. Panel members, most of whom are part time and make themselves available as needed, direct the course of phase 2 investigations before making decisions. They are paid modest fees (well below what most could earn elsewhere). And since most have significant other interests and sources of income, and are appointed for a fixed term, they are not susceptible to political or institutional pressure.

Decisions made by CC panels have seldom been successfully challenged; the few successful challenges have not materially altered the CC's conclusions or remedies.

The UK's **antitrust** regime has a less clear-cut distinction between phase 1 and phase 2 and has been subject to criticism in recent years. Many of the CC's members have extensive antitrust experience, both in the UK and elsewhere. We strongly believe that the same degree of separation between phase 1 and phase 2 as applies to mergers and markets should be applied to civil antitrust cases, and that scrutiny of civil antitrust phase 2 cases should be undertaken by member panels.

Phase 2 merger and market inquiries run to **statutory timescales**, which encourage efficiency and focus on important issues, provide predictability for businesses which limits burdens on them, and ensure timely delivery of outputs. Statutory timescales should be extended more widely, to antitrust cases and to phase 1 activity, backed up by information-gathering powers and stop-the-clock measures.

CC inquiries are also run on principles of **transparency**. Parties know who the decision-makers are, they have direct access to members (who are involved throughout) at specified points in the inquiry, and they can see and challenge the CC's evidence and reasoning, including the case against them. They know early on which issues the CC is pursuing, so they can focus on addressing them. The new authority could enhance transparency in antitrust enforcement.

These disciplines make it more likely that correct decisions will be made as quickly and efficiently as is consistent with rigour and fairness.

Panels have also proved their value in handling **regulatory appeals**. The expertise in economic analysis, and the suitably qualified pool of members that the CC has developed, make the new authority the natural home for these functions. There is no reason to change these arrangements and the new authority can continue to adapt its approach and processes, and tailor panel membership, to the demands of particular cases.

The **governance** of the new authority needs to ensure appropriate accountability, separation of powers and checks and balances in decision-making. Phase 2 decision-makers cannot have any say in the decision to refer individual cases. But they must have a voice in the governance of the authority through representation on the supervisory board. Conversely, the board must be accountable for the work of the authority but must not be involved in decisions about individual cases at either phase. The main roles of the board should be governance, policy and strategic direction, and establishing a framework which ensures that cases are conducted in line with its rules and guidance.

A new authority designed on these lines will be able to reach well-founded decisions based on good economic analysis and balanced assessment of the facts, through a demonstrably fair process. It would bring the timeliness, robustness and credibility of member panel decision-making to all kinds of competition work. It would be able to deploy staff flexibly across phase 1 and phase 2 activities and different competition tools in response to varying workloads, increasing the efficiency of the regime. And it would be able to use those tools judiciously to improve the competitiveness of markets and thus promote innovation, productivity improvement and economic growth.

Why reform the competition regime?

Q.1 *The Government seeks your views on the objectives for reform of the UK's competition framework, in particular:*

- *improving the robustness of decisions and strengthening the regime;*
- *supporting the competition authorities in taking forward the right cases;*
- *improving speed and predictability for business.*

The CC supports the Government's aim of enhancing the world class calibre of the UK's competition regime. The principles underlying any reforms should be:

- to preserve and build on the elements of the current system that give it its world class reputation for rigour and fairness; and

- to capture the benefits of the merger of competition authorities, without losing the valuable components of the current regime.

The CC believes there is scope to improve in all three ways cited by the Government:

- *Robustness of decision-making.* The current two-phase inquiry process should be maintained for mergers, markets and regulatory appeals, and extended to scrutiny of antitrust cases. This process is characterized by decisions being made by panels of experienced, expert members, independent of Ministers and the phase 1 decision-maker. Members have an investigatory role and are involved throughout the inquiry. The inquiry is conducted according to fair and efficient processes including statutory timescales and a transparent approach. Those processes, and the expertise and independence of panel members, makes it possible for them to apply the far-reaching remedies available at phase 2. An authority equipped with such a proven decision-making tool should use it to address the criticism that has been levelled at antitrust enforcement.

- *Taking forward the right cases.* An authority with a clear focus on competition and a full range of competition tools at its disposal would be better equipped to apply the right competition tools to the right cases and pursue them energetically. That means applying rigorous and detailed phase 2 scrutiny to significant mergers and markets and to regulatory appeals, and extending similar approaches to the most significant antitrust cases to improve the effectiveness of the antitrust regime and business confidence in it. It also implies making full use of the market investigation regime to address the most complex and intractable competition issues in significant markets.

- *Improving speed and predictability for business.* Statutory timetables can be extended to phase 1, antitrust and remedy implementation activity where they do not currently apply. The application of principles of transparency can likewise be extended. And a larger pool of expert staff can be more efficiently deployed than is possible in two authorities. All these developments can help to ensure that decisions are made as quickly and efficiently as is consistent with rigour and fairness.

These reforms would enable a new authority to reach well-founded decisions through a demonstrably fair process. They would limit burdens on business by ensuring that the most thorough and rigorous processes are applied to the important cases that merit them, and are progressed efficiently, subject to statutory timetables. They would bring the robustness and credibility of member-led decision-making to all kinds of competition work. And they would enable the new authority to use the most powerful competition tools judiciously to improve the competitiveness of markets and thus promote innovation, productivity improvement and economic growth.

Q.2 *The Government seeks your views on the potential creation of a single Competition and Markets Authority.*

The CC believes that, implemented in the right way, the creation of a single Competition and Markets Authority (CMA) can enhance the UK competition system. While many of the objectives Ministers seek could be achieved without a merger of authorities, a single CMA will:

- bring increased clarity and authority to competition policy and advocacy;
- be able to deploy a larger pool of expert staff flexibly across the full range of competition tools;
- have better incentives to select the right competition tools for the right cases;
- be able to streamline and speed up processes to reduce burdens on business; and
- be able to apply good ideas and practices from both former organizations across the competition landscape, thus, for example, addressing the criticisms that have been levelled at antitrust enforcement.

All these developments should increase the efficiency with which the highest-impact cases can be pursued using the right competition tool and reduce burdens on business by increasing the overall speed of throughput of cases, without compromising the rigour of analysis and judgement that ensures the right decisions.

This can be best achieved by the new authority applying principles of triage rigorously to mergers and markets. A swift initial scrutiny can enable the authority to judge which is likely to be the best tool to use; for example, a market issue might be best tackled through Competition Act enforcement, a market study or a market investigation reference. Some further work might then be necessary to ensure that the relevant statutory test is met before launching the appropriate action, but the presumption should be that the initial screen uses little time and few resources, which should be devoted to the markets and the issues which most merit them. Similarly, initial scrutiny can enable the authority to identify the most potentially problematic mergers meriting further investigation and/or swift implementation of remedies.

The creation of a new authority inevitably involves risks. Single authorities operate in most other jurisdictions worldwide. The UK has escaped many of the criticisms that have been levelled at them of inadequate separation of powers and roles or of risks of confirmation bias. In order to maintain its reputation and its authority, the CMA needs to be structured to maintain:

- its independence from Ministers;
- the separation between corporate governance and strategy on the one hand and initiation of and decision-making on cases on the other; and
- the separation between phase 1 and phase 2 decision-making, and thus the independence of phase 2 decision-makers.

The transition to a new CMA entails both direct costs and the risks of distracting, or being unable to retain, the staff of the existing authorities through a period of uncertainty and transition. These will need to be managed carefully.

The CC has a good record of improving the efficiency of its operations and is seeking to improve further. Though there may be some synergies available from better deployment of expert staff in a merged authority, the CC does not believe that they are substantial. Decisions about the merger of the authorities should be based on enhancing its effectiveness. Seeking significant additional savings risks compromising the quality of the work and decision-making of the CMA.

A stronger markets regime

Q.3 *The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

The CC welcomes the Government's recognition that the markets regime is one of the key strengths of the UK competition regime and shares the Government's enthusiasm for finding ways to strengthen the markets regime and ensure it is properly utilized as we move to a single CMA.

Market investigations need to be used where there are good grounds to believe that competition is not delivering benefits to consumers in significant markets; there are important issues in those markets that a thorough investigation can assess and if necessary resolve.

Enabling investigations into practices across markets

The CC broadly supports this proposal. It has the potential to provide the CMA with an additional tool to promote competition across markets and proactively investigate problematic behaviour across the economy. The sort of issues for which it might be most likely to be useful might be:

- Features that do not fit neatly within only one market, for example collective licensing of public performance and broadcasting rights in sound recordings.

- Recurring sources of consumer complaint or identified detriment, including situations where similar economic characteristics have the potential to affect competition adversely across multiple, distinct markets. Under the Fair Trading Act 1973 (the FTA) the Monopolies and Mergers Commission (MMC) investigated discounts to retailers, full-line forcing and tie-in sales (now offences under the Competition Act 1998 when practised by a dominant company). More recently, issues like early settlement terms (in Payment Protection Insurance (PPI) and Home Credit) and the sale of secondary products at particular points of sale (eg in PPI and Extended Warranties) have arisen in more than one CC market investigation. There may be some synergies in investigating the same practices across multiple markets. And the provision might also enable the CMA to target its investigation on to these specific practices rather than review the market as a whole.

The proposal would combine the OFT's current ability to conduct 'horizontal' market studies at phase 1 with the investigatory and remedial powers currently available at phase 2; thus it completes the set of competition tools available to a merged authority.

By adding a second phase to such studies, the CMA would be able to follow through its initial screen by looking in depth at those practices where intervention might have the greatest impact.

The CMA would need to consider what processes to use to carry out such investigations. They would need to work somewhat differently from existing market investigations and the CMA would need to beware of spreading itself too widely (which might impose unwarranted burdens on businesses peripherally involved) or too thinly (which might dissipate effort).

Powers to report on public interest issues

The CC broadly supports this proposal. It brings the markets regime in line with the merger regime, where the CC has investigated public interest issues, for example media plurality in the Sky/ITV merger case.

However, there are risks associated with the CMA being asked to consider more public interest cases:

- the CMA could be perceived to be politicized if its independence of Government could be questioned or if it came into direct conflict with Government; and

- its competition focus might be diluted if it needed to spend significant time in investigations on inevitably high-profile public interest issues.

Therefore, as with the merger regime, the public interest issues should be tightly defined in legislation (with formal mechanisms for the Government to amend the list).

Extending the supercomplaint system to SME bodies

The CC believes that this proposal could help the CMA identify markets for investigation and build broadly-based support for the regime.

However, there are some risks associated with it which would need to be managed:

- supercomplaints require the authority to resource an investigation to a short timescale, inevitably drawing resources from other activity and limiting the CMA's freedom to determine its own priorities;

- as with current supercomplainants (ie consumer groups), the relevant SME bodies may be especially interested in particular markets, which could lead to missed issues in other markets; and

- it will be important to guard against self-interested supercomplaints from bodies representing producer rather than consumer interests.

Whether or not this specific proposal is pursued, it will also be important for the CMA more broadly to enhance its sensitivity to the voice and particular concerns of small businesses, which are often entrants or maverick innovators capable of enhancing and broadening competition in markets, and often have particular insights to bring to competition activity from their perspective as customers of other businesses and from their understanding of their own customers.

Measures to reduce timescales and strengthen information-gathering powers

The CC supports the use of statutory timescales in competition law enforcement. They impose a useful discipline on case management, encourage focus and prioritization of work and ensure timely delivery.

The CC believes that one benefit from the proposed merger could be to reduce the overall time taken to complete all parts of a market investigation, from initial screen through phase 1 scrutiny and phase 2 investigation to remedies implementation where appropriate. This suggests that, alongside timetables for individual elements of the process, a timetable might be applied to the overall process, recognizing that time well spent in one stage of the process can reduce the time needed at the next.

The CC agrees with reducing the statutory deadline for the phase 2 investigation from 24 to 18 months, with the ability to extend the deadline by six months where there are special reasons to do so (eg in complex cases):

- Recent cases such as BAA airports, Groceries and PPI have taken almost the full 24 months to complete. However, they have been among the most complex undertaken by the CC. The CC considers that earlier market investigations which were less complex, such as Home Credit, Store Cards, Liquefied Petroleum Gas (LPG) and Northern Irish Personal Banking could have been completed in a shorter time period with the benefit of the learning the CC has now gathered from experience of the market investigation regime.

- It is hard to predict which market investigations are likely to take the most time. CC experience suggests that the complexity of the investigation—multiple issues, multiple (often local) markets and/or multiple parties—is a significant driver of time. Other drivers include the availability of data on the markets and the extent to which that data has been collated and analysed by the referring body prior to the reference.

- The exercise of the power to extend could sensibly be modelled on the merger regime, where the CC must disclose the special reason for the extension. This model has worked well, but the board of the CMA would want to ensure that the power to extend is not used excessively.

- CC experience suggests that in most cases it will be obvious by the time provisional findings are being drafted whether the issues are such that an extension is likely to be necessary to complete the analysis and, where relevant, develop effective and proportionate remedies.

The CC supports in principle the introduction of statutory timescales for all phase 1 studies. As with phase 2, there is probably a case for an ability to extend the deadline at phase 1, for example to allow for consideration of undertakings designed to avoid a reference or where there are other special reasons to do so.

The CC agrees with the introduction of timescales for the remedies process after publication of the final report, if combined with information-gathering powers and the ability to extend the timetable where there are special reasons to do so. The CC suggests six months, with the possibility of a four-month extension. Experience of market investigation remedies to date suggests that this timetable is challenging but achievable. Extensions are most likely to be necessary in cases where consumer testing of remedies is necessary (as in PPI), or where the CC encounters complex practical issues relating to remedy implementation (as in LPG).

It will be necessary to have powers to gather information and to stop the clock in this period to ensure that the quality of implementation is not compromised. It also reduces the incentive to game the system (which is otherwise increased by a fixed timescale). The remedies implementation clock should be reset, rather than stopped, in the event of an appeal.

The CC agrees with the introduction of information-gathering powers for phase 1. This will be necessary to achieve the ambition to speed up phase 1 investigations without the quality of phase 1 decisions being compromised. However, the powers available would need to be those appropriate to an initial screen, to avoid them becoming burdensome on parties and phase 1 scrutiny becoming too extensive. Information-gathering powers will need to be accompanied by a power for the CMA to stop the clock where information is not provided, to avoid gaming by parties.

The CC agrees to the introduction of a statutory threshold for phase 1 market study. This would add clarity to the process and is probably necessary if there is a statutory timescale. However, this should not be a high threshold, which could deter legitimate initial investigations.

The CC shares the Government's ambition of facilitating quick referrals to phase 2 where justified. It considers that the creation of a new authority and the imposition of thresholds, definitions and timescales for phase 1 screens, and any more detailed market studies which might follow from an initial screen, will facilitate this.

The CC also agrees that the creation of the CMA provides an opportunity to clarify the CMA's ability to investigate breaches of the Competition Act 1998 it identifies in the course of a market investigation. Having all competition responsibilities within the same organization will facilitate this link.

Measures to ensure remedies are proportionate and effective

The CC supports the introduction of powers to require the appointment of an independent party to monitor and/or implement remedies. The CC has used independent parties successfully in merger cases (notably Macquarie/National Grid) where parties have been willing to provide undertakings. Similar powers in the markets regime where orders are a more likely means of remedy implementation are necessary because of the number of parties involved and the weaker incentives they have to offer undertakings voluntarily.

Had such powers been in place, the CC might have used them in past cases in preference to the remedies it adopted. Where the CC has made recommendations to Government, it would doubtless have considered whether powers of this kind could have been used instead.

The CC supports the introduction of powers enabling remedies to include the publication of non-price information. The CC has published non-price information (eg switching messages) alongside price information as a remedy in market investigations including PPI and Northern Irish Personal Banking. The CC has been careful not to publish price information where there was reason to fear that it might encourage tacit coordination. This was the case in the LPG investigation where prices charged to individual customers were not widely known, but not, for example, in the Home Credit investigation where suppliers clearly already knew one another's prices but customers did not.

Measures to simplify the review of remedies process and update remedial powers

The creation of a single authority offers the prospect of simplification of remedies review process through removing any duplication or inefficiency from the current participation of two authorities in the process.

To ensure that these benefits are captured, the CC supports the introduction of timescales and information-gathering powers. We propose timescales of 26 weeks with the potential to extend by 16 weeks for remedies deriving from a market investigation and 26 weeks with the potential to extend by 8 weeks for remedies deriving from a merger inquiry. These timescales would cover the whole process of review currently undertaken by both the OFT and the CC.

The CC does not consider that the case has been made for the revision of remedy review thresholds. The requirement to identify a change of circumstances provides an important element of legal certainty, but should not unduly inhibit the CMA where there is a genuine need for review, as it can be interpreted widely.

The CC supports the proposal to clarify that phase 1 and 2 powers apply when cases are remitted following appeal.

The CC does not agree with any proposal to remove the requirement to consult if not making a Market Investigation Reference (MIR) as it is important for transparency. The CC will support revisions to clarify the precise circumstances when such a decision should be considered as one where consultation is required.

Q.4 *The Government also welcomes further ideas, in particular, on modernising and streamlining the markets regime, and on increasing certainty and reducing burdens.*

The CC believes that by applying the principles of triage more rigorously to markets, the CMA could ensure that problems are swiftly tackled using the most appropriate competition tool.

An initial phase 1 scrutiny governed by a tight timescale, requiring limited resources, can enable the authority to judge which tool is most likely to be appropriate—a market investigation, Competition Act or consumer protection law enforcement action by the competent authority, a market study, or no further action by the CMA. Whatever phase 2 action is preferred, resources can be devoted to it and an appropriate statutory timescale applied to ensure that the process overall is not more burdensome on parties than necessary.

A stronger mergers regime

Q.5 *The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

The CC supports proposals to improve the merger regime in the UK, in particular those that will:

- ensure that all potentially anticompetitive mergers can be reviewed by the CMA;
- reduce the risks created by integration of mergers prior to such review; and
- reduce costs to parties and the CMA, and ensure that mergers that are anticompetitive bear the appropriate portion of costs.

Addressing the disadvantages of the current regime

The principal disadvantages of the current voluntary notification regime are the risks of missing anticompetitive mergers and the risks that arise through integration of merging parties prior to scrutiny of the merger by the competition authorities. The latter risks, in the CC's experience, are:

- Any consumer detriment from an anticompetitive completed merger is experienced in the period between integration and the implementation of remedies. This can be a period of well over a year, and based on the CC's estimates the detriment caused to customers can be substantial.
- It can be difficult to reverse integration or apply preferred remedies, even divestitures, to a completed merger. For example, assets may have been sold, key staff may have left or the business may have been integrated such that no viable stand-alone business remains. In other cases, assets are no longer saleable, or no suitable purchaser can be found.
- It takes longer, and is therefore more costly to the authorities, to deal with completed mergers where a substantial lessening of competition (SLC) is found. Under the Enterprise Act, the CC has needed an extension to its timescale in 10 of the 15 inquiries into completed mergers which have given rise to an SLC, compared with 3 of the 11 anticipated mergers which have given rise to an SLC. The additional time is needed to identify and maintain the degree of integration that has taken place, negotiate interim remedies and arrange for them to be implemented and monitored (for example, by appointing a monitoring trustee and/or a hold separate manager).

There are also costs to parties of monitoring trustees and hold separate managers where appointed as part of interim measures needed to preserve the ability to achieve an effective remedy, though these may be risks understood and taken willingly by parties.

A system of mandatory notification, akin to those widely operated in other jurisdictions, would ensure that all mergers with a UK nexus are notified to the CMA (with the exception of those that are wilfully or negligently not notified). If such a system had suspensory effect (preventing both integration and completion), it would prevent the risks that arise through integration prior to clearance.

View on the merits of mandatory notification vary among the CC's members. Some favour it and note the consistency with regimes in operation in many other jurisdictions. However, that a system of mandatory notification would impose costs on parties for mergers that are not currently notified but would need to be. Many such mergers would not raise competition issues. Yet the additional costs would be borne by parties engaged in neutral or even pro-competitive mergers as well as by those meriting scrutiny. Moreover, there would either be additional costs to the CMA in scrutinizing a higher volume of mergers, or the level of scrutiny given to each would have to be less.

These are significant disadvantages and the CC recognizes that the merits of mandatory notification may not outweigh them.

The hybrid system proposed attempts to reduce these costs by adjusting the notification thresholds, so targeting to a greater degree the obligation to notify, but retaining a Share of Supply provision which enables the authority to review cases where the obligation to notify is not satisfied but there is a prospect of a competition issue. This would enable more targeted scrutiny than is achievable through a turnover threshold. But while it would overcome some of the drawbacks, it would deliver neither the comprehensive coverage, nor the legal certainty of a mandatory notification system.

If a mandatory or hybrid regime were preferred, the CC would be concerned that the notification thresholds referred to in the consultation document are too low for an efficient notification trigger. The CC would therefore recommend that a higher notification threshold should be set, while the authority's jurisdiction will remain for all mergers above any small business exemption (discussed below).

In the event that the regime remains voluntary, the CC supports the strengthening of the regime. The incentives for parties to bring mergers to the attention of the CMA at an early stage need to be increased. But the CMA will also need to evaluate and account for its ability to detect mergers and identify those meriting review in a timely fashion.

In a voluntary regime it will also be important to strengthen the CMA's ability to impose initial measures quickly. The CC supports the proposal to introduce an automatic suspensory power on completed transactions the CMA identifies, triggered when the authority requests information from the merging parties. Relief from the automatic suspension should be provided following consideration of a request from the merging parties. The CMA should retain the ability to decide whether to impose initial measures (by order or undertakings) on transactions notified to it. This proposal strengthens the incentive to notify transactions while recognizing the strong commercial pressure to integrate acquired businesses. It would also preserve the CMA's power to impose remedies where completed mergers are found to be anticompetitive.

The CC supports the introduction of penalties proposed for breaches of hold-separate measures and also for failure to notify (in the event a mandatory system is introduced).

Jurisdictional thresholds

The CC recognizes the Government's desire to exempt transactions involving small businesses from merger control. However, the CC has experience of small mergers which can have substantial effects:

- large bus companies taking over smaller local ones can have substantial effects on (often localized) groups of customers; and

- mergers which affect new but growing markets can have a long-term impact.

The application of merger control in such cases can protect vulnerable customers and send important messages to participants in developing markets.

Ultimately, Ministers have a choice between exempting smaller businesses from the regime and catching all anticompetitive mergers. If they are minded to put in place a small business exemption in place of the existing statutory discretion available to the OFT not to make a phase 2 reference, it should apply when the turnover of both the acquirer and the acquiree are below the set level. Such a threshold may enable the share of supply jurisdictional threshold to be dispensed with, provided that the levels for the exemption are low. This will bring greater clarity to business about which mergers are subject to scrutiny, reducing any disincentive on small businesses to merge.

The CC supports the retention of the material influence limb to the definition of merger. It recognizes that even in a mandatory notification regime, this would require the authority to have the ability to call in mergers that the parties did not raise with the authority when the jurisdiction arises and that it should not be a merger subject to the notification requirement. In a voluntary regime this would represent no change from the current position. The CC notes that this limb has enabled scrutiny of significant mergers raising both competition and media plurality concerns (eg Sky/ITV), an opportunity currently denied to the European Commission as the recent Ryanair/Aer Lingus case illustrates.

Measures to streamline the regime by reducing timescales and strengthening information-gathering powers

The CC agrees with the introduction of statutory timescales for phase 1, Undertakings in Lieu (UIL) processes, and remedies stages, subject to the ability to extend the deadline in some circumstances (eg complex cases at phase 2). The CC suggests:

- Twelve weeks, with the possibility of a six-week extension for merger remedies implementation following phase 2; but
- a shorter period of eight weeks for UILs (with the possibility of a further four weeks for anticipated mergers), reflecting the nature of remedies that are most suitable at phase 1.

The CC supports the introduction of information-gathering powers at phase 1, to be used consistently with the intention of a first-phase screen, but with penalties for non-compliance. Similarly the authority should have available to it the same powers of sanction at both phases.

However, the CC considers that it is important that the regime overall does not suffer from gaming by the parties nor cause delay in processing mergers in the authority. While stop the clock provisions should be available in phase 1, there needs to be some means of ensuring that the clock does not remain stopped for too long.

The CC supports in principle the proposal to consider remedies in Phase 2 before having to decide whether the merger results in an SLC. This would be an evolution of the UIL of reference arrangements for a single authority. Parties should have one opportunity to offer undertakings to avoid an in-depth investigation at the point (or shortly after) the duty to refer arises. The system might work as follows:

- To allow for sufficient time (within the proposed eight-week time frame) to consider the offer, for undertakings to be drafted, for up-front buyers to be approved and for undertakings to be consulted on, we would anticipate that parties would have to provide sufficient information to enable consideration of the UILs proposed very quickly after the phase I decision, and before the timetable for phase 2 scrutiny begins.
- This could be prior to the panel being appointed (as now) or the application could be reviewed by the newly-appointed panel.
- There would be one opportunity and a strict window of eight weeks to agree undertakings with the CMA (during which time the overall clock would stop). In effect, the making of the reference would be suspended until such time as the UILs were accepted, or the Phase I body determined that suitable undertakings were not likely to be accepted during the eight-week period.
- As an added incentive, for anticipated mergers, the authority might have the flexibility to be able to extend this period by a further month in the case of complexity (eg when the number of divestments is large and the parties are showing willingness to implement the remedy).

Q.6 *The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?*

See the response to Q5 above.

Q.7 *The Government welcomes further ideas on streamlining the mergers regime.*

The CC believes that the creation of a new CMA offers opportunities to streamline the merger process further. A merged authority offers the opportunity to improve efficiency by transferring elements of a staff team (and the knowledge they have built up) directly from phase 1 to phase 2 at the point of reference (note that this efficiency is only possible without risk of confirmation bias if a new decision-maker is appointed). It also makes it easier to address the issue of greatest concern to business which is the overall time taken by the merger control system.

In addition to imposing time limits on individual stages of the process, we propose a 12-month overall time limit for merger scrutiny, from initial notification to implementation of remedies, to run alongside the phase-by-phase timescales. This would apply to the parts of the process largely within the control of the authority, so would exclude periods of negotiating UILs (subject to their own timetable as described above) and periods when the inquiry clock is stopped because of failure to provide information. It would address directly the concerns expressed by business about the overall time taken by merger review and motivate the CMA to capture the efficiency savings from the merger of authorities and transfer them to parties.

Effective action to avoid pre-notification integration would make this timetable easier to adhere to.

A stronger antitrust regime

Q.8 *The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime, in particular:*

- *Options 1–3 for improving the process of antitrust enforcement;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

The CC shares the Government's objectives for the future antitrust regime—more decisions, taken faster, to a high standard of quality and transparency. The antitrust enforcement process both in the UK and EU is too slow and remote, reducing its impact, and the UK should seek to show a lead in the EU in introducing innovations to address this.

We recognize that the OFT has improved its processes with experience over time, and current trials may lead to further improvements. But Option 1 would miss the opportunity to capture a potential benefit from the creation of the CMA—the ability to deploy members on the cases that most merit their input.

The CC believes that more substantive change is desirable. The CMA's range of proven decision-making tools will include the member panels currently used for phase 2 merger and market investigations. Their core expertise lies in making decisions based on their assessment of the interaction of evidence, economic analysis and law, the very capability that lies at the heart of decision-making in civil cartel, agreements or abuse of dominance cases.

While it would be wrong to apply a single rigidly defined model to all the CMA's decision-making, it would be equally wrong to rule out the use of panels for antitrust cases. The independence, expertise and judgement of panel members give them credibility with the parties to merger and market investigations and regulatory reviews. Their track record in driving the management of complex and difficult cases to a timely conclusion and their relatively low cost all reinforce the view that they are well suited to antitrust cases.

We believe the best way forward would be to require a second phase for antitrust cases in which independent decision-makers are deployed. This might take the form of enabling panels of independent members with appropriate expertise to conduct the second stage of antitrust case decision-making within the CMA. The second stage might start at the point at which the CMA decides to open a formal investigation, or might be delayed to a later point, but should in practice be well before the issue of a statement of objections.

The membership of the panels and their procedures would need to be adapted for the potentially penal process involved in antitrust work, but we believe that the model of an independent group assessing different kinds of evidence and reaching decisions could be readily adapted to all kinds of antitrust case.

The advantages of a panel system for antitrust cases include:

- clarity as to the identity of the decision-maker, enabling effective communication with and access to them by persons interested in a case;
- formal independence of the decision-makers from the decision to investigate a case;
- specialist decision-making expertise, giving reassurance to the parties of the fairness of the process as well as quality and credibility to the decision; and
- the effective and focused project management and decision-making that the regular interaction between panels and staff provides.

Engaging panels in antitrust cases would not be novel. It would be a logical extension of a proven decision-making tool at the authority's disposal to cases for which it is well suited. There would be scope for synergy with other panels deciding cases; many similar issues of evidential assessment, market definition, assessment of market power, efficiencies and competitive effects arise in merger

and market investigations as well as in antitrust. Panels, operating within a framework of legal precedent, guidance and rules, have shown themselves appropriate for decision-taking, selecting and applying remedies with significant economic impact on parties in merger and market investigations.

Panellists would be drawn from a pool of expert practitioners, including some with very specialist legal and economic expertise. And because they would only be paid when required, it would be possible to obtain access to such panel members at a fraction of the cost of comparably qualified professionals.

While we believe panels can enhance antitrust decision-making, however they are deployed, we believe that the full benefits of their involvement will be achieved if their role is investigatory, not simply adjudicatory. They should be involved from early enough in the process to steer the direction of inquiry work, should meet to discuss the case regularly through its duration, should see the bulk of the evidence and should hear evidence directly from the parties. They should not simply receive and rule on a set of papers prepared by a staff team at the end of a process.

While we recognize that it would be possible to combine the introduction of internal panels with a change in the grounds of appeal to the Competition Appeal Tribunal (CAT) to harmonize them with the rights available in cases decided by the European Commission, we do not consider that such a change to appeal rights is necessary. If decisions are based on the application of sound economic analysis, judgement and fair processes, they should be capable of withstanding scrutiny on the merits in the CAT. What matters most in our view is that the CMA itself carries out focused and time-limited inquiries, weighs and critically assesses evidence, and reaches infringement and sanctions decisions, which are sufficiently robust to withstand challenge and secure the confidence of the CAT.

We understand the reasoning behind Option 3—the prosecutorial model. We recognize that it would bring some improvements on the current system, and some CC members with antitrust experience favour it. Were it to be preferred, we are confident that the CMA could, over time, make it work.

However, we can see that there would be significant risks—and transitional costs—of such a radical departure from UK and European precedent for anti-trust cases. In particular:

- We are not clear that it would provide an adequate mechanism for the assessment of economic evidence in particular cases, particularly 'rule of reason' and abuse cases.

- It might result in a high proportion of cases being settled out of court by negotiation, losing the precedent value of published, legally tested decisions.

- It risks outcomes being unduly influenced by willingness and ability to resource a court defence rather than just the facts of the case, which might disadvantage small or less well-resourced businesses.

- We recognize that case management by the CAT could expedite matters, but doubt that it would be any quicker or cheaper than other options.

We are therefore not persuaded that it would be desirable to take such a significant and radical step when a less dramatic and proven improvement option—decisions taken by investigatory panels of members on the CC model—will be available to the CMA.

Q.9 *The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.57, and the costs and benefits of these.*

The CC believes that antitrust cases should be subject to time constraints in order to focus decision-taking. The CC believes that time limits, if extendable where there is lack of cooperation by parties as proposed for the markets regime, can powerfully drive efficient processes and fair outcomes. We recognize that some of the considerations are different and that the scale and complexity of Competition Act cases varies. However, we believe that, if appropriately resourced and with appropriate information-gathering powers, the CMA should be able to conclude a second phase of most Competition Act cases in no longer than the two years that the longest, most complex market investigations have taken the CC.

Member panels should apply a similarly transparent approach to antitrust work to that employed currently at the CC, where possible giving persons under investigation and third parties the opportunity to understand their developing thinking and make oral representations to the decision-makers.

These proposals would be evolutionary changes building on the best practice processes the OFT is already implementing as contemplated by Option 1.

The CC agrees with the introduction of financial penalties for non-compliance with information requests; the CMA needs a plausible power of sanction (ie neither so light as to be ineffective nor so heavy as to be disproportionate for the CMA to use).

The CC considers that the current jurisdiction of the CAT should be retained and supplemented by revision to the arrangements for private damages actions, so that the jurisdiction of the CAT and High Court is harmonized, and cases are transferable between them as necessary to secure their expeditious disposal, recognizing that the correct forum for competition cases will depend on a number of factors.

The CC considers that the current investigative powers and powers of entry of the OFT should be retained unchanged in any new regime.

Q.10 *The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.*

Our proposals above for antitrust cases to be referred for investigation and decision by an independent panel and for time limits for case investigation and decision-taking would require some statutory provision to secure this. However, this could be a relatively light touch provision, leaving considerable discretion to the CMA to determine the timing of reference of cases, and the time limits to be imposed at different stages.

It would be desirable for there to be some harmonization of the powers of the CMA to obtain information and evidence under its different powers, and that the relevant powers under the Competition Act 1998 and Enterprise Act 2002 should be reviewed.

The criminal cartel offence
Q.11 *The Government seeks your views on the proposals set out in this Chapter to improve the criminal cartel offence, in particular:* • *the arguments for and against the options;* • *the costs and benefits of the options, supported by evidence wherever possible.*
The CC has no comment to make on this question.
Q.12 *Do you agree that the 'dishonesty' element of the criminal cartel offence should be removed?*
The CC has no comment to make on this question.
Q.13 *The Government welcomes further ideas to improve the criminal cartel offence.*
The CC has no comment to make on this question.

Concurrency and sector regulators

Q.14 *Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?*

The CC does not believe that the concurrency arrangements have worked in the way envisaged when they were established, nor as well as they could to date. This view is supported by the conclusions of the National Audit Office's *Review of the UK's Competition Landscape* (2010). The specific proposals in response to Q15 are designed to address this.

Q.15 *The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the options, supported by evidence wherever possible.*

The CC agrees with the suggestion that the sectoral regulators should be encouraged to use competition powers ahead of other tools where appropriate. The proposals below would support this objective.

The CC supports proposals to ensure that the substantial body of competition expertise assembled in the CMA should be used to benefit the regulated sectors. In particular:

- The CMA could provide a central core of expertise for the sectoral regulators to draw upon.

- However, were CMA staff and sectoral regulators to engage in any joint working, for example in phase 1 market studies or in antitrust investigations, the CMA would need to take steps to ensure that the CMA's roles as a phase 2 decision-making body, as the appeal body for some regulatory decisions and its broader role in reviewing the regulated sectors (see below), were not compromised.

- The CMA will have greater expertise and experience in conducting phase 2 cases under both the Competition Act and the Enterprise Act than any of the sector regulators. It would therefore be logical for it to conduct phase 2 investigations in the regulated sectors, on reference from the relevant sectoral regulator (the regulators would retain the same powers to conduct time-limited market studies in the relevant sector as the CMA would have in other sectors). This would bring greater quality and consistency to competition law enforcement across all sectors of the economy.

The CC does not agree with the suggestion that the CMA carry out a rolling programme of market reviews into the regulated sectors. This would unhelpfully fetter the ability of the CMA to set its own priorities and risk taking resources away from necessary work to review sectors that may in practice not be a priority.

The CC prefers the proposal (in paragraph 7.33 of the consultation document) that the CMA could periodically review the competition work of the sector regulators and publish its conclusions, giving the sectoral regulators a powerful incentive to be proactive in their use of their competition powers and highlighting where they might consider taking further action, including potentially making market investigation references.

Q.16 *The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.*

The CC has no comment to make on this question.

Regulatory appeals and other functions of the OFT and CC

Q.17 *Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?*

The CC agrees that the CMA will be the most appropriate body to consider regulatory references and appeals:

- It is important to retain a capable and well-resourced body to provide an effective appeal mechanism. CC members and staff have developed significant knowledge and expertise in these areas, and are familiar with the necessary procedures. They are experienced in and equipped to do work like that associated with price control appeals, where a rapid decision on a corrected price control is appropriate, rather than remittal. Such work is highly numeric in nature, which the CC is better placed to carry out than the CAT.

- The CMA would have an advantage over an independent appeals body in being able to exploit synergies with competition work, and would be able to handle better the variable case load. Price reviews take place at defined intervals and many appeals are associated with these. The level of staffing at an independent body would have to cope with peaks and potential peaks (the potential for appeals following a major regulatory decision may be high, while the number of actual appeals may be low) in workload.

- Regulatory appeals require expertise and knowledge relating to regulatory economics, regulatory accounting, financing and cost of capital assessment, the specific industry and regulatory regime, along with general legal, micro-economic, accounting and commercial appreciation. The CC has members and staff with specialist knowledge of financial markets and corporate finance (which is also deployed in merger and market investigations). CC decision-makers include some with general and specific regulatory and sectoral expertise and others with a broader perspective used to working with complex markets.

- The CC's ability to undertake market investigations and impose remedies in regulated sectors (eg BAA) is complementary to the appeals role—both require a high degree of knowledge of the economics of the regulatory regime and of the sector. This synergy benefits both regimes. Experience in regulatory affairs helped the CC in imposing a regulatory reporting requirement on Aberdeen Airport as a remedy in the BAA airports market investigation.

If the CMA takes on these roles, these advantages will be maintained. There may be some risk of perceived tensions with some of the CMA's other roles, such as working with or receiving references from the sectoral regulators. But the separation of decision-making required is no more challenging than the separation the CMA will have to manage between phase 1 and phase 2 scrutiny of mergers or markets.

Q.18 *The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.*

Although the CC considers that there are potential merits to this proposal, it does not consider it practicable to mandate such an approach.

Scope, objectives and governance

Q.19 *The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.*

The CMA does not consider it necessary to provide statutory objectives in addition to the statutory powers and duties which the CMA will have. Should the Government decide to enshrine objectives on the face of legislation, they should be:

- broad enough not to limit the CMA's discretion nor to risk becoming outdated; and
- couched so as to encompass all of the CMA's powers and duties.

The CC is not persuaded that it will be possible to draft statutory objectives that strike the right balance between undesirably fettering the discretion of the CMA, and being so general as to be meaningless.

For similar reasons, the CC does not agree with the proposals to place a duty or objective to keep certain markets under review. This would fetter the ability of the CMA to direct resources where they are most needed. A better alternative would be to require the CMA to set out (and publish for comment) a programme over a set number of years, with the markets for review to be decided as the CMA sees fit.

Q.20 *The Government seeks your views on whether the CMA should have a clear principal competition focus?*

The CC believes that the CMA should have a clear focus on competition. Diluting it with consumer protection law enforcement powers would:

- risk distracting from its competition focus;
- provide temptation at case level to use consumer protection law enforcement rather than competition powers to fix a competition problem; the CC considers this less likely to be effective; and
- dilute consumer enforcement resource and expertise across many agencies; the CC understands this to be counter to the Government's intentions for the consumer enforcement regime.

The CMA should have the interests of consumers at heart in its application of competition law. But the CC has not found it necessary to have powers to enforce consumer protection law in order to address demand-side issues inhibiting effective competition in markets. It has acted itself to remedy problems on the demand side of markets (for example, improving information available to customers and encouraging switching in the Home Credit market investigation) and successfully recommended action by others.

Q.21 *The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.*

The CMA will be very different from both the CC and the OFT, combining many of the functions of both. The current governance structures of the CC and OFT are fit for their purposes. But the CMA brings together tasks which are currently separated and the CMA needs a purpose-designed structure consistent with principles of good governance.

A new governance structure should adhere to the following principles:

- To give effect to the separation of phase 1 and 2 decision-making, there should be no role for any phase 2 decision-maker in making references, nor any role for anyone involved in deciding to initiate or refer cases in phase 2 decision-making.
- The structure should impose checks on the powers of any individual.

- The interests of decision-makers at both phases should be represented and balanced on the board.

It may be possible to give effect to these principles in a variety of ways. The CC believes one such model could be as follows:

- The CMA should have a supervisory board accountable to Parliament (and the sponsor department) for the strategy and management of the organization.

- The board should not be directly accountable to Parliament for individual case decisions, nor should it take any casework decisions itself. The CMA is accountable to the courts (the CAT in the first instance) for the quality of its decision-making.

- The board should hold the executive to account for the running of the organization—for use of resources, financial and risk management, the timeliness and quality of its casework—but not the decisions made.

- The board should be chaired by a non-executive, who could take a leading role in representing the CMA publicly. We believe that the board should be predominantly non-executive, with only a minority of executives.

- An Accounting Officer appointed by Ministers would take charge of the day-to-day running of the CMA, and would be an executive member of, and accountable to, the supervisory board.

- He or she would be responsible for resource deployment and all operations of the CMA including compliance with law, duties, guidance, rules of procedure, and might play some public advocacy role.

- He or she might want to convene an executive board of senior colleagues to manage the organization.

- A pool of full- and part-time panellists, appointed by Ministers for a fixed term, would (in groups) determine phase 2 merger, market and antitrust references and regulatory appeals in line with published rules/guidance.

- A head of the body of phase 2 panellists would appoint groups from among the panellists (and advise them), and would be an executive member of the board.

- None of the phase 2 panellists could have any role in case initiation or making references.

- A head of phase 1 would also be a ministerial appointment and an executive member of the board responsible for case initiation and references to phase 2. He or she might be obliged to involve or consult senior professional staff when making reference decisions.

- CMA staff would all report (ultimately) to the Accounting Officer and could be deployed flexibly across the various activities of the organization.

The main attributes of this model are:

- its underpinning of a model of executive decision-making for phase 1 activities and member panels determining phase 2 cases;

- the supervisory nature of the board, accountable for the CMA's activities but not for individual decisions;

- the majority non-executive nature of the board; and

- the balance in the executive between the interests of the different phases and the day-to-day management of the authority.

Decision-making

Q.22 *The Government seeks your views on the models outlined in this Chapter, in particular:*

- *the arguments for and against the options;*
- *the costs and benefits of the regime and to business, supported by evidence wherever possible.*

The CC believes that the system of decision-making in the CMA should be based on the current phase 1 and phase 2 separation in place for merger and market investigations. This system is one of the features of the UK system that gives it its reputation for fairness and robustness. It needs to remain in place for merger and market investigations and could usefully be extended to antitrust.

Phase 1 decisions should be taken by executives, though care should be taken in structuring the organization to ensure that these decision-makers do not have influence over phase 2 decisions. Although some continuity in case teams across phases provides some continuity of knowledge, it also carries the risk of perception of confirmation bias.

The phase 2 decision-makers should be wholly separate from phase 1 to avoid confirmation bias. The independence of phase 2 decision-makers and the fresh pair of eyes they bring to the more detailed scrutiny of the case are important safeguards which give credibility and legitimacy to the decisions they take, which can do significant economic damage to the interests of parties.

The CC does not support the introduction of executives or non-executive board members into phase 2 panels. This would reduce the independence of the phase 2 process, and does not in return add anything extra that members, including a full-time Chair, do not already provide.

CC members are clear that their experience, expertise and judgement is as valuable in merger inquiries (where decisions often hinge on business judgements about the health of a firm or the likelihood of a particular market development) as in market investigations.

The CC does not support the proposal to have phase 1 and 2 decisions taken by different executives. It is not clear what weakness in the current system this proposal seeks to remedy. Moreover:

- This form of separation provides a much weaker safeguard against confirmation bias.
- It loses the benefit of the panel's challenge function during investigations (this could only be compensated for at a higher cost).
- Decisions made by executives would almost inevitably have to be more adjudicatory in nature than decisions currently taken by panels, as executives would be overseeing more cases and could not get so involved in the detail. This weakens the decision-maker's engagement in the case and risks giving rise to decision bottlenecks and additional work.

The CC disagrees with the proposal to change the mergers panel to an adjudicatory one. Having panels involved from the outset of the case promotes effective case management, enables members to steer the direction of the inquiry, avoiding late changes of direction or requests for additional work, and gives parties confidence in decision-makers' close understanding of the issues. It can be achieved at modest costs if members are paid, as CC members are, only for when they work in the authority.

Q.23 *The Government also seeks views on the appropriate composition of the decision-making bodies set out in this Chapter, and in particular what the appropriate mix of full-time and part-time members is.*

The CC considers the current use of part-time members with a few full-time panel chairs to be the best approach.

Full-time chairs develop expertise in managing cases, and can draw on the experience of multiple cases as well as their own professional background, experience and judgement in deciding on cases. They can work closely with the staff team and regularly exchange case experience and insights.

These interactions, and input from senior professional staff to group discussions, contribute to ensuring the requisite degree of consistency in decision-making: consistency with the law and with the CC's published rules and guidance.

The use of part-time members allows for a variety of people with particular expertise to take up the role. The CC currently has six professors of economics and one of accounting, continuing a long-established pattern of input from a variety of relevant academic disciplines. It also has eight former senior competition law practitioners and eleven senior business people, most now with largely non-executive responsibilities and/or portfolio careers. They bring expertise, experience and judgement to decision-making. Requiring more of a commitment of them would result in a different mix of people willing and able to commit to the role, and some of the benefits associated with the diverse back-grounds of our members would be lost. For example, we would be unable to include practising academic economists if they were unable to be members without giving up their current positions. Recent experience trying to fill deputy chair vacancies, both from among the current membership and from beyond, suggests that there is a relatively small pool of people of sufficient calibre willing to make this form of commitment (and contrasts with the greater numbers generally willing to seek part-time roles).

Moreover, full-time members could not be remunerated on an hourly rate as part-time members are. As salaried employees, their remuneration would be higher (roughly twice the hourly rate of a part-time member) and their cost to the authority would become fixed; unlike part-time members, we would continue to pay them even when the workload is low.

Were the pool of members to be smaller (even if the overall time available were unchanged), the risk of conflicts and competing inquiry pressures on their time would increase, making it more difficult to staff cases appropriately. The breadth of expertise and views brought to bear on any case would inevitably decrease, and the perceived independence from the organization of the decision-makers could be compromised.

Q.24 *The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process*

The CC has nothing further to add in response to this question.

Merger fees and cost recovery

The CC has no comment to make on most of these proposals (but see response to question 32 below)

Q.25 *What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/ mandatory notification regime?*

Q.26 *Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons*

Q.27 *What are your views on recovery where there has been an infringement decision being based on the cost of investigation?*

Q.28 *What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?*

Q.29 *Do you agree that this would be an appropriate way to collect the costs, separates the fine from costs in a way that makes appeals clear and that the costs should go to the consolidated fund rather than the enforcement authority?*

Q.30 *Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?*

Q.31 *Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?*

Q.32 *Do you agree that telecoms appeals should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing? If not, your response should provide reasons supported by evidence where appropriate.*

The CC agrees with the principle that unsuccessful appellants should meet the CMA's costs. This would limit the cost of appeals to the public purse and has the potential to discourage ill-founded grounds of appeal, without limiting parties' appeal rights. The principle could also be applied to other appeal regimes as well as to telecoms appeals.

The CC believes that it would be helpful for the CMA to have discretion on how best to apportion costs, as courts have. In deciding how best to do so, it would be likely to take into account the extent to which appellants had been successful and unsuccessful in their appeals.

Q.33 *What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?*

Overseas information gateways

Q.34 *How well is the current overseas information disclosure gateway working? Is there a case for reviewing this provision?*

The CC has no comment to make on this question.

Questions on the impact assessment

The CC has provided extensive evidence to BIS both for the original impact assessment and for its subsequent revision of it, and will continue to do so as far as it is able.

It will be important to set out the costs and benefits of the proposals, and the opportunities and risks associated with them, clearly.

Q.35 *Do you have any evidence about the costs to businesses of notifying mergers to the OFT, in terms of management time and legal fees?*

Q.36 *Under a prosecutorial system, are there likely to be changes to the overall costs of the system?*

Q.37 *Do you have better information about the costs and benefits of the current competition regime?*

Q.38 *Do you have evidence that indicates better assumptions could be made to estimate the costs and benefits of the proposed options?*

Q.39 *Are there likely to be any unintended consequences of the policy proposals outlined?*

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Mr Duncan Lawson
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31 May 2011

Dear Sir

BIS Consultation Document : "A Competition for Growth"

Competition Law Process Management Limited welcomes the opportunity to comment on the UK competition regime. In this response we focus on what we regard as the least satisfactory of the current arrangements, namely those concerned with the Antitrust regime. This response therefore addresses Questions 1, 8 , 10, 21 and 26 of the Consultation Questions.

The role of Competition Law Process Management Ltd is to assist clients, largely corporate clients, in the management of competition matters. Our perspective is therefore commercial and not legal. We believe that Antitrust activities damage the interests of legitimate companies and their customers and should be pursued in an effective manner by the OFT. We should be happy to supply further information. A copy of this submission will appear on our website.

This submission is in three Parts. Part One draws out certain points made in your Consultation Document. Part Two identifies the issues which we consider need to be addressed. Part Three explores ways of approaching these issues in the context of the Consultation Questions which you have posed.

Part One : Points from the Consultation Document

The issues with the current administration of Antitrust by the OFT are conveniently illustrated by the Construction case referred to in Box 1.1 on page 12 of your Consultation Document.

First, although you refer there to "penalties totalling £129.2m" imposed by the OFT in this case many of these fines have since been reduced significantly on appeal. Indeed the press (eg The Times 12 March and 24 April 2011) has referred to the OFT as being "embarrassed again" and suffering a "humiliating blow" in respect of these appeals.

Secondly, as you record in Table 2 on page 147, the Construction case had already taken 58 months and "25 companies are appealing to CAT – no time added as case remains live".

The Construction case involved a practice known as "cover pricing" and the third issue is illustrated by the CAT's observations (at paragraph 103) in its appeal judgment in that case delivered on 24 March 2011 : "*The OFT accepted in the Decision that cover pricing was widely regarded as legitimate, and that the practice was long-standing, widespread and endemic throughout the industry. As explained above, by the autumn of 2006 the OFT had evidence of cover pricing involving over 1,000 companies and over 4,000 tenders, and the sheer volume and extent of the practice led the OFT to limit the number of infringements which it would pursue. The OFT also accepted that a motivation for the conduct was a genuine and widespread perception within the industry that if a company did not participate in a tender process when invited to do so it ran the risk of exclusion from tender lists, and that in certain cases this risk had materialised. Nor does the OFT dispute that the conduct was aimed at saving the otherwise wasted costs of preparing tenders for work which is not wanted."* It is clear, therefore, that the defendants in the Construction case were engaged in an activity which at the time was widely practised and was widely believed to be lawful.

These three features – heavy headline penalties leading to lengthy appeals, long delays in completing investigations and an equivocal legal basis for the case – are three features which appear to be common in OFT Antitrust investigations and they contribute both to the small number of new cases brought in the UK by the OFT and to the high average duration of cases (illustrated in Table 5.1 on page 47 and Figure 1 on page 151 of your Consultation Document) and also to the resulting high cost per successful case. You mention, at page 47, that the Tobacco case is still before the CAT "eight years after the OFT opened an investigation" and the Dairy Products case, which you do not mention, is even more significantly delayed. It was launched formally with a statement of objections in September 2007 and related to activities in 2002 and 2003. It is still on-going.

Part Two : Issues to be Addressed

Why do OFT Antitrust investigations suffer from these recurrent problems ? In our corporate experience over a number of years we have identified five issues which we see repeatedly with OFT Antitrust cases.

1. The size of the case.

The Construction case, as you say on page 12 of the Consultation Document, involved penalties on 103 companies. The statement of objections was issued originally to 112 parties (OFT Press Release 52/08). The Tobacco case (OFT Press Release 56/08) was begun against 13 parties and the Dairy Products case (OFT Press Releases 134/07 and 170/07) against 10 parties. The Tobacco case currently on appeal before the CAT involves half a dozen QCs and about a dozen other barristers plus innumerable solicitors and experts, perhaps 50 expensive professional people in total. The case appears to be too large to fit into any of the CAT's court rooms. Yet the OFT's allegations do not link most of these defendants. They just happen to have been caught up in an unwieldy and inefficient mass appeal of largely separate allegations. With these big cases the OFT simply bites off more than it can chew. As a result the cases last for such long periods of time and cost so much money (to innocent, guilty and the public purse alike) that justice is not being done. Worse, the CAT has power to refer the whole matter back to the OFT to start all over again.

2. The turnover and management of OFT staff.

In a case such as the Tobacco case, lasting as you say for more than eight years, the OFT's case team constantly changes and no-one has senior management responsibility for the case from beginning to end. Consequently there is no proper accountability for the public money expended : once a case has started no-one seems to ask whether the continuing case is value for money. This is illustrated by pages 50 to 52 of your Consultation Document, where you set out the administrative "improvements" which the OFT has only recently introduced or is now considering in response to the current scrutiny.

3. The high headline penalties

Companies who are fined in aggregate £129m, as you indicate in the Construction case, or £225m (OFT Press Release 39/10), as in the Tobacco case, seem to have little option but to appeal. This is particularly so when point 4 below is taken into account.

4. The equivocal legal base of the cases.

Antitrust is a serious matter, and given the relatively small number of cases brought by the OFT one would expect them to feature hardcore Antitrust activities in the commanding heights of the economy. In fact, as is illustrated by Tables 2 and 3 on pages 147/8 of the Consultation Document, many of the sectors investigated are second order, and it is often the case (as with Construction) that the legal point pursued by the OFT, far from being covert or damaging to the consumer, is in relation to activities which are in fact widely publicised, widely known, widely practised and being undertaken without any or any significant adverse financial impact on consumers. Indeed in the Dairy Products case the matters now complained of were extensively discussed at the time in the trade press and in Parliament.

5. The opacity of the OFT process

The OFT seeks to maintain secrecy during its investigations, and there is no procedure short of judicial review for questioning its process as interim decisions are taken by the OFT during investigations which may last over several years. The OFT acts as investigator, prosecutor and judge imposing heavy fines, but the protections afforded by the Criminal Justice system, and even the Civil Procedure Rules, do not necessarily apply. In addition, the Chairman of the OFT has stated (15 May 2008) that : "any information which is provided by the OFT during the course of an investigation, including for example the contents of a statement of objections, should not be disclosed to the press or others ... The OFT will look to take appropriate action if this happens". The OFT itself feels free to issue press statements, but companies (who may be listed on the Stock Exchange and thus under an obligation to advise the market) are restrained from commenting while the OFT investigation is under way. And, as with the Dairy Products case, OFT investigations can apparently last indefinitely. In Antitrust cases the OFT operates in a brackish backwater, spending public money while protected from investigation by the Courts or by the media.

In a seminar at the Competition Commission on 15 March 2011, in considering the proposal to merge the competition authorities, Dr Mark Williams of NERA pointed out that "The decision whether a competition issue exists, and the origin of that issue, is a complex matter involving significant judgement. This must be undertaken by a group of experienced, qualified individuals

acting with professional economic and legal support". Elsewhere in the paper he sets out the level of experience he feels is required in making these judgements : "competition law partners of major law firms, leading counsel, senior case handlers of major economic consulting firms, academic economists or academic lawyers of high standing and regulatory experience, or long-serving competition decision makers with significant skills in competition law or economics".

We do not see this at the OFT. In multi-million pound cases we see important decisions taken by relatively junior civil servants who frequently rotate between OFT roles and out of the OFT altogether. We do not see significant experience involved in Antitrust cases, and indeed that is partly why the OFT makes such a poor choice of cases.

Part Three : How can the System be Reformed ?

If these are the issues, what can be done to remedy them ? We address this matter by responding below to the appropriate Questions among your Consultation Questions.

Question 1 : Objectives for reform

Answer : We note that your objectives are closely related to the issues we have identified above and we therefore agree that they should be pursued. Specifically,

- A more robust decision-making structure should ensure that the OFT ceases to devote resources to the investigation of cases with an equivocal legal basis in second order economic sectors and starts to investigate hardcore Antitrust cases

- Taking forward the right cases should ensure that there are fewer time- and resource-consuming appeals against the OFT's decisions and the levels of fine imposed.

- Improving the speed and predictability of cases should reduce overall legal and associated costs and turn the OFT into an effective real-time regulator. We comment on predictability in response to Question 10.

Question 8 : Options for Strengthening the Antitrust Regime

Answer : We do not consider that Option 1 (to retain and enhance the OFT's existing procedures) would ensure improved efficiency. Although we note that some of the proposals set out on pages 50 to 52 of your Consultation Document address some of the issues we have identified we believe that it is too little, too late. It should not require an expensive Consultation exercise to encourage the OFT to propose improvements to remedy obvious long-term deficiencies in its administrative procedures.

We consider that Options 2 and 3 each offers some prospect of improvement and we consider that they should be considered against the further comments we make below in response to other Questions.

Question 10 : Other Ideas to improve the Antitrust Process

Answer : We consider that the following ideas should be considered.

- The OFT requires a clear management structure, not unlike that of a commercial organisation, with a Chief Executive answerable to a Board of Directors for the delivery of agreed activities against the input of agreed resources. Lawyers, economists and other competition experts should fall within the structure reporting to the Chief Executive.

- Like any commercial organisation, the OFT should supply expertise in-house or buy this in from the market as indicated by the rational and efficient allocation of its resources.

- Where the OFT comes across activities which are borderline or equivocal (as in the Construction and other cases) then it should be prepared to enter into discussion with the parties involved with a view to terminating those arrangements of which it disapproves without costly enforcement actions. An analogy might be made with the use by the police of their discretion.

- Indeed where, as in the Construction case, the parties may be unclear as to whether the activity they are engaged in is legitimate or not then it would be sensible for the OFT to offer a without prejudice advisory service, along the lines of previous advisory procedures for obtaining guidance on possible mergers.

- If necessary, after consulting sponsoring Government Departments, the OFT should be empowered in the public interest to negotiate the termination of borderline or equivocal activities over an agreed timetable. This would ensure orderly and predictable enforcement.

- If (as in Construction and other cases) there is a difference of opinion over whether certain activities constitute Antitrust activities and an industry wishes to continue them against OFT disapproval then the OFT should be empowered to undertake a test case, without the cost and complications of pursuing a multitude of parties. An analogy might be made with HMRC.

- In order to understand different markets, and to evaluate market practices, the OFT should work closely with companies and their trade associations. An analogy might be made with the Health and Safety Executive.

- Indeed if the OFT decides to undertake an investigation of a company then it should communicate this fact to the company. At present the OFT can pursue an investigation over several years before issuing a statement of objections, which may be the first time the company has been made aware of the investigation. By then the OFT will have committed itself to a position and may, for example, have drawn conclusions about the meaning of a document without any discussion with the company about the context in which the document was produced. In the past the OFT's misunderstanding of such matters will have led to unnecessarily costly and formal exchanges.

Question 21 : Proposed Governance Structure

Answer : We consider that the three current functions of the OFT in Antitrust cases – investigatory, as prosecutor and judicial – should be separated so that a fresh and informed view is taken at each

stage. We also believe that the OFT should be subject to formal and established procedural rules as appropriate either for criminal or for civil cases.

We consider that the OFT should have a Chief Executive accountable to a Board of Directors. The Board should so far as possible comply with the Combined Code for listed companies and should contain a majority of non-executive Directors, preferably with a range of public and private sector experience. Whether the Chief Executive is supported by an executive committee, and if so its membership, should be a management matter exclusively for the Chief Executive.

Question 26 : Cost Recovery

Answer : We consider that the OFT's activities should be conducted in a way which is entirely independent of the consideration of any fines which may ultimately be recovered. Any link between the two matters is likely to distort the decisions made by the OFT. We therefore believe that the OFT should be funded from the public purse and any fines paid into the public purse, without any hypothecation.

We consider that the OFT's current practice of seeking high headline penalties inhibits what should be its principal role : by a combination of carrot and stick to ensure compliance with Antitrust law, guiding industry on good practice and penalizing hardcore cases whenever these are exposed.

We hope this submission is helpful. We believe that the object of the reform of the OFT should be to transform it from a body currently engaged in expensive and largely historical research into an effective real-time regulator for Antitrust matters.

Yours sincerely

R C N Davidson CBE
J P Price
Directors

Consumer Focus

A competition regime for growth: a consultation on options for reform – Consumer Focus response

The Government's review of the UK's competition regime provides a welcome opportunity to embed and sustain the many excellent features of the current regime whilst strengthening and improving its efficiency and effectiveness of the regime. Consumer Focus, the statutory consumer watchdog, is pleased to contribute to the Government's consultation on competition regime reform.

Effective competition and properly functioning markets are essential ingredients for sustainable economic growth and job creation, and are of profound importance to the achievement of the Government's economic agenda. They are also crucial for the delivery of important benefits to consumers: choice, value for money, quality products and services and dynamic improvements as a result of innovation. Effective competition reduces the need for intrusive regulation, which can be costly and have unintended consequences. As the UK's main consumer advocate, we consider that interventions to promote effective competition – wherever it can be achieved – are a vital part of the armoury of policy responses needed to deal with problems of consumer detriment.

We therefore support the Government's general objectives for reforming the competition framework, and in particular the emphasis on ensuring that the right cases get selected – which means focussing hard on the areas of greatest public advantage from competition interventions – and on improving the robustness and speed of decisions. But it is essential that in reforming the framework, any changes strengthen and improve the current regime rather than inadvertently weaken it.

We are for example concerned by what appear to be arbitrary distinctions between consumer and competition issues and the characterisation of the Consumer and Markets Authority (CMA) as a 'pure' competition body.

To this end we urge the Government to reform the regime along the following lines:

1. **Design the new Competition and Markets Authority from first principles**

We fully support the proposal to bring together work currently carried out by the OFT and the CC into a single competition authority with a broad span across the economy. We can see synergies and scope for improved process and outcomes by bringing work together into a single body. We would urge the Government to take the opportunity to design the CMA as a modern competition and markets body based on the functions it needs to carry out to deliver a coherent, efficient, fit for purpose entity, rather than take the alternative approach of bolting together predecessor organisations.

Criteria that we would like to see built in to the Government's blueprint for the new organisation include:

a) Clear over-arching objectives with a strong emphasis on the consumer interest

The new organisation needs to be based around:

- A clear and universally applied set of criteria for understanding the public interest, and within that the consumer interest
- An agreed methodology for assessing detriment
- A clear evidence base for policy positions taken.

b) Listening and connected

The new organisation will need to build and maintain mechanisms for:

- Gaining insight into public and consumer concerns and experiences
- Understanding the diverse interests arising in different sectors of society, and in particular nations, regions, communities and minority groups
- Picking up market intelligence
- Leveraging the input of experts in all relevant fields
- Understanding the position of stakeholders of all kinds, including government and business
- Effective networks of consumer and public interest bodies in all areas where this will assist with the organisation's objectives
- Empowering feedback from all involved in its work
- Independent monitoring of the impact of its investigations.

c) Flexible and fleet of foot

This means:

- Priorities should be set on the basis of where competition investigations have the potential to make the biggest incremental difference
- An ability to deploy and redeploy resources swiftly and effectively across the organisation, with a flat, flexible structure
- Facilitating cross-sectoral working and comparisons especially where there is evidence of similar types of competition constraint in different areas e.g. account switching
- Learning from the results and impact of previous CMA investigations.

d) Independence from vested interests

The OFT and CC have in recent years had a good record here, and their work has received strong international recognition. But it is vital that this is retained.

There must be complete independence from Government. In this context we do not support the proposal to allow specific Ministerial requests for the CMA to investigate public interest considerations in cases other than mergers. This may in our view put at risk the CMA's independence or the perception thereof.

There should be a strong and independent Board, drawing on the widest possible range of expertise and experience, including consumer experience, and able to set clear strategic and operational goals for the organisation as a whole.

We support the model of part-time members on enquiries although there should be fewer than the CC currently has, in order to build individual expertise and produce greater consistency, and they should have greater breadth of experience than is presently the case.

2. Set a clear statutory framework

In our view it is essential that the new CMA is given clear and unambiguous statutory objectives. At the heart of these should be:

- to maximise the benefits of competition for the UK economy as a whole and
- to ensure that markets work in the interests of consumers.

We recognise that the CMA might also have an important role as an advocate for competition generally, e.g. in debates on wider public policy issues, but we think this should be secondary to the more tightly defined objectives set out above. Clarity of purpose and objectives, laid down in statute, is crucial in terms of enabling bodies discharging public functions, like regulators or competition authorities, to focus and prioritise their work, and to be held accountable for what they do.

We also think it will be necessary to develop a series of '*have regard'* obligations, which should include in particular:

- the interests of consumers who are vulnerable either because of personal characteristics or circumstances
- the interests of consumers in the UK's different nations and regions, and in remote areas
- the interests of younger and older consumers and those with disabilities
- the interests of future consumers as well as consumers today.

It may be helpful here to draw together a list of examples from the statutes of other regulatory bodies as a means of identifying appropriate parallels.

We welcome the proposal that economically-important markets are kept under review by the CMA and consider that this should include markets that are of particular importance to consumers, for example where they provide essential services and/or represent a particularly large proportion of consumer spending.

3. Maintain concurrency but improve coordination between sector regulators

We support the view that sector-specific economic regulators should retain concurrent competition powers and agree the desirability of having consistently strong obligations on all sector regulators to use competition powers wherever appropriate.

In view of the strong consumer interest in regulated markets we believe there is great merit in developing a dedicated expert consumer advocacy unit to represent consumer interests in sectors subject to economic regulation. This unit would have a vitally important role in relation to the CMA as well as the sectoral regulators – it would be a source of expertise both on specific sectoral issues and on cross-cutting issues. We would expect it to be a regular contributor to the CMA's investigations adding very substantial value especially where the consumer interest is complex and the consumer voice otherwise weak. A unit of this kind would also be in a strong position to help the CMA identify cross-sectoral issues and remedies and to prioritise future work plans. We have attached a more detailed note on this.

With regard to financial services we support the inclusion of a statutory objective to promote effective competition for the new Financial Conduct Authority, which would also allow the development of arrangements and relationships parallel to those currently in place between the competition authorities and regulators such as Ofgem and Ofcom.

4. Strengthen and enhance the super-complaint regime

Openness to super-complaints should be an important feature of the CMA as an organisation, which should substantially enhance its effectiveness.

Super-complaints are a highly effective, relatively low-cost mechanism for enabling issues which give rise to significant consumer detriment in markets that are not working properly to

be properly investigated by a body with the skills, status and statutory powers to take action to put things right. Consumer Focus believes it is essential to maintain and further strengthen the supercomplaint regime in the new landscape.

In our view it is essential that the integrity of the current super-complaint regime is retained. We recently convened a roundtable of bodies with super-complainant status, and the general view was that this has been a very useful tool in the armoury of consumer bodies, leading to tangible action to reduce consumer detriment. There was however a shared view that the regime could be improved. The participants are writing separately to BIS about our shared conclusions. Key points include: the need for faster outcomes for consumers; more learning across markets; more and better evaluation of remedies; and clear and consistent expectations by regulators of consumer bodies in line with the OFT guidance. We consider it important that the new body should not place unnecessary burdens on organisations making super-complaints.

The CMA should be able to receive super-complaints in the full range of issues that may give risk to consumer detriment, as at present, because of the inextricable links between dysfunctional demand (or consumer) side of markets and the proper competitive functioning of the market. It is suggested in Chapter 9 of the document that consumer organisations' market analysis is similar to OFT's market studies, with the proposal that consumer bodies could conduct what are described as 'pure consumer studies'. We are unconvinced by this analysis, and think the document overplays the ease with which consumer and competition issues can be unpicked from one another. One of the successes of the current regime has been a growing understanding of consumer behaviour when analysing competition issues. The approach in the document potentially represents a step backwards and could also have the effect of rendering the super-complaint regime narrower and less effective, with consumer bodies able to refer far fewer instances of detriment to the CMA and other regulators.

We support extending the range of bodies designated as able to make supercomplaints to those who represent small businesses in so far as the problems faced by many micro and very small businesses are similar in kind to retail consumers, but would like to see the regime designed in such a way as to prevent SMEs from challenging efficiency-enhancing practices by larger businesses.

The suggestion that *'only organisations that represent primarily SMEs should be able to qualify as designated supercomplainant*s' (para 3.16) appears to be intended to exclude organisations representing big businesses. This is sensible but there is a danger that this might have the unintended consequence of also excluding bodies that cover domestic and SME consumers. The majority of Consumer Focus's work in the energy and postal sectors is about domestic customers, but we do have considerable insight into SME experiences too. It would be a missed opportunity if the new arrangements prevented us, or our successors, making super-complaints about major issues affecting SMEs as consumers.

Clearly the current criteria applied to super-complaint applicants remain relevant, and it will be important that SME super-complaints should be able to demonstrate amongst other things access to information, in-house expertise, market intelligence, and the ability to understand complex markets and present evidence clearly.

In the current arrangements, only certain regulators can receive super-complaints. The current list does not include the Financial Services Authority, even though six of the 15 super-complaints made so far have been concerned solely with financial services. In such instances, super-complaints are made to the OFT, which then liaises with the FSA. This is plainly an inefficient way of working, slowing things down and requiring the OFT to build expertise on issues where it may not have existing knowledge. The forthcoming

establishment of the Financial Conduct Authority and Prudential Regulatory Authority to replace the FSA provides an opportunity to remedy this anomaly. The healthcare regulator Monitor should also be able to receive super-complaints.

5. Ensure an effective markets regime

We fully support a strong and effective markets regime that includes the use of 'horizontal' powers and the ability to investigate practices across markets. We strongly urge the government to grant the CMA powers to look at any market issues, including but not exclusively structural or behavioural competition issues, that may give rise to significant consumer detriment. Both market studies and more formal investigations need to be carried out by a body with the requisite skills and analytical capability, stature, powers and resources to do the necessary work and achieve results that deliver benefits for consumers and the wider economy.

6. **Maintain the strict independence of the competition and markets function**.

It is essential for the integrity of the competition and markets regime for it to be wholly independent of government, industry and other interests, aligned purely to the discharge of its statutory duty to promote effective competition and markets in the interests of consumers. To this end we do not support the proposal that the CMA should be required to report to Government on request on specific public interest issues (other than mergers, as now) as we believe this could compromise its actual or perceived independence.

7. Ensure effective remedies and deterrence

We believe there should be a review of remedies as part of the Government's review process, learning lessons from other sectors and other jurisdictions. We also recommend a new statutory requirement for the CMA to review the effectiveness of any remedies imposed, say three years after their introduction, as experience suggests that this would be beneficial.

8. Improving effectiveness

There are four key areas where we can see scope for major improvements on the current regime.

First, as the consultation document points out, there is significant potential to streamline processes and shorten timescales for decision making. Both would help deliver certainty and results more quickly for business and consumers alike and we generally support the proposals to streamline processes.

We support the establish of time limits for phase one and phase 2 investigations, with suitable exemptions, although we are concerned that the proposal for an 18-month time limit at phase 2 is insufficiently radical and may be seen as representing business as usual. The new arrangements should aim to speed up both phases.

Second, we are concerned about the extent to which the current system is 'gamed' by some businesses and the increasing use of the appeals process to either buy time or seek to challenge decisions on process rather than substance issues. Either consumer advocate bodies should be given symmetrical powers to appeal competition decisions or the appeals process should be far more tightly bounded, whilst still protecting the proper rights of businesses and individuals.

Third, consumer advocacy bodies should have symmetrical powers of appeal, alongside regulated firms, on decisions taken by economic regulators. This would provide more balance in the wider system of economic regulation.

Fourth, we would like to see more emphasis on collective redress, which is a significant omission from the consultation document.

Consumer representation for the 21st century: a 'Regulated Industries Unit'

Introduction

1 Our booklet '*Regulated Industries and Consumers'* (Consumer Focus, March 2011) set out the enormous challenges for consumers arising from changes taking place in gas, electricity, water, post and communications, rail and airports. These vital services used to be run by state monopolies but have been privatised. All are subject to economic regulation because of the difficulties of achieving full and effective competition.

2 The current structure for promoting and representing consumer interests in these sectors is a patchwork, and different bodies with varying roles and responsibilities represent consumers in different regulated sectors (see Annex). Most of these arrangements date back to when the sector concerned was privatised, or in some cases even earlier. While they have served consumers well to date, the changing economic and policy environment presents new challenges and opportunities, and the UK Government's review of the consumer landscape makes it timely to consider whether alternative arrangements would be more effective.

3 The UK Government's current parallel reviews of economic regulation including some sector reviews, consumer empowerment, and competition and markets policy, also provide important context to any review of consumer representation arrangements. This is of particular importance in view of the pressing need for major infrastructure investment across the sectors concerned, and prospective bill increases for consumers over the next decade.

4 This paper sets out further thinking by Consumer Focus on how a new Regulated Industries Unit (RIU) could best be designed and structured, and the benefits that would flow from such a Unit. Consumer Focus itself is planned for closure by April 2013 and we do not seek in any way to reverse that decision. However, UK Government has made it clear that it does not wish to see any diminution in the promotion of consumers' interests and wants to see most of our functions retained. With this in mind, we have put forward this analysis of what we believe would work best for consumers at least cost to the public purse. It is based on over 35 years' experience of representing and promoting consumer interests across the economy and what is needed for influence to be effective. Economic regulation is a complex business and specific skills and expertise are needed on behalf of those whose voices need to be heard: consumers.

Policy context

5 We have taken account of wider public policy developments over the last year which are relevant to consumer representation in regulated industries. Listed below are the main areas where our proposals will help achieve key UK Government policy objectives:

- **Streamlining and clarifying the consumer landscape**

  Our proposals would enable a further streamlining of current consumer advocacy and representation bodies and result in fewer quangos. The proposed remit for a 'Regulated Industries Unit' would cover water and railways as well as gas and electricity markets, communications, postal services and airports.

The establishment of a distinct and distinctive consumer advocacy body for sectors subject to economic regulation would give greater clarity to all stakeholders in terms of a single body, the RIU, being the 'go to' body for economic regulators, the CMA , government policy makers and regulated firms just as the Citizens Advice service should become the 'go to' body for individual citizens and consumers.

- **More efficient and cost effective arrangements**

We estimate that our proposals could save £5 million to £10 million as against the current arrangements which cost over £20 million. The RIU would not need any tax payer funding, i.e. it should be funded exclusively from industry levies. Indirect savings for consumers could be expected to be significantly larger than this – for example Consumer Focus's recent work on over-payment by customers of Npower led to a negotiated £67 million of refunds to the customers affected.

- **Better co-ordination across sectors subject to economic regulation**

Bringing together consumer representation across all regulated sectors would enable cross cutting generic issues (e.g. smart metering in energy and water, tariff structures /complexity; price review consumer input; universal service obligations; network modernisation cost allocation) to be efficiently addressed, and for best practice in one sector to be promoted more widely. This would achieve strong resonance with BIS's own statement, in its newly adopted 'Principles of Economic Regulation', that says:

'It is important that institutional arrangements recognise interdependencies between sectors and that the effectiveness of policies is not hindered by consideration of regulation in silos'.

- **Putting consumer interests at the heart of economic regulation**

This is UK Government's stated policy; but without independent, well informed and properly resourced consumer input into complex regulatory policy and decision making, regulators will find this difficult to achieve in the face of vigorous and well resourced industry representations. The RIU would work on the basis of well researched evidence properly deployed rather than seeking out media headlines.

- **Greater regulatory stability, to encourage more economic and efficient investment**

Over the next five years £200 billion needs to be in invested in energy, water, rail, airport, post and communications. Over a somewhat longer term a similar figure needs to be invested in energy infrastructure to ensure security of supply and to deal with climate and technological changes. Most of this will be private investment. The greater the regulatory certainty, the lower the cost of capital.

Strong and effective consumer representation in regulatory processes in advance of decisions that affect consumers being taken will help deliver stability to the regulatory system and help ensure security of supply.

- **Ensuring small businesses get a fair deal**

A dedicated RIU could represent the interests of small business users as well as retail (domestic) consumers; small businesses are a class of consumers whose voice needs to be heard if they are going to play a full part in economic recovery.

- **Promoting deregulatory and self regulatory solutions**

An RIU would maintain strong relationships at senior level with regulated firms and promote the spread of good practice, voluntary initiatives and other developments to help reduce the need for formal regulatory interventions. It could use a range of behavioural tools to incentivise good practice.

- **Empowering consumers**

We see an RIU fitting well alongside the Citizens Advice service in helping fulfil the UK Government's consumer empowerment agenda: the advice function would help empower individual citizens while an RIU would provide collective strategic empowerment in complex regulated markets.

Devolution

6 We are conscious of the need to take account of devolution when designing a Regulated Industries Unit and considering its functions.

7 For example, in UK wide regulated industries such as Energy and Post, it will be necessary to make appropriate arrangements to advocate on behalf of consumers in the devolved context , both to ensure that the issues arising for consumers in the devolved nations are adequately heard and reflected in the development of UK wide policy, and to ensure that early and appropriate influence is exerted over policy initiatives that are (in these areas) within the competence of the respective devolved governments (for example fuel poverty strategies, green energy or energy conservation initiatives, investment in new methods of generation).

8 As an example, the regulated industry of water is within the competence of the Scottish Parliament, with a Scottish regulatory framework and its own consumer advocacy arrangements, and aspects of (public) transport policy, investment and consumer representation are equally within the remit of the Scottish Parliament. Similar issues apply in Wales.

Role, responsibilities and powers of an RIU

9 An RIU could take a number of forms, and options are discussed later, but whatever the organisational design, it would have the following role and responsibilities:

- Promoting the interests of current and future consumers (retail/domestic consumers and small businesses) in gas and electricity, water, post and communications, and rail and air ports, plus potentially other sectors which may in future be subject to economic regulation
- Understanding and being required to have regard to the interests of all consumers including those with disabilities, older people and consumers living in remote rural areas
- Representing the interests of consumers to statutory regulators in the discharge of all regulatory functions that impact on consumers – including for example revisions to licences, price reviews, enforcement and codes of practice
- Representing the interests of consumers to regulated firms and encouraging voluntary market-based solutions as an alternative to regulation
- Promoting the interests of UK regulated industry consumers in Europe and influencing EU legislation
- Representing the issues and concerns of consumers in the devolved administrations in the development of UK wide policy, and representing the interest

10 The statutory powers required for an RIU to operate effectively would be as follows:

- Information gathering powers, so the RIU could undertake independent reviews and analysis where needed, subject to safeguards to prevent disproportionate data requests to businesses and regulators
- Formal rights to be consulted by economic regulators on all matters which affect consumer interests
- Rights of appeal to the CMA and sectoral regulators against high impact regulatory decisions
- Powers to undertake independent research and investigations into matters affecting consumers in relevant markets
- Powers to make a super-complaint to an economic regulator, or to the CMA where cross cutting issues affecting more than one sector are identifed4 Consumer Focus.
- There would need to be clear accountability to Ministers and Parliament (equally in the devolved administrations as and where relevant), to a range of Government departments (BIS, DEFRA,DECC,DfT, DCMS) and, in a different way, to the industries funding the work.

Skills and resources of an RIU

11 Many of the skills required for consumer representation in regulated sectors are generic: the ability to engage with and influence complex regulatory processes; understanding the economics of regulated sectors; the ability to document and analyse how regulated markets work for consumers; a good understanding of behavioural economics and technological issues. Dedicated sector specific expertise would also be required. The scale of work required by a consumer body in regulation industries, even in terms of responding to formal consultations, is considerable.

12 For example in 2010 UK economic regulators issued 150 consultative documents. In addition government departments carried out 75 policy consultations in regulated sectors, and the European Commission issued 36 consultation documents in energy and communication sectors alone. Not all of these require consumer input, but even if 50 per cent did the amount of dedicated work required is considerable.

13 In order to avoid any loss of focus which might result from bringing sectoral functions together, an RIU should be structured with dedicated teams for each sector but with specialist expertise legal, economic and market research working across sectors to maximise synergies, promote cross sectoral learning and make the best use of resources.

14 As indicated earlier, in the main, these markets are UK-wide and it will be important to maintain the flexibility to work in partnership with relevant consumer bodies in Northern Ireland, Scotland and Wales in order to develop a co-ordinated UK wide view where appropriate and to reflect particular needs and conditions in the nations. We also note that the UK Government may consider differing arrangements for consumer representation across the UK and is awaiting the views of devolved governments. Whatever the differing arrangements may be, the dual need to adequately reflect the needs and conditions in the nations in the development of a UK wide view, and to reflect the structure of regulated industries and their regulation (where this is devolved) is critical.

15 The influence of EU legislation on consumer interests across regulated industries is significant and it is important that the voice of consumers is heard when policies are being

formulated. The RIU would work closely with other European consumer organisations and directly with European institutions and regulatory bodies.

16 In terms of budget, the current patchwork of consumer representative bodies in the most relevant sectors (gas and electricity, water, post and communications, and rail and air ports) costs more than £20 million p.a. , comprising £5 million costs to the public purse through general taxation and £15 million in levies on industry. Part of these funds are required for advice work, but around £7 million of industry money would be required on our estimates to fund the advocacy work of the RIU. This should still lead to a net saving of £5 million to £10 million.

17 It should be expected that the reflection of devolution in the structure of a Regulated Industries Unit would result in identifiable resources to work on (sector specific) issues as relevant in the devolved contexts and if necessary a physical presence in the nations .

Conclusion

18 We see major policy and efficiency benefits from the establishment of a dedicated unit to represent the strategic interests of consumers in regulated sectors. Such a unit would cost less than the current system and reduce the complexity of the consumer landscape. It would ensure that complex, cross cutting and fast moving issues that will cost consumers millions of pounds in higher future bills are influenced and determined in a way that really does put consumer interests at the heart of economic regulation.

19 Our rationale is set out in this paper and in our earlier pamphlet of March 2011. We hope this further contribution to thinking on these crucial issues helps deliver the best outcome for today's and tomorrows' energy, communications, transport and water consumers – and possibly in other sectors in years to come.

Annex

Publicly funded bodies representing consumers in industries subject to economic regulation

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland formed by the Consumers, Estate Agents and Redress (CEAR) Act 2007.

It has statutory duties in respect of energy and post but it operates across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do. Consumer Focus has the following powers:

- to investigate any complaint or matter which affects or may affect consumers generally or consumers of a particular description
- to investigate complaints made on behalf of gas or electricity supply consumers and postal services consumers. If these designated consumers are 'vulnerable'
- to give them advice and/or make representations on their behalf
- to investigate the number and location of post offices
- to request that any of the following parties provide information required for the purpose of exercising its functions: the OFT; a designated regulator (Ofgem, Postcomm or Ofwat); any person (to include partnerships, corporate bodies, public and private) supplying goods or services in the course of a business
- to apply to the relevant regulator or to the Court for an order requiring parties to comply with a request for the provision of information
- to make 'super-complaints' about markets that are failing consumers, as a result of our successful application under the Enterprise Act 2002

The CEAR devolves to Consumer Focus Wales, Consumer Focus Scotland and Consumer Focus (Post) Northern Ireland certain representation, information, and investigation functions.

Consumer Council for Water (CCW) represents water and sewerage consumers in England and Wales.

It seeks to ensure that the collective voice of water consumers is heard in national water debates, and that consumers remain at the heart of the operation of the water industry. CCW takes up complaints by consumers if they have tried and failed to resolve issues with their water companies. The Water Act 2003 gives CCW the following functions and duties:

- to have regard to the interests of consumers of water and sewerage services in England and Wales, including certain vulnerable customers and customers that are not able to switch suppliers under the Act's competition measures
- to handle and investigate consumer complaints in respect of water and sewerage companies
- to obtain and keep under review information about consumer matters and the views of consumers on such matters

- to make proposals, provide advice and information and represent the views of consumers to public authorities, water and sewerage companies and others whose activities may affect the interests of consumers
- to provide advice and information to consumers
- to publish statistical information about complaints to and about water companies
- to investigate any matters of interest to consumers that are not necessarily the subject of a complaint

Waterwatch Scotland performs similar activities to CCW but in a devolved environment. The Public Services Reform (Scotland) Act 2010 abolishes Waterwatch Scotland and transfers the functions to the Scottish Public Service Ombudsman and Consumer Focus.

Passenger Focus (rail services consumers in Great Britain and coach, bus and tram consumers in England and Wales) is a statutory consumer body, which aims to get the best deal for passengers in the rail, bus, coach and tram sectors.

The Communications Consumer Panel is the policy advisory body on UK consumer interests in telecommunications, broadcasting and spectrum markets (with the exception of content issues). The Panel provides advice to Ofcom, the Government, the EU and others on how to achieve a communications marketplace in which the communications interests of consumers and citizens are protected and promoted.

The Aviation Consumer Advocate Panel – The Civil Aviation Authority has proposed that this new independent body is set up to represent passengers' interests. This would replace the Air Transport Users' Council, which was abolished earlier this year. Complaints handling will be handled by the CAA's Regulatory Policy Group, to ensure that consideration of the issues that most impact on consumers is at the heart of the Group's regulatory work.

Corker Binning

BIS CONSULTATION PAPER MARCH 2011

"A Competition Regime for Growth"

The Criminal Cartel Offence

Submission of Corker Binning

June 2011

1. Eight years after the commencement of the criminal cartel regime only two cases have come to court. The first prosecution, the Marine Hose case, posed no legal or evidential difficulty for the OFT. All the defendants had already committed and bound themselves to an antecedent US plea agreement in relation to every aspect of their criminality even to the extent that their deference met with the disapproval of the Court of Appeal. The Court said "we have our doubts as to the propriety of a US prosecutor seeking to inhibit the way in which counsel represents their clients in a UK court…". So Marine Hose was a pushover for the OFT and as such, offers no guidance whatever for any issue concerned with the nature of the offence and the ability of the OFT to act as an effective prosecutor.

2. The second prosecution, the BA/Virgin case, is the first and only occasion that the OFT has prosecuted the cartel offence without a guilty plea. The trial, scheduled to open in April 2010, would therefore have been the first opportunity for a judge and jury to consider the issue of dishonesty in the context of the offence. But within a month of the trial's opening the OFT's case spectacularly collapsed. The cause of this setback was nothing to do any difficulty of evidence or with the wording of the offence. Since then the OFT has stated there it has other criminal cartel investigations underway although none of these has yet reached the courts.

3. This paucity of forensic experience was not anticipated when the then government heralded the enactment of the cartel offence in 2002. It was said then that prosecutions in respect of it would send out a strong message to would-be perpetrators. Furthermore that certain types of "hard-core" if not really hard-core cartels were so nefarious that such conduct should constitute a very serious offence for which the sanction of prison time was necessary.

4. Another and often overlooked enforcement innovation which the Enterprise Act 2002 awarded to the OFT was the power to seek a bespoke directors disqualification order (a Competition Disqualification Order) for up to 15 years in respect of complicity in a cartel. It is not necessary for the OFT to prove dishonesty when seeking a CDO. If our research is accurate, since the OFT was vested with the power to seek a CDO in June 2003 it has neither obtained nor ever sought a CDO. Section 204 of the Act has never been used.

5. In the light of this history it is surprising that the Government, instead of exhorting the OFT or SFO (which can also prosecute the offence but has never actually done so) to do more and gain some experience of prosecuting contested trials, is proposing a watering down of the offence by means of removing the need to prove a defendant's dishonesty. The justification for this being that the dishonesty element has made the offence too hard to prosecute.

6. In response to this proposal the first question which should arise is whether, at the level of principle, the element of dishonesty should form part of the offence. Of course when the offence was first mooted by government and later considered during the Act's legislative passage, this element and the rationale for its inclusion in the new offence attracted considerable attention and debate. It did not slip into the Act during a late night parliamentary sitting or, like SOCPA 2005 which created the now to be abolished SOCA, get nodded through in a parliamentary rush on the eve of a general election. The case for change as now advocated should begin with the issue of whether it is proper in relation to an offence which alleges serious criminality and in respect of which the maximum penalty is 5 years that there should no longer be any need to establish an accused's dishonesty.

7. If a reworded cartel offence did not include the requirement to prove dishonesty, this would constitute a remarkable and troubling exception to the tradition of English criminal law when serious criminal conduct is involved. In economic crime, the offences applicable to the serious criminal conduct of individuals created either by the common law (such as conspiracy to defraud and offences or cheating the public revenue) or by statute (such as the Fraud Act 2006) have all included an element of conscious impropriety. Whilst this mental element may be expressed in slightly different terms in the calendar of offences falling within the rubric of economic crime, essentially they mostly require proof of dishonesty. One cannot defraud or cheat by mere recklessness or negligence. Of course there are offences of strict liability applicable to individuals as well as companies but these tend to be summary only offences where the conduct is not nearly so serious as in the more serious offences such as criminal cartel activity.

8. The creation of new criminal offences has usually been preceded by a public consensus that the conduct to be criminalised is that which the majority of the public regard as nefarious or seriously harmful to the public interest. . If those in officialdom contend that a criminal offence needs to be made easier to prove because a jury will otherwise not convict, the first question surely to ask is whether such reluctance reflects a widespread perception that the conduct should not be prosecuted at all. So in the case of the cartel offence, is the perceived difficulty about proving dishonesty rooted in a fear that the public generally believe that anti-competitive activity is best sanctioned by the civil and not criminal law? Without a jury ever having had the opportunity to consider a verdict in respect of this offence, this question remains a real one.

9. The proper interplay between cartel-like conduct which classically is secret price-fixing and dishonesty has, moreover, become something more rather than less important since to the offence was enacted. In the conjoined appeals of Norris and Goldshield in 2008, the House of

Lords rejected the prosecutor's submission that secret price-fixing necessarily amounted to a conspiracy to defraud. Whilst neither appeal was concerned with the cartel offence *per se* the House nonetheless observed (para 60) that "there are problems with the notion that mere secrecy can of itself render the price-fixing agreement criminal." There are thus substantial grounds for contending that even so-called hard-core cartels may be regarded by a jury as not satisfying the high threshold needed in order for the conduct to be rightly criminalized.

10. Before calling for a change so fundamental so as to delete the dishonesty element in order to secure some convictions what is urgently needed is that the OFT gains some experience of prosecuting a contested trial and that there is some "road-testing" of the offence by a judge and jury. There is considerable potential for the OFT to sharpen the tools available to it and for it and the SFO to consider whether the alleged conduct could for example be better prosecuted under the Fraud Act on the ground of an abuse of position or a misrepresentation. It would be a matter of great regret that the offence was diluted in order to pander to some political impulse (whether in the UK or the US) that a need to secure a few convictions trumps the tradition and values of our criminal law. A prosecution of any individual is a very serious matter. A prosecution of an executive for cartel conduct is very likely to terminate their career, win or lose, and risks severe personal and family repercussions. If the offence is as serious as the last government and this one contend, it should not be diluted but should stand as a true deterrent to those bent on real criminality. It is quite wrong to criminalise mere negligence or even sharp practice where the existing civil sanctions for undertakings and disqualification for individuals are a sufficient penalty.

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