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By Email

07 June 2011

Dear Sir

A Competition Regime For Growth: A Consultation on Options For Reform ("the Consultation Document")

I am writing to offer some brief observations on Chapter 5 ("A Stronger Antitrust Regime") of the Consultation Document. I would also like to draw attention to the importance of widening the scope for stand alone civil actions to be brought in the Competition Appeal Tribunal. Although this matter is covered briefly on pages 57 and 58 of the Consultation Document, it has strong potential for immediately enhancing the effectiveness and thereby improving the overall impact, of competition law in the United Kingdom.

I should make it clear at the outset that my observations are personal and, although they follow discussions with the President and several other members of the Competition Appeal Tribunal, they should not in any sense be taken as representing any collective view of the Tribunal.

Whilst I have no view to offer on the merger of the Office of Fair Trading and the Competition Commission (through the creation of a single Competition and Markets Authority ("CMA")) there are some, perhaps self-evident, points to mention in relation to the discussion of antitrust decision making procedures.

Consultation Document: Chapter 5

There is no *structural* feature of the present system of administrative decision-making that would prevent the achievement of the Government's aim for a fast and effective antitrust enforcement system. That system has the benefit of many years of operation in Europe and a decade of experience has now built up in the UK. Considerable time and effort have been expended in exploring how to deal with competition cases. The investigation of these complex matters is difficult work and the competition authorities have naturally had to take time to build expertise and experience. The cases have thrown up a number of novel points and the decisions of the Tribunal have steadily accumulated into a coherent body of caselaw that can provide useful guidance to competition authorities and business in the application of the law. This has been a very significant investment in the practical calibration of the system introduced by the Competition Act 1998.

That is not to say that improvements cannot be made to the present system so as to promote greater detection of cases and swifter enforcement. My understanding is that the OFT already has a number of initiatives underway in this regard and, no doubt, continued improvements can be made by the CMA to build upon the experience already acquired in commencing and managing investigations through to the decision stage. One way in which the enforcement procedure might be aided is if procedural challenges during the investigative procedure had to be brought by way of judicial review before the Competition Appeal Tribunal rather than the Administrative Court as at present. This might allow a faster and cheaper resolution of the issues and

enable the investigation to proceed as quickly as possible. Over time the judgments of the Competition Appeal Tribunal would ensure that a body of caselaw evolved that could form a source of coherent principles to guide investigators in their handling of procedural matters.

Shifting to a new system would inevitably involve a similar cycle of learning and calibration. Conceivably it might take another 5 to 10 years to reach a level of understanding in the operation of the system comparable with the present position. This should not necessarily rule out a radical change to the system but the transitional costs, the disruption to enforcement activities and the time lag involved should only be borne with a very clear idea of the scale of the benefits that are likely to accrue as a result. The obvious risk in changing procedural models is that it does not of itself guarantee a step change in performance. Nor does it guarantee a higher quality of decision making since, as the European Commissioner for Competition has acknowledged, high quality decisions are feasible under both the administrative and the prosecutorial (see below) model. Much will, as now, depend upon the effective deployment of skills in investigation, case management and decision-making . Before deciding to embark upon more radical change, careful thought will be needed as to whether the benefits sought might not be achieved in a more immediate and less disruptive way through incremental improvements in those areas.

If nevertheless, it was thought desirable to move away from the present system it must be recognised that, within the confines of the three options being consulted upon, this involves changing to a system that is prosecutorial in nature whereby the investigator presents a case to a tribunal for decision.

Theoretically a tribunal within the structure of the CMA might be thought useful for this purpose but this would be dependent upon a strained application of principles stemming from the European Convention of Human Rights which might in the long term prove vulnerable to legal challenge as the Strasbourg jurisprudence develops. More importantly, no matter how it is presented, parties are never likely to perceive an internal tribunal as a substitute for the consideration of the case by an external judicial body and this is likely to stimulate appeals or reviews in a system which, with the addition of the process before the internal tribunal, will consist of more stages than at present. This will, in turn, be likely to result in delay and additional litigation cost. Finally, if it is to be independent the internal tribunal will never be able to form a rational and integrated component of the CMA's organisation because it will have to be organised and managed as if it was an external judicial body. Trying to create and manage such an arrangement is likely to be distracting for the CMA and wasteful of its resources especially as an external tribunal already exists.

Moving to a prosecutorial system before the Competition Appeal Tribunal would be relatively straightforward – although a significant effort in re-formatting procedures would be needed in the transitional period. In organisational terms this would be a coherent option for change since it aligns responsibility for detection, investigation and "prosecution" with the CMA and judicial decision making with the Tribunal. It is an entirely rational division of responsibilities. It may also be a procedurally efficient option since it removes the burden on the CMA to reach its own reasoned infringement decision. However, as noted above, speed of process is largely dependent on case management skills, whatever the procedural model and whether a prosecutorial model will be faster than any other model is difficult to predict. Certainly, (as occurred immediately after the implementation of the Competition Act 1998) in its early days there are bound to be a number of cases where parties seek to test the parameters of the system and these cases may take time to resolve as everyone acquires experience of the new system. Nevertheless it might give the CMA a psychological advantage since it could concentrate its energy and resources on building and advancing a case rather than having to defend a decision. Furthermore the prospect for a defendant of having to defend its position in a public hearing before the Tribunal might, in many cases, prompt an early settlement.

The prosecutorial option has tended to arouse a number of concerns. First it has been said that it would result in the CMA ceding control of competition policy to the Tribunal. This overlooks the fact that the

CMA will remain the main instigator in the system, able to choose when and in what circumstances to use its powers of investigation and prosecution not only to deter infringement in established areas (such as cartels) but also to develop the law through test cases in novel areas. The role of the Competition Appeal Tribunal will fundamentally be the same as now – to apply competition law to the particular facts raised in individual cases. Competition policy will therefore largely arise out of the dynamic interplay between cases chosen and advanced by the CMA (according to its policy priorities) and decisions of the Tribunal. This is how legal principles are applied and adapted to suit changing conditions – and is how the present system works. The second issue sometimes mentioned is that the Tribunal may not be in a position to decide on cases that involve an appreciation of economic effects. This overlooks the fact that the Tribunal is a specialist judicial body with a cross disciplinary membership - including several eminent economists and others with economic regulatory and relevant experience. Moreover much of the Tribunal's caseload already involves hearing and deciding matters based on expert economic evidence under its present competition law and telecoms regulation jurisdictions. The third point that has been mentioned is that a prosecutorial system will mean that it will be impossible to have non-infringement decisions and that the useful precedent-making facility provided by such decisions will be lost. This is not correct – the Tribunal's decisions, whether finding infringements or non-infringements will fulfil this function. Furthermore, there is no reason to suppose that the signals that are conveyed to the players in a market by way of a non-infringement decision cannot equally be conveyed by other means such as the reasons given by the CMA for closing a case or an agreed settlement on terms approved by the Tribunal.

Civil actions

Although the subject of private actions is only briefly dealt with in the Consultation Document this is an area where, with relatively little effort, it should be possible to achieve an immediate step change in the enforcement and public awareness of competition law. It is generally accepted that private actions form a vital complement to public enforcement and bringing such an action is the only avenue left open to a complainant whose case, whilst entirely valid and important within a particular business context, may not fit within the overarching priorities and available resources of the competition authority. It is also a matter of wide acceptance that the Competition Appeal Tribunal, with its specialist expertise, provides an ideal forum for the hearing of such cases. Yet the Tribunal's current jurisdiction is confined to follow-on private actions and is subject to a number of illogical and arbitrary fetters which are proving a hindrance to the sensible development of private enforcement in the UK.

By way of background, there are two types of private enforcement: *follow-on* actions (in the sense that they are brought after, and in reliance upon, an infringement decision that has been made by the competition authority) and *standalone* actions (where there may have been no public enforcement action hitherto). At present, the Tribunal has a first instance jurisdiction similar and parallel to that of the civil courts in relation to follow-on actions for damages pursuant to findings of an infringement of competition law by the competition authority. However standalone actions, pursuant to which a claimant must prove both liability and recoverable loss, can be brought only before the civil courts.

There are very cogent arguments in favour of enabling the Tribunal to hear standalone actions for damages and injunctive relief in competition cases brought by harmed parties. Standalone actions alleging an infringement of competition law involve, as often as not, complex questions of fact, law and economics. The Court of Appeal has acknowledged this point and has suggested that "… the problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might, when negotiations between the parties fail, be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers": *Attheraces Ltd v British Horseracing Board Ltd* [2007] EWCA Civ 38, paragraph 7. Since it already deals with precisely such matters in appeals from substantive decisions of the OFT, the Competition Appeal Tribunal is closely acquainted with the legal framework, the relevant case-law and many of the legal and economic concepts which typically arise in competition cases. Moreover

the Tribunal has a proven reputation for fast and effective case management of such cases. As such it should be the venue of choice for parties wishing to enforce competition law. At the very least, parties should have the option of beginning a stand alone claim in the Tribunal.

Yet there is no legislative provision enabling the Tribunal to hear standalone cases. There is little or no sense in this position and indeed the Court of Appeal has recently expressed the view that it is "somewhat anomalous" that the specialist tribunal is entrusted with the decision as to whether an infringement exists or not on an appeal from the competition authority, but is not allowed to address the identical question in a claim for damages: *Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2, paragraph 143.

Furthermore there are a number of technical fetters on Tribunal's present jurisdiction with regard to follow-on actions which are imposed by the legislation without any underlying rationale. These fetters are acting as a deterrent to parties bringing follow-on actions before the Tribunal even though many would prefer to do so for reasons of cost, speed and effective consideration of the subject matter of their claims. The problem areas include:

- A two year time limit (in contrast to the normal six year limitation period in the civil courts);
- A requirement for permission to bring a follow-on claim in circumstances where a relevant decision of the European Commission or the OFT is under appeal;
- A requirement that the follow-on claim must be substantiated in all respects in the exact findings of the competition authority's infringement decision. In practice such decisions often fail to deal with every aspect of a damages claimant's allegations of infringement – and, indeed, that may be quite appropriate from the perspective of a competition authority required to address the entirety of the infringement having regard to the broader public interest. At present the civil courts have the ability under their inherent jurisdiction to inquire into and fill any gaps in the infringement decision. The statutory framework does not permit the Tribunal to do likewise. This is a significant hurdle for parties to overcome and naturally gravitates them, often against their will, to the civil courts.

All these matters require very small fixes which have the support of a wide group of interests. These fixes will bring immediate results in promoting the effective enforcement and increased awareness of competition law at practically no increased cost to the State. A growth in private enforcement should be a very useful development for the CMA since it will relieve some the pressure on its limited resources. The present situation is in danger of allowing the Competition Tribunal's damages jurisdiction to wither because of an obvious anomaly and results in an under-utilisation of the competition enforcement system's capabilities.

I hope these comments are useful in the Secretary of State's consideration of this matter.

Yours faithfully

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13 June 2011

Dear Duncan

Dundas & Wilson's response to the consultation on options for competition reform

This is the response of Dundas & Wilson LLP to the BIS consultation on "a competition regime for growth". Dundas & Wilson is a UK law firm, with experience of advising on the UK competition, markets and mergers regimes in a range of industries. This response is not to be taken to represent the views of any of Dundas & Wilson's clients.

We have not expressly answered all of the questions set out in the consultation.

Question 1 – why reform?

The Government explains the purpose underlying its consultation as being to:

- improve the robustness of decisions;
- support the competition authorities in taking forward high-impact cases; and
- improve speed and predictability for businesses.

These ambitions are entirely unobjectionable, and form a useful point of reference for assessing the effectiveness of any reforms. However, while we welcome improvement of competition enforcement, and believe that a number of the proposals will go some way towards delivering the desired outcome, we query whether major structural reform along the lines envisaged is necessary. While it is apparent that the UK authorities lag behind many of their international peers in the number and speed of substantive antitrust decisions (Chapter I and Chapter II decisions), it is far from clear to us that this is a consequence of any shortcomings in the *structure* of enforcement. The OFT has already identified and addressed a number of shortcomings in procedure, decision-making and prioritisation. The initial indications are that these measures are having some success in delivering the desired outcomes. There is a risk that structural reforms will merely delay the achievement of greater effectiveness. We have set out our concerns in more detail in response to Question 8.

Question 2 – the creation of a single CMA

We believe that, subject to the design of decision-making processes, which we discuss in more detail below, the merger of the OFT and CC to form a single CMA has the potential to deliver greater levels of efficiency, in addition to the cost-savings that can be expected from the merger of two institutions. In particular, a single CMA would be able to achieve more efficient end-to-end case management in market and merger cases, benefiting both the institution itself (and thereby the taxpayer) and businesses that are subjected to its procedures. A frequent complaint from the CC is that it does not control its own case-load. It is entirely dependent on referrals to it from the OFT and regulators. It is therefore difficult to plan resource allocation. A single CMA could allocate staff more efficiently and across its phase 1 and phase 2 work. We have also addressed this issue in response to Question 22. A frequent complaint from businesses referred to the CC is that at the start of phase 2 they are presented with requests for information that are similar, but not identical, to those already received from the OFT in phase 1, imposing an entirely unnecessary additional burden on them. They are also required to educate a new team of officials. While the two institutions have taken steps to address this issue, a single CMA would presumably be able to design investigations in such a way as to minimise the burden of responding to information requests.

Question 3 – reforming the markets regime

Key concerns are that market studies often appear vaguely defined, frequently extend beyond the assessment of competition issues raised in a particular market, and are uncertain in length.

We believe that there should be statutory timescales for both phase 1 and phase 2 investigations. It is notable that the European Commission's energy sector inquiry, launched in June 2005 with the despatch of 3,000 questionnaires to industry participants across the EU, was concluded in only 18 months. The Commission published an issues paper in November 2005 on the basis of which it decided to continue the inquiry. It then issued a preliminary report in February 2006 and a final report in January 2007. It should be possible to achieve similar timescales in the UK, particularly with a single CMA. An overall timescale of 18 months for phase 1 and phase 2, with a reasoned decision to start phase 2 at about the 6-month point should be entirely achievable. At most, phase 2 should take 18 months and phase 1 6 months. Phase 1 should not be capable of front-end extension by means of "informal studies" or consultations. It should be initiated only on the basis of a clearly articulated competition test. It might be worded along the lines of "where the CMA has reasonable grounds for suspecting that there are features of a market or markets that may distort competition etc", in other words, more or less the test currently employed for a decision to make a market investigation reference. At the end of the phase 1 study, there should also be a reasoned and appealable decision, taken by reference to a clear competition-based test, whether or not to refer to a phase 2 investigation. This test should be set at a rather higher level than at present, comparable to that applied in the case of merger references, along the lines of "where the OFT believes that it is or may be the case that features of a market or markets distort competition etc". This higher standard for initiating and deepening market investigations would be balanced by the introduction of formal powers of investigation at phase 1.

Question 6 – the approach to notification

We believe that a move to a mandatory merger filing regime is logical, bringing the UK into line with most other jurisdictions. Accompanied by mandatory suspension, it would avoid the potential harm caused by pre-emptive action and the difficulty of imposing remedies in the case of completed mergers. We do not believe that a mandatory regime represents the only way of achieving this objective, however: provision for reinforced interim remedies along the lines outlined at paragraphs 4.12 to 4.15 of the consultation document would achieve many of those objectives with less adverse impact on the vast majority of (innocuous) mergers.

In the event of a move to a mandatory regime, we very strongly oppose setting the thresholds at a figure of £5 million for the UK turnover of the target and £10 million for the turnover of the purchaser. These thresholds would be entirely disproportionate, and would make the UK test one of the most easily satisfied among developed merger regimes, if not in the world. The UK would undoubtedly be perceived by the global competition community as a "rogue" regime. This would have an adverse impact on the perception of the competitiveness of the UK. We note BIS's acknowledgement that setting the thresholds at these levels would be likely to result in 1,190 filings per year. This compares with the 50 or so voluntary filings made in 2010. The burden on businesses would be significant; the burden on the CMA would probably be intolerable.

A reasonable compromise might be a hybrid regime along the lines described in Option 2 at paragraph 4.28 of the paper, although allowing the CMA to investigate down to the level of the small merger exemption (not the share of supply test). The upper turnover threshold might also be set rather lower than the current figure of £70 million (perhaps at £40 million or £50 million), thereby permitting automatic review of a larger proportion of mergers. In the case of non-mandatory filings, the CMA's ability to investigate effectively could then be accompanied by more effective interim measures, possibly including automatic suspension/non-integration in the event of an information request. This would strike a balance between not imposing a disproportionate burden on the great majority of mergers, while allowing the CMA to intervene effectively in the case of mergers that raise competition concerns. Reinforcement of the interim measures would also create a greater incentive for merging parties falling below the mandatory filing threshold to consider a voluntary filing.

In any event, investigations (both phase 1 and phase 2) should be subject to tighter statutory timetables. In the case of investigations below the mandatory filing threshold, the CMA should also have a shorter window within which to take action – possibly 2 months from completion, and with time starting from completion of a transaction, rather than on the date when material particulars are published, as at present.

Question 8 – strengthening the antitrust regime

In the area of antitrust, we believe that Option 1 offers the best means of achieving the Government's objectives. Existing procedural reforms at the OFT are already having a significant impact on its caseload. One example is narrowing the scope of the case in the *Private motor insurance* investigation, allowing rapid delivery of a finding that is already having an influence outside the specific facts of the case. Another is reaching quicker decisions in cases such as *Reckitt Benckiser* and *RBS/Barclays*, both more representative of current target timescales than the cases listed in Table 2 of Appendix 2.

We believe that Option 2 presents a number of disadvantages, and few advantages. While an internal tribunal provides the appearance of greater rigour, in fact there is a danger that, however independent its members, their status within the CMA will make them likely to give greater weight to the case put forward by their own agency. The European Commission's hearing officers share a similar "independence", but have not always been successful in dispelling the perception that – whether consciously or not – they will favour the Commission's position over that of parties. In the Option 2 model, the lack of a full merits review of the decision taken by the internal tribunal would leave parties dangerously unprotected against errors of assessment. But even if the "appeal" were only to a judicial review standard, that is no guarantee that overall timescales would be shorter. Competition infringement decisions have major consequences for businesses, which will use whatever grounds of appeal are available to them – whether on the merits or by way of JR.

The prosecution model – Option 3 – is superficially attractive. However, it is not of itself a guarantee of robustness and speed. *R v. Burns etc* (the BA 4) is evidence for this. The prosecution took 4 years before collapsing – slower than some of the more recent OFT CA 1998 investigations. While a "prosecution" of a CA 1998 case might be expected to be slightly less evidence- and procedure-intensive than a criminal prosecution under the EA 2002, significant reductions in timescales are unlikely. Nor is Option 3 any guarantee of robustness – the reason for the collapse of *R v. Burns* was precisely the lack of robustness in case preparation.

We therefore do not believe that Options 2 or 3 provide any greater certainty than Option 1 that the objectives of the reform will be met. They risk tearing up 11 years of progress, and creating another 5 or so years in which no decisions are taken, while the new regime beds down.

Question 9 – additional changes

We support reform of the CAT's private enforcement jurisdiction.

Question 12 – removing the "dishonesty" element

We note that the concept of dishonesty has not yet been properly tested in the context of the cartel offence. The difficulties with dishonesty encountered in *R. v. Norris* will not necessarily be repeated in any prosecution under the cartel offence. However, if the decision is taken to remove dishonesty, some other concept will be required in its place in order to differentiate between agreements intended to restrict competition and agreements that merely have that effect.

We do not believe that replacing the concept of dishonesty with that of secrecy is the solution. Secrecy in this context is likely to be a subjective and flexible concept raising as many difficulties as dishonesty. Moreover, some sensitive commercial partnering and other beneficial cooperation agreements that nevertheless have restrictive effects may be kept secret for entirely legitimate reasons.

Our suggestion (if removal of dishonesty remains the intention) would be to amend the definition of the offence so as to resemble rather more closely the Australian offence. This would prohibit making or implementing an agreement whose purpose is one of the hard core

cartel activities current listed in section 188 EA 2002, knowing or believing that it is such an agreement.

Question 19 – objectives of the CMA

We agree that the CMA should have a primary statutory focus on competition.

Question 22 – options for decision-making

We have commented on decision-making in the context of antitrust enforcement in response to Question 8 above.

For mergers and markets work, our preference would be for a degree of continuity between phase 1 and phase 2 work. We mentioned in response to Question 2 above the benefits of coordinated information-gathering. However, we also consider that the panel structure of the CC is a significant strength of the current regime. Our suggestion would therefore be for members of the phase 1 team to join the phase 2 team, playing much the same role as members of the CC's inquiry team staff at present, but contributing the knowledge already developed in phase 1. The decision would then be taken by appointed CMA panel members.

Question 25 – merger cost recovery

Merger cost recovery at the levels proposed for a voluntary regime risks having a significant chilling effect on merger activity. Fees at the levels proposed in paragraphs 11.11 and 11.12 of the document would act as a deterrent to transactions.

We also query the calculation of fees under the mandatory notification regime and the hybrid regime. Our understanding is that the total cost figure of £9 million used in paragraphs 11.9 to 11.15 is based on approximately the current case-load (approximately 70 mergers reviewed). However, given that the mandatory regime is, on BIS's own estimates, likely to result in some 1,190 filings per year, this represents a gross under-estimate of the costs of the regime – particularly if statutory timetables are also introduced. On this basis, the figures shown in paragraph 11.15 are likely to increase proportionately, and it is likely that fees closer to those shown in paragraph 11.11 (£65,000 to £195,000) will be required in order to ensure cost recovery. They will similarly act as a deterrent to transactions – and will further contribute to the perception of the UK regime as being uncompetitive.

Question 26 – antitrust cost recovery

We are opposed to cost recovery in antitrust cases. The OFT currently notionally offsets penalties recovered against costs incurred in its accounts in order to demonstrate the value for money provided. We do not believe that real recovery is required.

Question 28 – recovery in leniency, settlement and commitment cases

If the decision is taken to recover enforcement costs, it is essential that this principle should not apply in leniency, settlement and commitment cases. In commitment cases, there will be no infringement decision and there will therefore be no legal basis for cost recovery. Furthermore, charging enforcement costs would act as a deterrent to commitments. Similarly, charging costs in leniency and early resolution costs would act as a disincentive to early case closure, obstructing the key objective of rapid decision-making in antitrust cases.

Ideally this exception should be statutory, but at the very least should be set out in clear policy guidance from the CMA.

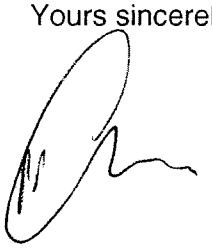
Question 35 – business costs of merger notifications

Our view is that while the range of £50k to £200k for both parties' expert costs (legal and other advisers) for a UK merger notification represents an average, and is probably accurate at the lower end, the upper end of the range represents an underestimate. £200k might be a more accurate figure for *each* party in more complex phase 1 cases, although a not insignificant proportion will exceed this figure too. In phase 2 cases, costs are likely to be in excess of £500k.

Conclusion

If you have any further questions, please do not hesitate to contact us.

Yours sincerely



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8 June 2011

Our ref BMG\99999\0003

Dear Mr Lawson

Consultation on Options for Reform of the Competition Regime

Edwards Angell Palmer & Dodge LLP (EAPD) welcomes the opportunity to comment on the Government's proposals to reform the UK competition regime, as set out in its consultation document, *'A Competition Regime for Growth'*. Our comments, which reflect our experience representing clients before the UK authorities, are provided in the interests of assisting Government with the reform process. They do not amount to legal advice and do not necessarily represent the views of EAPD's clients. Given the large number of questions raised by the consultation document, this response focuses on the key themes and issues, rather than responding to each question listed in that document.

1. General observations

As the consultation document notes, in the 11 years since the competition regime was last thoroughly reformed the UK has developed a 'world class' competition regime. This is a significant achievement and should not be taken for granted. The current regime is the product of an institutional structure that has remained relatively stable over decades, combined with a newer legal framework grounded on well-established principles of EU law and the best elements of the pre-2000 legal regime. This legal framework, together with the procedures underpinning it, has been steadily developed and improved since the coming into force of the Competition Act 1998. While the current regime is certainly not perfect (and the combination of common law standards of review with civil law administrative principles can certainly make enforcement difficult), in our view it is generally fit for purpose.

Notwithstanding this generally positive picture, Government is proposing reforms that are wide-ranging, ambitious and potentially radical. In taking such steps, it is extremely important that the benefits of the current regime are not swept away by a desire for change. It is also important that reforms are not based on assumptions that may be questionable, such as a view that more enforcement decisions *necessarily* equate to better enforcement or that a single agency is *necessarily* better than two. It is also important that proposals

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for future reform are not based on an assessment of past problems, including low enforcement levels, which, given the speed with which enforcement cases reach fruition, are more likely to have reflected a situation that was present some years before those problems came to light and has since been addressed.[1]

The prohibitions imposed by competition law, especially those concerning the unilateral behaviour of potentially dominant firms, are powerful and (quite rightly) difficult to apply. If misused, the prohibitions can substantially damage or deter legitimate and beneficial business activities and hence hinder the very growth that Government wishes to encourage. While it is clearly important that consumers, and businesses of all sizes, are able to bring potential infringements to the attention of the authorities, it will often be better for the economy as a whole to have no enforcement at all than bad or misguided enforcement. It is important that enforcement authorities are able to prioritise when allocating their resources and this necessarily involves choices over what *not* to investigate.

With the above in mind, we would strongly suggest that any moves to reform the regime should be based on the identification of a need for reform and a clear view of what precisely needs to be changed. As noted above, the current regime is not perfect. In our view, its main disadvantages are:

- OFT resources can become distracted away from enforcement activity by market studies or other research projects that may produce little tangible outcome;
- the decision-making process in competition enforcement ('antitrust') cases can be unclear and lack accountability;
- while maximising consumer welfare is an appropriate guiding principle, the OFT may at times have focused too much on consumer-facing markets, to the potential exclusion of important issues in upstream, business-to-business markets;
- the market investigation regime is unpredictable in its application and procedurally burdensome;
- antitrust cases can take too long and the procedure, particularly between Statement of Objections and final decision, can be unduly complex; and
- the jurisdictional thresholds of the merger control regime are inherently uncertain and catch too many very small transactions.

These disadvantages (which are addressed further below) should not be considered in isolation, however, and must be assessed within the context of a generally effective regime. We would therefore recommend that they are addressed in a targeted way, which retains as much as possible of those parts of the regime that do function well.

Government's proposals for reform are explicitly based on three, high level objectives:

- to improve the robustness of decisions;
- to support the authorities in taking forward high impact cases; and
- to improve the speed and predictability for business.

While these are laudable objectives, in our view they do not in themselves require legislative or institutional change to achieve. Rather, and above all else, they require capable, experienced and well-managed staff, operating in an independent, confident, yet accountable authority, with clear objectives. Competition law enforcement is difficult and improvements tend to be slow, as agencies and individuals learn what works and

[1] A recent speech by the OFT's Chief Executive summarises the development of the regime over the last ten years - including how policy developments feed through into outputs over time - very well. See *UK Competition Policy: the first decade*, 11 May 2011.

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what does not. It is essential that this learning is able to take place, within a stable institutional and legal environment.[2]

It is also essential that the right staff are recruited and appropriately motivated, rewarded and retained and that those staff that are unable to fulfil the demands of the role are moved elsewhere. The most extensive and ambitious legislative and institutional changes will fail without the right staff to implement them. Change, of necessity, causes uncertainty and disruption and may lead to the loss of the very staff that are needed to deliver the hoped-for benefits of the change. It is important that Government takes this cost into account when planning its next steps.

Finally, we would suggest that any new legislation must avoid being excessively prescriptive as to how a new agency is to be run and there must continue to be sufficient flexibility to allow procedures and practices to develop, in light of enforcement experience.

2. Institutional changes

Many of the changes put forward in the consultation document are driven by the proposal to merge the competition functions of the OFT with the Competition Commission (CC), to create a single Competition and Markets Authority (CMA). We consider that the case for such a merger is finely balanced, particularly given the cost of such change noted above. The proposed merger raises two distinct questions: first, whether it is preferable to combine competition and consumer enforcement in one agency; and, second, whether it is preferable to combine all competition enforcement functions within in the same agency.

Addressing the first of these questions, having a single, integrated consumer and competition agency should deliver joined-up, economically literate enforcement across both areas and helps to ensure a high level of public awareness of, and support for, the agency. On the other hand, the more responsibilities an agency has, the more scope there is for resources to become diverted away from core functions, such as competition enforcement, towards other, potentially less demanding, activities. On balance, we consider that moving the OFT's purely consumer protection powers to another agency should help ensure a consistent focus on competition enforcement, without reducing the ability of the CMA to maintain an enforcement approach that is focused on improving consumer welfare or to impose remedies that are concerned with consumer behaviour, where appropriate. We are concerned, however, that Government appears to be proposing instead to devolve most of the OFT's consumer regulation powers to local trading standards bodies, rather than transferring them to a single national consumer authority. Although the details of Government's proposals on consumer protection remain to be seen, this proposal does appear to create a real risk that, in the absence of a national consumer protection agency, concerted action to protect consumers against regional or nationwide concerns outside the competition field will diminish or, at least, become harder. Such a move may lead to consumer harm not being addressed and would also make it harder for the CMA to coordinate action on issues that raised both competition and consumer protection concerns. If these concerns are not addressed by Government's forthcoming paper on consumer policy, we submit that it would be preferable to continue with the CMA as an integrated consumer protection and competition enforcement authority than to separate out these functions and devolve the former to local authorities.

Turning to the separate question of whether the CC and OFT should be merged, we accept that such a merger should allow for more efficient use of the expertise currently residing within each agency. In particular, a single CMA should allow for more efficient use of available specialist expertise, especially at times when

[2] We would note that the US Department of Justice and Federal Trade Commission (each of which is ranked by *Global Competition Review* as a 'five star' agency) have enjoyed such stability over decades, as have (for example) the European Commission, which receives four and half stars from *GCR*, and the German *Bundeskartellamt*, which receives four stars.

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there are few second phase investigations underway. Moving to a single CMA should also remove the internal costs of managing the interface between the OFT and CC, as well as creating a more powerful single advocate for competition. If delivered, these benefits should, on balance, justify a merger, provided that the negative effects can be avoided or minimised. In particular, the benefits of the current dual-agency structure with respect to fair and independent decision-making should be preserved and disruption of ongoing casework avoided. Given that this cannot be guaranteed, we would suggest that Government at least consider whether there may be scope for introducing greater resourcing flexibility and inter-agency coordination under the existing structure, without the need for a full merger.

As far as the proposed CMA structure is concerned, we agree with the proposal that the CMA should be managed by a powerful, full time executive board, which is itself accountable to a supervisory board. As far as decision-making is concerned, it is important that this reflects the different needs of the CMA's different enforcement tools and the different phases of an investigation. Uniformity of decision-making procedures across the CMA's various functions is neither possible nor desirable. It is desirable, however, to retain the considerable expertise of current CC members, which will be a valuable asset for the CMA. It also essential to continue to protect parties' rights of defence and to maintain their right to an appropriate level of judicial oversight and scrutiny of decisions. The implications for decision-making structures are addressed in the separate sections below.

3. The market investigation regime

We agree that the current market investigation regime has a valuable role, by providing for the in-depth expert examination of competition concerns in 'gap cases', i.e. those that are not susceptible to being remedied through enforcement action under the Competition Act. Such concerns include persistent market power, non-collusive oligopolies and restrictions on competition arising from regulation or other forms of government intervention. Market investigations may also serve to expose issues around which there is a high level of public and media interest to neutral, objective scrutiny and hence avoid less considered forms of intervention. Given their high cost and intrusiveness, however, both during an investigation and on an ongoing basis when remedies are imposed, market investigations should remain the exception, and should not be used in situations where conduct can be addressed using Competition Act powers. We now turn to the specific points raised in this part of the consultation document.

Investigative powers

We do not consider that there is a need for the CMA to have formal information gathering powers during first phase investigations, since parties are generally willing to provide information voluntarily at this stage, provided that requests are reasonable and appropriate for a first phase inquiry. If information gathering powers were to be given to the CMA during a first phase, authorisation by a more senior member of staff, such as an executive board member, should be required, to help prevent abuse. The threshold for opening a first phase investigation should nevertheless remain low. While concerns have arisen over the large number of market studies undertaken by the OFT, this could be addressed, at least in part, by giving the CMA an explicit focus on competition enforcement and (subject to the points made above) removing its consumer protection role.

Decision-making

We agree that a two phase approach to investigations should be retained. Provided that first phase market investigations (roughly equivalent to a current market study) are kept relatively light touch, the decision to open one could be taken at a relatively low level within the CMA, provided that there

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was some coordination of activity. In contrast, the decision to open a second phase market investigation is a significant one, given the burden it places on the parties, as well as the resourcing implications for the CMA. As a result, we would suggest that such decisions should be taken by the executive board of the CMA.

We agree with the proposal that the CMA should be required to decide on whether to open a second phase market investigation within a specified period, following the opening of a first phase investigation, provided that there was scope for an extension, where this was objectively justified. We have doubts, however, as to whether the existing two year limit for second phase market investigations could be materially shortened, given the work involved in most instances.

Given the significant powers of the CMA, we consider it essential that final decisions on the outcome of second phase market investigations are taken separately from the CMA management structure. The CC's current panel system offers a potentially viable model for this. While core case staff could be carried over from a first phase investigation to maintain relevant knowledge, additional expert staff (potentially including a dedicated inquiry director) would need to become involved at second phase. In addition, a panel of three to five non-executive (but appropriately senior) individuals (similar to CC members) should take on the role of ultimate decision maker at the point a second phase investigation is opened. As with current CC practice, these individuals would effectively run the investigation and take the ultimate decision, applying their knowledge of the case, the advice of their staff and their own judgment, rather than simply acting as a decisional tribunal, acting only when the final case is presented to them.

Provided that the individuals concerned remain sufficiently independent from the CMA hierarchy and permanent staff, this decision-making structure should be ECHR compliant. If such independence could not be assured, we would suggest that either: (i) all final market investigation decisions should be subject to a full merits review before the Competition Appeal Tribunal (CAT); or (ii) all decisions to enforce remedies should be made by the CAT, based on the CMA's representations on the need for such remedies.

Cross-market investigations

We do not support the creation of a new power enabling the CMA to carry out in-depth market investigations across multiple markets. The current Enterprise Act regime already provides a degree of flexibility concerning the scope of references and a reference need not be limited to a single economic market.[3] A full market investigation reference extending across multiple sectors is likely to be unmanageable. Even if a single issue of concern spans multiple sectors, the reasons behind the issue, and potential justifications for it, may vary from sector to sector.

We consider that the full weight of a market investigation reference should be reserved for the examination of specific issues of concern, in a specific sector. To the extent that wider concerns arise across the economy, we would suggest that the more appropriate course of action is for the CMA to undertake further informal investigations, for example by commissioning reports from third parties or undertaking first phase investigations, to identify where targeted enforcement action in specific sectors may be justified. This should enable businesses in other sectors affected by similar issues to adapt their behaviour in response, if this is justified, or (only where absolutely necessary) future enforcement action in those sectors.

[3] See, in particular, paragraph 3.12 of OFT *Guidance note 511 on Market investigation references* and section 133 of the Enterprise Act 2002.

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Public interest issues

We consider that the explicit focus on competition is a significant strength of the current regime, in that it provides a clear framework for a review, while maintaining a high degree of flexibility over the scope of investigations. It also avoids independent competition authorities being dragged into the consideration of issues that are better and more appropriately addressed by ministers or Parliament. We would not therefore support an extension of the CMA's jurisdiction to include consideration of public interest issues, beyond what is currently provided for by statute.

Extending the super-complaints regime

We see no justification for extending the current super-complaint regime to bodies representing SMEs. While there may be grounds for according consumer bodies special status when dealing with competition authorities, we do not consider that such grounds exist where businesses (i.e. producers) are concerned. Firms of all sizes are free to complain to the competition authorities about the conduct of their competitors, suppliers or customers and will presumably remain so, after the CMA is created. They are also increasingly willing and able to bring their concerns before the courts.[4] To give complaints from SMEs special status could lead to the distraction of resources from more productive tasks and send an unwelcome message regarding the ability of particular groups to dictate the CMA's agenda.

4. The mergers regime

The current UK merger control regime works well and has many benefits. In particular, the lack of a compulsory filing obligation means that parties are able to take an informed view on whether a transaction should be notified to the OFT and there is a degree of flexibility over how notifications are made. The OFT is also open to informal and confidential pre-notification discussions, in appropriate circumstances, in a constructive manner. Investigations are generally well run and focus on the key issues of substance, rather than irrelevant filing requirements or purely procedural issues. Although second phase investigations before the CC are very demanding, experience suggests that such an intensive and lengthy review process does result in robust outcomes and that the CC has the confidence to clear transactions unconditionally, where the facts so justify.

The current regime does have drawbacks, however. In our view, these are that:

- the scope of the OFT's jurisdiction is inherently uncertain, based as it is on a flexible share of supply test, a low control threshold (material influence) and uncertainty over when the deadline for referrals expires;[5]
- it catches extremely small mergers, which can be subjected to a disproportionately intensive and expensive review, compared with other regimes; and

[4] We would note here the recent case of *Purple Parking v. Heathrow Airport* [2011] EWHC 987 (Ch) as a good example of a company (apparently an SME) obtaining redress for a competition law infringement by a much larger company before the courts.

[5] For example, the author's experience includes a situation where the OFT argued that they were entitled to investigate a merger, even though it was more than four months since it had been made public, on the grounds that it had not been made public on a national level, despite the fact that the merger had only a local impact, that it had been made public in the area affected by the merger and that it had been brought to the OFT's attention following its being made public in this way. Such a level of uncertainty is undesirable.

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- the ability of parties to complete a transaction without clearance, or even notification, means that resources can be distracted by the need to prevent companies from integrating their operations further during an investigation or to separate out assets, in the event that a completed transaction is prohibited.

Government's proposals should be measured against their ability to address these drawbacks, without creating new ones. We will now consider how best to address each drawback.

Uncertainty

In our view, the best way of reducing uncertainty would be to introduce a modern, mandatory filing regime, based on clear and appropriately set jurisdictional thresholds. Such thresholds should reflect international best practice, as recognised by the International Competition Network,[6] and be based on a combination of the parties' global and UK revenues, discounting sales generated by the seller. The level of the turnover thresholds is critical, as setting them too low will result in the CMA being overwhelmed by notifications of non-problematic transactions, needlessly increase the costs burden on business and materially damage the UK's reputation as a serious competition regime.

When considered in this context, the thresholds proposed under option 1, namely £10 million worldwide turnover for the buyer and £5 million for the target, are far too low. A regime based on such thresholds would be simply unworkable and its introduction would be a profound mistake. While Government's option 2 would be less damaging, the requirement to notify all transactions where the target has UK revenues of £70 million or more would do little or nothing to remedy the defects identified above, which largely flow from the share of supply threshold (which would be retained under that option). At best, option 2 would slightly reduce the number of situations in which the CMA is required to investigate completed transactions. This would be at the cost of creating a new burden on business to notify a potentially large number of competitively benign mergers. We submit that this is too high a price for such a small improvement.

Small mergers

As noted above, properly calibrated jurisdictional thresholds would remove very small transactions from the merger control regime. While this could potentially mean that small anticompetitive mergers could not be prevented, we would submit that this is a reasonable price to pay for reforming a regime that is currently disproportionately occupied with transactions with a limited economic impact.

Increased use by the OFT of the *de minimis* exception has certainly helped reduce the burden on business and the proposal to introduce a safe harbour for small transactions is to be welcomed. The £10 million cap on the buyer's turnover significantly limits the utility of the latter move, however, and we would suggest that it should be substantially increased or removed altogether.

Completed mergers

The need to review completed mergers is an unavoidable aspect of a voluntary filing regime, since at least some parties to potentially anticompetitive mergers will (deliberately or otherwise) inevitably not bring them to the authorities' attention. The OFT is already able to prevent companies from

[6] See in particular the ICN's recommended practices for merger notification procedures, at: http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

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> integrating further, while it is investigating a completed transaction, and the scope for integration is limited still further once a CC investigation is commenced. While the authorities are still required to review, and potentially remedy, situations in which integration is completed before an inquiry is commenced, parties usually understand the risk they take in adopting such a strategy. While there may well be a case for strengthening the CMA's powers to prevent integration during an investigation, these should not be extended to a degree that effectively creates a mandatory hold-separate obligation by the back door.

The arguments for and against change in merger control review are finely balanced. While we consider that a move to a properly calibrated mandatory filing regime would have merits, the options under consideration by Government do not appear to include such an outcome. In light of the options offered, all of which would be materially worse than the current regime, we would recommend retaining the existing system.

The proposed merger of the OFT and CMA would, however, necessitate some changes to the decision making process, given that there would no longer be institutional separation for first and second phase cases. In our view, this could be addressed by retaining the existing panel-based review and decision structure for second phase cases, provided that panel members remained sufficiently independent from the CMA hierarchy and staff. As now, the decision on whether a merger should be subject to a second phase investigation could be taken by a senior official, such as the head of the CMA unit responsible for mergers. Should the independence of second phase decision-making not be assured, consideration should be given to moving remedy making powers to the CAT, with the CMA being required to satisfy the CAT that remedies are required before they can be imposed. The CAT's decisions on remedies could then be subject to judicial review by the Administrative Court or, potentially, appeal to the Court of Appeal.

5. The antitrust regime

As noted above, the current antitrust regime suffers from some defects. In particular, cases can take a long time, procedures can be cumbersome (particularly post-Statement of Objection) and there can be a lack of transparency at key points in the process, particularly final decision stage. The OFT appears to be aware of this, however, and is taking steps to address them. For example, it has produced new guidance on procedures, which include sensible innovations such as greater use of confidentiality rings when giving access to the case file, and commitments on transparency.

The antitrust regime is still young by international standards and we do not consider that it is fundamentally flawed. To the extent that difficulties arise on specific cases, these are often due to inexperienced staff or a lack of adequate internal oversight. While independent review by the CAT is appropriate and indeed essential for the regime, we do consider that it has at times failed to give the OFT a sufficient margin of appreciation when assessing finely-balanced economic issues. In addition, the CAT arguably created distortions in the regime during its early years by assuming jurisdiction to review administrative case closure decisions, as if they were fully reasoned non-infringement decisions. This may have created an incentive for the OFT to adopt procedural tools that make CAT review less likely, such as the informal resolution procedure. Such tools can lack transparency and can even call into question parties' rights of defence. We are hopeful that both the CAT and OFT are learning from this experience, however, and that any problems that remain on this front do not justify a wholesale change to the regime.

While we can see that a prosecutorial regime (as suggested under option 3) has some merits, particularly in those areas where the current regime is weakest, it creates challenges of its own. In particular, it would require a radical change in approach by the CMA's staff, which would need to be capable of prosecuting potentially complex cases, and could reduce the ability of smaller companies to defend themselves against enforcement action. Such a change would also make it harder for the CMA to operate as an autonomous

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driver of competition policy, within an integrated European Competition Network. As well as the medium term disruption that such a change would bring, there is a also a longer term risk of reduced enforcement activity, given the burden of prosecution, and a heightened incentive for the CMA to resort to non-transparent and potentially unjustified settlements as an alternative to prosecution.

In our view, the 'new administrative approach' outlined under option 2 has little to recommend it. The addition of an internal tribunal review stage is unlikely to address the defects of the current regime and risks simply creating yet another cause of delay. Most importantly, by removing the full merits review by the CAT in favour of an enhanced internal review process, this option would dangerously weaken a fundamental safeguard of the current system.

As a result, we would favour option 1.

As far as other issues raised by the consultation document are concerned, we agree that there may be a justification for the CMA to have a wider range of powers to compel parties to respond to information requests, given the difficulty of bringing a criminal prosecution for non-compliance under the current regime. We do not see a need to change the OFT's powers of entry.

We do consider that the creation of a single CMA would be a good opportunity to address current issues over decision-making on antitrust cases. Although the OFT has issued some clarification in this area, stating that final decisions on Competition Act cases will be taken by a named Senior Responsible Officer, we submit that this is not sufficient. We would suggest that (at the very least) infringement decisions should be taken by the CMA's Chief Executive or Executive Board, albeit on advice from the case team. While there may also be scope to involve independent decision-making members in the process, as in second phase merger and market investigation cases, we consider that the case for this is less clear cut in antitrust enforcement. As noted above, we would not favour this approach if it amounted to the introduction of an internal tribunal review stage.

6. Criminal cartel enforcement

Although we consider that civil actions against undertakings under the Competition Act 1998 should remain the primary means of competition law enforcement in the UK, we agree that there is a role for actions against culpable individuals in particularly serious cases. This could by way of director disqualification orders (which we consider have been under-used by the OFT) or through criminal prosecutions, using cartel offence powers.

It is crucial, however, that criminal actions are brought only in situations where the individuals involved can be shown to have demonstrated clear and specific culpability, beyond simple involvement in an anticompetitive arrangement. We continue to believe that the requirement to prove dishonesty is a central safeguard of the criminal cartel regime. Dishonesty is a concept that individual employees can understand and use as a basis for their actions. Applied properly, it should ensure that individuals who participate in morally reprehensible cartel activity are appropriately punished, without casting the net of criminality too widely. The current cartel regime is still bedding down and, although the first contested criminal prosecution for the cartel offence collapsed, this appears to have had little to do with the suggested difficulty of proving dishonesty.

Replacement of the dishonesty requirement with one based on secrecy or a failure to be open would run the risk of involvement in legitimate commercial conduct, such as joint ventures, creating criminal liability, simply on the grounds that the arrangements were commercially confidential. It would also create an unacceptable degree of overlap with the civil enforcement regime. If the degree of secrecy adopted by parties

went beyond normal measures to protect confidentiality, for example by using code names, 'cover' meetings or encrypted messaging systems, this could still be used in a cartel prosecution as evidence of dishonesty.

As a result, we see no need to change the current criminal cartel regime.

7. Concurrency

We agree with Government that the current concurrency arrangements, under which sectoral regulators enjoy the same antitrust and market investigation powers within their respective sectors as the OFT enjoys across the economy, should remain largely as they are. We consider that sectoral regulators are generally best placed to identify issues that restrict or distort competition in their sectors and to decide whether action under general competition powers or sector specific regulatory powers is best suited to address them.

We nevertheless consider that the current system could be improved. In particular, we consider that it should be easier for the CMA to step in and take action in a regulated sector, in circumstances where the sectoral regulator has persistently declined to act. While this would simply reflect the legal position, under which the OFT retains jurisdiction over the entire economy, it would be a departure from current practice, under which the OFT tends to leave enforcement in regulated sectors to the relevant regulator. We would also suggest that more could be done to ensure the coherence of the overall enforcement regime. For example, it may be appropriate to give the CMA a role within the UK regime that is similar to that of the European Commission within the European Competition Network. Under such an approach, sectoral regulators would be required to consult with the CMA at key stages in an antitrust case, including before making a final decision.

While it may be harder fundamentally to change the incentives of sectoral regulators to refer markets to the CMA, given the loss of control this implies, a requirement to reach a decision on a reference within a set period for a first phase review may assist the situation, by forcing the authority to decide whether a reference is justified at a relatively early stage. There should also be greater scope for the CMA to subject a market in a regulated sector to an in-depth market investigation, where the sectoral regulator has declined to do so.

8. Cost recovery

The consultation document contains concerning proposals regarding the recovery of the costs of the competition regime. The documents states that "The competition regime is expensive to run and maintain". The accuracy of this statement depends on one's perspective. Compared with Government spending in a range of other areas, the cost of the entire competition regime is tiny. While the total cost of the UK regime does appear quite high, compared with the cost of peer regimes in France and Germany, the quality of output in most areas is also high.

Enforcement of competition law is a public good and, according to the OFT, its activities already produce benefits to UK consumers of seven times its annual running costs. Given that these benefits are spread across the economy, as a matter of principle it would seem appropriate for the costs of providing them to be similarly spread, through general taxation, rather than being borne by those businesses that happen to be directly involved with the competition authorities at any given time.

Our response to the specific proposals is provided separately, by area.

Merger fees

Approaches to charging fees for merger control clearly vary between jurisdictions and range from no charges at all under the EU Merger Regulation to charges of up to US$280,000 in the United States.

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The OFT's fees are already towards the high end of this scale, with charges being set at a level that, in straightforward cases, can exceed a party's legal costs for preparation of the OFT notification and subsequent investigation. We understand, however, that Government needs to seek additional income where it can and a reasonable level of fees for the merger control process is defensible, provided that this does not distort the behaviour of the competition authority. Current fees just about meet this test. The current fee structure also has the benefit of simplicity.

As the consultation document sets out, any moves to achieve full cost recovery would lead to substantial increases, resulting in fees that would be unreasonably high and, we submit, disproportionate. Such high fees would effectively amount to an unjustified tax on transactions and could distort the incentives of the OFT to investigate only problematic mergers.

While we note that individual fees would be substantially lower under a mandatory merger regime, this would be predicated on the much higher volume of filings triggered by the excessively low thresholds proposed in the consultation document. As explained above, we do not favour such an approach.

Antitrust fees

In cases where an undertaking has been found to have committed a serious infringement of competition law, it can be fined. Fines, which can run to hundreds of millions of pounds, go straight to the Treasury. Although the pattern varies from year to year, it would be reasonable to assume that, over time, income from such fines will cover the costs of the competition regime. It is important that any linkage between fines and costs remains indirect, however, to avoid distortion of enforcement incentives.

Given this context, it is unclear why Government believes that addressees of infringement decisions should be expected to pay an additional amount, to cover the costs of the investigation leading to that decision. In our view, such an approach could enable a competition authority to punish companies for legitimately exercising their rights of defence (on the basis that this increased its costs) and would lead to extended disputes over whether the 'costs charge' was defensible in a particular case. It would also represent a dangerous conflation of the purpose of fines (to punish wrongful behaviour and deter others from infringing) with cost recovery. Simply separating out costs from fines in the decision would not alter this fact, as they are both paid by the addressee from funds that could otherwise be put to potentially beneficial use within its business.

Other fees

The context in regulated sectors is different, given that it is common for the costs of the regulatory regime (including appeals) to be covered by those subject to regulation (e.g. through licence fees). As a result, we have no objections to introducing a power to recover the costs of telecoms regulatory appeals from the parties.

We do have concerns over the proposal to enable the CAT to recover its own fees, however. While the CAT's costs are relatively low, it is important that its role as a neutral appellate body, with no interest in proceedings other than ensuring a just outcome, is maintained. Enabling it to recover its costs from unsuccessful parties could potentially distort this critical role, for very little benefit. This principle appears to be reflected across the courts system, where cost recover is very limited, and we see no reason to abandon it with respect to CAT appeals.

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> As far as recovery of parties' own costs in CAT appeals is concerned, we consider that the current flexible approach of the CAT works well and is just. We would therefore be opposed to any moves by Government to dictate how the CAT's discretion on costs awards should be directed.

We trust that the above comments are of assistance and look forward to seeing the Government's concrete proposals on reform in due course.

Yours sincerely

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13 June 2011

Dear Duncan,

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

Energy Networks Association (ENA) is the industry body for the major gas and electricity transmission and distribution companies in the UK. We are pleased to respond on behalf of our Members to BIS' consultation paper 'A Competition Regime for Growth' which was published in March 2011. Our response is not confidential.

ENA's submission concentrates on Chapter 7 of the consultation (questions14-16) concerning the issue of concurrency and the sector regulators, with particular reference to Ofgem, the gas and electricity regulator. We note that Chapter 8 deals with 'Regulatory references and appeals and other functions of OFT and CC'. Whilst ENA would support the proposal for the new Competition and Markets Authority (CMA) to be the body that considers regulatory references and appeals (Q.17), we have not responded to Q.18 of the consultation as appeals processes in the energy sector have been the subject of a separate DECC consultation.

ENA's response first summarises the main points which the consultation paper is making in relation to concurrency and goes on to make some observations on BIS' proposals.

What the consultation paper is saying

The starting point for the Chapter 7 analysis is that too few anti-trust cases have been brought in the sectors covered by sector regulators. Having noted that only two cases have arisen (National Grid and EWS), the paper says,

'Given that regulated sectors contain many of the most dominant companies and uncompetitive market structures and cover services of considerable consumer interest, the comparative lack of activity in the sectors seems surprising.'

The paper accepts that there is continuing and heavy scrutiny of these sectors by the sector regulators and that there could be 'good' reasons for this state of affairs – including the availability of 'speedier' remedies to the sector regulators. However,

the overall tone of the paper is to suggest that these good reasons are outweighed by the 'bad', including:

- a lack of relevant resource in the sector regulators;
- the possibility that regulators themselves are reluctant to risk criticism from another government agency.
- The paper considers whether all anti-trust and market investigation (MIR) responsibilities should be given to the CMA but also considers that this might have some undesirable consequences.

The government has concluded that sector regulators should retain their concurrent anti-trust and MIR powers but that the regime should be improved.

To this latter end, the government is consulting on whether, inter alia:

- the sector regulators should be given a strong common obligation to use their competition powers in preference to their sectoral powers wherever legally permissible and appropriate;
- the CMA should be tasked with acting as a central resource for the sector regulators on competition cases so that it can work with them and for them on cases in the regulated sectors;
- the CMA should be responsible for coordinating the use of competition powers and addressing strategic issues over their use across the areas for which they have concurrent powers.

Thus, having decided that both the CMA and sector regulators will continue to be responsible for anti-trust and MIR powers in the regulated sectors, the question is just how they will work together in this area.

Comment

There are two main underlying questions which are raised here, viz:

- Are general competition powers being too little used in the regulated sectors and, in particular, in the regulated energy sector? In other words, is their relative non-use for 'good' reasons (e.g. the lack of anti-competitive activity in the regulated sectors and/or the relative efficiency and effectiveness of sector-specific solutions) or for 'bad' reasons (e.g. the status quo discriminates against the use of general competition powers, and in favour of sector-specific solutions, in the regulated sectors)?
- What is the best way to organise the use of anti-trust and MIR powers and to, more generally, counter anti-competitive activity in the regulated sectors?

As far as the energy sector is concerned, there is no evidence of the sort of volume of anticompetitive activity which BIS seems to think characterises the regulated sectors. Ofgem's scrutiny of both the retail and wholesale markets (viz. the number of formal investigations over the last few years) and of the activities of network businesses in contestable areas (including connections, independent networks and metering) means that there is no obvious sense in which non-use of competition powers reflects lack of investigative activity by Ofgem *or* 'widespread evidence of anti-competitive activity'. The paper's implicit assumption that regulated sectors will be rife with anti-competitive activity is not borne out by the facts.

In addition, BIS' contention that the lack of use of general competition powers in regulated sectors is 'surprising' is, at least as far as the energy sector is concerned, not surprising at all, given Ofgem's attempts to ferret out anti-competitive behaviour

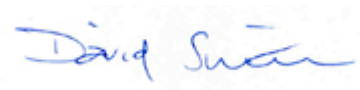
and the deterrent effect this can be expected to have on would-be offenders. Such behaviour is far more likely to be found in areas of the economy which are less continuously trawled over by competition and/or regulatory bodies.

However, ENA believes that there may be more merit in BIS' contention that lack of relevant legal resource and/or fear of being criticised by the OFT/CC/CAT may have biased Ofgem's choice of tools when investigating markets or when contemplating enforcement. Indeed, ENA suggested to DECC (in response to the latter's call for evidence on the role of Ofgem) that Ofgem's lack of legal resource might be a good reason for having competition enforcement owned by specialist competition bodies.

Thus, given BIS' preference for retaining concurrency, ENA would support the general principle of making best use of the government's competition resources by increasing the cooperation between the CMA and sector regulators. Indeed, more sharing of specialist resource would seem to be a good idea and that, in addition, there may be merit in the CMA having a 'coordinating' and 'strategic' role on the use of competition powers in regulated sectors.

If you have any questions on our response do not hesitate to get in touch.

Yours sincerely,



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ENERGY RETAIL Association

ERA response to BIS consultation on the UK competition regime

1. This response sets out a general view on behalf of the Energy Retail Association (ERA) membership.[1] ERA members may choose to respond individually with more detailed or specific concerns.

ERA position in brief

2. Energy Suppliers are supportive of a strong, independent competition authority that uses the sectoral expertise of the Gas and Electricity Regulator, Ofgem, to ensure a competitive gas and electricity supply market. Competitive gas and electricity markets provide significant benefits to consumers by driving down prices. The UK gas and electricity market is one of the most competitive in Europe. As a result, energy prices available to consumers are amongst the lowest in Europe.[2]

3. Energy Suppliers feel competition arrangements should assist in ensuring a competitive market by allowing the sectoral regulator Ofgem to clearly stipulate the behaviour expected of market participants, monitor this behaviour closely, apply sectoral regulation to remedy any market issues, and if necessary make a reference to the competition commission – or in the future the CMA. Energy Suppliers therefore support the retention of concurrent market investigation reference powers being held by Ofgem, within a system where it refers issues to the CMA to determine whether and what remedies should be enforced under competition laws.

4. In fulfilling this role it is important that Ofgem continues to operate independently of Government and any ideological agenda. Importantly, the CMA and Ofgem must base their decisions on an objective analysis of hard economic evidence.

5. Energy Suppliers dedicate significant resource to liaising with Ofgem and other statutory bodies, such as Consumer Focus, to display their compliance with sectoral regulation, much of which is framed in order to ensure a competitive market.

6. As all players within the energy supply market have to display compliance, the cost of doing so is ultimately born by energy customers. While ensuring a competitive market must be the central aim of any reform to the competition regime, any reform must also seek to minimise the cost to market participants of displaying compliance.

[1] British Gas, EDF Energy, E.ON, RWE Npower, Scottish Power, and SSE

[2] Britain's competitive energy market, has given us among the lowest energy prices in Western Europe. Britain has the cheapest gas and fourth-cheapest electricity, according to Government statistics(DECC *Quarterly energy price report March 2011 p.7*). Also 100,000 customers switch energy supplier and tariffs each week.

An independent competition authority is central to a properly functioning market

7. Energy Suppliers feel that an independent competition authority is an important element of a functioning energy market. The competition authority's powers can provide certainty around the conduct of market participants and therefore investor confidence in the market.

8. In a sector like energy which is subject to widespread Government intervention, the independence of the competition authority is particularly important. The new Competition and Market Authority and Ofgem in its competition capacity must maintain this independence and not be susceptible to pressure from Government to act in a specified way. It is also essential that the decisions of the CMA and Ofgem are based on objective analysis of hard economic data.

9. The independence of the regulator from Government is also a requirement of the Gas and Electricity Directives forming part of the EU Third Energy Package. Any reform of the competition regime must ensure therefore, that even when exercising its powers as a competition authority, Ofgem's decision making is not influenced by Government.

Response to Q14: Sectoral expertise is important for the authority overseeing the UK energy supply market

10. Ofgem has considerable expertise and experience relating to the functioning of gas and electricity markets. It is important to ensure that this expertise is utilised by maintaining Ofgem's position as the primary body for monitoring gas and electricity markets. Under such arrangements, sectoral regulators should maintain concurrent market investigation reference (MIR) powers and make references to the CMA where remedial action to be taken on competition grounds.

11. Within a framework where concurrent MIR powers are retained by sectoral regulators, it is important that they make decisions underpinned by objective and rigorous economic analysis. Sectoral regulators should only make a reference to the CMA where there is a clear objective justification grounded in economic data and competition law for doing so. Sectoral regulators should always guard against the temptation to engage in an adversarial approach to the regulated entities in the sector, which may lead to subjective analysis of data, and decisions that are not properly grounded in evidence.

An obligation to use competition powers rather than sectoral powers would introduce too much uncertainty for market participants

12. The sector regulators should not be given an obligation to use their competition powers in preference to their sectoral powers. The regulator's sectoral powers are in any event aimed at preserving competition. By setting out, in for example Electricity Suppliers' Licence Conditions, the expectations of market participants, certainty around the conduct required is created.

13. However, it must be noted that often licence conditions are overly prescriptive and create operational and compliance costs that heavily outweigh any consumer benefit.

14. To move from a system that is largely based on enforcement of these sectoral provisions to one where a more general set of principles must be used as the justification for market intervention, may create uncertainty for Energy Suppliers, and could undermine the benefit of having sectoral regulation.

15. However, if a more principles based approach was adopted in order to revoke some of the more unnecessary elements of sectoral regulation it could be more effective and less costly for suppliers to comply with.

The development of common principles could help to provide industry certainty in certain areas

16. While the application of sectoral regulation does help provide some certainty, for certain aspects of competition law not necessarily covered by sectoral regulation, the development of common principles of application across sector regulators could help provide further certainty.

Common principles can be developed without more case-law

17. Energy Suppliers do not agree with the consultation's suggestion that a richer body of case law is required in order to develop clear principles around how competition powers will be used. A benefit of having a sector specific regulator dealing with concerns in the sector as a whole is that they can be addressed without requiring a reference to the Competition Commission (or in the future the CMA). This is a result of the level of information provided to the regulator on a regular basis and the on-going dialogue between regulator and regulated entities.

18. The lack of referrals to, and rulings by, the Competition Commission may therefore be a sign of the current arrangement's ability to address competition concerns at an early stage rather than an inability to identify and act upon anticompetitive behaviour in the market. Given the resource requirements for all parties within a Competition Commission (or CMA) investigation and a case at the Competition Appeals Tribunal - costs which will eventually be passed through to consumers and taxpayers – the avoidance of such cases is a significant benefit of the current arrangements.

19. As stated above, Energy Suppliers would, however, appreciate any further clarity that can be provided over the principles of competition law to be applied generally, particularly in areas not covered by sectoral regulation. It may be that this is achievable through the adoption of some more general principles of enforcement across sectoral regulators, potentially coordinated by the CMA. These principles need not be laid down in case-law; rather, alternative means should be established to clearly set them out.

Ofgem has adequate competition resources to monitor the energy supply market and make decisions on whether a referral is necessary

20. Energy Suppliers have an intimate knowledge of Ofgem's capacity and working arrangements and feel that it has ample tools at its disposal to monitor and regulate energy markets and decide when a referral to the Competition Commission (or CMA) is necessary.

21. Ofgem have regularly investigated the functioning of the energy supply market over recent years. The recent Retail Market Review, published on 21 March 2011, is an example. This type of investigation is additional to regular market reports that are formulated by Ofgem, investigating issues such as retail margins in gas and electricity supply.

22. Previous major investigations include the 2008 Energy Supply Probe into the markets for gas and electricity supply, which introduced new licence conditions for Energy Suppliers designed to promote, amongst other things, competition within the energy supply market. The fact that a review of the 2008 Probe Remedies formed part of the 2011 Retail Market Review shows how Ofgem are constantly reviewing the structure of the market.

23. As discussed below, however, Ofgem should make some modifications to how it conducts its duties.

Any investigative role for the CMA beyond investigating references made to it by Ofgem is not necessary

24. In light of Ofgem's sectoral expertise, within a system where they maintain MIR powers the CMA needs to play a similar role to that which is currently played by the Competition Commission. That is, it should only become involved in the investigation of, and determination on, market issues in the energy supply market when a reference is made to it by Ofgem. Any further involvement in monitoring and investigating the energy supply sector would represent a duplication of efforts and resource, and potentially create uncertainty by having two separate bodies adopting separate approaches to monitoring the energy supply market.

Ofgem needs to alter its approach to applying competition law and sectoral regulation in the gas and electricity supply sector

25. While under a regime with concurrent market investigation powers Ofgem should continue to play the leading role in investigating the market and making references to the CMA, there should be some alterations to the way they do this.

26. It is important that when acting as a competition authority Ofgem bases its decisions and proposals on an objective analysis of the economic data. This has not always been the case, an example of this was a document published alongside the Retail Market Review, Ofgem on 21 March 2011, entitled "Do energy bills respond faster to rising costs than falling

costs?"[3]. To summarise Ofgem's conclusions, the paper states that "This analysis found some evidence that energy bills follow an asymmetric trajectory", but "because of the number of plausible reasons for finding asymmetry, the implication for consumer harm is not clear cut."[4] In its public rhetoric Ofgem has, however, seemed to ignore the second of these statements and instead only focussed only on the first. It is important that in the future, Ofgem ensures it acts on a balanced reading of the economic evidence.[5]

Remedies need time to take effect

27. It is Energy Suppliers' view that it is appropriate for Ofgem to monitor the functioning of the market. However, many remedies will take time to have an impact, meaning that a reasonable amount of time should be provided between implementation of a remedy and review of that remedy.

Investigations create costs that are ultimately borne by consumers and create investment uncertainty

28. In the energy supply market, Ofgem have instigated a number of general investigations across the market over recent years. These investigations require Energy Suppliers to disclose large amounts of information and commit significant resource to doing so. The costs incurred across industry in complying with these investigations are often ultimately borne by energy customers.

29. Moreover, as investors decide whether to invest in the UK energy supply market or in other parts of the UK energy market, uncertainties around the regularity and duration of market investigations and consequent alterations to market structure, present uncertainty that will provide a deterrent to investment.

More clarity on the details of investigations would reduce cost and uncertainty

30. In order to reduce these impacts, Ofgem should be clearer around how long investigations will take, the timetable for any market remedies that may flow from an investigation, and when these remedies will be reviewed.

Response to Q5 and Q6: The current voluntary merger notification regime is adequate

31. Energy Suppliers agree with the consultation document; the UK merger notification is strong and capable of ensuring that anti-competitive mergers do not take place. This is particularly true in high-profile consumer facing sectors like Energy Supply. There is, therefore, no need to move away from the current voluntary notification regime to one requiring compulsory notification.

[3]Ofgem (2011), *Do energy bills respond faster to rising costs than falling costs?*, Discussion paper, 21 March 2011.
[4]Ofgem (2011), paragraphs 3.12 and 3.13.
[5] For a full analysis of this work seeNERA, 13 May 2011, *Asymmetrical Price Response in Energy Supply: A Review of Ofgem's Analysis* http://www.energy-uk.org.uk/files/NERA%20Price%20Assymetry%2013%20May.pdf

32. To move to a system of mandatory notification would increase the transaction costs, and timescales associated with mergers that can help to bring significant efficiencies and consequent consumer benefits in every segment of the energy market. The voluntary merger notification should therefore remain.

Next steps

33. ERA would welcome the opportunity to discuss any of the points made in this response in further detail.

Stuart Brady
Energy Retail Association

BIS | Department for Business Innovation & Skills

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

Response form

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* *Our response to each chapter has been drafted by a named academic member of the Centre for Competition Policy. Each was written following a sequence of discussions held in the Centre by the authors and other members. These discussions were coordinated by Dr Andreas Stephan and this response has been edited by Professor Bruce Lyons. Wherever possible, the views expressed are based on the available academic research and represent the collective view of the Centre. However, we have not attempted to agree on the precise nuance of interpretation so we retain named authors for each chapter and are individually responsible for the contents. Summary comments on this consultation have been published in recent months on our Competition Policy Blog:* http://competitionpolicy.wordpress.com/.

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08 June 2011

The ESRC Centre for Competition Policy

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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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X	**Academic**
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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. *See front page.*

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.*

Q.1. It is hard to disagree with these objectives, but the first should be prioritised. See our response to Q.2 below specifically on 'criteria by which to judge the proposed merger' of the OFT and CC.

Q.2. (by Bruce Lyons and Stephen Davies)

Any other merger, particularly one creating a monopoly, would be the subject of considerable scrutiny. We think that is appropriate in this case, so we structure our answer in the same way as a competition authority would go about any other merger review.

The 'industry' in which the firms/agencies operate

The OFT acts as a first phase review body for mergers and market investigations. If it finds a potential competition problem, it refers the merger (or market) to the CC for a detailed investigation. The CC has stronger powers to order remedies or to prohibit an anticompetitive merger. The OFT also investigates and prosecutes antitrust violations (i.e. cartels, anticompetitive agreements or abuse of a dominant position), and has a consumer protection role. The CC undertakes regulatory appeals. This division of responsibilities for each institution has evolved gradually since the Monopolies Commission was established in 1948.

Other countries have different institutions to perform similar tasks. For

example, DG Competition in Brussels undertakes the entire merger review process as well as antitrust. In the USA, there are two agencies (FTC and DOJ) but each does complete merger reviews and antitrust – cases are distributed roughly along industry lines. Other countries have other idiosyncrasies so there would seem to be an opportunity for comparative analysis to identify the best institutional design. However, it turns out that most peer reviews place the UK alongside the EC and USA as world-leading competition authorities. We believe it would be unwise to conclude that institutions do not matter.

Criteria by which to judge the proposed merger

The standard by which commercial mergers are judged is whether they substantially lessen competition. A modest lessening of competition may be balanced by efficiency gains as long as consumers do not lose out. In the case of a single CMA, we need to adapt these criteria. The first priority is:

- Would the merger likely result in a less competitive economy with adverse effects on consumers?

And if the answer is too close to call, we can bring in the efficiency defence:

- Would the business community receive a better service?
- Would there be cost savings to the taxpayer?

This ranking of criteria may require some justification. Annual consumer benefits attributable to competition policy in mergers, markets and antitrust are estimated at £739m. Furthermore, deterrence effects have been estimated to be at least five times as great. These benefits have to be set against combined annual costs of the OFT and CC of just £73m. Unfortunately, there is no reliable measure of business compliance costs, but it would clearly be unwise to risk even a small proportion of these benefits without huge cost savings.

Effects of the proposed merger

Cost savings on behalf of the taxpayer are easily dealt with. Potential cost savings include: rationalisation of back-of-office costs; single premises; and more effective use of staff with fluctuating work-loads. The consultation is backed by an analysis of such savings. According to the impact assessment, after allowing for transition costs, the expected saving averages £1.3m pa, or a tiny 0.18% of the measured policy benefits even excluding deterrence. Clearly the merger must be judged by its likely impact on good case choice and decisions that promote competition and do not chill innovation.

The review of a commercial merger focuses only on merger-specific effects. It sets aside anything that could be changed in its absence. Similarly, the evaluation of the OFT/CC merger should not be clouded by issues discussed in the consultation that are not merger-specific (e.g. compulsory notification of mergers). This leaves three key issues that would be directly affected by the

merger:

1. *Coordination*. There are less often anti-competitive effects and more often efficiencies in a vertical merger than there are in one that is horizontal. The OFT/CC merger is essentially vertical as the first phase cases flow from the OFT to the CC for deeper investigation. This has been the position since the OFT was established 38 years ago. The CC has no powers to initiate any investigation – every merger or market inquiry must come through the OFT (or a sector regulator). Also, the CC can impose remedies but the OFT often has to monitor them. It is, perhaps, disappointing that coordination is not seamless after all these years, but it is not and there remains room for improvement. One example is that case flow is not as smooth as it might be and this compromises resource utilisation.

2. *Externalities on other institutions*. The OFT and CC currently each have a range of roles beyond mergers and markets. For example, the OFT is the body responsible antitrust. Sector regulators can concurrently apply some of these provisions to their own sectors (though they rarely do). The OFT also has an important responsibility for consumer protection, which will probably be merged with other bodies responsible for representing consumers. The CC can receive market references from sector regulators and hears regulatory appeals. The Competition Appeals Tribunal has very different roles in relation to the OFT compared to its relationship with the CC. The system is very complex and might benefit from rationalisation, but an OFT/CC merger would be only part of the jigsaw. It will have profound (and not always obvious) implications for many other institutions. Our fear is that piecemeal reform may create knock-on problems for related institutions (e.g. CAT, regulators, consumer bodies).

3. *Decision making*. This is arguably the biggest issue of all. The OFT has a model of decision making that was apparently based on the European Commission (DG Comp). Case teams investigate and this is followed by an executive decision. The identity of the decision maker has been opaque, at least until the last couple of months when the OFT has begun naming an individual executive for each case. In contrast, the CC arose out of the Royal Commission model of decision making. This has a panel of named, part-time, non-executive experts brought together to advise the staff case team from the start and then to decide each case. In terms of corporate culture, the style of decision making could hardly be more different. We also know that many commercial mergers fail because it is impossible to weld two incompatible cultures together. Success in commercial mergers often depends on either wholesale adoption of the better approach or the careful design, bottom to top, of a rational decision making structure that is seen as such by all parties. The CMA requires the latter. We return to this in our answer to Q.24.

Provisional findings (i.e. our conclusion on Q.2 given what we currently know)

The UK already has a first class competition regime, albeit with room for improvement. The creation of a single CMA has the potential to enhance quality if it is well designed. There could be a smoother flow of cases, shared expertise and a more coordinated treatment of remedies. The system could also be faster and less complex for firms. On the other hand, there would be few potential cost savings, externalities on other institutions, and possibly a loss of competition between agencies vying to be the best.

Most importantly, the decision making structure of the proposed CMA must be got right. This applies to antitrust as well as mergers and markets, and it needs to be appropriate to whether decisions are final determinations or referrals for further investigation. We could only recommend (or not) approval of the merger once the proposed decision making structure, internal organisation of two-phase case flow and scope of activities of the CMA have been clarified.

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: None

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.*

Q.3. (by Bruce Lyons)

The markets regime is a powerful weapon that is available to almost no other country. In particular, it can impose remedies on non-dominant firms that have not broken the standard elements of competition law. Remedies can range from structural divestments to legally binding behavioural commitments. Other regimes, including the European Commission, can choose to investigate markets, but none can impose such powerful remedies (except Israel, which recently replicated the UK model). The consultation regards this as one of the key strengths of the UK competition regime that needs enhancing. We are more cautious.

Nine markets have received the full weight of a Competition Commission investigation since 2004. As the consultation points out, he average duration of investigation (including appeals) is just over three years. Additional time is then necessary to adopt remedies, usually 4-10 months but it can take up to a further three years. Many of the markets investigated in this way have related to consumer finance (e.g. store cards, home credit, NI personal banking, payment protection insurance) but they can also be a hangover from a problematic privatisation (e.g. BAA airports, rolling stock leasing) or a high profile consumer market (e.g. groceries). The OFT has conducted a further 24 smaller market studies in the same period (in addition to the first phase of the market investigations referred to the CC). These include a number of essentially consumer protection studies. The OFT's smaller studies take an average of 10.4 months but can only result in voluntary remedy agreements.

Some of these investigations have undoubtedly been greatly beneficial for competition. For example, it would have been very difficult to challenge the London airport monopoly (including Heathrow, Gatwick and Stansted) under Article 102EC/UK ch.2 (abuse of dominance) because the main problem was poor quality service and lack of innovation, not exclusionary conduct or obviously exploitative prices. However, in other *cases it has been difficult to identify remedies that address the identified competition problem*. For example, if consumers are apparently irrational in buying expensive payment protection insurance at the point of sale, careful evidence is required before a prohibition on such selling can be shown to improve welfare.

Where does this leave us? The markets regime can indeed be an important weapon in the competition armoury, but like all weapons it should be used with great care and it works best as a deterrent. The main focus should be on how better to identify markets suitable for investigation. We are unaware of any research supporting the view that the system needs more such inquiries.

However, that is the direction in which the consultation appears to be heading. It suggests four innovations which are unlikely to benefit competition and which may cause harm:

- Conducting *in-depth investigations into practices that cut across different markets*. The danger is that pricing practices almost always have market specific features that render generalisations fairly meaningless (e.g. 'below cost selling' may be a competitive consequence of a two-sided market with, for example, newspaper readers being appropriately 'subsidised' by advertisers who want access to them; or it may be aimed discriminatingly at a new entrant to the detriment of competition). An example of the failure of this approach is the Monopolies Commission inquiry into 'parallel pricing' (1973, Cmnd 5330) which found that prices might move together either due to competition or collusion. It would be hugely costly for firms across the economy to feel the weight of the CMA's information-gathering powers and to follow due process in this form of inquiry. An appropriate division of labour is for academic research or commissioned projects to develop and clarify the principles that can distinguish between the economic effects in any particular case. The CMA should then gather the relevant evidence to apply the principles to particular markets under scrutiny.

- Giving powers to *report on public interest grounds* in addition to identifying adverse effects on competition. However carefully couched in caveats, this opens the gates to a re-introduction of a public interest test which would be a retrograde step for a competition authority. The value of a specialist competition agency is that it has expertise in how firms compete and how this can be channelled to benefit consumers. It is not well adapted to assess non-competition effects. This proposal could resurrect 'industrial policy' through the back door. If this proposal (to be able to report to the SoS in relation to the wider public interest) is nonetheless implemented, there should be a very tightly specified list of what constitutes the wider public interest, along the lines of the non-competition issues in the Enterprise Act in relation to mergers.

- Allowing *SME bodies to become 'super-complainants'* such that they have the right to a reasoned response by the competition authority if they request a market inquiry – the super-complainants system was introduced to help consumer groups who feel their members are being ripped-off. However, this extension could support disgruntled or inefficient competitors. Competition works through consumers putting their money where their preferences are. SMEs are a vital source of new ideas to entice buyers, but they should spend all their energy in achieving this. Lobbying for protection only diverts such energy. Of course, the CMA must be alerted to anticompetitive practices, including those of large firms that exclude SMEs from providing consumers with what they would prefer. The CMA must listen to such intelligence, but formal SME 'supercomplaints' are unlikely to be an improvement and

could tie up scarce CMA resources.

- The markets regime would certainly benefit from streamlining, and there are some helpful recommendations in the consultation on how to ensure that remedies are proportionate and efficient. However, a proposal to introduce *more information gathering powers in phase one of a market inquiry* is less obviously 'streamlining'. There are always several firms in each market and a heavy duty first phase could make the system more burdensome than necessary. The purpose of this first phase is not properly discussed in the consultation document. It should be a light-touch first filter and the second phase should be used for substantive requests for data that firms have not previously volunteered. A clearer phase I/phase II path would encourage firms to see the value of volunteering information in phase I.

The markets regime has so far done more good than harm. The first objective of any reform should be to keep it that way. For example, there is a danger of investigating markets in which competition may not work perfectly but for which there are no appropriate remedies.[1] This leaves plenty of room for improving case selection and investigation procedures. Some useful suggestions are made in the paragraphs following #3.29 in the consultation.

Finally, it would be helpful if there were clear *criteria for referral* of a market to second phase investigation. This could be along the lines of 'a reasonable belief that the market could be delivering substantially higher prices or lower quality or slower innovation than would be delivered by a more effectively competitive market'. The 'reasonable belief' wording is taken from the CAT's judgment on merger references (an alternative formulation could use the ECMR's merger reference wording of 'serious doubts').

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;*

[1] The recent caution expressed by the OFT in relation to referral of the audit market is a sensible approach because of the concern that there may be no remedy even if an adverse effect on competition were found.

- *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.*

Q.5. (by Bruce Lyons)

The UK regime for controlling potentially anticompetitive mergers has a number of idiosyncrasies as compared with most other competition authorities across the globe. For example: the two phases of merger inquiries are carried out by separate institutions; merger notification is voluntary; very small mergers can be caught by the 'share of supply' test for jurisdiction; and minority shareholdings can be prohibited on the grounds of 'material influence'. Some of these are good idiosyncrasies, and other jurisdictions could learn from the UK, but other idiosyncrasies are a handicap, and the UK system would benefit from reform. Which fall into each of these two categories?

1. *Separate institutions for each phase*. The current UK system is unrivalled for avoiding 'confirmation bias', which can happen if an investigation team spends the second phase trying to prove its initial hunch was right. In the UK, if the OFT has a reasonable belief that a merger might be anticompetitive, it is referred to the CC for a completely new team to investigate and decide afresh. On the other hand, an increasing number of mergers are settled at the OFT stage (up steadily from a quarter in 2004/5 to two-thirds in 2009/10). We are aware of no research that distinguishes whether this is because firms are learning to predict the regime after the 2004 reform, or because firms and the OFT are rushing into inaccurate remedy agreements before the competition issues have been properly clarified. Our own research on EC settlements in Phase I suggests early settlement more likely leads to excessive remedies (Type 1 errors) in more straightforward mergers, but anticompetitive mergers (Type 2 errors) may be agreed in Phase I in the case of a complex merger or where the authority is under pressure of resources.[2] With careful design of an integrated institution, it should be possible to guard against both confirmation bias and excessively hasty agreements. Minimum requirements include different heads of investigation team and different decision makers in each phase.

2. *Voluntary notification*. See answer to Q.6 below.

3. *Share of supply test*. Most jurisdictions, including the EC, review

[2] Luke Garrod and Bruce Lyons 'Early settlement and errors in merger control' *CCP Working Paper 11-6*.

mergers only of a certain size. In the UK, this element is captured by the 'turnover test' which allows regulatory scrutiny if the acquired firm exceeding £70m turnover. For firms that may be smaller, the UK system also captures mergers that would create or enhance a 'share of supply' of at least 25%. Two-thirds of all UK mergers that require some form of intervention are captured, not by the turnover test, but by the share of supply. One reason for this is that the EC threshold captures most large mergers which are consequently dealt with in Brussels. This raises the question: do small monopolies matter? It is quite possible that the costs of an investigation would deter some beneficial small mergers but there would be serious dangers in the absence of share of supply test. For example, a sequence of local monopolies (e.g. funeral parlours) could develop across the country. If entry is easy, as it may be in many small scale markets, then there would be no need to refer the merger for heavy duty investigation. In fact, the OFT has been successfully prioritising along these lines for some years and there is no need to eliminate the share of supply test. However, if notification is to become mandatory, clear guidance would be needed on provisional market definition.

4. *Material influence*. The UK has the ability to intervene in cases of minority shareholdings that confer a material influence on another firm even though this falls short of full control. This was applied to good effect in the proposed merger of BSkyB and ITV. The EC does not have this power, which has resulted in Ryanair holding a substantial minority stake in Aer Lingus despite a full merger having been prohibited. Commissioner Almunia sees this as 'probably an enforcement gap' in Europe and we agree. The EC needs to emulate the UK on this one – not vice versa.

The consultation also discusses the *'small merger exemption'* (#4.40-4.42). That discussion makes some good points but it fails to emphasise the importance of a deterrent effect. Similar to the above arguments in relation to the share of supply test, even if the cost of investigating a small merger appear excessive in one particular case, this may still be justified in terms of the overall merger control system if it deters further anticompetitive mergers from being initiated.

Finally, another idea is floated in the consultation, apparently without much enthusiasm, which is to allow *remedy agreements very early in Phase II* and without further work on economic effects. That would be a very bad idea. It would encourage firms to try and bluff through an anticompetitive merger in Phase I, in the knowledge that if it was not accepted, it could immediately make a revised offer without incurring further costs of delay or investigation. The discipline of a negotiation timetable, including enforced delay before a revised offer in Phase II, is an important incentive for sensible initial offers.

Q.6. (by Bruce Lyons) *Mandatory notification*

A few mergers may slip under the radar of the OFT due to voluntary notification, but a greater problem is the consequence that half of all interventions in UK mergers have to deal with completed mergers. This creates problems when the businesses have already been integrated, key personnel changed loyalty or left, capital equipment moved or scrapped, information (including price lists) exchanged, etc. We know from research on merger remedies that divestitures create major problems even before businesses have been integrated (FTC, 19991; EC, 2005; Davies and Lyons, 2007; various evaluation studies conducted by the OFT and CC).[3] Post-merger unravelling can only make these problems worse. If there is any chance of prohibition or that remedies may be required, it is far better to deal with uncompleted mergers.

Mandatory notification should, therefore, include a requirement that the merger must not be completed until the time necessary for a Phase I decision has passed (extended if there is a referral). This may delay the completion of some mergers, but it speeds first phase decisions for those that would have been picked up late by the OFT. There would be some increase in paperwork for firms, but this could be minimised by a simplified procedure for mergers without significant market overlaps or market dominance. This has been very successful for the EC and it may be further simplified as a screening device.

A concern may be the potentially increased workload for the CMA, though it would no longer have the cost of pro-actively trying to find information about un-notified mergers and their possible competitive effects. When France introduced mandatory notification in 2002, the authority's caseload appeared to rise substantially, but it is difficult to disentangle this from other changes including the jurisdictional threshold and economic cycle.[4] A separate issue would be if a mandatory system was so bureaucratic that it deterred efficient mergers.[5]

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[3] Davies, Stephen and Bruce Lyons, 2007, *Mergers and Merger Remedies in the EU: Assessing the Consequences for Competition*, Edward Elgar; European Commission, 2005, "Merger Remedy Study" available at: http://ec.europa.eu/comm/competition/mergers/others/; Federal Trade Commission, 1999, "A Study of the Commission's Divestiture Process" accessed at www.ftc.gov/os/1999/08/divestiture.pdf

[4] Personal communication with the Chief Economist at the French Competition Authority (Dr Thibaud Verge). He also points out problems with firms using a sequence of acquisitions to stay below any threshold and the need to maintain an over-ride for small, anti-competitive mergers.

[5] Simon Evenett ('How much have merger review laws reduced cross border mergers and acquisitions?', *undated*) finds a statistical association between voluntary notification and increased US outward FDI in the 1990s. However, his statistical model does not account for political factors that appear to be highly correlated with the voluntary system. The nine voluntary notification countries include Australia, Chile, France, New Zealand, Norway, Panama, UK and Venezuela; while 'pre-closing' mandatory notification countries include Albania, Azerbaijan, Belarus, Bulgaria, Kazakhstan, Kenya, Macedonia, Ukraine and Yugoslavia, albeit alongside many other more closely aligned countries like

Mandatory notification also has an externality that may be beneficial to shareholders. Half of all mergers fail to add value to the firms, which is less surprising when you think about the pressures and constraints. Managements cannot discuss certain issues prior to completing a merger because this would breach Article 101EC/Ch.1UK (cartels), 'due diligence' has limitations, and there may be secrecy due to strategic issues in acquiring shares. A period of reflection to consider market effects and potential efficiencies may lead to a rethink which improves the proportion of successful mergers. The following evidence is suggestive.

Martynova and Renneboog (2006) conduct a large scale study of stock market reactions to mergers.[6] They calculate the capitalised change in stock values around the time of the bid. This 'event study' approach provides the market expectation of enhanced (or diminished) value of a merger measured by its 'caar' ('cumulative average abnormal returns' between day x before the merger is announced and day y after it is announced: caar[-x,y]).[7] M&R also calculate the proportion of mergers with positive caar (%pos). They do this for over 2,000 mergers across all European countries.

In the following table, I have taken their published aggregate figures by country and calculated averages for the three voluntary regimes at the time (UK, France and Norway) and compared them with all other countries in the sample. This reveals that mandatory regimes are associated with a greater proportion of successful mergers (at least in stock market expectation) and higher returns for the bidding firm.[8] Without access to the original data, I have not been able to calculate statistical significance tests. However, these simple calculations are at least consistent with the view that mandatory notification encourages firms to consider why they are proposing a merger and to consider its consequences. Because many other national differences may be affecting these results and we do not have statistical significance tests, our more modest conclusion is that there is no evidence of mandatory notification deterring profitable mergers.

[*Table follows on next page*...]

Ireland, Israel and Japan. It is not convincing evidence of a deterrence effect of mandatory notification.

[6] Marina Martynova and Luc Renneboog (2006) 'Mergers and acquisitions in Europe' see http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/publications/discussionpapers/2006-003.pdf

[7] More precisely, each merger has a 'car' and the 'average' in 'caar' refers to the average across a class of mergers. [-x,y] is known as the event window.

[8] The single exception is caar[-60,60], but this four month event window will be subject to enormous noise as other events affect share prices over the period. For this reason, most event studies focus on much shorter periods as in the [-1,1] and [-5,5] day event windows.

Bidding firm abnormal returns (and % positive returns) around time of merger

	Notification Regime			
	All	*Voluntary*	*Mandatory*	*Difference*
caar[-40,-1]	0.88	0.64	1.23	-0.58
%pos	50	48.76	51.79	-3.03
caar[T=0]	0.51	0.31	0.80	-0.49
%pos	50	48.29	52.47	-4.18
caar[-1,+1]	0.74	0.45	1.16	-0.71
%pos	51	49.12	53.72	-4.60
caar[-5,+5]	0.74	0.55	1.02	-0.47
%pos	51	50.17	52.20	-2.02
caar[-60,+60]	-2.94	-2.70	-3.29	0.59
%pos	50	49.53	50.68	-1.15
# obs	2194	1298	896	402

Notes:

1. Averages for each regime are weighted by the number of mergers (1,298 in voluntary regimes [France, Norway and UK] and 896 in other European countries)
2. Calculated from the abnormal stock market returns data as reported in M&R book chapter Appendix B on abnormal returns
3. Voluntary notification is taken from Evenett working paper Table 1, which uses US international competition policy advisory committee data for 1999

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.*

Q.8. (by Andreas Stephan)

Is a prosecutorial approach desirable?

The OFT currently enjoys the combined roles of policeman, prosecutor, judge and jury. While it must always be concerned with ensuring a decision stands up to appeal, there is no obstacle to it delivering as many competition decisions as it wishes. Under a prosecutorial approach, the competition authority builds a case which it prosecutes in an adversarial setting such as a court room or internal tribunal. Such antitrust procedures exist in the US, Australia, Canada and Ireland. The court is the decision maker, not the competition authority. A prosecutorial approach is likely to boost transparency, lend greater credibility to the enforcement regime and reduce the number of appeals. The court or tribunal's first instance finding will take into account many arguments that parties currently feel are not properly heard until the appeal to the Competition Appeals Tribunal (CAT). A prosecutorial approach would thus help address concerns from the business community over separation of powers.

However, a prosecutorial approach is unlikely to improve the frequency of cases because the OFT would have the added burden of convincing the court or tribunal that a decision should be adopted in the first place. It would thus introduce an obstacle to enforcement where there is currently none. If appeals under an adversarial system are heard by a general court, there will also be greater difficulty in getting economic evidence heard. One of the CAT's strengths under the current system is its proficiency in both the law and economics of competition policy. It does not necessarily follow that it would be able to deal effectively with economic evidence when presented in an explicitly prosecutorial manner. Finally, it would take the UK further away from the EU model with which it is obliged to ensure compatibility.

The dangers of streamlining

Past reports by the National Audit Office certainly suggests that the OFT could operate more efficiently and provide the taxpayer with better value for money. However, beyond management and administrative efficiencies, the consultation document speaks of the possibility of 'streamlining' current procedures. Although such mechanisms do improve efficiency, there is always a cost in terms of rigour and accuracy. For example, in the OFT's dairy price fixing case a number of firms under investigation agreed to settle the finding of an infringement. Later, the bulk of the infringement had to be dropped because two of the parties who refused to settle were successful in challenging it.[9] Concessions of this kind risk coaxing firms into admitting guilt

[9] A Stephan, 'OFT Dairy Price-fixing Case Leaves Sour Taste for Cooperating Parties in Settlements' (2010) ECLR 30(11) 14-16

when they are not even sure they have done anything wrong; something which is extremely damaging to the perceived legitimacy of competition policy.

The inadequacy of numbers

More research is needed to determine exactly why other EU states have delivered far greater numbers of decisions than the OFT. As most EU member states also follow the Commission's model (as opposed to a prosecutorial approach) procedures may not be flawed in the way the consultation document infers. As it recognises, numbers relating to the frequency and speed of UK antitrust cases may be misleading. For example, they do not measure the accuracy of decisions. Many would argue that a minimalist approach to competition law enforcement is, in any case, preferable – only intervening in markets when absolutely necessary. Sector specific regulators may be using other powers to address potential antitrust problems. UK businesses may be involved in less anticompetitive behaviour because of a stronger competition culture. In addition, the OFT may be engaging with businesses in order to ensure compliance, where other authorities prefer the finding of an infringement. The existence of these and other factors can only be confirmed by a more careful comparative evaluation of the UK competition regime.

Q.9. (by Morten Hviid) *Private actions*

Apart from a few words in the foreword by the minister Vince Cable and four paragraphs in chapter 5 [5.49-5.52], private enforcement is not mentioned in the consultation document. According to his foreword, Vince Cable is keen to promote private-sector challenges to anti competitive behaviour, but will bring separate proposals in due course. In doing so, I think BIS is missing a trick by believing that private enforcement is a separable complement to public enforcement.

Below I argue that there are several areas where the interaction between private and public enforcement is of such a nature that they are better looked at together. The two key areas are over-enforcement and settlement. Fears that private enforcement lead to over-deterrence[10] can make competition authorities less willing to make adverse findings and where they do find an infringement, feel that they need to take into consideration the possible outcome of likely follow-on cases in setting fines. Follow-on cases are not cost effective, making it worthwhile to consider whether the competition authority

[10] Over-deterrence refers to a situation where the ex-ante expected "penalty" for an action exceeds the expected harm so that a rational firm refrains from taking such an action. This can arise either because the "penalty" imposed exceeds that needed for deterrence or because there is a substantial risk that the authority wrongfully condemns the action.

can be given a direct role in helping consumers obtain compensation.

Looking at the EU and UK debate about private enforcement over the recent past[11], the view that the two enforcement modes are separable is possibly not a surprise. The debate in the EU [and to a lesser extend the UK] has been distorted through a single minded focus on compensation as the sole aim and effect of private enforcement and on cartel infringements as the key target for private enforcement. The typical discussion goes along the following lines:

> Cartels overcharge consumers, thereby directly harming those who still purchase the good by reducing their disposable income. Consumers should be compensated for these losses. The best way to achieve this is for the people or their representative[12] to follow up on a competition authority decision with a follow-on action in the Competition Appeals Tribunal.

This standard line of argument deserves several comments, some of which illustrate the problem with separating out the discussion of private and public enforcement.

Inefficiency[13]

The first thing to make clear is that follow-on cases consume resources. While the costs of private enforcement may not show up in the Public Sector Borrowing Requirement, they are not a free good.[14] In the past debate, little thought seems to have been given to this.

Follow-on litigation in the CAT means running the case for a second time (or a third if it has already been through an appeal). To the extent that we learn

[11] See for example the 2008 EU White Paper (White Paper on Damages actions for breach of the EC antitrust rules {COM(2008) 165 final}). The White Paper is accompanied by a Commission Staff Working Paper {SEC(2008) 404}, an Impact Assessment {SEC(2008) 405} and a Report: "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios". All documents are available at the European Commission Web site at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html. The new Commissioner Almunia is equally committed to making private enforcement work, see for example his May 12th, 2010 speech "Competition and consumers: the future of EU competition policy", {SPEECH/10/233} page 6. The UK Office of Fair Trading published their own discussion paper in 2007: "Private actions in competition law: effective redress for consumers and business", Office of Fair Trading discussion paper OFT916.

[12] This representative is envisaged as a private representative such as a consumer association, a law firm or possibly even a professional competition claims firm, rather than the competition authority.

[13] Other, such as Daniel Crane also doubts that private enforcement is an efficient mechanism to secure either compensation or deterrence. See Crane, Daniel A., 2010, Optimizing Private Antitrust Enforcement (September 17, 2009). Vanderbilt Law Review, 63(2), 675-723.

[14] An important distinction between public and a private enforcement is that the funding for the former comes via the Treasury where the distortionary effects of the taxes required to raise the necessary funds will have been considered, whereas the funding of the private case comes from one of the parties to the case with no thought to such effects.

nothing new through this, this seems an expensive way to secure compensation.[15] Moreover, due to the cost of running the follow-on cases they are likely to have to be pursued as some form of class action. One proposal is that a designated body pursues the action on behalf of the consumers who were harmed. There is something odd in one body acting on behalf of the consumers taking over from another body who does exactly the same. An example of this is the "Replica Football Kit" case [Decision of the Office of Fair Trading No. CA98/06/2003]. Here *the Consumer Association* brought a follow-on action to the original OFT decision, which itself had already been appealed several times. Rather than running the case again, it would be at least worth considering giving the competition authority the power either to disgorge some of the fine to compensate those harmed, or to use a settlement procedures to set up mechanisms to compensate those harmed. The OFT in its consultation in 2007 [OFT discussion paper OFT916, paragraph 4.17] touched on the latter possibility. The counter argument would be that then only some people would be compensated, but firstly this is a matter of degree since there will always be cases which are too costly to pursue for damages. Secondly, given the evidentiary burden in private cartel cases, it is far from obvious that private individuals or their representatives are able to pursue a case successfully where the competition authority would not also have the necessary information and available mechanisms to design a compensation package. Where the consumers cannot be identified individually, the authority may be able to set up a fund (similar to *cy pres* awards in the US where unclaimed settlement funds may be given as such awards to relevant non-profit organisations), something which happened in the private schools case.

While a number of these issues are complex, they could and should be discussed alongside the discussion of the design of the public enforcement regime.

Deterrence

While legally one might distinguish between the fine applied by the competition authority, the damages awarded or agreed in the private case and any costs allocated to the firm, for the firm, the sum of these is the financial consequence of the competition law violation and this is what will serve as a deterrent. This leaves the competition authority with an interesting problem because they are inevitably the first mover and also the only party tasked with providing an appropriate punishment.

For the special case of cartels, it is often argued that private enforcement through increasing the total punishment adds positively to deterrence because public enforcement is inadequate. This argument is not convincing. If the public punishment is inadequate, then either the competition authority is not applying the appropriate fine or there is something preventing it from doing so. The latter may be the case as there is a 10% cap on fines, a cap which is a totally arbitrary and not based in any evidence about harm. If monetary fines

[15] Of course it is possible that we learn more from the private action, for example, because competition authorities may be conservative in their estimate of harm in order to minimise the risk of heavy fine reductions on appeal.

imposed on the firm are inadequate, it is better to sort this out now rather than consider it as part of a separate, later consultation on private enforcement.

The main problem which private enforcement can create for general enforcement arises through possible adverse effects on leniency programmes. Since firms will look at the total bill from violating competition law, if damages become excessive this added risk may make firms less likely to come forward and reveal the cartel. These concerns are far from merely theoretical. The most obvious illustration of this is the US *Antitrust Criminal Penalty Enhancement and Reform Act* of 2004 which removed joint and several liability in a private action from a firm granted immunity under the leniency programme and in addition reduced the private liability of that firm to single damages. This Act was passed to deal with fears that firms were reluctant to seek immunity because the private damages might outstrip any public fines.

Cartel cases do present a separate problem for private enforcement in the case where there are credible concerns about the future financial viability of some of the cartel members, but that can equally be considered in a separate consultation.

For the other parts of competition law there is a much more serious risk of over-enforcement. This can arise because the theory of harm is not yet fully developed. For example, wrongly condemning a particular rebate scheme may in itself not impose large error costs because the firm may be able to construct an alternative incentive scheme which works almost as well. However if the decision gives rise to either a follow-on action for damages or future private litigation, the error costs imposed on the economy may be significant and affect the decision of the authority. Over-deterrence can also arise where the decision is unclear about how wide the reach is. An example of the latter is information sharing where a decision may still not make clear to other firms in other industries where the boundary is between what can and cannot be shared. More generally any area of competition law where there is any remaining legal uncertainty about the practice, and arguably this would account for most actions short of naked price fixing, any increase of the total bill for a finding of competition law violation would have a chilling effect on business. This risk may have a knock-on effect on the competition authority, who as a result may set a higher standard of proof to reduce the cases of errors.

If private enforcement becomes widespread, we may in the end observe that the competition authority pursues very few vertical agreement cases [Chapter I or Article 101 TFEU] or cases under Chapter II [or Article 102 TFEU]. Such a pattern of work-sharing between private and public enforcement may be entirely desirable. There are cases where one of the affected parties is better placed than the competition authority to enforce the law. Private parties harmed directly by the anti-competitive practice typically have better information about the infringement occurring than the competition authority. In some cases they also have the necessary information to enforce the law as well at the necessary resources. However, the extent to which this is possible or plausible, depends on the nature of the courts (specialist or generalist), the

right to obtain information and the cost of using the court system. See for example M. Harker and M. Hviid, Competition Law Enforcement: the "Free-Riding" Plaintiff and Incentives for the Revelation of Private Information, CCP Working Paper 06-9 and M. Harker and M. Hviid, "Competition Law Enforcement and Incentives for Revelation of Private Information" (2008) 31 World Competition 279-298.

Remedies

The private enforcement debate has focused almost exclusively on damages and mostly on follow-on cartel cases. Empirical reality in Germany shows that there are very few cartel cases, very few follow-on cases, and very few cases where the requested remedy is compensation. However, there are a large number of private cases in which firms (in particular SMEs) and consumers enforce their rights under competition law in the courts. These cases are looking for other remedies, in particular injunctions, either asking that another firm stop doing something (e.g. charging excessive prices or margin squeezing) or start doing something (e.g. supplying them or granting them access), see for example S. Peyer, Injunctive Relief and Private Antitrust Enforcement, CCP Working Paper 11-7. The aim of these cases would appear to help firms make markets work better for them and hopefully ultimately consumers. It is much more logical that firms are willing to use the law to enforce the non-cartel part of competition law and in particular in cases where they are not asking for compensation but for a fair treatment as guaranteed under the law. The concern about private enforcement is always that firms may not have an incentive to upset an important supplier or buyer and hence would be reluctant to bring a case, except possibly as a last resort. It may therefore be possible that firms perceive a big difference between asking someone to “play nice” through an injunction and to ask for financial compensation, with the latter a much more aggressive action.

It is by considering all the other possible violations of competition law where the problem of thinking of private enforcement as a complement not a substitute becomes much clearer. However, once we accept that private enforcement is there to support, not feed on, public enforcement and deterrence, it seems sensible to consider the two sides of enforcement together rather than separately.

Standing

The consultation document raises the possibility of extending the super-complaint powers to SME bodies [e.g. section 3.14-3.16] to give these standing to pursue private enforcement. This is not the place to go in to details with the potential dangers in the proposal, mainly related to tacit collusion and coordinated behaviour, but see our answer to Q3. However, to discuss this without considering the possibility of individual self-help through private enforcement runs the danger of overlooking the simplest solution.

Concluding remarks

This commentary has argued that it would have been appropriate to discuss

public and private enforcement together because fundamentally they serve the same purpose of deterring breach of competition law. While it is too late to bring private enforcement directly into the discussion, it would still be possible to have an eye to what private enforcement could add to the mix. The discussion of this consultation document should be cognisant of the later discussion about private enforcement.

Most importantly, in the discussion of any settlement powers and procedures, the discussion about the optimal design of the enforcement regime should consider the possibility of settlements also dealing with compensation for harm.

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.*

(by Andreas Stephan)

The collapse of the British Airways trial highlights a number of shortcomings associated with the cartel offence.[16] The requirement of dishonesty is the most problematic aspect, as there is empirical evidence to suggest that attitudes towards cartel practices in the UK have not significantly hardened since criminalisation.[17] This is in part due to the absence of frequent high profile convictions, which mean that the harmful and dishonest nature of price fixing has yet to be effectively communicated to members of the public and to some in the business community. Dishonesty has adversely affected the OFT's case selection and confidence as a criminal prosecutor, reflected by the reliance on a US plea bargain to secure the only convictions to date in *Marine Hoses*. The criminal offence has been overshadowed by a danger that juries will not be convinced that what was done was dishonest by the standards of reasonable and honest people, or that the defendant knew his actions were dishonest by those standards. The decision to redraft the offence should therefore be welcomed.

Should dishonesty be replaced with anything?

It is notable that none of the four options mooted in the consultation document suggest an alternative 'moral marker' to dishonesty. They focus instead on the more substantive scope of the offence. While the absence of such a definitional element would raise concerns among some in the business community, two things should be noted about having a wider cartel offence. First, the enduring success of cartel offences in the USA and Canada is largely due to the flexibility afforded by a wide definition. This is particularly important during the early stages of enforcement, when the prosecutor is seeking to build a body of successful cases. Second, the fallout of the failed British Airways trial demonstrates the reputational damage to the prosecutor of getting a case wrong. The public and media constraints on prosecutorial discretion should therefore not be underestimated. A lack of credibility will kill a criminal offence, regardless of how it is defined.

The desire to exclude countervailing economic arguments

The four alternatives ostensibly reflect the same concern which originally motivated the inclusion of dishonesty: that the offence should not capture behaviour which might be subject to countervailing economic arguments. There is a particular fear that such arguments would confuse jurors. However, we need to ask whether such concerns are appropriate where a criminal

[16] A Stephan, 'How Dishonesty Killed the Cartel Offence' (2011) Crim. L. R. 6, 446-455

[17] A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 Comp. Law Review 123-145

offence only applies to 'hard-core' horizontal practices. Countervailing economic arguments very rarely excuse horizontal price fixing, market sharing, output restriction or bid-rigging. When they do, the evidence needs to be very compelling indeed. An experienced judge can play a filtering role when directing the jury.

It is suggested that Option 4 (which is probably the most sensible of the four overall) would in some way avert countervailing arguments, but it is unclear exactly how. It perhaps assumes that firms making such arguments will always be open about defensible collusive practices because they have nothing to hide. The fact that an agreement has been kept secret cannot, however, preclude economic arguments of countervailing benefits. Ironically, the courts have even ruled that economic evidence can be relevant to the issue of dishonesty under the current criminal offence. [18]

Can customers really avoid companies which openly collude?

A stated rationale for Option 4 is that where a cartel openly informs customers of its anti-competitive conduct, those customers will choose to trade elsewhere. This is rather dubious given the very characteristics that make a cartel worthwhile (significant enough market share to raise price, high barriers to entry, and low substitutability) also mean that customers have little choice about who they buy from. However, this would not preclude customers from seeking damages or prevent the competition authority from imposing fines under the Competition Act 1998.

Reconciling civil and criminal enforcement

Once the dishonesty requirement is consigned to the history books, the biggest challenges to increasing the number of criminal cartel cases may have little to do with the design of the offence itself. Unlike many other competition regimes, the UK's cartel offence relates only to individuals. This means that unlike Canada, the US or Ireland, criminal investigations against individuals must complement civil investigations against their firms. The authority's experience and internal expertise are consequently geared for a different process. As the standard of proof is higher for criminal cases, these investigations must take precedence. Criminal cases will thus hold up the civil cases. It also means they are unlikely to be engaged in the most serious pan-European cartel cases dealt with by the European Commission.

Criminal investigations are more time consuming, more expensive and more risky than civil cases against the firm, making it likely they will have an adverse effect on the way in which an authority prioritises its cases. For example, the repeated delays and legal challenges in the failed British Airways case appears to have caused the OFT to back off from applying the offence in its other civil cases. In particular, Director Disqualification Orders appear to have gained greater prominence in recent years as a proxy for the deterrent effect of the criminal offence. These problems are (to some extent) averted in the US and Canada through sophisticated systems of direct

[18] *IB* v *The Queen* [2009] EWCA Crim 2575

settlement or plea bargain in criminal cases. Such mechanisms are not currently available in the UK.

The proposed reforms to the criminal offence would certainly make it easier for a prosecutor to successfully argue their case. However, this will not necessarily ensure a wave of criminal cases. There are serious procedural issues which also require careful attention – in particular the incentives to prioritise 'safer' civil investigations over less predictable criminal prosecutions. The OFT's lack of experience as a criminal prosecutor is also something which needs to be addressed; in particular, its over-reliance on the single cooperating party in *British Airways* when building their case.

The importance of pressing on with criminalisation

Despite the failings of the current offence and the tricky business of reform, it is essential that the UK presses on with criminal sanctions against individuals involved in cartel practices. Corporate fines under the administrative procedure are typically imposed years after an infringement was instigated and do not directly affect the individuals responsible. Unlike a prison sentence, they can also be treated as a cost, rather than a sanction. If we fail to punish individuals, there will be limited deterrence of cartel infringements because cartelists will know it is the firm that bears the risk of their misbehaviour. The only civil sanction available against individuals is Competition Disqualification Orders, but these are not imposed where the employee has cooperated with an investigation (which is why none have been imposed to date) and are not available at the EU level. Criminal sanctions also help raise awareness of why cartels are illegal, strengthening a culture of competition within the UK.

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.*

(by Catherine Waddams)

Sector regulators are generally established to impose ex ante regulation in markets where monopoly is inevitable, desirable, or both, at least in the short term. They have developed and refined tools for the purpose. Meanwhile some parts of the supply chain have become competitive, often as a result of the regulator exercising its duty to encourage competition where appropriate. So UK regulators find themselves with responsibility for and expertise in sectors where suppliers compete for business and from which they have withdrawn ex ante regulation (for example in energy and telecoms retail).

Potential tension arises because regulators also carry statutory duties for the sector, imposed by Parliament, particularly to meet environmental and social objectives. While such objectives may sometimes be delivered appropriately through monopoly networks, it is very difficult to achieve them in markets which are open to competition. Often, as in the case of the non discrimination clauses introduced in retail electricity,[19] interventions are likely to undermine the competitive process and as a result often struggle to deliver both the competition and non competition objectives. Remedies to improve competition are usually concerned with process, while other objectives are much more focused on outcomes. Where ex ante price caps remain, these can be used as an additional instrument for the regulator to exercise trade-offs between different statutory duties. Where markets have opened to competition, the regulator's application of additional criteria will usually lead to different remedies and outcomes from those applied by a Competition Authority whose objectives are competition focused.

Whether the Regulator or the Competition Authority should have primacy therefore depends on whether the Government believes that the non economic objectives should apply to the competitive part of the market, or only to the regulated monopoly part. If the former, the Regulator should have primacy over competition issues, to ensure that the other objectives are considered (though the outcome for competition itself will, by definition, be poorer). But if potentially competitive parts of the market are to be governed by competition concerns alone, then the Competition Authority should have primacy. The decision about priorities has important implications for delivering policy, and it belongs squarely with the government. If the government does not bite this bullet and make clear its priorities, its agencies will behave as counterproductive rivals rather than effective complements.

Where does this leave us in relation to the current consultation? Competition is a means to deliver better outcomes to consumers and society in general. For the sector regulators, it is often specifically included in their statutory duties. For example the Utilities Act gives to GEMA a primary duty " "to protect the interests of consumers ..., wherever appropriate by promoting

[19] See Morten Hviid and Catherine Waddams Price 'Non-discrimination clauses in the retail energy market' *CCP Working Paper 10-18*

effective competition". This was amended by the 2010 Energy Act to make explicit that competition was seen as being a means to the end of protecting consumers, and that other means should also be assessed. Other developments have imposed additional objectives on many regulators, for example environmental and social.

In contrast the CMA is likely to have a clear primary competition focus (pace section 9). It will certainly favour competition remedies over others (as the ROSCO MIR illustrated). Even if it has wider public objectives, these are likely to be less clearly focussed than those of the sector regulators. So if the sector regulators' objectives apply across their sector, including the (potentially) competitive parts, they should retain primacy on competition matters, using the expertise of the CMA, but retaining the decision whether to conduct an inquiry, and what its terms and remedies should involve. If this route is taken, competition issues will be applied differently in regulated than in unregulated sectors.

If, however, competition is seen as pre-eminent where it is feasible, then the CMA should have primacy. Such a solution would be difficult to implement because of the different objectives for different parts of the sector, and would give the sector regulators an incentive to discourage competition, since they would lose influence over a part of the sector, and so have fewer instruments with which to deliver the various other objectives with which it is charged.

I therefore conclude that if sector regulators have non-competition powers, these should extend to (potentially) competitive areas, and that the sector regulators should have access to the expertise of the CMA to help it apply competition inquiries and remedies within this wider framework.

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

Yes, with primacy for the sector regulators, see argument above.

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.*

(by Catherine Waddams)

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. The issues of conflicting objectives discussed in relation to Chapter 7 are currently dealt with by the CC adopting the objectives of the sector regulator in undertaking regulatory appeals, and this would need to be extended to the new CMA.

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.*

This would seem an excellent idea, though there is necessarily a tension between having a model which is both sufficiently general and adaptable to apply to the variety of sector regulators, and contains a common core.

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.*

(by Pinar Akman)

Q.19. There are advantages and disadvantages to stipulating the objectives of the CMA in the legislation. Some of these are already recognised in the consultation documents. One thing that is not recognised, however, is a potential clash with EU law as interpreted by the EU Courts. Although a 'duty to promote competition to the benefit of consumers' is in essence what the goal should be, there may be problems with the conformity of this goal with the jurisprudence of the ECJ, in light of the rule in section 60 of the Competition Act, particularly after *GlaxoSmithKline*.[20] There is also a potential issue of who the 'consumers' are whose interests are to be protected. There are many instances in which the interests of the intermediate 'customers' and the interests of the final 'consumers' will differ [see Akman, '"Consumer' versus "Customer": the Devil in the Detail' (2010) 37 (2) *Journal of Law and Society* 315]. Thus, if the term 'consumer' is to be used, then it must be made absolutely clear what it means in the legislation. Even with an objective merely expressed as 'duty to promote competition', there are potential problems so long as it is not made absolutely clear what 'competition' and its protection in this context mean. All in all, it might be best to leave a general objective out of the legislation, but indicate the specific duties of the CMA in the individual context of the prohibited practices.

Q.20. The CMA should *not* have a principal competition focus to the exclusion of roles in consumer protection. There are several reasons for this.[21]

First, there may be an important *loss of synergies* that result from a single authority dealing with both consumer protection and competition law. A single authority when dealing with a certain market (e.g. due to competition concerns) gains valuable insights into that market which might *trigger or prevent* further action under consumer protection law. Similarly, action in consumer protection (e.g. prohibiting certain 'unfair' practices) can have implications for competition on the market as a whole and might be better undertaken by a single authority responsible for both functions.

Second, there will be a *loss of expertise* that the OFT has thus far built in the area of consumer protection. Perversely, this expertise, being consciously forsaken, will have to be rebuilt by Trading Standards (TS) and Citizens Advice (CA). There is no mention in the BIS consultation of any cost implications of this at all. Moreover, neither TS (funded by *local councils*) nor CA (a *charity*) has the broad expertise that results from *national* enforcement or the appropriate resources. It is questionable that they will ever be in a position to deal with requirements of *national* enforcement, let alone those resulting from the UK's obligations to apply EU law.

[20] See Akman The 'Consumer Welfare' Delusion in GlaxoSmithKline – A Response to Bruce Lyons, November 25th, 2009, CCP Blog

[21] For some of them see Akman Separating Consumer Protection from Competition Enforcement: 'if it ain't broke, why fix it?', May 11th, 2011, CCP Blog

Third, if the CMA is to have the duty to ensure 'fair and effective competition and promote competitive markets conducive to stability, growth, innovation and consumer welfare' (#9.2 of consultation) and it is called the 'Competition *and Markets* Authority' then it will be rather strange for it not to have any consumer functions, when consumers are clearly an integral part of most markets. Indeed, the examples in the consultation used to demonstrate a categorization of the subject matter of the market studies conducted by the OFT clearly show that at a substantive level, issues of consumer protection and competition law are tightly related, if not, intertwined. Issues such as consumer contracts, payment protection insurance, local bus services, etc can at any given time be issues of pure consumer protection, pure competition protection or a mix of the two. A separation of the powers of consumer protection and competition is very likely to cause serious problems for the market studies regime.

Finally, an overall problem regarding the separation of the powers is that nowhere in the BIS consultation two issues are addressed: *why* it is necessary to separate these powers (i.e. what is the evidence demonstrating that the current system does not work) and *how much* it will cost to separate these two powers (i.e. what will be the cost to the economy of the lost synergies and the resources spent on TS and CA to gain the necessary expertise).

As it stands, it is impossible to understand why the consultation seeks to deprive the CMA of consumer protection powers. With so many reasons not to do this, it can only be hoped that the current system is preserved.

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.*

(by Bruce Lyons)

Q.22 & 24. The proposed merger of the OFT and Competition Commission is a great opportunity to review how decisions should best be made in a competition authority. There are plenty of alternative models and most countries seem to have their own distinctive styles. Much of the reputation of different agencies results from the expertise of its staff, including economists, lawyers and administrators. This can sometimes paper over the cracks of a fragile formal decision-making structure. In the long term, however, a robust institution is one that provides a well-informed challenge to both firms and its own staff. Unfortunately, there is a serious danger that the proposed Competition and Markets Authority (CMA) will be given a hotch-potch of superficially targeted, but in practice incompatible, decision processes by which different bits of competition law are enforced by a divided institution.

How different are the *skills required to gather and interpret evidence* in different elements of competition law (e.g. mergers, agreements, abuse of dominance, market inquiries)? The answer is 'very little'. The essence of competition law, appropriately interpreted through the lens of economic effects, is that it requires a blend of law and economics skills to implement. This is true of assessing the likely effect of a merger or rebate scheme or exclusive contract on price or investment or innovation incentives. In both the OFT and CC, staff with economic and legal skills gather the evidence. A similar blend of skills is necessary to balance the evidence and decide a case, though decision makers need additional, wider experience, and do not necessarily require all the technical skills for compiling economic evidence.

The UK system, despite its common law roots, falls firmly in the European tradition of agency-led inquisitorial cases. The courts are for appeal against agency decisions (unlike in the adversarial US system). There is also almost no private action in prosecuting competition cases in the UK. Unless the chosen ch.5 options result in fundamental changes, *agency-led inquiries* will continue at the core of the system.

Given that *similar skills are required by decision makers* for most categories of competition case, who should make those decisions? The current UK system has two institutions with very different processes for making decisions based on a staff investigation. As stated in our answer to Q.2: 'The OFT has a model of decision making based on the European Commission (DG Comp). Case teams investigate and this is followed by an executive decision. In contrast, the CC arose out of the Royal Commission model of decision making. This has a panel of non-executive experts brought together to advise the staff case team and then decide each case.'

The OFT currently decides on antitrust and first phase mergers and market inquiries. The CC decides second phase mergers and markets. *This mix and associated differences in decision making bodies cannot be justified.*

Spurious arguments are sometimes wheeled out to justify what is essentially a historical accident. For example, 'mergers are different because they are prospective, so require skills to predict likely effects', but current practices (e.g. restrictive contracts) also need an assessment of what would happen in their absence. Another argument is that 'anticompetitive agreements and abuse of market power are illegal, so subject to fines while proposed anticompetitive mergers or uncompetitive markets are not', but this is an Alice-in-Wonderland justification for having the illegal activity decided by a single executive while mergers and markets are decided by a panel of independent experts.[22]

If there is to be a unified decision making structure, what should it be?
Executive decisions are speedy and usually reliable when implementing relatively straightforward rules. In cases where issues must be balanced and nuanced, however, there is value in widening the decision-making base. Also, when the decision is based on evidence provided by their own staff, an executive can quite naturally be influenced by staff management and support issues. A panel's strength is in the diversity of experience it brings to a judgment, and the ability to debate key issues between equals. Furthermore, a non-executive panel will also be less influenced by organisational priorities or career concerns, though it may be a little slower to reach its decision. Executive decisions are perfect for phase one decisions, including whether to open a serious antitrust investigation; and decisions by a non-executive panel have exactly the right qualities for deciding second phase cases. The latter require impeccable credentials not least because they can involve the transfer of private property (e.g. a fine or preventing the sale of business).

*This does **not** mean that the CMA should straightforwardly adopt the CC model*. There are some strong positive attributes to CC panels, most of which are not found in other jurisdictions. For example, panel members read all the evidence as it comes in. They also undertake site visits which provide insight into the businesses under scrutiny, and they have face-to-face hearings with the executives responsible for the businesses and business practices. This provides an unrivalled access of firms to decision makers but in a structured and open environment. It allows the decision makers to ask direct questions face-to-face about any aspect of the business they consider relevant; and it allows the firms to rebut the staff case in front of the decision makers.[23]

However, other features of the CC panel system require reform. There is a serious confusion between leading the investigation and independent decision making. Although there is a staff inquiry director, the panel continually reviews internal documents and can influence the direction of the inquiry. This continues with the drafting of chapters for the preliminary and final reports. This inevitably compromises the appearance of impartial review of

[22] As will be argued below, the differentiated appeals system does not sensibly compensate for this oddity.

[23] EC hearings are more 'set piece' presentations and are typically not in front of the decision makers. The hearing officer's important role is in ensuring due process but his input into the decision is mainly to confirm a fair hearing. At the FTC, the commissioners individually see the firms a few days before reaching a decision.

the evidence in reaching a decision. The panel should stay at a distance and only draft its decision/conclusions.

The clinching issue for a unified structure of decision making, with non-executive panels deciding all phase two cases (including antitrust), is that we need a coherent appeals system. Currently, natural justice and the Human Rights Act mean that decisions taken by a panel (i.e. the CC) are subject to judicial review (i.e. the court can require the CC to investigate certain points more carefully and to reconsider its decision), while executive decisions (i.e. OFT antitrust) are appealed 'on their merits' (i.e. the court can replace the OFT's decision with its own decision). Judicial review is consistent with the inquisitorial approach of agency decisions. Indeed, it is used by the European Court in relation to all European Commission decisions. JR keeps the agency on its mettle but does not unbalance decision making.

Unfortunately, 'merits' appeals completely unbalance a competition case. Agency staff in the OFT (and, indeed, Brussels) search for unbiased evidence on which to present the basis for a decision. If such a decision is appealed 'on its merits', the firms involved have every incentive to present one-sided evidence to the court. In a full-blown adversarial system (as in the USA), the agency might respond by selectively emphasising its most powerful evidence of anticompetitive behaviour.[24] However, that cuts against the grain of an inquisitorial system where the agency is itself in search of the truth. Furthermore, the court (i.e. CAT) does not have a full complement of staff to investigate cases, even though it does have a panel to decide them. Antitrust cases often involve several firms (horizontally or vertically related or both) who are party to an appeal. The CAT can then face technical expert evidence from, possibly, half a dozen well-funded defendants selectively supporting one side of the case plus one modestly funded OFT expert trying to support the middle ground. *It is not possible for the OFT to shift from inquisitor to prosecutor between decision and appeal*. In such circumstances, a 'merits' appeal system cannot be expected to work well. It is far better to have cases decided by an independent panel and subject to appeal on grounds of judicial review.

Reading the options and apparently preferred option in the consultation, I am very concerned that the proposed CMA will fail to have a rational decision making structure. History has a powerful hold on institutions, particularly those with fine international reputations. The status quo is more aggressively defended than attacked, especially between collegial institutions that have no wish to undermine each other. Meanwhile, law-makers in government pay more attention to accountability to parliament than they do to the nitty-gritty of how individual decisions are made. The complex set of options set out in the current consultation might too easily muddle into place.

[24] Luke Froeb and Bruce Kobayashi 'Evidence production in adversarial vs. Inquisitorial regimes' (*Economics Letters*, 2001, 70, 267-272) compare the two 'pure' systems and find that each has advantages but neither dominates the other. It is clear from their model, however, that a mixed system of one side inquisitorial and the other adversarial would be problematic.

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 members system provides an excellent array of relevant expert talents, including economists, lawyers, finance and business people with employment backgrounds in the private sector, public sector and universities. This allows for an important skill mix to be available in each panel. However, the current system includes far too many members each taking too few cases. It would be better to move to a much smaller set of members in a rolling system with greater commitment (3-5 days p.w.) for 2-3 year terms.

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?*

(by Morten Hviid)

When considering how to finance enforcement it is important to remember that this delivers positive externalities. Firstly, enforcement leads to *deterrence effects* and so implies that those involved in the case are not the only "beneficiaries" of the decision. Secondly, enforcement *clarifies the law* and how it will be applied, which benefits all firms which is also a general benefit. Where there are positive externalities, there is reason to subsidise users out of general taxation. This may include a levy on firms subject to competition law but there is no reason for cost recovery on any specific case. This general point applies to merger fees and appeals but the unintended consequences of cost recovery seem most problematic for antitrust investigations.

Merger Fees

Q.25. (*optimal fee structure*)

Given arguments above, it is not at all obvious that full cost recovery is desirable. Decisions involve both an element of *deterrence and an element of learning, both of which are public goods*. It is generally recognised that if public goods are funded privately, there is a risk of underinvestment in these goods since the person providing the funding does not get all the associated benefits. In the case of mergers, underinvestment would imply too few mergers being proposed. To avoid this, at least the public goods element of the costs should be covered through general taxation.

Secondly, some of the costs included in the table in recital 11.4 are *fixed costs*, although we do not know how big a share this is. The allocation of these to individual cases will be almost totally arbitrary. Again funding the fixed cost element out of general taxation would appear the more sensible solution. If we focus on option 1, for a merger where the target turnover is £10 million, the fee would be 0.65% of turnover while for a merger where the target turnover is £100 million, the fee would be about 0.2% of turnover. In other words, the fee is regressive and smaller mergers attract a larger percent fee. One can only assume that this arises because the fixed costs per case are substantial, but is that the case?

Thirdly, the current three bands are based solely on the value of the acquired business. Is there *any good reason to think that this is a good proxy for the complexity and hence cost of the case*? It seems rather odd that there is no increase in the complexity of the merger when the turnover of the target is increased from £70 million to £140 million. Is this an indication that essentially the same amount of resources would be thrown at each merger in the same size class? If this is the case, what is the justification?

Fourthly, if turnover of the target is a reasonable measure of the complexity of the case, why have bands rather than a percentage of some measure of the turnover of the target? Would there be a large number of

targets estimated to have a turnover of £19,999,999 or £69,999,999? What is the *logic of having fees fixed within band*?

Fifthly, it is unclear whether it is the intention to have different fees for *first and second phase investigations*? How problematic would it be to have the fee depend on this? For example, if there are to be differences in fees, how can we ensure that the incentive of the merging parties is not to offer too much in terms of remedy to settle the case in phase I?

In conclusion, full cost recovery for merger cases is a poor idea both theoretically and practically. If the fees are kept reasonably low, there is not much to choose between the two options. The proposed bands are poor proxies and a better proxy for complexity should be sought, especially if there was mandatory merger notification.

Q.26–Q.31. *Antitrust costs*

The proposal is to let those who have violated competition law pay the costs of investigating the case. On the face of it, this sounds reasonable. More careful thought may suggest that this really is a Pandora's box which might better be left unopened. The first point is that as for merger cases, where there are *positive externalities*, usually general taxation is a better way to fund enforcement than through levies on those directly involved. This is true both for the competition authority decision and any subsequent appeals. Secondly, it may be hard to argue against symmetry so that when the *competition authority is not able to prove their case*, they pay the firms against whom a case has been initiated their costs. There appears no desire for such symmetry in the consultation document. If cost allocations are symmetric, there is a real risk that this is going to make the competition authority more risk averse, resulting in [even] fewer cases being pursued.

The fundamental problem is that while the courts may consider the cost allocated and the fine as two very separate things with two very separate motivations, costs to fund the enforcement activity and fines to deter future behaviour, for the firm they are one and the same thing, money which has to be handed over. A similar argument is made in answer to Q9. Hence an allocation of costs is to the firm not distinguishable from an increase of the fine. Two implications follow from this.

The fine is currently assessed to be able to deter. If fines and costs are treated as completely separate, adding costs will lead to over-deterrence in all but the simplest open-and-shut price-fixing cases. However, if costs are allowed for in the computation of fines, then since both fines and costs are supposed to go to the Government's consolidated fund, nothing is gained. A question which should then be asked is whether the distortion through allocating costs is greater than the distortion from simply raising taxes. A second problem arises when it comes to the effect of the fine on the future viability of the firm. We have lately seen several cases where a bankruptcy discount has reduced fines even if the violation was price fixing. Will costs and fined be dealt with in the same way? Obviously

careful thought has to be given to the effect on immunity and leniency programmes since the value of these is undermined if most of the financial effect on the firms arise from cost allocations rather than fines and if the costs are not part of the discount.

There is an (admittedly arbitrary) 10% of turnover cap on fines. There is a danger that appeals courts will see the cost allocation as a too clever means of circumnavigating this cap. This is particularly so since there is invariable some issues about which cost should be allocated. The table of costs in recital 11.4 does not distinguish between fixed (or common) costs and variable costs. The allocation of the fixed costs is often seen as being arbitrary.

Other issues relate to incentives. It is unclear how allocating costs will affect incentives to settle and whether this can lead to unfair settlements. The risk of racking up very large costs if the case is not terminated now may push a firm who is convinced that it did not violate the law to offer to settle. This type of cost allocation may have positive efficiency effects if it serves as a punishment to firms who "drag out" the case by being obstructive.

It is unclear how the *incentives of the competition authority to manage its costs in a reasonable manner* would be affected. Equally unclear is the solution to the practical problem about how to allocate costs when there are multiple defendants. Who will adjudicate on any disputed levels of costs? Will the Senior Courts costs office be charged with this task or will this be a matter for the CAT? In either case, who will pay for appeals relating to costs? The consultation document rightly identifies the problem of what to do with initially allocated costs if the decision is overturned on appeal, but that is just one of many problems.

Following on from this, *it is unclear whether we will get more appeals*. A significant part of enforcement is a public good which benefits us all and it may well be best to fund enforcement through general taxation rather than try to identify specific funders, no matter how much the bill is merited.

Let me finish on an irritation about an oft cited and rarely questioned statistic. The consultation claims that cartels have a 15% detection rate. This claim does not have strong empirical foundation. It basically arises because decisions in the US and EU find the average length of a cartel is 7 years. If detection rates are the same every year, this suggests the probability of being detected in any given year is one divided by seven, i.e. approximately 15%. The fallacy in this approach is that in many cartel decisions we do not have a precise estimate of the duration of the cartel, partly because in order to minimise appeals, authorities err on the side of caution and underestimate duration in order to secure a conviction. Furthermore, we only know of the duration of the cartels which are detected (i.e. the sample is biased).

Summary answers to the questions:

Q.26: We do not agree for reasons stated above.

Q.27: This is best left alone.

Q.28: Since firms will look at their total liability when seeking immunity, leniency or settlement, if cost recovery was contemplated, any discount offered should include costs.

Q.29: If both costs and fine goes to the consolidated fund, what exactly is the point?

Q.30: If the appellant is wholly successful, the original decision on cost allocations should clearly be reversed. If partially successful, this should be factored in to how much of the original costs the firm is liable for. Note that this will increase the value of the appeal to the firm and hence affect the incentives to appeal.

Q.31: Given all the possible problems which cost recovery throws up, the government would be well advised to leave this one alone.

Q.32. *Telecoms*

As there seems to be no good reason for Ofcom to be any different from the other regulators, the necessary steps to eradicate this difference should be taken.

Q.33. *The CAT*

As a matter of principle, the CAT as a tribunal should be able to do whatever all other similar appeals tribunal and courts do. In bringing an appeal, the appellant should be aware of the cost which this imposes and, unless there are good externality arguments which could be made when it comes to appeals in general or a particular appeal, should take this into consideration when deciding to lodge the appeal. Cost allocation provides the CAT with an instrument to respond to frivolous appeals or to parties who are misbehaving during the appeals process.

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: None

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: We have had insufficient time to address these questions beyond our response on the main consultation.

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URN 11/657RF

Ethical Economy

From: Nicolai Peitersen [mailto:npeitersen@ethicaleconomy.com]
Sent: 13 June 2011 14:51
To: Competition and Markets Authority
Subject: Consultation Response

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;
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. In the forthcoming book published by Columbia University Press, one of the co-signatories introduce the notion of 'productive publics' that signifies the wealth creation potential that lies in involving the sentiment of the publics in production and value setting on financial markets.

A new business unit specialised in balancing public interest factors, supported by guidance, tools and ways of working with other government departments should be a core objective of the new CMA - potentially embedded in statute. This will provide the certainty that greater investment in the UK demands, in particularly long-term investments in areas where voluntary self-regulation/ collaboration on environmental and social issues are required.

We welcome the Prime Minister's commitment to deal with this problem last December. The CMA should focus on competition, but also have the capability as described to balance public interest factors, particularly in the case of voluntary agreements. This 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'.

Yours sincerely,

Nicolai Peitersen,
Founder of Ethical Economy
Co-author of 'The Ethical Economy' (forthcoming Columbia University Press)
Formerly, investment and central banker

John Grant,
Author of the award winning 'Green Marketing Manifesto' and latest of 'Co-opportunity'
Sought after expert by MNCs (e.g. Unilever, IKEA, Marks & Spencer and many more)
Formerly, co-founder of St Luke's

Kelly Riggs,
Executive Director of GCCA (www.tcktcktck.org), global alliance of 250 NGOs around climate change

Lawrence Bloom,
Senior Policy Advisor to the Board of Bell Pottinger
Fellow of Res Publica
Jury Member of the Globe Awards
Member of the World Economic Forum's Global Agenda Council

Member of UNDP’s Green Economy initiative
Formerly, executive committee of the Intercontinental Hotel Group, managing their $3bn global real estate portfolio

Eversheds LLP

Consultation responses

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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
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	Central Government
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	Academic
	Other (please describe):

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

Response by Eversheds LLP

Consultation Questions : Response by Eversheds LLP

1. Introduction and summary

Eversheds LLP welcomes the opportunity to comment on the Consultation Paper issued by the Department for Business Innovation and Skills "A Competition regime for growth: A Consultation on Options for Reform" ("Paper").

Overall, we support the Government's view that the current UK competition regime is world-leading, but that there is scope for improvement. However, reforms should not be made "for change's sake", and it is crucial to ensure that the strengths of the current system are not lost in the attempt to remedy the weaknesses. Speculative changes to a system which works well on the whole should be avoided. In particular, one of the key drivers for change throughout the Paper appears to be the low number of decisions. It is our view that this is not the only way to measure the effectiveness of the current system and on its own is not a strong reason for making significant reforms. A small number of high quality decisions with good precedent value in important markets is preferable to a larger number of decisions, which may be of lower quality.

In addition, whilst we agree that the time taken to reach decisions is sometimes too long, time savings should not be made at the expense of quality and due process. Businesses value predictability and certainty, and should not be subject to over regulation and ever more burdensome regulation. A focussed system of competition regulation, which concentrates limited resources on the most important markets or on serious consumer harm would be the best way of achieving this.

In view of the large number of proposals set out in the Paper, we have focussed on the proposed reforms to the markets regime, cartel offence, mergers regime and concurrency and sector regulators, as these are the areas in which we can add most insight from our experience, and which are of primary concern to our clients.

As regards the market regime, we consider that market investigations are a useful enforcement tool and an effective part of the UK competition regime. However, detailed phase 1 market studies followed by a market investigation reference ("MIR") result in duplicative, burdensome evidence gathering and unduly long periods in which a market is under investigation. The focus for reform to the markets regime should be: to ensure that there are fewer, better targeted phase 1 market studies; to preserve the highly regarded phase 2 work on markets; and to reduce as far as possible the time taken overall.

As regards the cartel offence, our view is that the offence as currently exists forms an important part of the UK antitrust enforcement regime and provides a significant deterrent to individuals considering engaging in cartel activity. We consider that there is no compelling reason to amend the wording of the offence at this time. In our opinion the Government should give the offence generally and the dishonesty requirement in particular time to be fully tested by a jury. Authorities must be prepared to invest the time and effort needed to develop a body of case law, rather than looking for shortcuts. We do not think that any of the options put forward in the Paper adequately addresses the aims the dishonesty test was designed to achieve any better than the present system, nor do they appear to address the supposed shortcomings of the dishonesty requirement in any meaningful way.

As regards the mergers regime, our view is that the Government has not provided convincing evidence that a wholesale departure from the status quo to either a mandatory notification regime or a hybrid regime is justified. In addition, we do not believe that the introduction of either system would satisfy the broad policy objectives that the Government has set out to achieve. We therefore advocate maintaining the current voluntary system, although we think that the Government should consider using this opportunity to streamline the current processes, thereby reducing the regulatory, cost and administrative burden on small and medium sized businesses.

As regards concurrency, we consider that the sector regulators should maintain their current antitrust and MIR powers, but it is important that they should benefit from the experience of the OFT and CC (if retained) or CMA. The Government should consider a formal advisory or supervisory role for the competition agencies to ensure that sector regulator decisions are robust and effective.

2. 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.*

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:

1. We agree with the Government's view, set out in the Paper, that the markets regime is one of the key strengths of the UK competition regime, but that there is room for improvement. The Paper seeks views on;

   - Options to modernise the regime, by enabling in-depth investigations into practices that cut across markets; giving the proposed single competition agency, the CMA, powers to report on public interest issues; and extending the super complaints system to SME bodies;

   - Measures to streamline the regime by reducing timescales and strengthening information gathering powers; and

   - Opportunities to increase certainty and reduce burden, including simplification of review of remedies process and updating remedial powers.

2. We are broadly supportive of the proposals to streamline the system, increase certainty and reduce the burden of market investigations. However, we do not believe that the case for the options to "modernise" the regime has been made out, and indeed, these options seem to us to be at odds with the aims of streamlining and reducing the burden.

3. Our primary concern lies with phase 1 market studies. We consider that that the Office of Fair Trading ("OFT") practice of undertaking detailed and lengthy market studies before making a reference decision results in burdensome duplication of information requests and is not an efficient use of resources.

4. It also means that by the time remedies are being considered after phase 2 review the market can have moved on considerably since the investigation started and the competition problems were identified. This reduces the relevance of the investigation and its impact.

5. We consider that the function of a phase 1 market study should be to quickly identify whether it is appropriate to make a MIR. The OFT should move away from its current practice of considering phase 1 market studies as a tool to bring to bear all its consumer and competition responsibilities. This would bring the regime into line with the original intention of the legislation, and free OFT resource to concentrate on antitrust enforcement. The OFT could still use its other powers to remedy specific problems identified at phase 1, but this should be a secondary consideration, after the OFT has considered whether to make a MIR, rather than being an objective at the outset.

6. In considering whether to begin a phase 1 market study we also believe that the OFT should apply rigorous prioritisation criteria to ensure that it focuses on the right markets. These should be economically important markets, where there is concern of a serious restriction or distortion of competition resulting in significant consumer harm.

7. Increasing the number of MIRs in itself should not be objective of the system. Rather, the OFT should work to prioritise and identify markets with potentially very serious competition problems, carry out a short and targeted phase 1 study and, if the evidence supports the initial concern, refer the market to phase 2 investigation as soon as possible.

8. We consider that if there is to be a single competition agency this would assist in streamlining the process of market investigation. We agree with the Government's view that a two phase process would still be desirable to ensure that the regime is proportionate and flexible. However, we consider that phase 1 should be limited to a statutory period of 6 months. If a MIR is made, the phase 2 investigation could be carried out by the same phase 1 investigators, joined by additional phase 2 support. This would help to ensure continuity and avoid duplication. We consider that the efficiency gains of this process would outweigh any perceived confirmation bias.

9. We set out below responses to the specific options proposed in the Paper.

Investigations into practices across markets

10. We would not support the introduction of a power for the OFT or CMA to carry out "horizontal" investigations of practices in more than one market. Whilst it may be desirable theoretically for the OFT to investigate practices occurring within more than one market to ensure that all those markets are working well, we consider that "horizontal" market investigations would be extremely complex and time consuming, and an inappropriate use of resources.

11. This proposal also seems to us to be at odds with the Paper's other proposals aimed at streamlining the process, increasing certainty and reducing the burden of market investigations.

12. Given the increasing emphasis placed on an "effects based" analysis in competition regulation it seems to us that any remedies proposed would have to be market specific. How a particular pricing practice operates and its effects could vary significantly from one market to another and would require a bespoke remedy. Without considering the specific market in which a practice operates there a danger that the output of a horizontal investigation would be purely theoretical.

13. If the OFT is interested in cross market practices, or a group of separate but related markets with common practices, it should commission academic research in order to obtain information about such practices.

Public interest reports to Government

14. We acknowledge that there could be limited circumstances in which it would be desirable for the CMA (or CC) to have the power to make public interest reports to the Secretary of State. The CC in particular is highly regarded for its intelligent, independent and dispassionate interrogation of facts when looking at how markets work, and its experience in this regard could be useful.

15. However, we would be concerned if this power were used frequently, as it would be likely to create significant resourcing issues for the competition agency, and divert attention from antitrust enforcement which should be the agency's primary function.

Extending the super-complaint system to SMEs

16. We do not believe that it is necessary or desirable to extend the super-complaint system to SMEs. The Paper does not present any evidence that SMEs are currently unable or unlikely to make complaints under the current system that would justify such reform. Given that the OFT is currently entitled to take account of the nature of a complainant when assessing how much time and effort to put into a complaint, we do not see the current regime acting as a barrier to SMEs raising concerns, or that SMEs lack sufficient resources or ability to do so.

17. We believe that such reform would create the impression that SMEs are equivalent to consumers or are a special class of competitor deserving of extra protection. This would have a distorting effect on the competition regime. It would also be likely to result in special interest groups using the markets system as an opportunity for lobbying or advocacy rather than for addressing genuine competition concerns. This would add to, rather than decrease, inefficiencies in the system.

Reducing timeframes

18. As indicated above we support the proposal to introduce a statutory timescale to phase 1 reviews and we suggest that this should be 6 months. Our additional proposal that rigorous prioritisation criteria should be applied in advance of commencing a phase 1 review, and a shift in policy away from using phase 1 reviews as a vehicle for all the OFT's consumer and competition responsibilities to using them as a

speedy way to assess whether the issues merit a phase 2 review, should ensure that a six month period is realistic.

19. We would also support the reduction in the statutory timescale for a phase 2 review to 18 months, as long as there is the power to extend the time frame by a reasonable period to a maximum of 24 months in exceptionally complex cases.

20. We consider that a shorter, statutory timescale for market investigations from start to finish would be of great benefit to businesses, who remain concerned at the length of time investigations can take. It would also benefit the CMA (or CC) by ensuring that remedies remain relevant and investigations have as much impact as possible. We consider that the statutory timescale should apply to all market studies, not just those with the potential to be referred. As noted above, we consider that market studies should be used for the purpose of assessing whether to make a MIR. At the outset, all market studies would therefore have the potential to be referred.

Introducing information gathering powers at phase 1

21. We do not consider that it is necessary to grant the CMA (or OFT) information gathering powers at the market study stage. Currently, interested parties in a market study are incentivised to provide information so as to shape and influence the direction of the study. If they are deterred from providing information it is usually a result of the perception that the OFT is conducting a "fishing expedition", requesting extensive and broad ranging evidence with little clear direction or communication around purpose and scope.

22. This could be remedied by the application of more rigorous prioritisation criteria for commencing a market study and more focussed evidence gathering. The stated objective of a market study should be to consider whether a MIR is required, and this should mean that interested parties are incentivised to cooperate in order to avoid a MIR.

23. If information gathering powers are given, we consider that it would be essential to have a statutory timeframe for phase 1 review to avoid increasing the burden of responding, and to avoid disproportionate information requests. However we do not believe it is necessary to grant information gathering powers if a statutory timeframe is introduced.

Introducing statutory definitions and thresholds

24. Whilst we understand the desire for clearer definition of the purpose and role of market studies and the threshold for their initiation, we consider

that it would be extremely difficult to achieve this in practice. The same improvement in clarity and certainty could be achieved if the CMA (or OFT) were to focus on prioritisation criteria and better identification of the right markets to review; and shift the focus away from extensive phase 1 reviews covering the consumer and competition roles of the OFT as suggested above.

Improving interaction between MIRs and antitrust enforcement

25. We do not support the suggestion that a single CMA should be able to exercise antitrust powers in a MIR. If the investigation identifies potential specific breaches of competition law these should be referred for investigation outside the scope of the market investigation, following due process for such an antitrust investigation, in particular meeting the threshold for commencing such an investigation under the CA98 and following the CA98 information gathering processes. This is the position in the European Commission's markets regime, where it is common for specific, separate, enforcement action to commence following a sector inquiry.

Remedies

26. We support the proposals at paragraphs 3.29 to 3.40 of the Paper for amending Schedule 8 of the Enterprise Act 2002 in order to ensure that remedies are effective and proportionate; for clarifying the CMA's powers following remittals of mergers and markets; and for revision of the duty to consult on decisions not to make a MIR, such that only those who had expressly requested a MIR be made need to be contacted.

3. 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.*

Comments:

27. We agree that the existence of the criminal cartel offence in UK law acts as a significant deterrent to individuals considering engaging in hardcore cartel activity. In our compliance work, we regularly see the impact the realisation of the penalties that can be meted out under the offence has on business people. This helps them to appreciate the importance of understanding competition law, how to avoid breaking it and the consequences of doing so.

28. However, we disagree with the Government's fundamental premise for reform - that there have not been enough prosecutions to date. Given that the stakes of prosecution are so high for the individuals concerned, we consider that the OFT should focus on the quality of convictions - securing them where it is proportionate, just and appropriate to do so, rather than on a numerical score.

29. We consider that there is a disproportionate focus in the Paper on the dishonesty test which, by the Government's own admission is "yet to be properly tested." This element of the offence is given as the primary reason for the very small number of convictions under the cartel offence since June 2003. Other reasons, we submit, might have at least contributed to the lack of convictions and might be the greater cause: the fact that there have been relatively few major cartels in the period since 2003; that there have only been a small number of criminal investigations; and the relatively short time the offence has been on the statute books (particularly in the context of the average lifespan of a cartel). In addition, it could be argued that the OFT has lacked adequate levels of resource or experience to prosecute such cases successfully. None of these reasons are explored fully in the Paper, rather it is simply assumed that the dishonesty requirement alone explains the small number of prosecutions.

30. We consider that the effect of the Government's proposals, in particular the removal of the dishonesty requirement, is to make the cartel offence one of strict liability. In our view, this will have unforeseen and unintended consequences that neither businesses nor the general public will support: it means there could indeed be a greater number of convictions but not necessarily in appropriate cases.

31. We also consider that it is vital to preserve adequate rights for the defence in any changes that are introduced. Any proposals which allow the competent authorities to lower the bar in terms of ease of prosecution by means of limiting the rights of defence are unacceptable. Authorities must be prepared to invest the time and effort needed to

develop a body of case law. Attempts to shortcut the process of developing such a body are likely to result in less robust conclusions and actually reduce the deterrent effect of bringing the cases in the first place.

32. We have reversed the order of questions as set out in the Paper as a more logical way of presenting our response to this section.

Dishonesty

33. We do not believe that the Paper adequately makes out the case for removing the dishonesty requirement from the cartel offence. While we understand the concern that this test may prove difficult for juries to apply, we note that it is routinely and successfully applied in theft and other criminal cases; and in the competition law context, has not been tested at all. In neither of the cases under which prosecutions for the cartel offence have been brought thus far[1] has a jury been required to apply the *Ghosh* test for dishonesty.

34. The Paper suggests that a greater number of prosecutions could have been brought by the OFT but for the difficulty of making out the dishonesty requirement under the offence. However, no evidence is proffered by the Government as to the number of cases the OFT decided not to bring as a result of this legal hurdle. We submit that there could be several reasons for there being only a small number of convictions under the cartel offence to date: for example, reasons could be the lack of appropriate cases or required expertise and experience to bring such cases.

35. A corollary of removing the dishonesty test from the cartel offence could be a greater number of convictions for people who innocently, naively or negligently, rather than dishonestly, enter into one of the anti-competitive agreements set out under section 188 of the Enterprise Act 2002. The Government does not make expressly clear whether or not this is its intention, although from the options it sets out in its Paper it would appear that it is. This move constitutes a significant shift in public policy that, we suggest, would not be palatable to most members of the public and would set the bar for conviction too low.

36. The Paper sets out the three reasons for including the dishonesty element of the criminal cartel offence:

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[1] *Marine Hoses: R v Whittle, Allison and Brammar (2007-2008) and BA/Virgin: R v George, Crawley, Burns and Burnett* (2008-2010)

- So that the offence does not apply to agreements that would be lawful under the civil antitrust prohibitions;
- To reduce the likelihood that a conviction would depend on judgements taken on detailed economic evidence; and
- Because the dishonesty test is one that juries recognise and it signifies the seriousness of the offence.

37. In our opinion these are good reasons for including the dishonesty test and overall, none of the alternative options presented in the Paper meets them any better.

38. In relation to the first reason, we agree that there are other possible ways of carving out potentially beneficial agreements from the offence, however, none of the suggested options do so any more effectively than the present system.

39. In relation to the second reason, the Paper suggests that juries would be required to consider complex economic evidence regarding the dishonesty test and therefore this reason for including the dishonesty test in the offence falls away. However, we do not consider that the possibility that juries will face complex evidence is a sufficient reason to merit removing the requirement for dishonesty. Such evidence will not necessarily be adduced in every case and where it is put before juries, they are just as well equipped to evaluate this as the complicated evidence submitted in, for example, fraud trials. Furthermore, until juries have had to consider such evidence, it would seem premature to remove the dishonesty requirement on this basis.

40. In relation to the third reason the Paper does not compare like with like when it suggests, based on opinion poll evidence, that a jury would not be ready to convict an individual under the cartel offence based on dishonesty. Opinion polls can be unreliable. Furthermore, a jury (unlike a respondent to an opinion poll) would have considered the evidence adduced at length and would have time to consider all of the arguments put to them. We contend that members of the jury generally have an appropriate sense of "right and wrong" and therefore would be capable of appreciating the moral objection to dishonestly engaging in price-fixing and the consequential harm to consumers.

41. For all of the reasons set out above, we do not believe that the dishonesty requirement should be removed or replaced, particularly at a time when the competition regime more widely is facing wholesale reform. We consider that the Government should wait until further cases have been tried so that the advantages and deficiencies of the offence

may be evaluated on the basis of empirical evidence rather than hypothetical reasoning.

Option 1: removing the "dishonesty" element from the offence and introducing prosecutorial guidance

42. We believe that this option would make the offence too wide to be workable. Removal of the dishonesty requirement also removes the beneficial narrowing of the agreements the offence applies to, which it does in a more nuanced and sophisticated way than simply by removing whole categories of agreements. The Paper suggests that this mechanism would be replaced by prosecutorial guidance, which would set out the types of agreements that would be most likely to warrant investigation and prosecution. It would therefore be down to the prosecutor to evaluate whether or not an agreement had countervailing benefits and the offence should not be brought. We consider that agreements that could merit exemption under competition law could nonetheless be caught under this option, leading to greater uncertainty.

43. According to the Paper, prosecutors would have to have regard to the prosecutorial guidance. Such guidance would be open to interpretation, however and much would be left to the discretion of the prosecutor. The prosecutor would have a wider discretion to bring cases, potentially even where the accused had no dishonest intent. The challenge to a prosecutor's decision would be judicial review. We query how useful this would be to someone accused of the cartel offence. We submit that this would not provide an adequate safeguard to the rights of a defendant.

44. Contrary to the claim in the Paper that prosecutorial guidance will give "much greater clarity for businesses", we believe removal of the dishonesty element will increase uncertainty. We submit that it is more straightforward to include a mens rea element openly in the wording of the offence, rather than fleshing out the details in guidance: business people may be much less likely to read such guidance than to understand the wording of the offence.

45. If the dishonesty requirement were removed from the offence, it would not be clear what the offence covers. Consequently, this option would seem to fall foul of article 7 of the European Convention on Human Rights (as enacted by the Human Rights Act 1998 in the UK), which, as the Paper points out, has been interpreted to mean that an accused should know from the wording of an offence what acts and omissions they could be criminally liable for.

46. It is claimed in the Paper that the "making of agreements" has a physical and mental element. If this is the case, the mental element is palpably unclear and arguably, equally confusing for a jury as the dishonesty test is purported to be, since it is not apparent from the offence itself that a mental element is included at all. The lack of a clear mens rea in the offence means that it would not be obvious when a prosecution could be brought and in what circumstances an individual could be convicted.

Option 2: removing the "dishonesty" element from the offence and defining the offence so that it does not include a set of "white list" agreements

47. The arguments in relation to a lack of clear mens rea element apply here also.

48. With this option we recognise that the "white list" is intended to carve out certain anti-competitive agreements that, as a rule, have countervailing benefits. However, it will not be possible for such a list to cover every eventuality or situation. Such a list may remove some agreements that should be caught by the offence while others will be included that should not. The practice of using such lists at the European level was abandoned in the 1980s as impractical. In the same vein, such a list would be inflexible and amendment of the list would not keep adequate step with legal developments, a problem avoided with developing the law through case law.

49. We accept that such a list may in some ways provide greater certainty for businesses, clearly enumerating the types of agreements that fall outside the scope of the offence. However, as the Paper points out there would be scope for interpretation of the categories on the list which would counteract this additional certainty.

50. It is accepted in the Paper that the white list would be wider than the category of agreements that would, on analysis of the economic effects, actually be beneficial. This highlights that this option would be a blunt tool not fit for purpose. Again, the element of "prosecutorial selection" may leave even wider discretion to the prosecutor since there is no proposal for guidance to be given on which types of agreement are most likely to warrant investigation and prosecution. We echo here our comments under option 1 in relation to the inadequacy of judicial review as a means of safeguarding the rights of the defendant to challenge prosecutors' decisions.

Option 3: replacing the "dishonesty" element of the offence with "secrecy" element

51. The Paper suggests that one of the benefits of including a secrecy element in the offence instead of "dishonesty" is that it would potentially avoid the perceived obstacle among jurors to convicting on dishonesty grounds. Another suggested benefit is that the potential difficulty of applying a combination of a subjective and objective test is avoided.

52. We consider that replacing the "dishonestly" requirement with "secrecy" is not an adequate substitution for the mens rea element. After all, "secrecy" as per the Government's recommended definition at paragraph 6.41 of the Paper is an objective standard; if the defendant took measures to prevent the agreement or the intended arrangements becoming known to customers or public authorities, on an objective analysis, the secrecy element would be made out. By contrast to "secrecy," "dishonesty" as a concept has an established meaning in UK law and greater moral weight. Dishonesty is prima facie wrong, while secrecy (or "confidentiality") in business circles is not necessarily so. In most circumstances, it may even be expected or encouraged. Thus it may prove equally or more difficult to apply a secrecy test than the well established dishonesty test. What kind of evidence could be adduced to evidence secrecy? How easy/difficult would it be to prove? In effect, the Government would be replacing the untested with the unknown and untested, bringing greater uncertainty.

53. In our view, forming an agreement with other businesses at the same level of the supply chain covertly is a necessary but not a sufficient element for wrongdoing as there needs to be some form of intent to cause harm to warrant conviction under the cartel offence; "secrecy" therefore falls some way short of what is required.

54. Commercial agreements are regularly concluded confidentially and this is quite proper. The logical consequence of including a secrecy element in the cartel offence would be that a tranche of agreements that should not be caught by the offence could be: for example, where an agreement is potentially anti-competitive but has countervailing benefits.

55. The Paper also sets out a potential requirement for secrecy to include "passive secrecy" (i.e. where no active measures to maintain secrecy are taken) in addition to active secrecy. However, this seems to us to be a somewhat contradictory concept: a finding of passive secrecy should indicate that the accused kept what they were doing secret because they must have known what they were doing was wrong. If the accused only "passively" kept their activities secret it could be argued that the accused may not have the requisite knowledge that what they did was wrong. Passive secrecy therefore would bring the prosecutorial bar far too low in our view; it would compromise the rights of defence and set a difficult

evidential burden. Active secrecy, if the dishonesty requirement must be replaced by a secrecy requirement, would in our view be preferable to a definition that includes passive secrecy.

Option 4: removing the "dishonesty" element from the offence and defining the offence so that it does not include agreements made openly

56. This option appears to do a similar job to option 3 and has similar drawbacks. Where option 3 includes agreements with a secrecy element option 4 excludes agreements with an open element. As the Paper points out, it is simpler than Option 3 since it avoids the problems set out above concerning proving "active" and "passive" secrecy. In our view this comprises the defendants' rights of defence however, making it too easy to convict for what is a serious offence.

57. It would appear that this option is designed to take out of the scope of the offence agreements that are anti-competitive but are permitted under the civil antitrust regime due to their countervailing benefits. However, companies are surely entitled to keep such agreements confidential for commercial reasons. This does not signify that the agreement is anti-competitive or illegal.

58. This option is possibly easier to apply than the dishonesty test but there would be a lack of a clear mens rea element set out in the offence, inclusion of which, in our view, is strongly preferable.

Alternatives suggestions for reform

59. In our opinion the criminal cartel offence should be retained as currently drafted, at least for a further period of reflection. Given that the OFT has three criminal investigations underway at present, we believe it would be sensible to allow the offence in general, and the dishonesty requirement in particular, to be tested at trial before reform is considered further.

4. 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.*

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:

60. The Government recognises that the UK's merger regime is highly regarded, being ranked by KPMG as second worldwide behind the USA. The Government goes on to say, however, that the current voluntary notification system has a number of specific drawbacks, namely:

- some anti-competitive mergers escape review;
- the current regime results in the review of a large number of completed merger cases which, in turn, makes it difficult to apply appropriate remedies in the event that a merger is found to be anti-competitive; and
- the efficiency of the current regime is impeded by the amount of time taken for a merger to reach the end of the review process.

61. These perceived shortcomings are cited as reasons why the current voluntary system needs to be reformed. Our overarching comment, however, is that we do not believe that the Government has presented sufficient evidence to support a case for wholesale reform.

62. We are not convinced that there is compelling evidence that a significant number of anti-competitive mergers escape review. The Government expressly acknowledges that the absence of third party complaints about mergers that "go under the radar" indicates that transparency is not a significant issue. We would agree with this. Our experience is that the OFT's merger intelligence function is proactive in monitoring merger activity and this contributes to the efficacy of the regime, along with the ability of the OFT to investigate mergers within 4 months of announcement. If a merger goes undetected, this is more likely to be the consequence of a lack of resources as opposed to a fundamental flaw in the current regime. The Paper does not set out any examples of consumer harm resulting from irreversible implementation of mergers which may have been declared by the CC to have resulted in a substantial lessening of competition.

63. The Government states that the investigation of a high proportion of completed cases can hinder the effectiveness of the mergers framework, as the effects of the merger can sometimes be difficult to undo and appropriate remedies can be difficult to apply. The investigation of a large number of completed cases does not **inexorably** mean that it is

difficult to apply appropriate remedies in the event that a merger is found to be anti-competitive. We do not believe that is a significant number of cases where a merger has completed but the Competition Commission has been unable to impose an effective remedy.

64. As for the speed of the current regime, we agree that the process can be slow, duplicative and burdensome on business. Our view, however, is that this issue may be addressed by improving the existing processes and does not of itself justify a wholesale departure from the current system. We now turn to each of the options proposed by the Government.

Mandatory notification regime

65. The introduction of mandatory notification regime, coupled with a suspensory obligation, would address the perception that anti-competitive mergers are escaping regulatory scrutiny and would avoid the need for the competition authorities to impose remedies to "unwind" problematic completed transactions.

66. A mandatory notification regime also has the potential to deliver a number of other benefits, namely:

- **simplicity and certainty** - businesses would readily be able to assess, in advance, whether a potential transaction is caught by the regime; and
- **consistency** - a mandatory regime would bring the UK into line with other merger regimes operated worldwide.

67. However, our view is that any gains that are likely to be made in terms of simplicity, certainty and consistency would be at the expense of:

- **An increased cost and regulatory burden on business.** If the thresholds were to be set at the level proposed in the consultation document[2], our experience is that virtually all mid-market mergers would exceed the thresholds and would have to be notified to the authorities. It is difficult to see how this outcome would meet the Government's overriding policy objective of limiting burdens on business and streamlining the process.
- **An increased case load and resourcing burden on the competition authority.** If the Government wishes to meet its

[2] A mandatory notification would be triggered where the turnover of the target in the UK exceeds £5 million and the worldwide turnover of the acquirer exceeds £10 million.

policy aim of improving the robustness of decision making, we anticipate that significant resources would need to allocated to the competition authority for it to manage an increased case-load. Absent sufficient resource to allow for a proper review of cases, our concern is that the quality of decision making may be sacrificed. We would strongly recommend, therefore, that BIS conducts a forensic examination of mergers that have occurred in recent years to assess the extent to which the proposed thresholds would capture additional merger activity in the UK and whether, as a result, the authority would require additional resources.

Hybrid system

68. Our view is that a hybrid system incorporating a mandatory and voluntary element is unlikely to achieve the Government's policy aims of streamlining the existing regime, or offering business enhanced predictability.

69. In terms of the mandatory element, our expectation is that mergers that trigger the £70 million threshold would be likely to come to the OFT's attention in any event, either through voluntary notification or by being "called in". We therefore see little benefit to be gained by subjecting these transactions to a mandatory notification requirement.

70. As for the voluntary element, mergers between small to medium sized businesses (who, in our experience, tend to operate in smaller and, potentially, more concentrated markets) would remain vulnerable to being "called in" by the authority under the share of supply test.

71. Absent a robust and meaningful exemption for small business, this would continue to render the regime uncertain and unpredictable. It could also have the undesirable effect of deterring small to medium sized businesses from undertaking mergers that would in fact be efficiency enhancing and pro-competitive.

Voluntary merger regime with strengthened interim measures

72. The Government proposes two options for strengthening the ability of the competition authority to stop integration that could ultimately prejudice the ability of the authority to impose effective remedies when a merger has completed. As noted earlier, we do not believe that is a significant number of cases where a merger has completed but the Competition Commission has been unable to impose an effective remedy.

73. Absent this evidence, we do not believe that there is a serious failing in the current regime which requires redress. If there were to be a case to answer, however, an automatic statutory restriction on further integration as soon as the CMA commences an investigation into a particular merger seems disproportionate. We would, however, support a proposal whereby the CMA would have the ability to trigger standstill powers during its Phase I investigation, provided that these powers are accompanied by an appropriately pitched threshold which the CMA would have to satisfy before these steps could be taken. This, in our view, would address the difficulty that the Government perceives, without creating a disincentive for businesses to undertake mergers. Equally, it would seem entirely appropriate to introduce penalties for breaching any such measures properly imposed by the CMA.

Conclusion

74. Our view is that the Government has not provided convincing evidence that a wholesale departure from status quo to either a mandatory notification regime or a hybrid regime is justified. In addition, we do not believe that the introduction of either system would satisfy the broad policy objectives that the Government has set out to achieve. We therefore advocate maintaining the current voluntary system (subject to our comments in paragraph 76 below).

75. If a wholesale departure from the current system of voluntary notification were to be regarded as necessary, however, we would advocate the introduction of a mandatory notification system **provided that**:

- the system is predicated on turnover thresholds and these should incorporate a UK nexus on the part of the target **and** the acquirer;
- the thresholds are set at an appropriate level so that mergers between small businesses are, effectively, exempt[3];
- the regime incorporates a short form procedure, whereby mergers which trigger the threshold but which do not raise substantive competition concerns, can be notified with minimal administrative requirements and cleared in an expedited

[3] In this regard, the Government could take into account the turnover thresholds in place in the merger regimes of other major industrial economies. For example, in Germany, a notification is triggered if the combined worldwide turnover of the parties exceeds €500 million and turnover in Germany of at least one party exceeds €25 million and at least one other undertaking has turnover in Germany exceeding €5 million. In The Netherlands, a notification is triggered if the combined worldwide turnover of the parties exceeds €113.45 million and turnover in the Netherlands of each of at least two of the parties exceeds € 30 million. In Italy, the combined turnover in Italy of all the parties must exceed €472 million or turnover in Italy of the target must exceed €47 million.

timeframe. In circumstances such as these, the CMA should also have the ability to publish a short-form decision; and

- recognition is made of the specific requirements of mergers involving distressed companies. A mandatory notification requirement will impose unnecessary expense and delay when attempting to rescue a business by selling it to a competitor of the troubled company, effectively reducing the pool of potential purchasers and thus reducing the number of rescues as a whole, with the attendant loss of employment and otherwise viable economic activity and reducing the return to creditors including HMRC. Should the Government decide to introduce a regime of mandatory pre-merger notification, we recommend that there should be an exemption for distressed companies (broadly those companies which would be able to avail themselves of the current "failing firm" arguments).

Creation of a single competition agency

76. Although we support maintaining the current voluntary regime in preference to wholesale reform, our experience is that the existing regime is costly, lengthy and burdensome for small to medium sized businesses. We have witnessed a number of instances where businesses have not proceeded with mergers that would have been efficiency enhancing because of the length of time and cost associated with the process (Phase II investigations in particular). This, of itself, generates a cost to the wider economy.

77. We therefore believe that the creation of a single competition agency would deliver clear benefits to business, and the wider economy, in the form of a more streamlined, efficient process that avoids the duplication that is inherent in the existing institutional architecture and processes.

78. A drawback, however, is that if one and the same case team conducts the Phase I and Phase II reviews, this could compromise the quality of decision-making. Specifically, it could be difficult to persuade a case team, who has decided at Phase I that there is a reasonable prospect of a substantial lessening of competition, to arrive at a different decision in Phase II ("institutional confirmation bias").

79. Our view, however, is that the risk of institutional confirmation bias could be ameliorated if:

- the threshold test for tipping a Phase I investigation into Phase II is clearly defined and sufficiently robust and a decision at Phase I to tip the investigation into Phase II is "without prejudice" to the

outcome of the Phase II investigation. In other words, the Phase I review should, genuinely, be a preliminary review;

- there is flexibility to extend the Phase I timeframe at the behest of the regulator or the merger parties. The current voluntary system has a degree of flexibility which is valued by the merging parties and we would advocate that this flexibility is retained. Equally, we would support the introduction of a "stop the clock" power to enable suspension of the timetable if the CMA believes that cancellation or significant alteration of a merger is likely;

- some elements of the current Competition Commission regime are preserved to provide a "check and balance" on the case team, such as requirement for the case team to report its findings to an independent panel in the event that it is minded to oppose a merger;

- the merger parties have direct access to the ultimate decision maker during Phase II;

- if it becomes clear during the Phase II investigation that a merger is unlikely to lessen competition substantially, the process should be capable of being terminated early (as is the case in other jurisdictions, such as Germany);

- equally, there should be an ability to fast track to a discussion about remedies in circumstances where it has become clear to the parties, and they accept, that the merger will lead to a substantial lessening of competition; and

- there is an effective ability to appeal the Phase II decision on the merits.

Fees

80. The notification fees that apply in the UK are already significantly higher than those which apply in other jurisdictions and we would not advocate a change which would see fees increase further and impose a greater cost on business. Our experience is that fees, at their current level, already discourage mergers between small and medium sized businesses resulting in a "chilling" effect on merger activity. Whatever the form of merger notification regime, we would therefore advocate a system whereby fees levied are proportionate to the value of the transaction (whether that is measured by turnover, profit or asset value) so as not to discourage mergers involving small and medium sized businesses.

81. The Government could also consider levying an additional fee on Phase II investigations in recognition of the additional workload incurred, but as outlined above, this must be proportionate to the value of the transaction and we would only support this if fees levied at Phase I were reduced by a corresponding amount.

7. 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?*

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:

82. We consider that it is right for the sector regulators to retain their concurrent antitrust and MIR powers, but important that they are able to benefit from the experience gained by the OFT (and by each other) in particular in pursuing alleged competition law infringements. Ultimately the familiarity of the sector regulators with the underlying characteristics of the markets concerned means that they have a great deal of useful background knowledge and understanding that should lead to well managed investigations. It is perhaps the relative lack of experience of some sector regulators in running investigations under CA98 that means their potential to act as effective enforcers in this area has not so far been realised. The concept of resource sharing between the CMA and the sector regulators in order to address this seems a sensible one. To this end the Government should consider:

- a mechanism by which the combined resources of the CMA and the sector regulators can be pooled for the efficient and streamlined running of CA98 cases;

- virtual secondments of CMA officials for every CA98 investigation pursued by a sector regulator.

83. We note the relatively small numbers of CA98 investigations and MIRs instigated by sector regulators. With the possible exception of Ofcom, we consider there may have been a temptation on the part of the sector

regulators to follow a slightly "easier" (and quicker) path of using sectoral (licence) enforcement powers in preference to CA98 enforcement, and that the desire of companies to maintain positive relationships with the regulators (and therefore to cooperate in the context of matters relating to their licences) may have encouraged this preference.

84. The sector regulators seem to have responded to criticism from the NAO by embarking on a number of CA98 investigations, but we would support a position where, if a matter were capable of being dealt with under CA98 or licence enforcement powers, the former route should be specified as the mechanism by which the sector regulator should proceed and, only where this mechanism proves inappropriate or ineffective in addressing the underlying problem, should the sector regulators resort to their licence enforcement powers.

85. It seems sensible that the CMA should coordinate the use of competition powers (and address strategic issues over their use) across the sector regulator landscape. Consistency in approach and operation should be specifically targeted, as ultimately this will lead to generation of more robust case law and greater deterrence. In our experience there is significant inconsistency as between the way the OFT manage CA98 investigations and the way these are managed by sector regulators. The CMA could play an important unifying role.

86. We consider that ultimate responsibility for decision making in CA98 cases involving companies subject to regulation should rest with the sector regulators even if the CMA provides significant expertise and resource to assist in the running of the investigation. A formal advisory role for the CMA might however be considered in order to ensure that the sector regulators decisions are as robust as they can be and that they are framed in terms which will provide a sufficiently wide deterrence message in respect of anticompetitive conduct generally (not just in the sector concerned).

If you would like to discuss any of the points raised in this response, we would be very happy to discuss this in a meeting.

EVERSHEDS LLP

13 June 2011

Federation of Small Businesses

Federation of Small Businesses
The UK's Leading Business Organisation

Duncan Lawson
Department for Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
Westminster
London
SW1H 0ET

13 June 2011

Dear Mr Lawson

RE: FSB response to A Competition Regime for Growth: Consultation on options for Reform

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the above named consultation.

The FSB is the UK's leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party political, and with 205,000 members, it is also the largest organisation representing micro and small sized businesses in the UK.

Small businesses make up 99.3 per cent of all businesses in the UK, and make a huge contribution to the UK economy. They contribute 51 per cent of the GDP and employ 58 per cent of the private sector workforce.

One of the aims of the consultation is to help small businesses to grow and enter new markets. However, other than extending the super-complaint procedure to small business bodies, and proposals to exempt small businesses from merger control for transactions, the consultation does not really address the interests of small businesses.

Small businesses want a fundamental shift in Whitehall culture away from regulation being considered as the best solution in all situations and as part of an absolute commitment from all civil servants to the deregulatory agenda. And above all they want major reforms in the EU which will halt the constant flow of new regulations and ensure that the focus shifts instead to wealth creation.

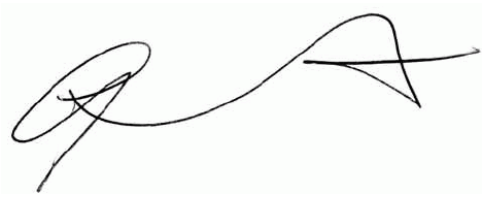
Any reform must not add extra burden on small businesses – financial, administrative or other. The FSB is cautious in its response to the proposals, and would welcome the opportunity to discuss these further, especially their potential impact from a regulatory perspective. In reading our response, the following must be borne in mind:

- Small businesses will not welcome further intervention and investigation from Government or independent bodies.
- Small businesses must not be unfairly penalised and fined for minor error or lack of understanding.
- A balance must be struck. Small businesses must be able to compete on a level playing field with big business.
- Small firms do not have the same resources in financial or time availability as larger firms.

- When making any change, Government must 'Think Small First'. Any new system must be easily accessible to the small business community. For example, guidance must be clear, unambiguous and targeted to small businesses.

We trust that you will find our comments helpful and that they will be taken into consideration.

Yours sincerely,



Clive Davenport, Chairman of the Trade and Industry Policy Unit, Federation of Small Businesses

Federation of Small Businesses
The UK's Leading Business Organisation

FSB response to A Competition Regime for Growth: Consultation on options for Reform

June 2011

Overview

The FSB is of the view that the competition regime to date has not been as favourable to small businesses as it appears to be to big businesses. We especially feel that the Office of Fair Trading (OFT) has not been sufficiently effective in enabling consumers to benefit from the small business market. In our response to the OFT's consultation on its Annual Plan 2011–12 we called on the OFT to focus on its chosen areas from both a small business and a business as the consumer view point. Firstly, the most important way compliance can be encouraged is via easily accessible and understandable communication sent to all businesses. We feel that this is an area that the OFT and any replacing body must continue to focus its attention. Secondly, businesses are also consumers, but do not appear to receive the same level of protection or service as the non-business consumer.

Over the last year, the FSB has been disappointed that some competition issues have not been addressed, to the detriment of the consumer. There is a perception amongst the small business community that whilst consumers are receiving a good level of choice overall, they could be receiving an excellent level of choice - potentially at a lower price - if small business concerns were addressed. The OFT's response to the super-complaint from the Campaign for Real Ale (CAMRA) on the beer tie notably neglected to address this.

There is also an issue when small businesses compete for public sector procurement contracts. 70 per cent of small and medium sized enterprises (SMEs) rarely bid for public sector work due to a lack of awareness of the opportunities that are available and the red tape surrounding the application process.

Recent research into small firms' access to public procurement markets across the EU places the UK 24th out of 27 member states, with only 24 per cent of contracts going to small firms, compared to 44 per cent in France.

Small and micro businesses do particularly badly in the UK, with only an estimated 11 per cent of the total value of contracts being awarded to businesses of that size. This is despite the fact that SMEs account for 49 per cent of the UK's turnover. This undoubtedly has an impact on the service and choice the end consumer receives.

The new Competition and Markets Authority (CMA)

Government is consulting on a proposal to merge the competition functions of the OFT and the Competition Commission. This is welcome however the new body must have a dedicated unit looking at the issues affecting small businesses. The new authority should be answerable to Parliament in respect of the Government's growth agenda and the role small businesses play in economic growth. There should be a specific duty enshrined in law for the new body to specifically consider the small business market.

We note also that the Government's proposals for the new CMA would negate the need to create ad hoc independent inquiry bodies such as the Independent Commission on Banking. The FSB is not against this proposal, but is concerned that these independent inquiries would not be able to

attract the same kudos and coverage if they were part of a larger body. This would especially be the case if the new body did not act in the interests of small businesses.

Extending the super-complaint system to SME bodies

We welcome in principle the Government's proposal to extend the super-complaint system to SME bodies. We are keen to be involved in future discussions. This would be an excellent opportunity for issues affecting small businesses to be thoroughly investigated. However, the broadening of this function would have resource implications for the CMA. With this in mind we recommend that Government restrict the criteria for making a super-complaint to harm caused to small enterprises rather than small and medium sized enterprises. We agree with Government that only those organisations representing primarily small businesses be able to qualify as designated super-complainants. We anticipate that there will be no cost and legal implications for organisations such as ourselves if this is done.

A stronger merger regime

The Government is considering introducing an exemption from merger control for transactions involving small businesses. We would support this proposal if, as outlined in the document, the target's UK turnover did not exceed £5 million and the acquirer's worldwide turnover did not exceed £10 million. There may be a case for lowering the £10 million threshold in order to ensure small businesses are not penalised by anti-competitive practices and we would like to discuss this further with the department. There should be an exemption from merger control for transactions involving small businesses under either a mandatory or voluntary notification regime.

The FSB-ICM 'Voice of Small Business' Annual Survey which was published in February 2010 found that as befits an organisation that represents small business owners and the self-employed, the mean turnover for FSB members' main business in the last financial year is approximately £525,000. At the extremes, a quarter (23%) turned over less than £50,000 while one in ten (10%) turned over more than £1 million.

What is unclear from the impact assessment accompanying the consultation is whether small firms are in fact exempt. We wish to seek clarification on this. The FSB recommends that those businesses employing less than 49 employees are exempt if they meet the recommended turnover criteria.

For further information

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Financial Services Consumer Panel
AN INDEPENDENT VOICE FOR CONSUMERS OF FINANCIAL SERVICES

Telephone: 020 7066 9346
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Duncan Lawson
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3rd Floor, Orchard 2
1 Victoria Street
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31 May 2011

Dear Duncan

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

The Financial Services Consumer Panel welcomes the opportunity to respond to this consultation. Our views below are based on our experience of and involvement with financial services markets. We support stronger competition and effective competition powers being applied to this market to overcome significant market failures and deliver better outcomes for consumers.

A Stronger Markets Regime

We support the extension of super-complaint powers to SME bodies and propose that it be extended further. The super-complaint power under the Enterprise Act should be more broadly defined if it is to be applied effectively to financial services. The current definition of "consumer" excludes those carrying on a business.[1] In the present context, this definition would leave exposed those non-financial businesses that are not given protection by other relevant legislation, such as that for consumer credit, by competition policy, by redress mechanisms such as the Financial Ombudsman Service, or by conduct regulation.

In practice, all but the smallest non-financial enterprises are left unprotected. SMEs and larger "mid-capitalisation" companies that seek external finance are heavily reliant on banks and other financial services.[2]

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[1] consumer" means any person who is—

(a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them; or
(b)a person for whom services are or are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them;

and who does not receive or seek to receive the goods or services in the course of a business carried on by him.

[2] " .. SMEs that do seek external finance are almost entirely reliant on banks, in the form of bank loans, overdrafts or other working capital products such as invoice discounting and factoring. …Mid-sized firms .. defined .. as having a turnover of £25 million to £500 million … tend to be largely reliant on banks for external finance". "Financing a Private Sector Recovery", Cm 7923, July 2010, HM Treasury and BIS, paragraphs 3.7, 3.11 and 3.12.

As a step towards addressing this underlap the Panel proposes that the Enterprise Act definition of consumer be widened to include representatives of non-financial businesses (not necessarily restricted to SMEs) for the purpose of submitting super-complaints about financial services.

Concurrency and the Sector Regulators

We support the extension of concurrent powers to the new financial services regulator, the Financial Conduct Authority and the proposal at (b) that the CMA should be tasked with acting as a central resource for the sector regulators on competition cases. The new CMA's role would be particularly valuable in providing support and additional resource to the FCA in developing its competition role, helping to overcome capacity constraints and lack of competition experience. The CMA's proposed co-ordination role (c) should assist in consistency of decision making and ensuring cross-sectoral issues are dealt with appropriately.

However, we would not want to see any fetter on, or precedence given, to the financial sector regulator's use of its range of powers as suggested at a). The regulator should be free to utilise its expertise in determining what is the appropriate response to any particular issue. The new financial services regulator may determine that the best way to fulfil its consumer protection objectives requires immediate intervention, conditions on licence or conduct, or exceptionally price control, in preference to its competition powers, in order to better deal with consumer detriment.

Scope, Governance and Objectives

The CMA's high level objective to keep economically important markets or sectors under review is likely to have particular significance in relation to financial markets, where necessary Government intervention has resulted in greater concentration and significant advantages to the bigger players in the market. We support this objective.

We will respond in more detail to the consumer landscape consultation. Without being clear about the changes proposed it is difficult to comment on whether consumer powers or functions should be available to the CMA. As the CMA will have an adjudication role and a competition focus this may not be the natural place for these powers and functions to fit.

We will look closely at the forthcoming consumer landscape review to ensure that it does not negatively impact on consumer representation and advocacy. The market investigation powers of the OFT have supported good consumer outcomes and we will need to be assured that those charged with this responsibility in the future have the resources, the expertise and statutory authority to conduct them and secure effective remedies.

Similarly while we can see the case for a single enforcement body and value the work of the Trading Standards Service, we will be looking for detailed proposals about the powers, resources and mechanisms for ensuring consistency and the authority to act in relation to large scale national or multi-national issues to assure us that the new arrangements will be effective.

Yours sincerely,

Adam Phillips
Chairman

From: Tom MacMillan [mailto:Tom.MacMillan@foodethicscouncil.org]
Sent: 10 June 2011 18:48
To: Competition and Markets Authority
Cc: andrew.dakers@blueyonder.co.uk; Sean Roberts
Subject: CMA

Dear Mr Lawson

I am writing in response to 'A competition regime for growth – A consultation on options for reform' consultation questions 2, 19 and 20.

We believe it is vitally important that public interest factors are explicitly integrated into the objectives of the CMA.

In our 2010 publication 'Food Justice: the report of the Food & Fairness Inquiry', senior representatives from the farming, food manufacturing and grocery retail industries identified competition considerations as a practical barrier to them meeting consumers' expectations that goods they supply are healthy and sustainable (http://www.foodethicscouncil.org/foodjustice). The inquiry committee recommended:

"The UK government should work with the OFT and consumer groups to develop publicly accountable mechanisms whereby businesses can collaborate to make progress on sustainability that is in the public interest."

We have explored and developed this recommendation further in two short papers that may be relevant:

- A short discussion paper available at http://www.foodethicscouncil.org/node/614
- A report of a subsequent business seminar, led by competition lawyer Michael Hutchings http://www.foodethicscouncil.org/node/627

With kind regards
Tom MacMillan

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Dr Tom MacMillan
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Forum for Private Business

Duncan Lawson
Consumer and Competition Policy
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SW1H 0ET

9 June 2011

Dear Mr Lawson,

Consultation response: a competition regime for growth

The Forum of Private Business represents 18,000 small businesses throughout the UK. We have decided to focus our response to the consultation on the key areas which have an impact on small firms.

Reform of the UK's competition framework

We welcome the Government's decision to consult on reforming the competition regime in the UK. We also welcome the recognition of small businesses and their importance to economic growth. We have recently launched a campaign called Get Britain Trading, based upon the principle that by taking action to enable small business growth, the UK's economy will benefit.

In particular, we hope that reform will achieve its key aim of improving the robustness of decisions and strengthening the regime. A regime in which players of all sizes can compete to the benefit of the consumer is in everyone's best interests. A reformed competition regime must consider the impact of competition on small firms, as well as large. The economy would benefit greatly if more resources were focused on ensuring fairer competition for small businesses. Larger firms benefit from their purchasing power and can offer goods and services at a lower price which small businesses accept is a fact of life. What is unacceptable is when large firms use their power to impose price cuts on suppliers' goods and services which suppliers have no choice to accept. An example of this is the supermarkets imposing extremely low prices on dairy farmer suppliers. In this respect we welcomed the Government's decision to introduce the Groceries Supply Code of Practice (GSCP) and the subsequent move to establish a body to monitor and enforce it. However it is not only the grocery market which is affected by this form of supplier abuse.

Super-complaint powers

We welcome the move to strengthen the voice of small business by extending the super-complaint powers to SME bodies. We are one of the two main SME bodies in the UK and would welcome the power to make super-complaints on behalf of our small business members. The Forum's members have an average of 10 employees and are therefore mainly small, rather than medium-sized. 99.3% of all businesses in the UK fall into the 'small' category, with fewer than 50 employees.

Creation of a single Competition Markets Authority

The two key areas where we wish to ensure small firms are protected are: the impact of competition decisions on the ability of small firms to survive and grow, and the treatment of suppliers by big businesses that are in strong competition with each other. We therefore welcome the creation of a single Competition and Markets Authority (CMA). In the past there has been some confusion about the allocation of responsibilities between the Office of Fair Trading (OFT) and the Competition Commission (CC) in relation to small business issues. The consultation asks the question about how to ensure that competition decisions are high quality, transparent and robust. We would like to point out that creating a CMA presents an opportunity to clarify the aims and responsibilities of the authority. Small firms are often unsure of where to go when faced with a competition issue and so to provide a transparent system it is important to provide clarity on the type and nature of cases that will be considered by the CMA. Any guidance must be accessible to small firms and we would recommend that a dedicated section of the CMA be established to handle small business competition issues.

If you require any further information, please let me know.

Yours sincerely,

Phil Orford
Chief Executive

Forum of the Future

From: Chapple, Alice [mailto:a.chapple@forumforthefuture.org]
Sent: 15 June 2011 10:49
To: Competition and Markets Authority
Cc: JP Office; andrew.dakers@cooperatition.org
Subject: Forum for the Future response to 'A competition regime for growth'

Dear Mr Lawson
We are writing with Forum for the Future's 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 [Consumer & Markets Authority] 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 specialised in balancing public interest factors, supported by guidance, tools and ways of working with other government departments should be a core objective of the new CMA - potentially embedded in statute. This will 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 voluntary self-regulation/ collaboration on environmental and social issues is required.

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 CMA should focus on competition, but also have the capability as described to balance public interest factors, particularly in the case of voluntary agreements. This 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'.

Yours sincerely

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

RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER LLP

13 June 2011

FRESHFIELDS BRUCKHAUS DERINGER

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1. INTRODUCTION AND SUMMARY

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on "*A Competition Regime for Growth: A Consultation on Options for Reform, March 2011*" (the ***Consultation***).

1.2 Freshfields Bruckhaus Deringer LLP is a leading international law firm. Our comments are based on our extensive experience of representing clients in the full range of competition law enforcement in the UK, and throughout Europe, the US and Asia. We believe this experience gives us valuable insights into both institutional design and enforcement procedures.

1.3 We have confined our comments to those areas which we feel are most significant in terms of the impact on UK business and consumers, and where we consider reforms would lead to the most desirable outcomes for the legal regime overall. Before turning to each section of the Consultation, we would like to make the following initial comments:

(a) we welcome the Government's commitment to a strong and vibrant competition regime as a key driver of growth. In particular, we welcome all measures which improve the efficiency, predictability, fairness and robustness of decision-making, whilst allowing the authorities to focus their resources on those cases which potentially cause most harm to competition, consumers and economic growth. These include:

  (i) establishing clear thresholds and criteria for the use of each element of the regime;

  (ii) improving case selection and prioritisation;

  (iii) effective management of investigations to facilitate robust decision-making within reasonable timeframes;

  (iv) enhancing procedures designed to protect due process and engender confidence that decisions have been reached on an objectively fair basis; and

  (v) maintaining prompt and effective appeal mechanisms.

(b) we have concerns, however, that some of the proposals may hamper the Government's key objectives for the UK competition regime. We believe that serious consideration must be given to the rationale for some of the more far-reaching changes envisaged in the Consultation. In particular:

  (i) the reforms should aim to ensure that scarce public resources are focused on cases which potentially cause most harm to competition, and that regulatory costs for business are not increased without any wider economic benefits; and

  (ii) the push for speed and efficiency should not undermine the procedural safeguards required to maintain the UK's international reputation for robust, fair and reliable competition enforcement.

1.4 We set out below our comments on the Consultation. Please note that these comments do not necessarily represent the position of any of our clients.

2. PROPOSED INSTITUTIONAL REFORM

2.1 The Government is consulting on a proposal to merge the competition functions of the Office of Fair Trading (the ***OFT***) and the Competition Commission (the ***CC***) to create a single "Competition and Markets Authority" (the ***CMA***). The key reasons for the merger, set out in the Consultation, are to ensure the flexible allocation of scarce public resources to competition issues and for the CMA to be a stronger advocate for pro-competition policy.

2.2 We understand that the creation of the CMA is currently the Government's preferred option. We believe that the merger may create some opportunities for synergies, and a fresh approach by the CMA, and that any such opportunities arising from this major structural change should not be missed. It should be considered a failing of the reforms if the outcome for the authorities is "business as usual". We note that:

(a) there is a risk that, following a merger, there will be reduced levels of enforcement during the integration period. However, such an inevitable impact should be capable of being managed through effective governance, direction and resourcing; and

(b) the institutional design could create internal tensions within the CMA, although any such difficulties should be viewed relative to the existing tensions within the two-authority model.

2.3 Our support for the proposed merger assumes that the following key issues are properly addressed in order to ensure accountability, to guard against the reality or perception of bias, to maintain business confidence by ensuring that due process and rights of defence are fully protected, and to ensure that the full benefits of the merger are extracted:

(a) ***Governance:*** the new structure should not separate those responsible for overall policy and strategy within the CMA, and accountable to Parliament, from those responsible for key decision-making (see our comments in **Section 9** below);

(b) ***Decision-making:*** the benefits of the current separation of Phase 1 and Phase 2 decision-makers in the mergers and markets regimes should be maintained within the combined authority (see our comments in **Section 10** below);

(c) ***ECHR:*** self-evidently, it will be vital to ensure that the new procedures of a unified CMA are compliant with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the ***ECHR***).

2.4 For ease of reference, this paper refers to the CMA where relevant in commenting on the proposed reforms, following the approach taken in the Consultation.

3. PROPOSED REFORM OF THE MARKETS REGIME

3.1 The Consultation states that the Government considers the markets regime to be a key strength of the UK competition regime, but that there is scope for streamlining processes and making the regime more "*vigorous*". The Consultation also suggests that the markets regime has been "*underutilised*" since it was introduced.

3.2 We understand the desirability of authorities being able to look at markets in order to identify potential underlying competition problems that may be appropriate for detailed investigation and possible remedy. However, in our experience[1], many such investigations are initiated without sufficient evidence of an underlying, industry-wide competition problem, and the investigations are very wide-ranging, lengthy and complex. This results in significant financial costs, and extended periods of uncertainty, for those businesses subject to review. It is not clear to us that the outcomes of investigations to date have justified the investment.

3.3 We therefore believe that the Government's proposals to re-invigorate and streamline the markets regime – and potentially subject a larger number of businesses and markets to these types of review – should be considered in light of the following issues:

(a) ***Role of the regime:*** the markets regime should be distinguished from other types of competition investigation by the fact that the companies under investigation are not alleged to have infringed any laws. Conducting market-wide investigations into suspected anti-competitive practices or features – in the absence of any alleged infringement of the law – is inherently complex. The Government should consider looking at the experience in other major jurisdictions, which illustrate the difficulties that can arise when independent bodies have wide-ranging powers to review markets and intervene in commercial practices[2]. These examples were not shown to have fostered economic growth, but rather more regulation. The markets regime must be used carefully, and only where there are identified competition issues in economically important markets that cannot be dealt with appropriately by other mechanisms, and where another regulator is not already engaged in much the same issues. A frequent outcome of MIRs is recommendations to Government to address second order competition problems arising from other policy instruments or legislation[3]. It is far from clear that the markets regime is the most efficient way for competition authorities to address these issues with the Government departments concerned.

(b) ***"Underutilisation" of the regime***: the fact that there have been fewer MIRs than anticipated when the markets regime was established does not necessarily indicate that the regime is not working. The Consultation notes that there have only been

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1 We have advised one of the parties in almost all the market investigations under the Enterprise Act 2002.

2 For example, the experience of the US Federal Trade Commission in its "Magnuson-Moss rule-makings" during the 1970s.

3 For example, recommendations to the franchising authorities to make changes to the franchise system (following the *Rolling Stock Leasing* market investigation); recommendations to the relevant departments to make to make the OFT a statutory consultee on applications for planning permission for certain grocery retail store developments (following the *Groceries* market investigation).

11 MIRs under the current regime, but during this time the OFT has completed 39 market studies, with five ongoing; the sector regulators also carry out market reviews. OFT market studies have taken from 3-21 months[4], which is a significant period of time for the relevant sectors to be under review, even on a more informal basis. The International Competition Network (***ICN***) *Market Studies Project* found that the majority (56%) of authorities which responded carry out an average of less than five market studies per year; 40% carry out on average one to two studies per year[5]. With 55 ongoing or completed market studies and market investigations since its inception (approximately seven per year), the UK markets regime already has a significantly above average level of activity in comparison to other regimes internationally. Utilisation of the regime should not be an end in itself and, moreover, scarce public resources should not be used to investigate markets where such intervention is not necessary.

(c) ***Cost to business:*** it is important to recognise the significant burden that a market investigation imposes on the companies involved, not only in terms of direct financial cost, but also in terms of diverting management time from running the business. Lengthy involvement in these types of investigation can have serious implications for a company's performance.

3.4 We set out below our comments on the key reform proposals.

A. Enabling investigations into practices across markets

3.5 The Government proposes to enable the CMA 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 and which are sufficiently similar that they could practically be subject to a single investigation.

3.6 We believe that the method, subject matter and conclusions drawn from an investigation into cross-market "practices" will differ according to the conditions of competition (i.e. the type of suppliers and nature of the product) in each individual market. It is notable that the Secretary of State had the power to refer anti-competitive practices for review by the Monopolies and Mergers Commission (***MMC***) under Section 78 Fair Trading Act 1973, but only three references[6] were made under this provision during the 26

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4 Consultation, page 21.

5 ICN, *Market Studies Project Report*, prepared by the ICN Advocacy Working Group, presented at the 8th Annual Conference of the ICN, Zurich, June 2009, paragraph 7.35. The figures were based on responses from 32 competition authorities (see paragraph 7.34).

6 Based on the reports published on the CC website, we identified that the following three references had been made under section 78 of the Fair Trading Act 1973:

- *Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings* (referred March 1988; reported December 1988);
- *Discounts to Retailers: A report on the general effect on the public interest of the practice of charging some retailers lower prices than others or providing special benefits to some retailers where the difference cannot be attributed to savings in the supplier's costs* (referred July 1977; reported May 1981); and

years it was in force. The conclusions of the MMC report on *Full-Line Forcing and Tie-in Sales* underline the importance of reviewing practices in their market context – the report noted "*that the practices frequently take their character from the circumstances in which they occur and that their effect on the public interest is not consistently harmful, beneficial or neutral but depends on those circumstances.*"[7]. Overall, the report concluded that the number of cases in which the practices did not operate against the public interest was substantial – sufficient to make prohibition of the practices inappropriate – and that responsibility for initiating action against the practices in individual cases where they were potentially anti-competitive should remain with the Director General of Fair Trading[8].

B. Enabling the CMA to report on public interest alongside competition issues

3.7 We believe that the CMA should have a clear mandate to focus its resources on cases which potentially cause most harm to competition, and that the proposal that the CMA investigate public interest issues concurrently with competition issues could undermine the principle of a competition regime which is free from political intervention. Businesses and consumers may not accept the legitimacy of the CMA's assessments absent political accountability. Moreover, it is not clear that the CMA would have the necessary expertise to investigate the issues raised. We do not believe that recent experience with public interest interventions in merger cases has been positive.

3.8 If the CMA is to be empowered to investigate public interest issues under the markets regime, we believe it will be important to ensure that, as with the current merger regime, there are only a limited number of pre-defined public interests that can be investigated, with any additions to be made by Order[9].

C. Extending the super-complaint system to SME representative bodies

3.9 We believe that the proposal to enhance the rights of SME businesses through the super-complaints system is likely to distort the proper functioning of the competition regime and should not, therefore, be adopted:

(a) ***Undermining the role of competition policy and the CMA:*** as the Consultation recognises, the CMA should have a "*primary competition focus*"[10]. Giving enhanced rights to one class of business could undermine this objective and give a misleading message of the principal role and function of the CMA in ensuring

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- *Full-Line Forcing and Tie-in Sales: A Report on the Practice of Requiring any Person to whom Goods or Services are Supplied to acquire Other Goods or Services as a Condition of that Supply* (referred April 1979; reported March 1981).

7 Monopolies and Mergers Commission, *Full-Line Forcing and Tie-in Sales*, paragraph 13.21. The report also noted that it had not been possible to reach firm conclusions about particular tying arrangements – to have done so would have necessitated far more detailed investigation than was appropriate in such a general inquiry and would have extended the duration of the inquiry unduly (see paragraph 1.9).

8 Ibid, paragraphs 13.21 and 13.31.

9 It is an open question as to whether the public interests which can be investigated under an MIR should be the same as those which can be investigated under the merger control regime. It could create issues due to crossover with Ofcom if the CMA could investigate media plurality under a MIR.

10 Consultation, page 7.

markets are working competitively to the benefit of consumers and the wider economy, rather than protecting certain competitors, or a class of competitors.

(b) ***Undermining the CMA's ability to set its own priorities:*** the CMA is intended to be a powerful body which should be able to determine its priorities independently, through identifying significant consumer harm and market distortion which requires investigation. Extending super-complaints to SME businesses will inevitably result in resources being diverted from such priority cases to investigating and responding to these super-complaints. This use of public resources to benefit one interest group does not seem justifiable in an era of greater success, and encouragement, of private actions by classes of consumer or business in other areas of competition enforcement across Europe.

(c) ***Complaints from SME businesses:*** as many cases over recent years illustrate, SME businesses are perfectly capable of, and do in fact, complain to the competition authorities. The OFT is aware of the issues faced by smaller businesses, takes their complaints seriously, and has sought to facilitate action by SMEs[11]. If the Government considers that further measures are necessary to promote the interests of SME businesses, alternative steps (such as providing dedicated resource within the CMA to advocate the role of the authority) may be preferable to enhancing the legal rights of SME businesses through statute.

(d) ***Defining SME businesses:*** in addition to the issues summarised above, there will inevitably be difficulties in defining the class of SME businesses which should benefit from enhanced rights. For example, we note that SMEs can in practice be the largest incumbents in regional and local markets. These definitional issues could result in longer-term problems for the CMA as businesses seek to take advantage of the enhanced rights to complain about competition from larger competitors.

D. Reducing the statutory timescale for market investigations from 24 to 18 months

3.10 Our experience from previous and ongoing investigations has shown that it is very difficult to reduce the timescale for a MIR below the statutory maximum, due to the nature of the market investigation procedure, which is extremely data- and resource-intensive. For example, on the current market investigation into Local Bus Services, the original administrative timetable anticipated completion of the investigation within 18 months[12]. However, the timetable has been revised five times since its original publication, and the most recent timetable indicates the inquiry will take close to the statutory maximum[13].

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[11] For example, in March 2010, the OFT published guidance for smaller companies considering taking private actions where they have suffered loss as a result of breaches of competition law.

[12] The administrative timetable in the Local Bus Services Market Inquiry was originally published on 4 February 2010, and envisaged publication of the Final Report in late June 2011, just under 18 months after the MIR by the OFT on 7 January 2010.

[13] The administrative timetable was revised on 27 May 2010, 10 September 2010, 9 December 2010, 28 January 2011 and 10 March 2011. The Final Report is now due to be published in late 2011; the statutory deadline is 6 January 2012. The latest version of the timetable is available at

3.11 We believe that, without significant changes to the current procedures, it will be difficult to reduce the timescales. One option for changing procedures, and achieving the desired reductions in timescale, would be to:

(a) improve the process of dialogue between the CMA and the parties throughout the process, in order to give each party a clearer understanding of the issues under investigation at each stage; and

(b) provide break-points during the investigation, at which stage the CMA would be required to state its case to the parties and allow for the case to the closed early, remedies to be negotiated or the case to proceed. Greater flexibility and transparency throughout should lead to improved timescales and more efficient and effective decision-making.

E. Introducing formal information gathering powers during market studies, a statutory definition of a market study and a statutory threshold for initiating one

3.12 We believe that, given the role and function of the markets regime, the absence of any alleged competition law infringement and the burdens imposed on companies subject to investigation, it is essential to have:

(a) ***A reasonable threshold for use of formal information gathering powers:*** we would be concerned about giving the CMA formal information gathering powers at a stage when it did not have any intelligence of a genuine competition problem in a market:

(i) we are not advocating a system which could lead to prolonged preliminary investigation. However, providing formal information gathering powers without any threshold would be out of line with other competition powers, including when a potential antitrust infringement has occurred;

(ii) the ICN *Draft Market Studies Good Practice Handbook* recommends that, where authorities have powers to compel the supply of information, it is good practice to consider seeking information on a voluntary basis first, to reinforce the separation between market studies and enforcement action and to build cooperation from stakeholders[14]. It is therefore appropriate to retain the practice of informal information gathering at the initial stages of a market review; and

(b) ***A clear threshold for the initiation of the "Phase 2" market investigation:*** before launching a detailed investigation, the CMA should be required to demonstrate – to a sufficiently high standard – that wide-spread competition problems are reasonably likely to exist in a market, and that a MIR is the best available policy

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http://www.competition-commission.org.uk/inquiries/ref2010/localbus/pdf/Administrative_Timetable_March_2011.pdf

[14] ICN, *Draft Market Studies Good Practice Handbook*, prepared by ICN Advocacy (Market Studies Project) Working Group, presented at the 9th Annual Conference of the ICN, Istanbul, April 2010, paragraph 6.17.

tool to solve them. The current very broad statutory test can lead to excessive discretion in case selection.

3.13 If the Government is minded to introduce formal information gathering powers at Phase 1 of a market review, i.e. before a market is referred for an in-depth Phase 2 investigation, we would suggest that:

(a) the CMA should conduct a short, informal market study (as now), up to the point that a suitable threshold has been reached. We believe that a test similar to the current Section 131 Enterprise Act 2002 (***EA02***) or Section 25 Competition Act 1998 (***CA98***) standard (i.e. "reasonable grounds to suspect" a competition problem) would be a reasonable threshold;

(b) once this threshold has been met, formal information gathering powers could be used for a defined Phase 1 period (e.g. six months) before a decision was taken as to whether sufficient evidence exists to merit a Phase 2 investigation;

(c) in order to initiate a detailed investigation, the CMA should be required to demonstrate that it has a reasonable belief – supported by evidence gathered in Phase 1 – that significant and widespread problems in the market exist, and that a MIR is the best available policy tool to solve them.

F. Improving the interaction between MIRs and antitrust enforcement

3.14 As noted in the Consultation[15], one of the consequences of a market investigation may be the identification of evidence of anti-competitive agreements or abuse of dominance. Under the current regime, if the CC identifies such evidence, it can provide that evidence to the OFT for it to determine whether there are reasonable grounds for suspecting an infringement and initiating formal proceedings under the CA98. This already happens in practice. For example, the OFT has launched a CA98 investigation into contracts entered into by each of Clear Channel and JCDecaux (media owners) with local authorities relating to advertising on street furniture such as bus shelters and information panels following its Outdoor Advertising Market Study in 2010/11. It is therefore not necessary to allow the investigation of possible breaches of competition law as part of a market investigation, and it would be inappropriate to do so:

(a) the standard of evidence gathering and assessment applied by the CC in market investigations is markedly lower than that of the information gathering and analysis for antitrust investigations, and it would be impractical to merge the two;

(b) the quasi-criminal nature of a civil antitrust investigation and the possibility that individuals may be subject to criminal proceedings and/or director disqualification mean that rigorous procedures must be followed from the outset of an antitrust investigation, which would not be the case if it was carried out as part of an ongoing MIR; and

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[15] Consultation, paragraph 3.27.

(c) this would be inconsistent with good practice as set out in the ICN *Draft Market Studies Good Practice Handbook*, which recommends that market studies are clearly distinguished from enforcement action[16].

3.15 Paragraph 3.28 of the Consultation refers to Chapter 10 regarding streamlining the interaction of the antitrust and markets regimes, but Chapter 10 does not elaborate on this point. Given the quasi-criminal nature of an antitrust investigation, and the potential consequences for the companies and individuals involved, it is very important to maintain due process around the initiation of antitrust investigations.

G. Review of merger and market investigation remedies

3.16 The Government is looking to streamline the review of merger and markets remedies, and to revise the threshold for review so that it is clear that remedies can be reviewed to ensure they operate as intended (not just where there is a change in circumstances). We would support the introduction of appropriate statutory timescales for review of remedies and consider that the remedy review process could be streamlined within a single CMA. However, we would be concerned if the CMA were to be given a broad-ranging remit to review remedies to ensure their ongoing effectiveness, without there being any need to identify a 'change in circumstances', as currently required to initiate a review.

3.17 As the Consultation notes[17], the need to identify a 'change in circumstances' provides an important element of legal certainty, as it creates an expectation that remedies will remain in place until a statutory trigger is met. Parties to a merger or a market investigation negotiate remedies in good faith, after an extended process which can, after a MIR, take up to three years[18]. It is not appropriate to introduce the possibility that the CMA could subsequently demand changes to those remedies because, in the CMA's view, they were not having the intended effects. This would lead to a risk that there was no closure for the parties, as they would be subject to continual ongoing re-opening of issues in the case. As the Consultation notes[19], a variety of factors may constitute a 'change in circumstances' and this gives the CMA sufficient opportunity to initiate a review of remedies.

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16 ICN, *Draft Market Studies Good Practice Handbook*, note 14 *supra*, paragraphs 2.2 to 2.4.

17 Consultation, paragraph 3.36.

18 See for example the market investigation into *Domestic bulk liquefied petroleum gas* (Final Report published 29 June 2006; the last Remedies Order was issued on 6 May 2009). The Groceries Ombudsman is only just going through now, although the CC's Final Report into the UK supply of groceries was published on 30 April 2008.

19 Consultation, paragraph 3.36.

4. PROPOSED REFORM OF THE MERGER REGIME

A. Mandatory or Voluntary Regime

4.1 The UK merger regime is highly regarded internationally, both because of the high standards of review and its flexibility. The voluntary nature of the regime allows the UK authorities to focus on mergers giving rise to real potential concerns, and businesses to complete deals that do not give rise to competition concerns without the burden and cost of notification and delayed closing.

4.2 The Government considers that there may be a case for the UK to adopt a mandatory merger notification regime, to bring the UK regime into line with most other jurisdictions. The Government cites two reasons for such a change:

(a) ***Some anti-competitive mergers escape review***: the Consultation quotes a report prepared by Deloitte for the OFT as evidence of a significant number of mergers escaping review under the current voluntary regime[20]. However, we question whether this is a real concern in practice. As the Consultation recognises:

(i) the OFT has significantly improved its "merger intelligence" function since the Deloitte Report was prepared. In our experience, merging parties are strongly advised to assume that, if they choose not to notify, the OFT will request information from the parties post-announcement. Third parties are also increasingly active in drawing transactions to the OFT's attention. The risk of a subsequent intervention (if competition issues arise) is accordingly very real, and not taken lightly by businesses; and

(ii) we believe that the number of potentially anti-competitive mergers which escape review is low. As the Consultation notes[21], the size of these mergers is generally smaller and the lack of third party complaints in these cases should indicate (in the vast majority of cases) a lack of real consumer harm;

(b) ***Investigation of a large proportion of completed cases, leading to difficulties in applying appropriate remedies:*** although the proportion of completed cases referred to the CC appears significant, the number of cases where this caused significant issues is small and would not merit wholesale change to the regime. The Consultation notes that, since 2004/5, out of 125 cases at Phase 1 where the duty to refer arose, 60 (48%) were already completed[22]. However, the Impact Assessment acknowledges that the unscrambling problem has only affected a handful of the many SLC cases that the OFT has investigated[23]. These figures

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20 "*The ratio of mergers which advisers considered would have been unlikely to obtain unconditional clearance by the OFT (but of which the OFT was unaware) to those which were found to have a SLC or had undertakings in lieu was approximately one to one*" – paragraph 4.51, *The deterrent effect of competition enforcement by the OFT: a report prepared for the OFT by Deloitte*, November 2007, OFT962.

21 Consultation, paragraph 4.4.

22 Consultation, paragraph 4.5.

23 Impact Assessment, paragraph 103.

should also be seen in the context of the total number of mergers reviewed by the OFT: 845 cases between 2004/5 and 2010/11. We appreciate that the "unscrambling issue" is a substantial problem in those cases where it does arise. However, we consider that these concerns could be addressed by strengthening the current regime for interim measures (i.e. the mechanisms for prohibiting integration pending clearance).

4.3 In conclusion, we do not believe the case for adoption of a mandatory regime has been fully made and we consider the benefits of the current voluntary regime should not be under-estimated. However, should the Government decide to adopt a mandatory regime, the two options proposed raise serious concerns.

Option 1: full mandatory notification where the target's UK turnover exceeds £5 million and the world-wide turnover of the acquirer exceeds £10 million

4.4 Although this proposal has the advantage of clarity and objectivity – in line with ICN recommended standards[24] – the proposed threshold would give the UK one of the lowest merger filing thresholds in the world (and significantly lower than those in the top five European economies):

UK proposal	• *Target turnover in the UK >£5 million; AND* • *Worldwide turnover of acquirer >£10 million.*
Germany	• Combined worldwide turnover >€500 million; AND • At least one party has turnover in Germany >€25 million; AND • Another party has turnover in Germany >€5 million.
France	• Combined worldwide turnover >€150 million (>€75 million for retail mergers); AND • Each of at least two parties has turnover in France >€50 million (>€15 million for retail mergers).
Italy	• Combined turnover >€472 million in Italy; OR • Target turnover >€47 million in Italy.
Spain	• Combined turnover in Spain >€240 million; AND • Each of at least two parties has turnover in Spain >€60 million OR the parties' combined market share is 30% or more.

4.5 We note that the Jersey Competition Regulatory Authority is currently consulting on the revision of its merger review thresholds[25]. The proposed revised test would require that (i) the parties' combined turnover in Jersey was at least £2 million in the preceding financial year, and (ii) at least one of the parties satisfies a local assets test. The Gross National Income in Jersey in 2010 was £3.6 billion, compared to Gross National Income

[24] The ICN recommends that notification thresholds should be clear and understandable, and based on objectively quantifiable criteria.

[25] Jersey Competition Regulatory Authority, *Competition (Mergers and Acquisitions) (Jersey) Order 2010 – a consultation on proposed amendments to the merger thresholds*, 12 May 2011.

in the UK in 2009 of £1,424 billion. It does not seem proportionate that the UK economy, which is nearly 400 times the size of Jersey's, should have a mandatory merger review threshold which is almost as low as that proposed for Jersey.

4.6 The Impact Assessment for the Consultation estimates that notifying a merger takes 150-250 hours of corporate managers' and senior officials' time, and estimates that 200 hours of management time would cost approximately £9,000[26]. We consider that the hourly rate used to make this calculation is likely to be too low, as the criminal penalties for provision of false or misleading information[27] and the strategic significance of the process mean that submissions require significant involvement of in-house counsel and senior management to ensure appropriate verification and sign off. Quite apart from the cost in monetary terms, 200 hours of management time is a significant burden to impose on those businesses carrying out no-issues transactions.

4.7 The parties also have to bear the cost of legal fees (which the Consultation estimates ranges from £50,000 to £200,000 for both parties[28]) and more junior staff time collating information and data for the review. Imposing such additional burdens on businesses carrying out no-issues transactions would not be consistent with the wider objective of driving growth and reducing "red tape". In addition to the cost to business, the CMA may well be required to divert resources to benign mergers at a time of declining funding. This would reduce enforcement activity in other areas and undermine the Government's objective of having greater (and more targeted, efficient) competition enforcement across all tools.

4.8 The Government suggests that the additional costs to business could be addressed through a short form notification procedure to minimise the impact on no-issues mergers. However, our experience of short form notifications in other jurisdictions, for example to the European Commission, indicates that they can still impose a significant administrative burden on the parties, and the informational requirements are increasing.

4.9 If the Government is minded to move to a purely mandatory system of notification, it will need to accept that, as in other countries, if the notification threshold is to be set at a reasonable level, some mergers will inevitably escape review. The Government needs to decide whether its priority is (i) to retain the ability to investigate small but potentially anti-competitive mergers, or (ii) to have a mandatory system to address the impact of completed deals.

Option 2: hybrid mandatory notification (mandatory notification where the target's UK turnover exceeds £70 million; the CMA would retain the ability to initiate investigations for mergers under this threshold which were caught by the share of supply test)

4.10 We strongly believe that such a model would be highly detrimental to the UK regime, as it incorporates many of the negative features of a mandatory regime (i.e. it would increase the number of no-issues mergers subject to review, and thus the costs for both business and the authorities) without achieving the benefits (i.e. clear, bright-line

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26 Impact Assessment, paragraph 118.

27 Under Section 117 EA02.

28 Impact Assessment, paragraph 117.

thresholds and increased certainty for all concerned). Such a system would also take the UK further away from ICN best practices.

4.11 If the Government considers that it is essential to retain the ability to investigate anti-competitive small mergers through the share of supply test, retaining and improving the current, well-understood, voluntary system would seem to be the only practical option.

B. Options for strengthening the existing voluntary notification system

Strengthening interim measures

4.12 Rather than introducing an automatic statutory restriction on further integration on commencement of the Phase 1 review, the CMA should have the flexibility to determine the most appropriate interim measures, taking into account the specific circumstances of the case. The OFT already has the power to negotiate or impose interim undertakings under Sections 71-72 EA02, and is increasingly making use of these powers at an early stage of its investigations. It would be sufficient for the CMA to have the same powers. An automatic statutory restriction on further integration at Phase 1 would be disproportionate, and as the Consultation notes[29], could discourage parties from notifying completed transactions until they had already achieved a certain level of integration.

4.13 We appreciate the difficulties that can arise in cases where significant integration has already taken place and the authorities are seeking to impose remedies, but these cases are in the minority (see paragraph 4.2(b) above) and it is therefore important that any additional powers granted to the CMA are proportionate. We consider the Government's proposal to introduce the ability for the CMA to require parties to reverse integration already carried out, at Phase 1 as well as Phase 2, is disproportionate to the harm identified. The ability to impose hold separate undertakings is sufficient in the vast majority of cases, and for parties that act in bad faith, the CMA would have the ability to bring civil proceedings.

4.14 We consider that interim measures would be more effective if the CMA issued more detailed guidance as to its expectations, and the practical measures that are likely to be necessary to satisfy the standard hold separate requirements. The current regime is onerous and poorly understood, and gives rise to practical problems with funding and managing the target entity.

4.15 Interim measures are an area where the proposed merger of the OFT and CC could be beneficial, as the CC has significantly more experience with monitoring hold separate obligations than the OFT, and the CMA would be able to apply this expertise at Phase 1.

4.16 The Government is considering introducing financial penalties (of up to 10% of the aggregate turnover of the enterprises concerned) for failure to comply with hold separate obligations, as it is concerned that the current form of redress, civil proceedings, is too cumbersome. However, the Consultation provides no evidence that there has been an issue with companies flouting hold separate obligations, once agreed/imposed. In addition, as the Impact Assessment notes[30], the introduction of penalties could increase

[29] Consultation, paragraph 4.14.

[30] Impact Assessment, paragraph 102.

CMA costs because of the need to consider penalties and deal with possible challenges to penalties. We consider that the process for imposing penalties could still be lengthy and cumbersome, as it would be necessary to establish breach of the obligations before imposing the penalty, and any appeal would presumably be on a full merits basis. We therefore do not consider that the case has been made for the introduction of financial penalties for flouting hold separate obligations.

Changing the jurisdictional thresholds

4.17 The Government is considering moving to a system whereby all mergers are reviewable other than small mergers, which would be exempt from merger control. If this replaces the current turnover and share of supply tests, this would improve clarity and certainty for business as to whether a transaction was reviewable. However, as set out in the following section, we believe the proposed definition of small merger is too low a threshold. This would bring many more no-issues mergers under the jurisdiction of the CMA. Whilst notification would remain voluntary under this proposal, the change in review threshold could increase the number of no-issues mergers notified to the CMA (to give the parties certainty of outcome) and the number of non-notified mergers that the CMA chose to pursue. This does not seem an optimum use of the authority's resources.

Introducing an exemption from merger control for small mergers

4.18 We agree that there should be a statutory exemption for small mergers, rather than this being an exemption which is available at the discretion of the CMA and only once the parties have gone through time and cost of the notification process, as currently. However, we believe that the threshold proposed in the Consultation (where the target's UK turnover does not exceed £5 million and the acquirer's worldwide turnover does not exceed £10 million) is far too low.

4.19 The Consultation cites[31] two facts which the Government considers justifies the thresholds for the proposed exemption:

(a) 16 out of 116 cases that met the realistic prospect of a SLC test since 2006 involved a target with turnover of less than £5 million. Of these 16 cases, eight were cleared on de minimis grounds, which indicates that only eight were of concern – just 6.9% of the total 116 SLC cases; and

(b) in eight of the 16 cases where the target's turnover was less than £5 million, the acquirer had turnover greater than £10 million, so these cases would not have been eligible for the proposed small mergers exemption.

4.20 The Government concludes from these data that the thresholds for the small mergers exemption are appropriate, on the basis that if they had been in place, approximately half of the small mergers reviewed in the past and found to meet the realistic prospect of a SLC test would still have been caught. However, the Consultation does not indicate the final outcome of the cases referred to above, nor has the Government estimated what the cost of the detriment might have been if these cases were not reviewed by the CC. It is therefore not clear that the Government has based the threshold for the

[31] Consultation, paragraph 4.41.

small merger exemption on sufficient evidence of the impact of anti-competitive small mergers.

C. Streamlining the merger regime

4.21 The fast-track reference to Phase 2 of the anticipated travel business joint venture between Thomas Cook, the Cooperative Group and the Midlands Co-operative Society is a welcome development and shows the flexibility of the UK merger regime. We would welcome the ability for the parties to negotiate remedies with the CMA earlier in Phase 2 of the merger review process, rather than being bound to follow the full CC reference procedure, as currently.

4.22 If statutory timescales for the Phase 1 review and Phase 1 consideration of remedies are introduced, it may mean that it is difficult to negotiate more complex remedies within the time available at Phase 1. It would therefore be helpful to have the ability to offer remedies immediately on initiation of the Phase 2 review – as is the case under the EU Merger Regulation. One of the benefits of a merged authority could be that there were various points in the merger review process where remedies could be considered, allowing the CMA flexibility to fit the timetable to the requirements of the case.

5. PROPOSED REFORM OF THE ANTITRUST REGIME

5.1 We welcome the recent steps taken by the OFT to improve and streamline its antitrust investigation procedures[32]. We comment below on the proposals for change set out in the Consultation.

A. Proposals for strengthening the antitrust regime and the process of antitrust enforcement

5.2 We understand the Government's desire to increase the number of antitrust cases and, crucially, to put in place faster and more efficient decision-making structures. We agree that, to date, enforcement under the CA98 has not been sufficiently prompt, focussed or predictable, and that some improvements to the enforcement process are desirable, in particular to improve the perception of fairness and objectivity.

5.3 In making any reforms, the Government must seek to ensure that the chosen decision-making structure will deliver greater speed and predictability without compromising fairness. The new system must therefore respect each undertaking's right to a fair trial and be clearly ECHR compliant. It must not create changes which will compromise the effectiveness of the regime. The Government therefore has some difficult choices to make, as there will inevitably be a trade-off between its competing objectives.

5.4 In summary, and for the reasons expanded on below, we consider Option 3 to be the most appropriate of the proposed reforms, if sufficient resources are provided to the CMA to bring cases effectively. Further, and importantly, it would represent 'best practice', in that (i) it provides institutional separation between the prosecutor and the

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[32] OFT 1263, *A guide to the OFT's investigation procedures in competition cases*, March 2011.

decision-maker and, consequently, the clear impartiality of the latter; and (ii) is clearly ECHR compliant.

5.5 Option 3 can only succeed if the Government is prepared to commit sufficient resources to enable the CMA to bring cases successfully. If the Government is not prepared to put the necessary resources behind Option 3, the regime change could have a chilling effect on enforcement, as the CMA will find it difficult to bring cases without significant changes to the current staffing for antitrust investigations.

5.6 Option 1 also offers scope for improvement, but may not be radical enough to meet the Government's objectives for the regime. In contrast, Option 2 will not, in our view, meet the Government's objectives.

Option 3

5.7 Option 3 provides the greatest scope to contract decision-taking in the longer term. It is the only option which will reduce the need for the CMA to conduct two resource intensive processes, both when establishing and working up an antitrust case before adopting a final decision and, subsequently, when defending the merits of its decision before the Competition Appeal Tribunal (the ***CAT***). Not only would it allow for the investigation of cases to be streamlined and improved, but it would also significantly decrease the likelihood of appeals. In addition, we anticipate that those appeals that were made would be likely to arise on narrower points than is currently the case (allowing the appeal process to operate more quickly and cheaply), as the issues arising in the case would already have been debated in the proceedings before the CAT. Further, this option has the following significant advantages:

(a) it provides institutional separation between the prosecutor and decision-maker, so guarding against prosecutorial and confirmatory bias;

(b) it is the option which seems to best reflect the substance of the spirit of the ECHR judgments which require serious 'criminal' charges to be heard at first instance before an independent and impartial tribunal;

(c) it allows antitrust defendants to benefit from additional safeguards, closer to those available to firms facing charges under comparable criminal offences;

(d) it provides the greatest respect for, and accords greatest meaning to, the presumption of innocence that antitrust defendants benefit from.

5.8 Option 3 is likely to present some challenges for the CMA, at least in the short term. In particular, it will require alterations in the working practices and culture within the CMA (from those of either the OFT or CC), an overhaul and reworking of investigation and case management procedures and the employment of a very different mix of staff than currently (more litigators and less general case handlers). However, these difficulties are not insurmountable if the Government is prepared to commit the appropriate resources. The OFT now has more than 10 years' experience in investigating and formulating antitrust cases, so the transition should be feasible.

5.9 If this option were adopted some thought would need to be given to:

(a) if, and how, the CAT could be guided on fining levels. A sensible solution might be for the prosecutor to recommend an appropriate level for the fine (based on a transparent approach set out in guidance) and for the CAT to determine whether or not this is the suitable level on the facts of the case;

(b) how guidance could be given to businesses in relation to case closures or 'non-infringements':

(i) NCAs are not able to adopt non-infringement decisions in relation to conduct which affects trade between Member States (and so which potentially infringes Article 101 or 102 TFEU);

(ii) however, the CMA would still retain a discretion to decide not to prosecute a case (and perhaps to issue a press release or explanatory memorandum at the same time), and to provide non-binding guidance to firms through the publications of opinions, notices and guidelines. There are a number of areas in which this type of guidance would be very welcome;

(c) how settlements or early resolutions of cases can be managed:

(i) it is of utmost importance that the CMA should retain the power to settle a case where appropriate and to be able to avoid the protracted proceedings which would otherwise ensue;

(ii) it would seem appropriate that settlements (with agreed statements of facts and penalties) should be put before the CAT for consideration and endorsement. In the US, for example, in civil proceedings the DOJ must file any negotiated consent decree before a Federal District Court with a competitive impact statement both for public consultation and approval by the court. The court only enters the decree if it determines, taking account of specified factors including the impact of the judgment upon competition in the relevant market(s), that the entry of such judgment is in the public interest; and

(d) how immunity and leniency applications should be managed within the new regime.

Option 1

5.10 Option 1 offers some scope for improving processes and contracting decision-making, whilst retaining some good features of the current system, including the full merits appeal before the CAT:

(a) it would provide the opportunity to build on the various improvements that the OFT has already made (e.g. regarding the sophistication of information gathering, the discussion of draft information requests to better focus its evidence gathering and the trial of a Procedural Adjudicator). As several of these operational improvements have only been introduced relatively recently, their effect on

decision-making is not yet fully known. A number of other improvements are, however, likely to be required to focus and speed-up decision-taking;

(b) it involves least change from the position today and hence least risk in terms of a loss of momentum and a hiatus in enforcement;

5.11 As the Consultation notes[33], however, the changes may not be sufficiently radical to bring about significant improvements in the speed and throughput of antitrust decisions. The introduction of time limits may, however, encourage the CMA to focus its investigations and to bring more cases in a timely manner (see paragraphs 5.14-5.17 below).

Option 2

5.12 All of the variants in Option 2 involve decision-making within a single administrative body. Consequently, if any of these were adopted, we believe it would be essential not to downgrade the comprehensive, full merits appeal conducted by the institutionally independent CAT. A decision to do so would inevitably lead to concern that the system was not ECHR-compliant (and hence to challenges to the system). These options would all thus appear to require the development of a new administrative approach and the addition of further procedural hurdles, without a clear case for reducing the rights of those affected by its decision to judicial review. Consequently, it is hard to see how Option 2 would achieve any of the advantages in terms of efficiency and speed that the Government seeks. Additionally:

(a) we do not consider the core proposal in Option 2 to create an internal and independent adjudicatory tribunal within the CMA to be preferable to Option 3:

(i) the CAT is already an expert and institutionally independent tribunal, and it is not clear why significant cost and effort should be incurred to recreate a new internal (but impartial) tribunal within the CMA itself. Indeed, it would be difficult to ensure that the internal tribunal has the requisite expertise, as antitrust cases require different skills and analysis to markets and merger investigations;

(ii) whatever safeguards are put in place, we believe it to be inherently less likely that an internal body would be willing to exercise as rigorous and independent a review as the CAT has proved itself willing to conduct. If the internal tribunal were to do so, there would be significant risk of institutional disharmony[34];

(iii) we do not believe that this proposal would increase speed of decision-making, given the need both for a hearing before the internal tribunal and, in most cases, subsequent scrutiny of the decision by the CAT. It seems

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[33] Consultation, paragraph 5.29.

[34] In this respect, the CMA would be in a very different position to the Financial Services Authority, which has regulatory, including licensing, powers over those who appear before the Regulatory Decisions Committee.

likely that many of the decisions made by an internal panel of the CMA would be subject to challenge before the institutionally separate CAT; and

(b) the proposal to introduce two stage panels would not seem to address the core concerns with the working and operation of the current system, but would require increased resources, and would still leave the investigator, prosecutor and decision-maker within the same institution.

An Option 4?

5.13 During the debate that the Consultation has provoked, there has been some discussion as to whether a 'split' procedure could be adopted, with different processes for 'cartel'/'object' cases on the one hand and for other antitrust cases on the other. Although we have not seen a fully articulated argument for such a proposal, we believe that, it raises a significant number of issues which make it inappropriate to pursue:

(a) it is well known that the dividing line between 'object' and 'effect' cases under Article 101 TFEU/Chapter I CA98 is not clearly defined, and that the issue still provokes considerable litigation and discussion in the literature. Plainly, a regime requiring differing procedures for different cases would require a bright line to be drawn between those cases. This would seem to be impossible, especially given the continued evolution of case law in this area;

(b) although object cases often require different types of analysis from effects/dominance cases (with the latter being more likely to require greater analysis of the economic implications of the conduct), both types of investigation require some economic analysis and may result in severe consequences for the investigated undertaking(s) – in particular, the imposition of significant fines following a finding of infringement. In light of this, the exact rationale for wishing to operate such separate regimes for the different types of cases is not clear to us;

(c) there is already recognition in the UK that hardcore 'cartel' cases merit different treatment from other antitrust cases – this is the reason that a criminal cartel offence was introduced in 2003. In our view it is not justifiable, additionally, to draw a further subcategory of anticompetitive arrangements suitable for different treatment within the civil antitrust regime.

B. Other proposed changes to the antitrust arrangements

Timetables

5.14 We believe it to be essential that antitrust actions are conducted in a timely fashion, in the interest of both efficiency and fairness.

5.15 Consequently, we support the introduction of statutory timetables for antitrust cases:

(a) statutory timetables would prevent the open-ended investigations that the OFT has conducted in some cases (as the Consultation itself notes[35]) and require the CMA to focus on a specific set of issues and to drive its case forward;

(b) if the CMA finds that it is unable to put its case together within a specified statutory timetable, of say 18 months to 2 years, it would seem reasonable that it should have to abandon the case (subject to the ability to stop the clock where the parties fail to provide information in a timely manner). For particularly difficult cases which the CMA is unable to resolve within the statutory timetable, an option would be to provide for a right to apply to the CAT for a limited extension of the statutory limit.

5.16 We would also favour use by the CMA of indicative timetables for each stage of the process in an individual case. The timetable should be set out at an early stage in the investigation.

5.17 We recognize that each case timetable is likely to vary considerably depending on the size of the investigation and the issues involved. Any statutory or administrative timetable will therefore need to be sufficiently flexible to take account of these relevant differences, but we believe that a three year long-stop should be sufficient.

Limitation Periods

5.18 Under the current regime, the OFT is not barred from taking an infringement decision even if allegedly infringing behaviour is historic and has already ceased. We would support the introduction of limitation periods to prevent the CMA investigating unduly old facts and cases (for example, limitation periods similar to those set out in Regulation 1/2003, Article 25 could be introduced). The investigation of old allegations raises particularly serious fairness and evidential issues.

Private Actions

5.19 We believe it would be prudent to wait for the outcome of the European Commission's Consultation, "*Towards a Coherent European Approach to Collective Redress*", before making any further significant decisions on whether, and if so how, to encourage further private antitrust actions in the UK.

5.20 We would favour the implementation of Section 16 EA02, to allow the CAT to hear standalone private actions as well as follow-on actions. We believe, however, that to further encourage private action in the CAT, the CAT's jurisdiction needs to be radically reconsidered and redefined both in the CA98 and the CAT's rules. The current case law interpreting the scope of the CAT's jurisdiction encourages proceedings to be commenced before the ordinary courts.

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[35] Consultation, paragraph 5.7.

Challenges to the handling of antitrust investigations

5.21 We would support the introduction of rules which clarify whether and when procedural issues arising in antitrust investigations can be challenged before the CAT or the High Court.

Offences for non-compliance with an investigation

5.22 The Government is consulting on whether to permit the imposition of financial penalties on parties not complying with a CA98 or an EA02 investigation (similar to the daily fines the European Commission can impose), on the grounds that the criminal prosecution power for non-compliance is too cumbersome and may consequently undermine enforcement.

5.23 The Government has not, however, provided any examples of cases in which the OFT or CC would like to have used these powers but were unable to do so because of their cumbersome nature. Given the serious nature of these sanctions and the fact that they should only be imposed in extreme cases, we do not believe the case has been sufficiently made out for this change.

6. PROPOSED REFORM OF THE CRIMINAL CARTEL OFFENCE

6.1 The Government is concerned that there have not been enough successful criminal cartel prosecutions to ensure that the cartel offence has the intended deterrent effect. The Government considers that the need to prove dishonesty as an element of the offence may be overly limiting the cases that can be brought, and making them too difficult to prove. The Consultation therefore proposes four options for the removal of the dishonesty element of the cartel offence:

(a) Option 1: relying instead on prosecutorial guidance;

(b) Option 2: defining the offence to exclude a set of white-listed agreements;

(c) Option 3: introducing a secrecy element; or

(d) Option 4: defining the offence to exclude agreements which are made openly (which is the preferred option in the Consultation).

6.2 We recognise the desire to increase the deterrent effect of the cartel offence, but would have significant concerns about the removal of the dishonesty element under any of the options proposed. We would also reiterate the point made in other sections of this response – that paucity of cases is not necessarily an indication that the regime is not functioning well. Not every civil antitrust investigation meets the criteria for a criminal cartel case.

6.3 Overall, it seems premature to be considering such far-ranging change to the cartel offence:

(a) it is not clear that the Government has sufficient concrete evidence (as opposed to limited academic commentary and questionable conclusions from public opinion surveys) that the dishonesty element of the offence is the reason for the paucity of

criminal cases. The Consultation does not refer to any instances where the OFT (or the Serious Fraud Office (the ***SFO***)) decided not to prosecute a criminal cartel case due to concerns about proving the dishonesty element. Indeed, we note that the OFT currently has three criminal cartel investigations ongoing[36], which suggests that it considers cases can be brought under the existing offence as currently defined. It would be useful to know, therefore, if the Government has concrete examples of cases which were not brought on account of difficulties with the dishonesty element of the offence;

(b) further, the Government is proposing to change a key element of the cartel offence before it has been properly tested in the courts. The *Marine Hoses* case did not test the dishonesty element, and the only consideration of dishonesty in the *BA/Virgin* case (before it collapsed) was whether it was necessary to prove that dishonesty was mutual (the Court of Appeal decided that it was not). The *BA/Virgin* case did not fail due to the difficulties of proving the dishonesty element of the offence.

6.4 Rather than considering changes to the offence itself, therefore, it may be better to focus attention on improving the approach to prosecuting cartel cases. Indeed, recommendations for such changes were made in the *Project Condor Board Review*, published in December 2010. The report made recommendations in relation to process and governance, leniency policy and evidence handling and management of forensic IT, and the OFT has been taking steps to implement these.

6.5 We note that the Consultation does not discuss enforcement of the criminal offence, and the main scope of the CMA's activities[37] does not provide that one of those activities should be criminal cartel cases. The Consultation therefore does not address whether the CMA or another agency (for example, a new single Economic Crime Agency or the SFO) should have the key responsibility for prosecution of the offence. We would welcome clarification on this issue and believe that the question of how the offence is prosecuted should be given due consideration by the Government when considering the necessity for reform of the offence.

6.6 If Option 3 is introduced for civil antitrust investigations, such that the CMA is bringing civil cases under a prosecutorial system, the CMA would be better placed in terms of staff and experience than the OFT currently is to run criminal cartel cases. If, however, Option 3 is not to be brought in, the key responsibility for prosecution of the offence should perhaps be limited to the SFO or an equivalent agency (with the possibility of joint teams to ensure that the CMA can give the prosecuting agency the benefit of its competition experience).

6.7 If the CMA is to retain the ability to investigate criminal cartel cases in the alternative to the SFO (or equivalent), significant improvements would need to be made to the interaction between the CMA and the SFO as regards case allocation and sharing of knowledge and best practice – expanding on the current Memorandum of Understanding

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[36] The OFT has ongoing criminal investigations into suspected cartel activity in the UK involving commercial vehicle manufacturers, the automotive sector and the supply of products for use in the agricultural sector.

[37] Consultation, paragraph 9.2.

between the OFT and SFO (the ***MOU***)[38]. With regard to the OFT's criminal prosecution in *BA/Virgin* case, the *Project Condor Board Review* supported the OFT decision not to refer the *BA/Virgin* case to the SFO for possible investigation, but to consult the SFO as needed. However, it seems to us that the issues raised could have been addressed through the MOU:

(a) the *Project Condor Board Review* noted that, whilst the SFO has superior criminal investigatory experience and resources, especially in relation to forensic analysis and recovery of electronic data, the SFO does not have the OFT's competition expertise. The MOU would appear to address this issue by providing that, where a criminal cartel case is taken on by the SFO, case teams will be comprised of both OFT and SFO staff, under the leadership of a SFO case controller;

(b) it was considered important that the OFT should develop its own criminal enforcement capability. Again, this would seem to be addressed in the MOU by the use of joint case teams, which would have trained OFT staff in the appropriate investigatory procedures (and SFO staff in competition issues);

(c) the *Project Condor Board Review* noted that there was no guarantee the SFO would accept the case for investigation and elect to prosecute – the SFO was at that time involved in several major investigations and undergoing internal reorganisation. If the SFO had decided not to prosecute, a likely consequence could have been the extradition of the defendants to the US, creating a perception that the OFT had abdicated its criminal enforcement powers. However, looking at the key criteria set out in the MOU, the importance of the case and its complexity would suggest that it could have been an appropriate one for the SFO to take on.

6.8 We do not consider that any of the options proposed in the Consultation are preferable to the current criminal cartel offence. We have commented briefly on each option below:

(a) ***Option 1:*** widening the offence and relying solely on prosecutorial guidance to distinguish the cases for investigation and prosecution is not an appropriate means of distinguishing criminal from civil behaviour[39]. It would seem essential that the offence should retain an element of *mens rea* and that the statute itself, not prosecutorial discretion, should determine its limits;

(b) ***Option 2:*** the EU experience is that white lists create uncertainty for business, as legitimate agreements may fall outside the white lists. It does not seem advisable to introduce as a test for a criminal offence criteria that the European Commission is phasing out in relation to civil enforcement. This proposal would also appear to reverse the burden of proof for agreements outside the white list, which would become presumptively anti-competitive arrangements. The burden of proof must lie with the prosecutor in a criminal investigation;

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[38] October 2004 – OFT547.

[39] Footnote 96 to paragraph 6.29 of the Consultation cites the *Visa International Multilateral Interchange Fee* case (OJ [2002] L 318/17) as an example of where the European Commission has exceptionally granted an individual exemption in relation to a hard core cartel infringement (price fixing). However, it is important to note that the *Visa* case was in fact an effects case, not an object infringement.

(c) ***Option 3:*** a requirement to show (active) secrecy would be a new concept for judges and juries, whereas the *Ghosh* test of dishonesty has the benefit of significant prior case law. This test would be difficult to apply in practice and does not seem an appropriate means of defining criminality. Many legitimate agreements are confidential, and this test would create uncertainty for business over legitimate commercial practices. It is also not clear why the moral element should be removed from the cartel offence, as this would seem to be an important distinguishing feature between criminal and civil conduct;

(d) ***Option 4:*** excluding agreements which are made openly introduces another complicating factor and it is not clear that this requirement would catch the right cases. For example, if the parties' customers are not the end consumer of the product, on being informed of planned price rises fixed by the members of a cartel, immediate customers may accept them as they will be able to pass them on downstream.

7. CONCURRENCY AND REGULATORY APPEALS

7.1 The Government is looking at a number of options to encourage more proactive use of competition powers in the regulated sectors[40]. Our comments on the various proposals are set out below. In summary, we agree that the sector regulators should maintain their concurrent competition powers, but we consider that they should each retain flexibility to determine whether to use their sectoral powers in preference to their competition powers. As regards the reforms proposed to the operation of the concurrency regime, we support all steps to encourage efficient case allocation and common high standards of case management and enforcement across the CMA and sector regulators.

A. Sector regulators maintaining concurrent powers

7.2 There is a balance to be struck between sector expertise and competition enforcement expertise. We note that the sector regulators have very different levels of expertise to enforce competition law. In contrast to the sector regulators, whilst the OFT has significant experience of conducting antitrust investigations, it does not have significant expertise in the regulated sectors.

7.3 Given these differences in expertise/competence, there is a clear need for the CMA and the sector regulators to work more efficiently and effectively together. The competition issues that tend to arise in the regulated sectors – for example margin squeeze – are some of the most complicated and fast developing areas of antirust law and economics. It is therefore essential for sector regulators to be able to draw on CMA skill, and for the CMA to be able to draw on the regulators' market experience. We therefore believe that improvements should be made to the operation of the concurrency regime (as

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[40] The sector regulators that currently have concurrent competition powers are Ofcom, Ofgem, Ofwat, ORR, the Northern Ireland Authority for Utility Regulation and the CAA (for air traffic services only). The Postal Services Bill will extend Ofcom's concurrent competition powers to the postal sector when it absorbs Postcomm. The Consultation (at paragraph 58 of Appendix 1) indicates that the Government is planning to extend competition concurrency to the CAA in respect of airports management and to Monitor (the health services regulator), and that it is considering whether concurrent competition powers should be extended to the future Financial Conduct Authority.

discussed below), but we consider that it is preferable for the sector regulators to retain the option of using concurrent competition powers as an alternative to sector regulation, subject to the improvements set out below.

B. Strengthening the primacy of competition law over sectoral regulation

7.4 The Consultation puts forward two options for encouraging sector regulators to make more use of their competition powers:

(a) the sector regulators could be required to work towards a common set of factors for deciding which of their powers to use; or

(b) the Government could establish a consistently strong obligation on all the sector regulators, as a matter of policy or as a statutory duty, to use their competition powers in preference to their sectoral powers wherever legal and appropriate.

7.5 The fact that there has been less competition enforcement action by the sector regulators than anticipated when these powers were granted is not necessarily a sign that sector regulators have made the wrong choice in deciding to use sector regulation in preference to their competition powers. The basis for the regulators having powers to regulate these sectors is clear, and more competition enforcement cases may not be desirable or appropriate. The Consultation has not identified any examples of cases where sector regulators could have used competition powers but chose not to do so, and the resulting outcome was detrimental for consumers. It is therefore not clear that the lack of competition cases in the regulated sectors indicates an underlying problem.

7.6 We would question whether it is appropriate to introduce some kind of statutory or policy obligation requiring the sector regulators to use their competition powers (which are likely to remain costly and slow compared to their sectoral powers) in preference to their sectoral powers, when sector regulation may be simpler to use. Competition in regulated markets is still evolving, and it does not seem appropriate to oblige the sector regulators to use their competition powers in preference to their sectoral powers at this juncture.

7.7 As set out below, we believe that there are areas where the operation of the concurrency regime could be improved, particularly to ensure efficient case allocation and high common standards of case management. In addition, as the Government also notes, the OFT and the CC have been seeking to streamline the antitrust and market investigation procedures, and there may be further improvements as a result of the Consultation. Taken together, these improvements should go some way to address the Government's concerns that the sector regulators may not be sufficiently incentivised to use their competition powers where it would be appropriate for them to do so, without the need to introduce some kind of legal obligation for them to prioritise the use of their competition powers.

7.8 We believe that a single set of guidelines from the sector regulators as to when they would be likely to use their competition powers (subject to any legal obligations to use specific sectoral powers) would be helpful in fostering a coherent approach to competition law enforcement across the regulators. We would suggest that the guidelines should specify that sector regulators will give clear explanations for their decisions to use particular powers, and include examples of previous decisions from the various regulated

sectors. This would mean that regulators would have to justify a decision to use their sectoral powers over their competition powers.

C. CMA acting as a proactive central resource for sector regulators

7.9 The Government is looking at a number of different options to improve resource sharing between the CMA and sector regulators. This may involve the CMA becoming a "centre of excellence" for conducting competition cases, and assigning staff on a short-term basis between the CMA and sector regulators to transfer skills.

7.10 We would support all steps to encourage common high standards of case management and enforcement across the regulators. We believe it would be helpful to have joint CMA/sector regulator teams working on antitrust investigations. This could be achieved without changing the Concurrency Regulations, through a Memorandum of Understanding (or similar arrangement). This would ensure that, while the conduct of the investigation and the final decision was ultimately the responsibility of one agency (the "competent person" to exercise the "prescribed functions" in the relevant case), expertise could be pooled through a joint team working under the leadership of the competent agency. This would be a similar arrangement to that envisaged in the MOU between the OFT and the SFO for criminal cartel cases.

7.11 The 2006 report into the use of concurrent competition powers by the sector regulators (the ***Concurrency Report***)[41] made eight recommendations concerning the liaison process between the OFT and the regulators, the choice by the regulators to use their sectoral or competition powers, and the way in which the regulators use competition law. Some of these recommendations cover points put forward in the Consultation, in particular:

(a) the use of joint teams (Recommendation 7);

(b) careful consideration as to whether sectoral or competition powers may be more appropriate (Recommendation 4); and

(c) whether the regulators can be more proactive in using competition law (Recommendation 8).

7.12 The Concurrency Working Party (***CWP***), the OFT and the sector regulators responded to the Concurrency Report and set out a number of proposed improvements to their procedures for interacting. There is no indication in the Consultation as to how far these have been actioned, and how successful they have been. We assume the Concurrency Report and any consequent reforms will inform the Government's decision as to the most appropriate action in relation to the concurrency regime. As commented elsewhere, it would be helpful to have more evidence on the operation of the current regime to form a view on the necessity of making the proposed reforms.

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[41] *Concurrent competition powers in sectoral regulation*, a report by the Department of Trade & Industry and HM Treasury, May 2006, URN 06/1244.

D. Giving the CMA a bigger role in the regulated sectors

7.13 We note that the Consultation does not comment on whether the CWP (and Joint Regulatory Group) are working well as a means of coordination between the OFT and sector regulators. We would query whether these informal arrangements are helpful, or in practice lead to turf wars between the agencies and a lack of overall leadership.

7.14 We would support the proposal for an ECN-type model where the CMA would have a case allocation and oversight role. This would provide the CMA with the necessary authority and allow more flexible use of resources between the CMA and sector regulators. It may also help with the apparent lack of sector expertise within the CMA.

E. Should the CMA keep economically important markets under review or have a duty to review economically important markets or sectors?

7.15 The Government is considering whether the high level objectives for the CMA should include keeping economically important markets or sectors under review[42]. It will be important to ensure that any duty of the CMA to review such markets does not lead to duplication of roles with the sector regulators. Any duty to keep markets under review must not be seen as a means of avoiding the need to meet the thresholds for formal information gathering and MIRs discussed in **Section 3**.

8. REGULATORY REFERENCES AND APPEALS

8.1 We do not have detailed comments on the Government's proposals for regulatory references and appeals. However, we question whether the CMA would be the most appropriate body for deciding these cases. We believe that serious consideration should be given as to whether it would be more efficient for such references and appeals to be heard directly by the CAT. Such a procedure may encourage more efficient case-handling and early focus on the key issues to be considered.

9. SCOPE, OBJECTIVES AND GOVERNANCE

A. Scope and institutional objectives of the CMA

9.1 The Government proposes that sector regulators should retain their concurrent consumer enforcement powers, but that national consumer enforcement outside the regulated sectors would no longer be carried out by the CMA, and would move to Trading Standards. This would mean that the CMA would no longer carry out market studies that focus solely on consumer policy, without also raising competition issues (e.g. care homes), if this is clear at the outset of the review.

9.2 We consider that national oversight and expertise in these areas is important, and it is not clear that separating consumer from competition enforcement will improve the operation of either. The Consultation does not indicate what benefits are anticipated from the proposed separation. The OFT has spent the last five years integrating its competition and consumer enforcement functions, on the basis that a holistic approach allows it to use the most appropriate tools to address the issue. If the CMA has a choice, it may use

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[42] Consultation, paragraphs 9.5-9.8.

competition enforcement rather than introducing additional regulations to protect consumers. Given the Government's desire to reduce regulation wherever possible, it seems preferable to have one body which has the option of using consumer protection legislation and/or competition enforcement tools as appropriate. The market study into personal current accounts is an example of the benefits of an integrated approach.

B. The proposed governance structure

9.3 We have significant concerns regarding the proposed governance structure for the CMA. The structure seems to separate those responsible for decisions within the CMA from those responsible for overall policy and accountable to Parliament. This structure will be unworkable in practice.

9.4 It is inappropriate to have a Supervisory Board, which is accountable to Parliament, but which is not accountable for, or in control of, decisions taken by the Executive Board. This 'dual' structure is unusual among economic regulators in the UK (see for example the structure in use at Ofcom) and at odds with the UK Corporate Governance Code. Whilst it is standard practice to have a division of responsibilities between the main board (which sets the organisation's strategy) and an executive committee (which is responsible for the day-to-day running of the organisation), it is also standard practice for the executive committee to be answerable to the main board, which has overall accountability for the actions of the organisation, and ensures appropriate risk management and internal controls.

9.5 These difficulties are likely to be exacerbated as some of the decision-making structures proposed (see particularly **Section 10** below) envisage that the final decision-making will be made by panels which are 'independent' of the Executive Board (and the Supervisory Board). It is not clear whether and if so how these could be "CMA" decisions.

9.6 There seems to be a real possibility that this structure will undermine Parliamentary accountability and lead to significant internal tensions within the CMA.

10. DECISION-MAKING: THE PROPOSED MODELS FOR MARKETS AND MERGER CASES

10.1 **Section 5** deals with our comments on the decision-making structure for antitrust cases. Our comments in this section are confined to the proposed models for markets and merger cases.

10.2 As discussed above, we are concerned about the separation of those who have responsibility for overall strategy and policy, and are accountable to Parliament, from those who have responsibility for decision-making. We consider that a single Board should have responsibility and accountability for strategy, policy and enforcement decisions. The Board would have the ability to delegate certain decision-making functions to executive committees of the Board, in accordance with best practice for corporate governance. Moreover, we believe that this could be structured in a way which retains the benefits of the current two-stage model whilst achieving the Government's stated objectives of efficiency and de-duplication of process.

Composition of the decision-making bodies

10.3 The current two-stage EA02 procedure for market and merger cases, although requiring some duplication of process, provides a valuable and important mechanism for allowing an independent institution to take a thorough and second look at preliminary investigations completed by the OFT. This system reflects the high stakes, and the potentially serious consequences that might result, for those involved in such investigations. The new system should preserve the rigour and impartiality of the current system of Phase 2 investigations as far as is possible within the unitary body. The desire to increase the speed of decision-making or the efficiencies of case transition between Phase 1 and 2 teams must not undermine this objective.

10.4 We believe that the Phase 1 and Phase 2 decision-makers should – insofar as possible – remain independent of each other. Such a model could be structured as follows:

(a) at Phase 1, one or more (clearly identified) senior members of the CMA Executive Board would make the decision as to whether to refer the case to Phase 2, taking into account the recommendations of the senior responsible case officer;

(b) if the case was referred, the review would be conducted by a sub-committee of the CMA, appointed according to proper corporate governance principles. The majority of such a committee should be employed by the CMA on a full-time basis, supported by a minority of part-time members with specific industry or other expertise as appropriate. The sub-committee would have delegated authority to evaluate the case at Phase 2 (based on the work of the case team) and then make a recommendation to (different) members of the CMA Board, who would make the Phase 2 decision.

10.5 We believe that continuity of team members involved in fact and data gathering would be helpful in achieving operational synergies and other significant process savings from the merger of the OFT and CC. This should reduce the burden on the parties at the initiation of a Phase 2 investigation, whilst guarding against the risk of confirmatory bias through the change of senior decision-maker(s).

10.6 The Consultation does not discuss whether a change in the level of appeal or review would be demanded by the institutional change made. If the proposed reforms would limit separation of Phase 1 and Phase 2 decision-making, the Government should review carefully whether an appeal on judicial review grounds alone remains sufficient to ensure compliance with the ECHR.

Transparency and Access to Decision-Makers

10.7 We believe that the reform presents an important opportunity to enhance the rights of affected parties in merger and markets cases to engage directly with decision-makers. Under the present system, an actual (or at least perceived) lack of direct access to the decision-maker is a source of frustration for parties and gives rise to concerns that the parties' key arguments have not been fully or adequately articulated by the case team to the decision-maker.

10.8 Improvements to the process of dialogue between parties and decision-makers would have benefits for all parties, as it would help the authority ensure it is focusing resources on the right areas and progressing the case efficiently, and would help the parties in presenting their case effectively. Such improvements could be drafted in procedural guidelines which the authority should be required by statute to produce. We would be happy to contribute our suggestions for such guidelines at the appropriate stage.

11. MERGER FEES AND COST RECOVERY

11.1 The Government is understandably looking to reduce the cost of the competition regime to taxpayers. However, the cost burden for UK businesses is also an important consideration. It is also important that the cost of appealing an adverse decision does not become so significant that it discourages parties which have good cases.

Merger fees

11.2 As the Government notes in the Impact Assessment[43], UK 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 for merger review. The fees charged in the UK are nevertheless still insufficient to cover the costs of merger review, due to the reduction in the number of cases reviewed by the OFT. Whilst the Government considers that this is justification for raising the fees still further, we would note that, in business, a fall in demand of this nature would lead to a review of efficiency and cost effectiveness, rather than an assumption that costs could always be passed on irrespective of changing circumstances.

11.3 As a general principle, we agree that some costs should be borne by the companies that are using the merger review system. However, the Government's proposal to introduce full cost recovery would lead to disproportionately high merger fees in the UK, as shown in the tables below. Mergers that are reviewed in the UK rather than by the European Commission by definition involve smaller companies and/or companies for whom the majority of their operations are UK-based. Imposing significantly higher merger fees in the UK than elsewhere would disadvantage UK businesses in comparison to their international rivals, and make the UK a less attractive place to do business, contrary to the objectives of the proposed reforms. We would also note that many mergers lead to efficiencies, and allow companies to develop further and/or faster than if they had remained independent. It would undermine the Government's growth agenda if merger fees were set so high as to discourage pro-competitive transactions.

11.4 In terms of allocating costs, we favour a system whereby merger fees vary depending on the size of the transaction, as currently, rather than introducing flat fees. Fee bands spread the cost more proportionately amongst the relevant businesses.

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[43] Impact Assessment, paragraph 95 (pages 33-34)

International comparison of merger filing fees

11.5 The Government's proposals for merger notification fees would put the UK significantly out of step with the other major European jurisdictions:

Germany	The filing fee is determined by the Bundeskartellamt on the basis of the personnel and material expenses and the economic significance of the case: • for a case of "average" importance, a fee of EUR 25,000 has been considered reasonable by the competent courts; • usually, fees are somewhat lower (€3,000 to €15,000); • in exceptional cases, a fee of €50,000 or up to €100,000 is possible. In addition to the fee, the Bundeskartellamt can recover costs for external consultants (e.g. economists) from the parties to the concentration.
France	No filing fee.
Italy	Filing fees are calculated at 1.2% of the overall value of the transaction, with a minimum fee of €3,000 and a maximum fee of €60,000.
Spain	The filing fee depends on the combined turnover (***CTO***) in Spain: • CTO up to €240 million: fee is €5,502.15; • CTO above €240 million but less than €480 million: fee is €11,004.31; • CTO above €480 million but less than €3 billion: fee is €22,008.62; • CTO >€3 billion: fee is €43,944 plus €11,004.31 for each additional amount of €3 billion in excess of the first €3 billion, up to a maximum of €109,860. The filing fee for mergers notified under the simplified procedure is €1,500.

Recovery of the costs of antitrust investigations

11.6 The Government is considering introducing the ability for the CMA to recover the costs of antitrust investigations from those parties who are found to have infringed competition law. The Consultation indicates that there are precedents for this, although it does not cite any – we would welcome details of the precedents that the Government has in mind.

11.7 We consider that cost recovery is not appropriate for antitrust investigations. The fines imposed in antitrust cases (paid to the Government's consolidated fund) more than cover the costs of the investigations, and the OFT has estimated considerable consumer benefits arising from its enforcement action, so it is appropriate that the costs of that action are funded by the Government. The possibility of the CMA recovering the costs of an investigation would reduce its incentive to conduct its cases efficiently, and would add a whole layer of expensive and time-consuming procedures around the determination of costs and costs appeals.

11.8 If the Government is minded to introduce cost recovery, it should be reciprocal, i.e. where the CMA closed its investigation without making a finding of infringement, the parties should be able to recover their costs from the CMA.

Recovery of CAT costs on an unsuccessful appeal

11.9 The Government proposes that the CAT be given the power to recover its costs from fully or partially unsuccessful appellants.

11.10 Whilst unmeritorious appeals are obviously undesirable, it is important not to discourage parties from appealing on grounds of cost. The prospect of the CAT recovering its costs may make the potential liabilities of an appeal prohibitive for the parties. Given the quasi-criminal nature of proceedings under the CA98, and the significant costs to the parties of remedies in a merger review or a market investigation, it is essential to ensure access to justice in competition law cases.

11.11 Moreover, competition law is a relatively new discipline in the UK legal system and is still evolving, so it is particularly important to ensure a flow of cases to clarify and develop the law. It is not only successful appeals that bring about the development of the law – the rulings in unsuccessful cases also have a precedent value and consequent public benefit.

11.12 We accept that the parties that use the system should contribute towards the costs of running the CAT, but would suggest that this is addressed as elsewhere in the justice system, i.e. through court fees rather than recovery of costs.

12. OVERSEAS INFORMATION GATEWAYS

12.1 The Government is considering whether there is a case for amending the thresholds for disclosure of merger and markets information to overseas regulators. We consider that in mergers, and particularly in market studies/investigations, it should still be necessary to obtain the consent of the parties to disclose information to an overseas regulator unless there is an overriding legal requirement that it be disclosed. The Government has provided no evidence of a need for change in this area. The Consultation refers to promoting reciprocity with overseas regulators, but to our knowledge competition agencies in most jurisdictions do not have powers to disclose such information without the consent of the parties. We would also note that the MIR regime is almost unique internationally, therefore reciprocity would be impossible in relation to MIRs.

13. CONCLUDING REMARKS

13.1 We welcome the Government's commitment to a strong and vibrant competition regime as a key driver of growth. The proposed reforms represent an important opportunity to build on the best aspects of the current regime and implement change where improvements are needed. However, serious consideration must be given to the rationale for some of the proposals, to ensure that public resources remain focused on cases which potentially cause most harm to competition and that the UK maintains its reputation for robust, fair and reliable competition enforcement.

13.2 We would be very happy to discuss any of the issues raised in this response, if that would be helpful.

FRESHFIELDS BRUCKHAUS DERINGER

13 June 2011

A COMPETITION REGIME FOR GROWTH

FORENSIC AND LITIGATION CONSULTING

CORPORATE FINANCE/ RESTRUCTURING

ECONOMIC CONSULTING

TECHNOLOGY

STRATEGIC COMMUNICATIONS

SUMMARY

This paper provides our thoughts on BIS's consultation on the options for reform of the UK's competition regime. Our view is that the consultation asks some sensible questions but dodges the most fundamental issue. This is: why is it necessary to merge the OFT and CC and will the benefits outweigh the costs?

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A COMPETITION REGIME FOR GROWTH

Introduction

This paper provides our thoughts on BIS's consultation on the options for reform of the UK's competition regime ("the Consultation").

The government is right to review whether there are ways in which the regime can be improved.

Certainly having the most effective, efficient and value for money competition regime that we can is an admirable objective and the government is right to review whether there are ways in which the regime can be improved. Not surprisingly some old chestnuts that are looked at whenever these issues are raised – for instance in the run up to both the 1998 Competition and 2002 Enterprise Acts - have surfaced again, such as mandatory notification for mergers, reducing the time taken to reach decisions, and the burdens of information provision. In addition, important new issues are addressed in the Consultation like the case for new powers to assess cross-market issues.

Arguably the most important weakness in the UK competition regime at present is the failure to have more Market Investigations (conducted by the Competition Commission, "CC"), as pointed out by various recent enquiries (such as the NAO review), and something that has been traced, at least in part, to the concurrent powers held by the sector specific regulators and their preference for using regulatory tools rather than making a reference to the CC.[1]

It is a major surprise that the Consultation treats the merger proposal as a done deal and does not consult on this issue

Yet the core of the proposals for change is an institutional one. The government proposes to merge the Office of Fair Trading ("OFT") and the CC as the key element of these wider reforms to:

"*maximise the ability of the competition authorities to secure vibrant, competitive markets, in the interests of consumers and to promote productivity, innovation and economic growth*".[2]

It is a major surprise therefore, that the Consultation treats the merger proposal as a done deal and does not consult on this issue – whether the rationale is sensible, whether the requisite costs and benefits have been identified, and what form the merger should take. This is troublesome and the case for such a change needs to be made not just asserted. The UK's competition regime is already very highly regarded internationally and a number of its distinctive features (such as sector regulator concurrent powers with sector regulation) have been copied by others.

The aims of reform – do they need a merger?

The government's declared premises for reform are 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.

All of these are sensible objectives. If the government considers that the overall regime needs strengthening then we need to ask, just how integral the merger is to that strengthening and indeed does it help or hinder in that process? Given the estimated static cost savings associated with such a merger are modest (according to the government, £1.3m p.a.) and the potential risks of damaging the regime – with its very large estimated dynamic benefits – are high (we discuss these below), what is the rationale? Might it be more effective to fix the known problems but leave the two institutions apart? How many of the failings of the current regime are due to having two institutions rather than one?

The CMA needs to work and be seen to work straight away

At first sight however none of the government's objectives appear to warrant a merger of the two authorities. The merged entity, the proposed Competition and Markets Authority ("CMA") may benefit from being just one voice, one organisation with a single brand, thereby enabling companies better to understand the regime. Perhaps the voices of the OFT and the CC are diluted because they are separate organisations and the quality of staff would be better if we had a monopoly buyer of such people? However, it is not clear that in order to fulfil government's objectives, a merged entity is required. At the end of the day, the key question in our view is whether outcomes will be better as a result of forming the CMA rather than leaving the two institutions apart.

What we would say is that if the CMA is created, it needs to work and be seen to work straight away. It cannot afford a damaged reputation in the early days as a consequence of significant public criticism

[1] Review of the UK's competition landscape, see http://www.nao.org.uk/publications/0910/competition_landscape.aspx
[2] http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf

and/or a surge in litigation as appeals increase because the system is flawed. That's the external impact. Internally, there are also risks. As John Fingleton points out, following an ambitious change programme at the OFT in 2006, for which the organisation lacked experienced senior leadership, staff turnover increased to 35% and:

"It probably took two to three years to re-build capacity, capability and confidence."[3]

Given the current standing of the UK's competition regime – recall, highly regarded and near the top of international league tables – we cannot afford to go down that route.

Rationale

Following calls by the CBI and NAO, amongst others, BIS considers that there are a number of areas where the current competition regime may be improved. The CBI considers that a merged entity will enable processes to be streamlined and the NAO stated that the uncertainty and length of time taken may have reduced authorities' appetite to use competition powers under the current regime. Below we summarise the key factors that lead BIS to state that the competition regime may not be as effective as it could be.

Many of the areas for improvement do not require a merger of the two institutions

Issue	Merger required?	Comments
Time taken – market studies and investigations, anti-trust enforcement and merger cases	X	One body could cut time and stop blame-shifting for delay but if a two-stage procedure remains in place, in many cases it is not clear merger will be better than improved version of current system
Complexity of the regime	X	Lots of simplification possible under a new regime, absent a merger
Effectiveness/efficiency in use of resources	X	Duplication inevitable if a two stage process used in future merged body
Relatively low number of decisions taken on significant cases (except mergers)	X	Procedures, not existence of one or two bodies, is key here

BIS also expresses concern in relation to a number of specific areas:

- Anti-trust cases – the cost is high and the time taken is long, leading to few cases and a low deterrence regime;
- Voluntary notification of mergers – the system yields problems in dealing with the anti-competitive effects of completed mergers;
- The market regime – the split between market studies (OFT) and market investigations (CC) is questioned on the grounds that resources may not be best used; and
- Whether the concurrent powers regime may be improved.

The Consultation at 124 pages (excluding appendices, 159 including) is lengthy and it includes 39 questions. We do not provide an answer to all questions posed; instead we discuss the key issues arising from the merger proposal together with some of the areas we consider to be particularly important, including:

- Mandatory merger notification;
- Small firm merger exemption and SME super-complaints;
- Consumer protection;
- Concurrent powers; and
- Appeals.

[3] www.oft.gov.uk/shared_oft/speeches/2011/0911.pdf

There is a general argument that in the UK we have too many sectors where there appear to be oligopolistic markets, where competition is not fully working as evidenced by economic rents – manifested not least in the high salaries and profits available. This for instance is claimed by some to be the case in areas like finance, the legal profession and some other professional services.

It might be argued that the creation of a single, focused body might be better at pursuing such issues. If it is we should definitely be for it. But it is hard to see that as being the key.

The fact is that this sort of market is very difficult to get a handle on, to prove whether anything is amiss, and perhaps even more tricky to find remedies for. The recent rather desperate attempt of the OFT to have a go at the audit market demonstrates this, where it is minded to refer it to the CC, if and only if it can first think of some remedies that might work if it finds a problem.

It is hard to see how a merger will fix the problems of the system

A similar story holds on other market investigations. The CC has for instance looked at the supermarkets more than once and has in general given them a clean bill of health. Those who find this result disturbing argue that the CC was not professional enough to get to the bottom of this complex and data heavy area and so maybe a super, combined authority would do better. But even assuming that there is a case to answer, the truth is surely that in such a complex areas, finding anti–competitive practice in the industry as a whole is very difficult.

The proposed merger

In our view the proposed merger of the two institutions raises the most issues. We ask whether it has been well thought through or was it a slip of the pen by Francis Maude when deciding which public sector bodies should be canned?

Presumably the rationale for the merger is cost savings (albeit modest) plus some tangible benefits such as increased speed and less duplication within the regime, leading to increased clarity for stakeholders.

One rationale for change is the commonly held perception by the NAO and others that there are too few market investigations. This may stem from:

- The OFT opening too few cases in the first place;
- The OFT not referring enough cases; and/or
- The regulators not referring enough cases.

Our understanding is that the rationale stems primarily from the latter on this list. In which case, it is hard to see how merging the OFT and CC will fix this. Because the Consultation ducks the issue of the proposed merger, it is difficult to pass many remarks regarding why in principle it will solve the problems of the current system.

Not only is good reasoning for a merger ducked, but there is little if any on its implementation. When Ofcom, a merger of 5 previously separate regulators, was formed, Stephen Carter ensured that there were cast iron processes in place to avoid blunders early on. He also injected 20% new blood to help establish the new culture and ran it along the lines of a professional services firm rather than that of a traditional regulator. By most accounts, the formation of Ofcom is considered to have been a significant achievement and success story, at least as an institution (stakeholders receiving fines and subject to regulatory investigations of course may hold alternative views). Overall, in the NAO review of the creation of Ofcom it gave a score of around 8.5 out of 10.

BIS will need to read thoroughly the NAO's recommendations on how best to conduct public sector mergers of regulatory agencies, based on the wider lessons learned from the Ofcom merger.[4] The NAO notes that the appointed Chair and Chief Executive:

"*were bold in planning the shape of Ofcom and approached the merger as if starting a new organisation, rather than merging the structures and approaches of the five previous regulators*."

The boldness included a nice shiny new building and location, a matrix organisational structure to help break down possible barriers between the former regulatory bodies, and a concerted effort to attract

[4] http://www.nao.org.uk/publications/0506/the_creation_of_ofcom_wider_l.aspx

staff from industry and consultancy. The latter required "more attractive remuneration". All of these are inevitably costly and attracting the right sort of personnel from outside the direct field may be difficult – good competition specialists are scarce and may prefer to continue with lucrative careers elsewhere. We note also that in its assessment the NAO expressed concerns about the cost and benefits of the merger, stating:

The formation of Ofcom cost significantly more than was set aside

"*Policy makers who propose mergers should give serious consideration to these costs in assessing whether a merger will represent value for money.*"

While the Ofcom merger was funded by a £57m loan from the then DTI, NAO estimated that it cost at least £80m. Interestingly there appeared to be no ex ante or ex post proper evaluation of the costs and benefits of Ofcom's formation until the NAO stepped in. BIS has compiled an impact assessment of the CMA creation and bases it on the upper end of the cost scale for prudence. We note however that everyone is to transfer to the OFT's HQ at Fleetbank House – no new accommodation is planned. Perhaps Stephen Carter should be consulted on this one.

As discussed thus far, many of the regime improvements are possible absent a merger. This fact needs to be balanced against the risk of merger failure. The following are perhaps the most important risks, noting that institutional design, decision making, processes and culture are inevitably interlinked, as observed by Lyons and Davies in their presentation on the merger of the two authorities.[5]

Institutional design, decision making, processes and culture are inextricably linked

- Corporate cultures – may there be a clash of cultures if the two organisations come together? Will this be detrimental to the regime and how may it be avoided? Strong leadership will be a must – from within or outside the existing organisations. How may the two contrasting styles – proactive vs. reactive, amongst others – be combined to best effect? 20% new blood? A new building? Many commercial mergers fail owing to a failure to successfully fuse together two incompatible cultures.
- Decision making – how will decisions be made in the new organisation? The board vs. members system of the two organisations contrast enormously. Indeed many see the members system of the CC as a great strength – ensuring complete independence from government and bringing fresh perspectives. Changing the decision making process for the CC part of the CMA at the same time as two corporate cultures come together will require a significant change management process, although in principle the lay member approach could be retained.
- Process improvement – current processes differ markedly between the two institutions – the OFT is proactive, the CC reactive; the OFT has an executive board, the CC has a panel. Getting processes right is hugely important, particularly early on as the CMA establishes its reputation. Arguably there will be benefits arising from economies of scale and scope and it will be possible to streamline many processes. Many concerns have been voiced about confirmation bias but perhaps these are excessive. As in professional service firms, cases can be subject to peer review, and phase 1 vs. phase 2 issues may be dealt with by establishing "ethical" walls.
- Relationships with other institutions – might positive externalities be lost? The system is complex (indeed the government has called for a reduction in complexity). May the merger sever some important interdependencies amongst the CC/OFT and other institutions, thereby causing losses elsewhere? Owing to the long time period over which such dependencies have arisen together with the complexity, may these only be found after the deal is done? May for example it be harder and more costly for government to liaise appropriately with a CMA that is responsible for everything compared to the OFT, that did not take final decisions on many issues?

It is sometimes argued that the burden of proof in mergers should be turned round so that those who want it to go ahead must prove that it is in the public interest rather than the test being simply that it is not against the public interest (by reducing competition). In general this is usually considered the wrong way ahead. But in this proposed merger, the costs are very, very clear (albeit not quantified) and the benefits at the very least unproven. The government still needs to make its case.

We next turn to a couple of other areas of the Consultation that caught our attention.

[5] http://www.uea.ac.uk/ccp/Single+Competition+Authority

Mandatory merger notification

Making it mandatory to notify a merger has been an idea that has been played with a lot over the years and it does happen in other countries. The case for is to make sure that cases that should be looked at are not missed – since it is very difficult to undo them ex post. The case against has been a combination of burdens on companies and over-loading of the authorities with cases that pose no issue whatsoever.

Overall, mandatory notification gives a slight bias in the system (relative to now) against mergers which – given that the economic evidence continues to be that most mergers are ex post in the interest of neither the acquirer or acquired company – not a bad thing. But it is hard to argue that one of the key problems of the UK regime is the number of mergers that are missed by the authorities in the current system. In any case, this can be fixed absent the formation of the CMA.

Small firm merger exemption and SME super-complaints

Neither the small firm merger exemption or SME super-complaints require a merged competition authority

BIS floats the idea of exempting mergers between small firms. This is a natural reflex. And it is almost certainly the case that the overwhelming majority of SME mergers raise no issue whatsoever. But if two small firms in a sector (maybe a sector producing a key screw for a piece of machinery) together hold say 80% of the market then it is surely something we would want the competition authorities to look at. So change here would be very unwise, and the OFT is against such exemption.

A more interesting idea is to add SME bodies to those who can bring a super-complaint and so get the competition authority looking at an issue and a market. Certainly giving more bias against big firms, that often spend a lot of time trying to stop smaller ones growing and challenging them, is a good idea. But worries have to be met around the way that this might be abused and merely discourage larger firms from growing. At best the case for this is currently unproven. Neither the small firm merger exemption nor SME super-complaints require a merged competition authority.

Consumer protection

There are good reasons for moving consumer protection out of the competition authorities but also for retaining it

Government is to consult separately on reform of the consumer landscape and is considering transferring most or all of the OFT's enforcement powers and its estate agency function to Trading Standards; its consumer advice, information and education functions will pass to Citizens Advice.[6] Sector regulators will retain concurrent consumer enforcement powers. The Consultation asks whether the CMA should retain some limited consumer powers or functions, noting that around 20% of OFT market studies have focused predominantly on consumer issues and that there are a substantial amount of studies that consider both competition and consumer matters. It acknowledges that market studies of competition issues may highlight areas best addressed by consumer enforcement or remedies. These facts suggest that consumer and competition matters are intertwined. If they are separated, may there be a loss of synergies and increased costs? It may be important to retain skills in behavioural economics to ensure the consistent application of consumer remedies to competition problems.

On the other hand, as Mark Armstrong points out:

"*Robust competition is the best single means for protecting consumer interests.*"[7,8]

However, as OFT has stated, the competition side is only one side of the market; there is a need also to consider the consumer side and competition per se does not always provide the best outcome for consumers. A well-known case is the introduction of competition for directory enquiries (known as "DQ"). While there were initially more than 200 new entrants, quality fell, the price of the incumbent's service increased and there was little transparency in the prices charged by operators. This debacle, along with other examples, led the OFT to state, "competition policy benefits from developments in consumer policy … we need a holistic analysis that looks at both firms' and consumers' behaviour and incentives."[9]

[6] For the purposes of this paper we do not explore who may ultimately be responsible for consumer matters.
[7] Mark Armstrong, "Interactions between Competition and Consumer Policy", Competition Policy International, Volume 4, No.1 (Spring 2008).
[8] Timothy Muris, "The Interface of Competition and Consumer Protection", Paper presented at Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, New York (Oct. 31, 2002).
[9] www.crai.com/.../John_Fingleton_-_Joining_Consumer_and_Competition_Policies.pdf

Moreover, we understand that Ofgem has shifted its approach away from competition-based intervention towards an increasing focus on consumer protection policy. May there be lessons for BIS based on this experience? There are probably both good reasons for moving consumer protection out of the competition authorities and for retaining it. Whether the decision has any bearing on the merger is another matter. Arguably its removal may put the OFT on equal footing with the CC – whereby both are concerned only with competition matters and this is potentially a preferable starting point for a merger of two institutions.

Concurrent powers

We highlighted that one of the perceived problems with the current system is that there are too few referrals to the CC, If the CC were to be given 'call in' powers when regulators dithered about references that could solve the perceived problem. We note again that this can be done without a merger.

Appeals

The system currently allows appeals to the CAT on the merits of the case in the respect of decisions made under the Competition Act 1998 by the OFT and the regulators in the telecommunications, electricity, gas, water, railways and air traffic services sectors. These Chapter 1 and 2 prohibitions are essentially about anti-competitive agreements or abuse of a dominant position. The CAT can also review decisions made by the OFT and the Competition Commission in respect of merger and market references or possible references under the Enterprise Act 2002 but here it is about judicial review not the merits of the case.

If there were to be a single competition authority then irrespective of ethical walls and separate procedures on any two stage process for merger or market reference cases there is likely to be more suspicion that cases were not given a totally fair run by two separate bodies and so increases the case for having a proper appeal on the merits. Yet if there were to be a wholesale switch to the CAT hearing every appeal on its merits then the appeal body becomes the de facto decider or competition authority which appears a retrograde step. Some (such as Allen and Overy) have suggested that an appeal on the merits should be allowed only when a decision blocking a merger has been made and only by the merging parties (not a third party).[10] But it is hard to see why such an asymmetry should be brought in.

None of the above is to dismiss the idea of making the whole appeals process move more quickly. Indeed in general keeping the competition regime to deadlines is good for competition and for business. But the system should not be squeezed too much: these matters are complex and once a merger, for example, is let through, it cannot be easily undone. And once a market has been found to be in the clear, it is hard to go back for a while, even if consumers are being ripped off.

Conclusions

We do not believe the merger of the OFT and CC should be a done deal

So, what do we make of all this? The Consultation sets out with good intentions but we believe that government should be consulting on the pros and cons of the merger and relating the merger proposal to the flaws in the current system. The lessons from the NAO review of the formation of Ofcom point strongly to the need for government to think hard about the rationale and to have a good handle on the potential costs, benefits and value to tax payers. While we agree that strengthening the regime is important, as is simplifying it, particularly for the stakeholders that have to navigate the system, we do not believe that the merger of the OFT and CC should be a done deal. We would like to see a consultation on that.

June 2011. The views herein are those of the authors alone and are not necessarily the views of FTI Consulting, Inc., its subsidiaries and affiliates or the other professionals at FTI Consulting, Inc., its subsidiaries and affiliates.

[10] See https://www.competitionpolicyinternational.com/file/view/6368

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Alison has considerable experience of assisting clients' competition cases. She has input to defining markets, presented to the Competition Commission, worked for DG Competition and led a number of submissions to competition authorities covering merger and abuse of dominance cases. Her experience includes a merger in the Netherlands TV market, EU roaming charges, UK transport pricing, the collective selling of UK sports rights, UK newspaper and magazine distribution, EU and UK fixed-to-mobile termination rates, the UK outdoor advertising sector, EU local loop and leased lines, GSM spectrum in the Netherlands, and EU pay TV sectors. She also has considerable experience of regulatory and consumer matters including the development of a toolkit that is now used by Ofcom to ensure that it takes into account adequately consumer interests in the formation of regulatory decisions. During her consultancy career, Alison has assisted clients in a variety of industries including: postal services, fixed and mobile telecommunications, electricity, gas, television and radio broadcasting, television production, newspaper and magazines, film, music, sports, advertising, lotteries, football, greyhound racing, salt, and the tobacco industry.

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