

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

MARCH 2011

Explanation of the wider context for the consultation and what it seeks to achieve

The Government's overarching objective in reforming the UK's, already world class, competition regime is 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.

The Government is therefore consulting on changes to:

- **improve the robustness of decisions and strengthen the regime** – enhancing the regime's ability to resolve and deter the competition restrictions that do most harm to competition, consumers and to economic growth
- **support the competition authorities in taking forward high impact cases** - developing the regime's ability to target the competition restrictions that do most harm to competition, consumers and to economic growth, and providing the regime with the tools and flexibility to make proportionate and focused interventions
- **improve speed and predictability for business** – building on the regime's ability to take the timely, proportionate and predictable actions that limit burdens on business and that provide for the certainty that enables business to invest and innovate with confidence

In this connection, the Government is consulting on a proposal to merge the competition functions of the Office of Fair Trading and the Competition Commission to create a single Competition and Markets Authority which can play a leading role in achieving the overarching objectives and delivering the desired outcomes.

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Respond by	Date: 13 June 2011
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This consultation is relevant to: Businesses of all size, economic regulatory bodies, consumer organizations, legal bodies, economic consultants and academics.

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Consultation Questions

Foreword

Competition is one of the great drivers of growth, keeping prices low for consumers and encouraging innovation, enterprise and investment.



On 29 November 2010, the Chancellor and I announced the Growth Review, *'The path to strong, sustainable and balanced growth'* as the first part of the Government's strategy to create the best conditions for future economic prosperity. This consultation on the competition framework is a fundamental part of the Government's growth agenda.

The UK's competition regime is internationally regarded as one of the best in the world. Nevertheless, I believe it can and should be even better. The proposals I set out for consultation are designed to deliver better outcomes for consumers, to help tackle barriers to entry, to give small business a new route to shine a light on market features that do them harm and to increase business confidence in the predictability of competition decisions.

I am also seeking views on whether the competition functions of the OFT should be merged with the Competition Commission. I believe one, powerful Competition and Markets Authority would ensure a more dynamic and flexible use of competition tools and resource, would create a single advocate for competition in the UK and internationally, would reduce delay and end duplication for business.

This consultation is about reforms to the public authority regime for competition. I am also keen to promote private sector-led challenges to anti-competitive behaviour and will bring forward separate proposals on this in due course.

In deciding the way forward, I am mindful of the need to preserve the best features of the current regime and to ensure transparency and independence of decision making.

Alongside this consultation, the Government is also launching a consultation on the Consumer Protection Regime *'A consultation on institutional changes for the provision of consumer information, advice, education, advocacy and enforcement'*, which will consider how a new competition and consumer landscape will work together to deliver benefits to consumers and to businesses.

Rt. Hon. Dr. Vince Cable MP
Secretary of State for Business, Innovation and Skills
and President of the Board of Trade

Executive summary

Competitive markets drive productivity and growth, and an effective competition regime is central to providing them. The current UK competition regime is world-leading, but there is still scope for improvement. The Government intends to make this system even better.

The Government's overarching objective in reforming the regime is to maximise the ability of the competition authorities to secure vibrant, competitive markets that work in the interests of consumers and to promote productivity, innovation and economic growth.

To achieve the Government's overarching objective, it is therefore consulting on change to:

- **improve the robustness of decisions and strengthen the regime** – enhancing the regime's ability to resolve and deter the competition restrictions that do most harm to competition, consumers and to economic growth, while ensuring that the regime retains the flexibility to strengthen its processes as the regime and economy evolve;
- **support the competition authorities in taking forward high impact cases** - developing the regime's ability to target the competition restrictions that do most harm to competition, consumers and to economic growth, and providing the regime with the tools and flexibility to make proportionate and focused interventions;
- **improve speed and predictability for business** – building on the regime's ability to take the timely, proportionate and predictable actions that limit burdens on business and that provide for the certainty that enables business to invest and innovate with confidence.

The Government will build on the successes of our world class competition regime, maximising its ability to sustain and develop its valuable contribution to competition, consumers and economic growth. In determining which reforms should ultimately be adopted, the Government will therefore focus on those reforms which can deliver benefits to competition, consumers and economic growth, and which can be implemented as soon as possible and without significant uncertainty and risks to the momentum and effectiveness of the regime.

In this connection, the Government is consulting on a proposal to merge the competition functions of the Office of Fair Trading and the Competition Commission to create a single Competition and Markets Authority (CMA), which can play a leading role in achieving the overarching objectives and delivering the desired outcomes. Key arguments for the single CMA are to ensure the flexible allocation of scarce public resource to competition issues

as they emerge, and for it to be a stronger advocate for pro-competition policy across government, including in the delivery of public services.

Proposals for consultation include:

Improving the robustness of decisions and strengthening the regime

- considering ways to improve the voluntary merger notification scheme and the alternative of the mandatory pre-notification of mergers;
- ways to strengthen the operation of concurrent competition powers, including joint working between the CMA and sector regulators on competition cases;
- reforming the dishonesty requirement of the criminal cartel offence to make it easier to secure convictions in serious cases;
- achieving the right governance and decision-making structures for the CMA.

Supporting the competition authority in taking forward high impact cases

- enabling the CMA to carry out investigations into similar practices across different markets;
- considering whether statutory objectives should underpin the competition focus of the CMA or whether the CMA should have a statutory duty to keep key sectors under review;
- strengthening the voice of small business by extending the super-complaint powers to SME bodies.

Improving the speed and predictability for business

- introducing more (and tighter) statutory deadlines in merger and market cases, coupled with appropriate information powers;
- introducing an exemption for small businesses from merger control;
- streamlining the handling of antitrust cases.

Ministers' relationship with the competition regime

The proposals set out in this consultation maintain the strong competition focus and ultimate independence of the UK's competition regime. They do not, for example, extend Ministers' involvement in the processes of referral of mergers or markets for investigation, decision-making on competition remedies, or in public interest considerations. The Government is consulting on whether, in market investigations, the proposed single CMA could report on specified public interest considerations if requested to do so by Ministers. This proposal mirrors the Competition Commission's current powers for merger investigations. The proposals are also intended to ensure that the CMA will be better placed to influence the development of government policy, and in particular to ensure it is a strong advocate for pro-competition policies.

Scope

The Government considers that the proposed single CMA should have a primary competition focus. Chapter 9 of this consultation document discusses the current powers of the OFT to conduct consumer studies and enforce consumer law. The Government's document '*Consultation on institutional changes for the provision of consumer information, advice, education, advocacy and enforcement*', to be published shortly, will discuss these issues in more detail and ask questions about the appropriate home for these functions in a reformed competition and consumer landscape.

How the Government will take decisions

The reform programme outlined in this document is a complex and important undertaking. The Government is committed to carrying out a full and comprehensive consultation process. Comments provided in response to this consultation paper will inform the Government's detailed thinking and its published response.

This consultation is aimed at reforming the powers and institutions behind the UK's public competition regime. We are also investigating whether there are complementary and additional changes that might enhance private sector-led challenge to anti-competitive behaviour. We intend to publish our views on this approach in due course.

The Government will reflect on the feedback provided and will analyse the potential impacts of the consultation options set out in this document. In reaching its conclusions, the Government intends to build on the successes of our world class competition regime, maximising its ability to sustain and develop its valuable contribution to competition, consumers and economic growth. The Government will take into account the need to develop a competition regime that is responsive to changes in the economy, which does not impose disproportionate burdens on business (including cost recovery) and which provides a good fit with the developing landscape for consumer

protection and for the economic regulators. In determining which reforms should ultimately be adopted, the Government will therefore focus on those reforms which can deliver benefits to competition, consumers and economic growth, and which can be implemented as soon as possible and without significant uncertainty and risks to the momentum and effectiveness of the regime.

How to respond

1. The consultation will begin on 16 March 2011 and will run for 12 weeks, closing on 13 June 2011.
2. A copy of the Consultation Response form is enclosed, or available electronically at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657rf-competition-regime-for-growth-consultation-form>. If you decide to respond this way, the form can be submitted by letter, fax or email to:

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Email : cma@bis.gsi.gov.uk

3. A list of those organisations and individuals consulted is in Appendix 4. We would welcome suggestions of others who may wish to be involved in this consultation process.

Additional copies

4. You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from:

BIS Publications Orderline
ADMAIL 528
London SW1W 8YT
Tel: 0845-015 0010
Fax: 0845-015 0020
Minicom: 0845-015 0030
www.BIS.gov.uk/publications

5. An electronic version can be found at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation>.
6. Other versions of the document in Braille, other languages or audio-cassette are available on request.

Confidentiality & Data Protection

7. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
8. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries

9. Questions about the policy issues raised in the document can be addressed to Duncan Lawson at the above address.
10. A copy of the Code of Practice on Consultation is in Appendix 5.

What happens next?

11. Following the close of the consultation period, the Government will publish all of the responses received, unless specifically notified otherwise (see data protection section above for full details).
12. The Government will, within 3 months of the close of the consultation, publish the consultation response. This response will take the form of decisions made in light of the consultation, a summary of the views expressed and reasons given for decisions finally taken. This document will be published on the BIS website with paper copies available on request.

1. Why reform the competition regime?

'The Government believes that action is needed to protect consumers, particularly the most vulnerable, and to promote greater competition across the economy.'

The Coalition: our programme for government

The importance of economic growth and competition

1.1 Competition is the lifeblood of a vibrant economy and fundamental to growth.¹ Open and competitive markets:

- make businesses more efficient and innovative;
- help small businesses to grow and enter new markets;
- drive lower prices and better products, services and choice for consumers;
- enhance productivity and economic resilience.

1.2 On 29 November 2010, the Chancellor George Osborne and Business Secretary Vince Cable announced the Growth Review,² a fundamental assessment of what each part of Government is doing to provide the conditions for private sector success and tackle barriers to growth. In the Review the Government identified making markets more dynamic as one of the four pillars which will support strong, sustainable and balanced growth.

1.3 This consultation sets out proposals for making the competition framework even more effective at supporting economic growth.

Assessment of the UK Competition Regime

1.4 The UK competition regime is highly regarded internationally. In 2010 the Global Competition Review³ awarded the Competition Commission (CC) its highest rating of 5 stars and the Office of Fair Trading (OFT) 4.5 stars, both appearing in the top 5 agencies in the world. In addition, an independent review of competition regimes by KPMG⁴ ranked the UK's competition regime third, behind the US and Germany. The National

¹ A summary of the literature and a wider discussion of competition and productivity can be found in the Impact Assessment which accompanies this consultation document.

² The path to strong, sustainable and balanced growth, HM Government, November 2010.

³ *Rating Enforcement 2010*, in Global Competition Review, June 2010.

⁴ Peer Review of Competition Policy, KPMG, 2007.

Audit Office (NAO) has also concluded that the competition regime (including as enforced by the sector regulators) is generally effective in meeting its aims and is well regarded internationally.⁵

- 1.5 The Government acknowledges that it has inherited a competition regime which has been independently assessed as world class. The regime has been ranked relatively highly in the following areas in particular: clarity of analysis and decision-making; transparency and the open and fair way in which the CC consults; business awareness of policy; effectiveness of legislation; technical competence; and political independence. The merger regime is particularly highly regarded: the KPMG report ranked this as second world-wide behind the USA.

Box 1.1

Impact of the current regime

- Following an antitrust investigation the OFT imposed penalties totalling £129.2m on 103 construction companies that had colluded with competitors on building contracts.⁶
- Following a Market Investigation by the CC, BAA sold Gatwick Airport and is also required to sell two further airports to increase competition in the UK airports sector.⁷
- The CC and OFT have estimated annual direct financial benefits to consumers of: **£84m for antitrust enforcement; £345m for the markets regime; £310m for the merger regime.**

Source: CC and OFT

- 1.6 However, commentators have pointed to aspects of the regime which could work more effectively:
- international reviews note the time taken over market studies and investigations, antitrust enforcement and merger cases; the complexity of the regime; the relative effectiveness and efficiency with which resources are used; the relevance and importance of subject matter; and the relatively low number of decisions on significant cases aside from mergers;
 - the CBI has called for the Government to consider the case for combining the OFT and the CC into a single competition agency, to streamline the important processes of merger review and market investigation;
 - the NAO has said there is a risk that the length and uncertainty of competition processes may reduce the appetite of competition

⁵ Review of the UK's Competition Landscape, NAO, 2010.

⁶ 25 Parties are appealing the penalty (and of these 6 are appealing liability) to the CAT.

⁷ The CC is currently considering whether there has been any change in circumstances since March 2009 which would cause it to reconsider implementing its original decision.

authorities (including the sector regulators) to use their competition powers.

1.7 The Government has specific concerns about the difficulties in successfully prosecuting antitrust cases at reasonable cost and in reasonable time. This means that the body of case law and precedents required for an effective competition regime is relatively thin, and the deterrent effect of the prohibitions is reduced. In addition, voluntary notification in the merger regime gives rise to problems in dealing with the anti-competitive effects of completed mergers. The market regime, with its split between market studies and market investigations, poses the question of whether the best use is made of the resources and powers available to the competition authorities. There is also scope to consider whether the operation of competition powers concurrently by the OFT and the sector regulators can be improved.

1.8 The Government is committed to ensuring the UK's competition regime remains among the best in the world. To deliver this, the Government proposes to reform the regime to:

- improve the robustness of decisions and strengthen the regime;
- support the competition authorities in taking forward the right cases;
- improve speed and predictability for business.

1.9 Specific proposals include:

Improving the robustness of decisions and strengthening the regime

- considering ways to improve the voluntary merger notification scheme and the alternative of the mandatory pre-notification of mergers;
- ways to strengthen the operation of concurrent competition powers, including joint working between the CMA and sector regulators on competition cases;
- reforming the dishonesty requirement of the criminal cartel offence to make it easier to secure convictions in serious cases;
- achieving the right governance and decision-making structures for the CMA.

Supporting the competition authority in taking forward the high impact

- enabling the CMA to carry out investigations into similar practices across different markets;

- considering whether statutory objectives should underpin the competition focus of the CMA or whether the CMA should have a statutory duty to keep key sectors under review;
- strengthening the voice of small business by extending the super-complaint powers to SME bodies.

Improving the speed and predictability for business

- introducing more (and tighter) statutory deadlines in merger and market cases, coupled with appropriate information powers;
- introducing an exemption for small businesses from merger control;
- streamlining the handling of antitrust cases.

1.10 The Government is also consulting on a proposal to merge the competition functions of the OFT and the CC to establish a single Competition and Markets Authority⁸ (CMA). A single CMA is central to the vision of an improved competition regime and will:

- provide the impetus to use competition powers and processes in the most flexible and dynamic way. For example, the CMA would have the incentive to reach earlier decisions on whether a market study or investigation was the most appropriate way to address a competition problem;
- enable more efficient and effective use of scarce public resources;
- create a single powerful advocate for competition in the UK, in Europe and internationally.

1.11 A single CMA will also enhance predictability and consistency, eliminate overlaps between current processes and provide a strong focus for competition expertise and capability.

1.12 The Government seeks views on the creation of a single CMA. The Government is mindful of the need to ensure that:

- the decision-making of a single CMA is demonstrably **independent** of Government and **accountable** to Parliament;
- competition decisions are **high quality, transparent and robust**;

⁸ This is a working title for the authority.

- there is **coherence and predictability** in competition practice and decision-making;
- competition processes are **efficient and streamlined** on the one hand and **fair and rigorous** on the other;
- reform should wherever possible **reduce the cost to business and the public purse** and improve the efficiency of the regime;
- the single CMA should have **the right legal powers and tools** to address competition problems in the interests of consumers and the economy.

1.13 The Government is committed to maintaining the independence of a CMA from political interference. Final decisions on competition issues would continue to be taken by independent competition bodies: Ministers will continue to take decisions only in the small minority of cases which raise defined, exceptional public interest issues.

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.*

1.14 In the consultation we set out a range of options for reform:

- Chapter 3 sets out proposals for modernising, strengthening and streamlining the **markets regime**;
- Chapter 4 seeks views on options for improving and streamlining the **merger regime**;
- Chapter 5 sets out options for enabling faster decisions in **antitrust cases**;
- Chapter 6 asks whether reforming the **criminal cartel offence** could make it easier to prosecute, increasing its deterrence value;

- Chapter 7 discusses options for improving the operation of **concurrent competition powers**;
- Chapter 8 looks at the function of **regulatory references and appeals**;
- Chapter 9 discusses the **scope and governance of a single CMA**;
- Chapter 10 asks what should be the **decision making structure** of the single CMA;
- Chapter 11 asks questions about **merger fees and recovering the costs** of the competition regime;
- Chapter 12 asks whether there is a case for reviewing the **overseas information gateways** provisions.

1.15 The Government plans to publish its response to comments received in Autumn 2011.

1.16 The next chapter summarises the background to the current competition regime and the European context. The UK arrangements are set out in more detail in Appendix 1.

2. The UK Competition regime and the European context

2.1 The legislative framework for the UK competition regime is set out, principally, in the Competition Act 1998 and the Enterprise Act 2002. The main elements of the current regime are:

- **Market studies and market investigations:** examining markets which may not be working well for consumers, with powers to impose remedies where an adverse effect on competition is found;
- **Merger control:** maintaining competitive pressures in markets by prohibiting anti-competitive mergers between businesses or otherwise remedying their potential adverse effects on competition;
- **Antitrust:** enforcing legal prohibitions against anti-competitive business agreements (including cartels) and the abuse of a dominant market position. There is also a specific criminal cartel offence against individuals who engage in certain forms of price-fixing and other forms of 'hard core' cartel activity;
- **Competition Advocacy:** promoting the benefits of competition and challenging barriers to competition, such as those which might result from existing or planned Government regulations.

2.2 These elements can be found in competition regimes around the world, although with some variation; the UK's system for examining markets is, for example, particularly well developed and is regarded as an exemplar.

2.3 In summary, the UK's main competition institutions are:

- the OFT, responsible in particular for antitrust enforcement and for the first phase of merger and markets cases;
- the CC, responsible for second phase merger and market investigations and, in appropriate cases, for the imposition of remedies to any anti-competitive effects found;
- regulators for such sectors as energy, water and telecommunications, many of which have concurrent powers to apply the antitrust prohibitions and refer markets to the CC; the CC also hears certain appeals against licence and energy code modifications and price determinations in these sectors;

- the Competition Appeal Tribunal (CAT), a specialised judicial body, which hears appeals and decides certain cases involving competition or economic regulatory issues.

The European Competition Regime

- 2.4 Articles 101 and 102 of the Treaty on the Functioning of the European Union outlaw anti-competitive agreements and abuses of a dominant market position when they may affect trade between member states. They are enforced by the European Commission and National Competition Authorities within their jurisdictions, which have powers to investigate infringements, and can impose fines on businesses that break the law. At the EU level (and also in the UK) fines can be up to 10% of worldwide turnover. Businesses can appeal against Commission decisions in the European Courts.
- 2.5 The European Commission also considers larger merger cases. Under the European Community Merger Regulation, the European Commission assesses whether mergers between enterprises above certain defined thresholds would create or strengthen a dominant position which would significantly impede effective competition. Member States have a formal role in the process but the final decision is for the European Commission alone. As with cases under Articles 101 and 102, the European Commission's decisions may be appealed to the European Courts.

3. A Stronger Markets Regime

The Government regards the markets regime as one of the key strengths of the UK competition regime, but considers that there is further scope for improvement to streamline processes and make the regime more vigorous in addressing problems in markets to support growth, enterprise and consumer welfare.

In summary, the Government is seeking views on:

- **Options to modernise the regime, by:**
 - 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.
- **Measures to streamline the regime by reducing timescales and strengthening information gathering powers.**
- **Opportunities to increase certainty and reduce burden, including simplification of review of remedies process and updating remedial powers.**

Introduction

- 3.1 A strong markets regime, in which competition authorities can investigate markets and propose remedies where competition is not effective, is essential to ensure that businesses are fair and competitive, and markets work well for consumers and support growth.
- 3.2 Under the current regime, responsibility for phase 1 market studies and phase 2 market investigations is divided between the OFT and the CC respectively. Where the OFT considers it has reasonable grounds to suspect that one or more feature(s) of a market in the UK 'prevents, restricts or distorts competition'⁹ it can exercise its discretion to refer the market to the CC for an in-depth phase 2 investigation (by way of a Market Investigation Reference (MIR)). Sector regulators, such as Ofcom and Ofgem, also have powers to carry out studies similar to the OFT's market studies in areas that are regulated by them and are also able to refer to cases to the CC for investigation (see chapter 7).
- 3.3 These provisions replaced the complex monopoly provisions of the Fair Trading Act 1973, to enable independent competition authorities to take

⁹ Section 131 of the Enterprise Act 2002.

a proactive and proportionate approach to tackling competition problems in markets. Unlike anti trust cases and the consideration of mergers, the markets regime is able to focus at a market-wide level, rather than at the level of the individual firm. It therefore allows competition bodies to look at industry-wide features of a market, such as markets with high concentration or high barriers to entry that may have an adverse effect on competition and cause consumer detriment.

- 3.4 The UK's markets regime has delivered considerable benefits. It is estimated that, over the period 2007-2010, consumers directly saved £345m per year¹⁰ as a result of the OFT's work on market studies, CC's work on market investigation references from the OFT, and reviews of orders and undertakings.¹¹ The regime is also seen as being at the forefront of global best practice, excelling in the quality of analysis, expertise, flexibility and transparency.¹² It is one of two market regimes internationally that have the ability to implement structural change or legally binding behavioural remedies as a result of an investigation.¹³

Box 3.1

The **market investigation into Home Credit loans**, which followed a super-complaint, found that weak price competition between lenders had resulted in profits in excess of the cost of capital of at least £75 million each year being earned by the industry between 2000 and 2005 - equating to around £20 on the price of an average loan. Causes of this absence of competition included the difficulties faced by customers when seeking to compare price and the fact that established lenders had much better information about the creditworthiness of their customers than any potential lenders, making it harder for customers to switch suppliers and for new suppliers to enter the market.

The remedies included market opening measures to reduce entry barriers and informational remedies to help consumers find the right product for them at comparable prices.

Rationale for consultation on reform of the markets regime

- 3.5 In the light of experience of operating the relevant provisions of the Enterprise Act 2002, the OFT and CC have worked together to improve communication and working methods, with the shared aim of ensuring that the markets regime is an effective and flexible part of the UK competition framework. Despite this and the successes of the regime, some commentators have identified areas for potential improvement:

¹⁰ Positive Impact 09/10, OFT, 2010.

¹¹ Note that this figure (£345m) for the direct financial benefits to consumers from market studies and reviews and MIRs is different from those presented as direct benefits for consumer from the market investigation regime (£317m) in the CC's Annual Report as: i) the former takes into account all OFT market studies, including those where referral to the CC is not considered a possible option, and ii) the latter includes referrals to the CC from other regulators and the OFT is not apportioned any benefits from these MIRs.

¹² Peer Review of Competition Policy, KPMG, June 2007.

¹³ Israel has replicated the UK model for a Markets Regime.

- **Need for stronger focus on structural deficiencies in competition.** Some commentators consider the UK's market studies and investigations to date to have been insufficiently focused on structural deficiencies in competition (e.g. market concentration or barriers to entry).¹⁴
- **Need to ensure powers keep pace with changes in the economy and technology.** Some powers of the Enterprise Act 2002 have become outpaced by technological advances, or are limited in ways that prevent the competition authorities from effectively and proportionately addressing competition problems in the market. Some phase 2 remedy making powers¹⁵, for example, were carried forward from the Fair Trading Act 1973 and were designed for manufacturing industries. These may lack flexibility when applied to the services industries or for high tech industries.
- **Duplication and complexity for businesses subject to the regime.** Businesses have told us that where market studies result in references they can be subject to duplicative requests for information and that the need to engage with two extensive investigatory processes can be unnecessarily complex.
- **Length of time taken for final decisions.** Lengthy market studies and market investigations can mean that there is a delay in implementing the changes necessary to address competition problems, as well as prolonging uncertainty in markets about possible outcomes of any investigation.¹⁶ To date, the time taken for OFT market studies not leading to phase 2 referrals has ranged from 3 to 21 months, whilst OFT market studies that led to phase 2 referrals have generally taken between 5 months and 10 months.¹⁷ For cases that were referred to the CC, the end-to-end process has taken between 33-67 months (including the OFT stage and remedies and, in some cases, legal challenge).
- **Insufficient market investigation references and disjointed working between the phase 1 and phase 2 process.** To date, 11 Market Investigation References have been made to the CC for in-depth inquiries (9 by the OFT and 2 by sector regulators), fewer than the 4 references per year initially anticipated.¹⁸ This suggests that the markets regime may be being underutilised.

¹⁴ Peer Review of Competition Policy, KPMG, June 2007.

¹⁵ Schedule 8 of the Enterprise Act 2002.

¹⁶ The OFT aim ensure that where a reference to the CC is one of the outcomes being considered at launch of a market study it will aim to consult on a reference within 6, (OFT announcement April 2009).

¹⁷ Payment Protection Insurance was an exception to this, where the phase 1 market study took considerably longer.

¹⁸ 3 From OFT, and 1 from sector regulators.

- 3.6 The Government considers that a two phase process for markets should be retained, even in a single CMA, as it is essential to ensuring that the regime is proportionate, flexible and commands confidence. The Government also considers that alongside this two phase process, the right of judicial review through the CAT will ensure that the ECHR requirements for a fair trial continue to be fully met. However, the Government has identified possible changes to address concerns to **modernise** and **streamline** the regime and **increase clarity and reduce burdens**. These are considered below.

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.*

Modernising the Markets Regime

- 3.7 The dynamic nature of markets and new behaviours and practices mean that the CMA needs to have the right powers to keep pace and ensure that markets work well. This section considers options for additional powers that could be given to the CMA to allow it to better respond to market problems to support growth, enterprise and consumer welfare.

Enabling investigations into practices across markets

- 3.8 **The Government proposes enabling the CMA to carry out in-depth investigations into practices across markets.** The ability to investigate practices within markets is essential to ensuring that they function well. Some practices, such as the costs to consumers of switching suppliers, below cost selling, or the provision of extended warranties and other secondary point of sale practices, may be apparent in more than one market. At present, however, where there are reasonable grounds to suspect such practices have an adverse effect on competition across markets, the CC cannot investigate them unless multiple markets are referred to them separately by the OFT or by sector regulators.
- 3.9 In such cases, it may be difficult to limit the scope of the investigation to a single practice in each market depending on the evidence received.

Giving the CMA powers to carry out 'horizontal' investigations of practices that affect more than one market, in addition to the existing powers to investigate the operation of competition in individual markets, could lead to a more targeted approach to tackling specific competition problems that affect multiple markets. This could lead to greater efficiency in some cases as it would allow practices to be investigated by the CMA without multiple markets having to be referred for examination.

Enabling the CMA to provide independent reports to Government

- 3.10 **The Government seeks views on whether the CMA could be enabled to provide independent reports to Government on public interest issues alongside competition issues.** A key strength of the UK regime is that it is clearly focused on competition and that it possesses considerable investigative expertise. In the markets regime, however, use of this capability in public interest cases is limited. Where the SoS has made a public interest intervention the CC can only investigate the competition issues. It cannot investigate or make recommendations on any public interest issues. The CC reports to the SoS on whether there is an adverse effect on competition and on possible remedies to these, and although the SoS is required to accept the CC's findings on the competition issues, when deciding on appropriate remedies, it is for the SoS to decide based on his own views of the public interest issues where the balance lies between competition concerns and public interest issues.
- 3.11 By contrast, in the public interest regime for mergers, the CC advises the Minister on whether a qualifying merger results in a substantial lessening of competition and whether, taking account of any substantial lessening of competition and the public interest considerations, the merger operates against the public interest.
- 3.12 It would be possible to create a similar power for the SoS to invite the CMA to consider public interest issues alongside competition issues. A key benefit of this would be to negate the need to create ad hoc independent inquiry bodies, such as the Independent Commission on Banking, and enable the CMA to take a core competition role in investigations in the future. It would also be more efficient for Government to draw on the CMA's investigative expertise to look across markets at issues that relate to competition and go wider than this.
- 3.13 Such powers will need to be accompanied with the appropriate checks and balances to preserve the CMA's independence and its ability to allocate resources to competition cases, and to ensure industry knowledge and expertise is available to the CMA in carrying out investigations. This will necessitate additional safeguards, including a requirement to meet the section 131 competition test, and powers to co-opt expert panel members where additional specialist expertise is required for a particular inquiry. The CMA would not have remedial

powers for public interest issues; and any new public interest remedies requiring legislation would continue to be subject to Parliamentary scrutiny.

Extending the super-complaint system to SME bodies

- 3.14 **The Government seeks views on whether the super-complaint system should be extended to SME bodies.** Tackling barriers to entry and conduct by large firms which have the effect of squeezing out small firms is critical to the promotion of competition and growth. Section 11 of the Enterprise Act allows a consumer body¹⁹ designated by Ministers to make a 'super-complaint' to the OFT about features of a market that appear to be significantly harming the interests of consumers.²⁰ In such cases the OFT must publish a report within 90 days setting out what action, if any, it intends to take and the reasons.
- 3.15 It would be possible to extend the super-complaint system to SME bodies thus providing a speedy mechanism to address features in a market(s) that have an impact on competition that significantly harms the ability of SMEs to compete. Broadening this function would, however, have resource implications for the CMA and could be used to challenge efficient business practices. Super-complainant status would therefore need to be tightly defined. An alternative proposal would be to restrict the criteria for making a super-complaint to harm caused to 'small' enterprises rather than small and medium sized enterprises.
- 3.16 It would also be necessary to avoid designating business representative groups that could have a conflict of interest between SME concerns and protecting big business interests. Were the super-complaint regime extended the Government proposes that only organisations that represent primarily SMEs should be able to qualify as designated super-complainants.

Streamlining the Markets Regime

- 3.17 Efficient and timely processes and decision making are essential to ensure that the markets regime removes competition problems quickly and that benefits are realised by consumers and businesses. It is equally important that the regime does not cause prolonged and undue uncertainty in markets. This section considers how the regime can be streamlined and made speedier.

¹⁹ Consumer body acting collectively on behalf of consumers, Section 11, Enterprise Act 2002.

²⁰ Consumers, for the purposes of section 11, refers to consumers as 'individuals' and therefore does not extend to businesses as consumers.

Reducing timescales

- 3.18 **The Government proposes statutory timescales for phase 2 market investigations should be reduced from 24 months to 18 months for the majority of cases. Additionally, the Government is considering whether statutory timescales should be introduced for phase 1 studies and for implementation of remedies following phase 2 market investigations.** These proposals would build on practice already developing in the OFT and the CC.²¹ The length of time taken to process cases through the markets regime is a major cause of concern for business. Introducing statutory timescales to phase 1 and reducing phase 2 timescales would reduce the overall time taken on an investigation. This would also ensure that market studies are not extended and there is a clear trigger point for a market investigation.
- 3.19 Any changes to the timescales will need to ensure that this does not undermine the rigour and robustness of the regime. Appropriate safeguards would therefore be needed, such as:
- the ability to extend the time frames in the case of exceptionally complex cases;
 - information gathering powers for phase 1 studies to ensure that evidence can be gathered to meet the threshold for reference to phase 2 within the set time period (see paragraph 3.21 - 3.22);
 - extending information gathering powers during the remedies implementation phase to 4 weeks after the final determination of the reference (i.e. when final undertakings are accepted or an Order is made) this currently ends 4 weeks after the publication of the final report,²² and
 - stop the clock mechanisms to take account of appeals made by parties or delays caused by the parties.
- 3.20 **The Government also seeks views on whether statutory timeframes should be introduced for all market studies or only those that have the potential to be referred to a phase 2 investigation.** In cases that do not lead to a referral for phase 2 investigation, other possible outcomes include voluntary measures agreed to by business or recommendations to Government, which may require longer than a 6 month period to put in place. However, as set out above, statutory timescales and the desire to speedily remedy problems in the market will need to be balanced against the potential burden placed on business, particularly if these are coupled with information gathering powers (see *below*).

²¹ Both the OFT and CC have committed to more challenging timescales: 6 months to reach the point of consulting on a reference, for phase 1 studies where a reference is an outcome that is being considered at the time the study is launched; and 18 months for a typical phase 2 market investigation, with the possibility of shorter investigations – of around 12 months - for more straightforward cases.

²² This issue is also relevant to merger inquiries (see paragraph 4.47). The opportunity would also be taken to clarify that the full phase 2 investigatory powers would apply during any remittal following an adverse CAT judgment.

Introducing information gathering powers at phase 1

- 3.21 **The Government seeks views on the introduction of information gathering powers at the phase 1 market study stage.** In the current regime the OFT has limited powers of investigation in carrying out a market study. Data, material and evidence have to be collated from parties on a voluntary basis.²³ There may be advantages in a CMA having information gathering powers at the market study phase. This could allow the CMA to complete market studies more quickly and, where appropriate, make timelier market investigation references.
- 3.22 We consider that information gathering powers would be necessary if a statutory timescale for phase 1 market studies were introduced (see above) in order to allow the CMA to gather evidence efficiently within the allocated time. These powers could introduce new burdens to business and could risk phase 1 market studies becoming more extensive if introduced without a statutory timeframe.

Facilitating prompt referrals to phase 2

- 3.23 **The Government seeks views on whether any other changes should be made to the statutory framework to facilitate prompt referrals to a phase 2 investigation where this is justified.** A key strength of a two phase regime has been to allow the OFT and CC to flexibly investigate and remedy problems in markets. Many commentators have welcomed the OFT approach to resolving issues successfully at phase 1 by securing voluntary changes to business behaviour and by making recommendations to Government. However, there are also cases where the effective operation of the markets regime is likely to require more in-depth scrutiny and greater powers of investigation and remedy associated with phase 2 investigations. These can include large scale and/or complex cases²⁴ in which there is a high degree of public interest and cases where voluntary changes to business behaviour are unlikely to be an effective remedy. As set out above, the Government proposes putting in place statutory timescales to streamline the throughput of cases. The creation of a single CMA is also expected to contribute to this.

Increasing certainty and reducing burdens

- 3.24 Tackling competition problems is fundamental to consumer welfare and to growth. To do this effectively, the CMA needs to have the right tools that enable it to take targeted action, without placing unnecessary

²³ Section 174 of the Enterprise Act 2002 provides a power to require information, but only applies where the OFT is considering whether to make a market investigation reference to the CC or to seek undertakings in lieu of such a reference.

²⁴ For example, cases such as BAA, Groceries and Payment Protection Insurance.

burdens on business. This section considers options to update the CMA tools and to increase certainty and reduce burdens.

Introducing statutory definitions and thresholds

3.25 The Government seeks views on whether there should be a clearer statutory definition of a market study and a statutory threshold for initiation of a market study. Market studies stem from section 5 of the Enterprise Act 2002, which allows the OFT to obtain, compile and keep under review information relating to the carrying out of its functions. There is no statutory definition of a market study or a statutory threshold for the initiation of one. Instead the OFT applies prioritisation principles to assess proposals for market studies against a range of criteria, including impact on consumers and the wider economic benefit; strategic significance, risks and resources before initiating a market study.²⁵ This enables a flexible and targeted approach.

3.26 Market studies can involve significant burdens and costs to industry. Some businesses have said that voluntary information provision has cost implications to business, and that these burdens are insufficiently justified in the absence of a statutory definition and statutory threshold to conduct a market study. There may therefore be a case for a statutory definition or threshold to be applied, in particular if information gathering powers are extended. Introducing a statutory definition of a market study and explicit thresholds for launching a market study could, however, impinge on the flexibility of the CMA to proactively carry out market studies to identify and address problems in markets. If a statutory definition or threshold for a phase 1 study were to be introduced, it would need to take account of the scope of the markets regime, discussed in chapter 9.

Improving interaction between Market Investigation References and Antitrust Enforcement

3.27 Improvements could be made to the interaction between the MIRs and the antitrust regime. At present the CC is not empowered in its market investigations to specifically investigate breaches of the Competition Act 1998 and Articles 101 and 102. This not only deters references of markets where the referring authorities believe there may be evidence of such breaches, but also risks the CC being encouraged to identify remedies other than enforcement of those prohibitions. An MIR is a powerful tool for enabling effective market analysis and evidence gathering to identify the nature of market problems. One of the potential consequences of a market investigation may be the identification of evidence of anti-competitive agreements or abusive behaviour in the market, which if tackled would in future be deterred.

²⁵ Market Studies: Guidance on the OFT approach, OFT, 2010.

3.28 The creation of a single CMA provides an opportunity to streamline the interaction between the markets regime and antitrust prohibitions to make them more effective. Relevant considerations are discussed in chapter 10.

Ensuring remedies in mergers and market investigations are proportionate and effective

- 3.29 There is considerable overlap of the provisions relating to remedies and remittals in phase 2 mergers and phase 2 market investigations. The next two sections 'Remedies' and 'Remittals' (paragraph 3.37) therefore refer to both phase 2 mergers and phase 2 market investigations. The remaining issues on mergers are covered in chapter 5.
- 3.30 Lack of effective remedy options can force competition authorities to apply remedies that are less effective than alternatives or are more costly to the parties than other equally effective measures they do not have the power to apply. Equally, retaining remedies that are no longer fit for purpose can result in harm to consumers, if the underlying market failure remains but the remedies are no longer effective, or can cause unnecessary burden to parties and hinder growth if there is no longer any need for the remedy. The Government has identified three potential areas for ensuring that remedies are effective and proportionate.²⁶
- 3.31 **The Government proposes to amend Schedule 8 to the Enterprise Act 2002 to enable the competition authorities to require parties to appoint and remunerate an independent third party to monitor and/or implement remedies.** The CC currently has limited powers under Schedule 8 to require the appointment and remuneration of an independent third party to monitor and/or implement remedies to ensure their effectiveness. The CC has successfully implemented behavioural remedies using a third party in a monitoring role in merger cases in situations where firms have been prepared to give undertakings to this effect.²⁷ However, it may not always be practicable to secure undertakings from all parties to a market investigation, so a change to the Order-making powers of the CMA would be needed to facilitate this type of monitoring arrangement. This change would increase the effectiveness of the remedies that the CMA introduces without increasing the cost to the taxpayer of the regime.
- 3.32 **The Government also proposes to amend Schedule 8 to the Enterprise Act 2002 to require parties to publish certain non-price information.** Information remedies can be an effective solution to a lack of competition in some markets. The ability to switch between products

²⁶ Also see timescales on remedies in chapter 4 - A Stronger Merger Regime.

²⁷ The Macquarie UK Broadcast Ventures/National Grid Wireless Group inquiry (2008) provides an example where the merger parties undertook to remunerate an adjudicator responsible to the OFT to resolve contractual issues as part of a package of behavioural remedies.

is often a key aspect of competition and a lack of information can be a significant barrier to switching. A number of recent CC investigations have concluded that steps to improve information are part of an effective remedy. Currently, however, the CC may only require parties to publish non-price information in conjunction with pricing information.²⁸

3.33 There are some instances in which the publication of certain information unrelated to prices may be an effective and proportionate remedy, for example where information is published telling customers how they may switch supplier. However, if a CMA were to effect such a remedy by means of an Order it would currently also have to require price information to be published.²⁹ This can cause unnecessary costs to business, for example, in markets where prices can change more frequently than the non-price information that is the main focus of the remedy. Additionally, market investigations can involve oligopolistic markets with the potential for tacit collusion over prices. A requirement to publish prices could in some circumstances facilitate collusion.

3.34 **The Government also seeks views on proposals to streamline the review of remedies process.** The current two-stage process for the review of remedies has resulted in a relatively complex and lengthy review process – taking from a few weeks to over two years from end to end.³⁰ The Enterprise Act 2002 places an obligation on the OFT to keep existing mergers and markets remedies (either imposed by the CC, or agreed with the OFT in lieu of reference) under review.³¹ In relation to remedies imposed by the CC, the OFT must also advise the CC where it considers that ‘*as a result of a change of circumstances*’, those remedies are no longer appropriate and that one or more of the parties to an undertaking can be released from it, or that an undertaking should be varied or superseded by a new undertaking, or that an order should be varied or revoked. It is then for the CC to take the appropriate action.

3.35 While the creation of a single CMA will reduce some complexities, there is scope to streamline the process by introducing appropriate statutory timescales and ensuring that in all cases the CMA has appropriate information gathering powers similar to those proposed for remedies implementation (see paragraph 3.19).

3.36 **In addition to these measures, the Government proposes to revise the threshold for review so that it is clear that remedies can be reviewed to ensure that they operate as intended.** The need to identify a ‘change of circumstances’ before initiating a review of remedies provides an important element of legal certainty, by creating an expectation that remedies will remain in place unless a statutory trigger is met. Experience to date has indicated that a variety of factors

²⁸ Paragraph 15 of Schedule 8.

²⁹ This is because paragraph 15 of Schedule 8 of the Enterprise Act stipulates that (1) an order may require a person supplying goods or services to publish a list of prices or otherwise notify prices; (2) an order made by virtue of this paragraph may also require or prohibit the publication or other notification of further information.

³⁰ Figures based on Review of Remedies to date.

³¹ Sections 92 and 93 for Mergers. Sections 162 and 163 for Markets.

can constitute a change of circumstances including, for example, some legislative changes and changes to the operation of markets such as new entry. The need to identify a change of circumstances may, however, constrain the ability of the CMA to take action, where it considers that a review of a particular set of remedies would be desirable to ensure their ongoing effectiveness, but where it is difficult to identify a specific event or market change that would trigger such a review.

Clarifying powers following remittals of mergers and markets

- 3.37 **The Government proposes to clarify that phase 1 and phase 2 powers of investigation and requirements relating to timelines apply if a decision of the CMA is quashed and the matter is remitted back to it for a new decision.** Currently, where the CAT has quashed part or all of a decision taken by the OFT or CC on a merger or a markets case following an appeal, the relevant issue(s) is referred (remitted) back to them to reconsider. In these cases the Enterprise Act 2002 does not set out the powers or duties, including powers to investigate and gather information, powers to report and timeframes, of the OFT or CC to reinvestigate the issue and come to a new decision.
- 3.38 This can cause uncertainty for the parties involved³² and require the parties, and competition authorities to deal with such issues through submissions to the CAT. The cost of such submissions, and potential delay resulting from having to seek clarification of such matters in the CAT could be avoided by clarifying the powers and duties that apply during a remittal in the legislation. The Government proposes clarifying this issue by specifying in legislation, that in the event that the CAT gives a judgment which overturns the whole or part of a CMA decision, the remittal will be conducted by the CMA applying the statutory provisions that applied during its initial inquiry, subject to any specific directions given by the CAT in its judgment.

Removing the duty to consult on decisions not to make an MIR

- 3.39 **The Government seeks views on revising the duty to consult relevant persons on decisions not to make a Market Investigation Reference.** Consultation and open discussion with parties is a fundamental aspect of the current markets regime and Government wants to retain this approach under a combined regime. The Enterprise Act 2002, however requires the OFT to consult relevant persons on decisions 'as to whether' to make a market investigation reference to the CC, which may in some circumstances include decisions not to make a

³² This gap in the statutory framework was discussed by the CAT in *Tesco Plc v CC* [2009] CAT 9. In principle, where the OFT or CC is required to reach a new decision, the powers necessary for it to do so are presumed to be reactivated as otherwise the authorities would be unable to comply with the requirements of the CAT's directions on the remittal. The amendment proposed would clarify that this is the case and would remove any uncertainty from remittal proceedings.

reference following a market study, as well as those to make a reference.³³

3.40 Most competition-related market studies and many remedy reviews can in principle result in a decision not to make a MIR, but in many cases stakeholders will not be pressing for the market to be referred. The requirement to consult, in all cases involving a decision not to refer, *any* person whose interests may be substantially impacted imposes a procedural burden that is disproportionate in cases where stakeholders agree that the market should not be referred. This can cause delay to the outcomes and benefits of market studies, and give rise to unnecessary costs to both the OFT and stakeholders. It would be possible to revise this duty to a duty to consult only in cases where any person has expressly asked for a reference to be made.

Appeals in market investigation references

3.41 The factors to be considered in making the final choices on the appropriate decision making structure for the CMA will include the need to ensure fair process and an ECHR compatible right of appeal to an independent and impartial tribunal. These are set out in chapter 10.

³³ Section 169 requires the OFT to consult any person on whose interests the OFT thinks the decision will have a substantial impact.

4. A Stronger Merger Regime

The Government regards the merger regime as one of the key strengths of the UK competition regime, but considers that there is further scope for improvement by addressing the disadvantages of the current voluntary notification regime and streamlining the process to support growth, enterprise and consumer welfare.

The Government is seeking views on:

- Options to address the disadvantages of the current voluntary notification regime. These are the risk of missing anti-competitive mergers, and the difficulties of applying appropriate remedies to completed anti-competitive mergers.
- Measures to streamline the regime by reducing timescales and strengthening information gathering powers.
- Introduction of an exemption from merger control for transactions involving small businesses under either a mandatory or voluntary notification regime.

Rationale for consultation on reform of the mergers regime

- 4.1 The UK merger regime is highly regarded internationally and, out of nine merger regimes, was ranked second behind the US.³⁴ Its strengths include its technical competence, independence from the political process, transparency, accountability and robustness of decisions. The direct benefits of the UK merger regime were estimated to be on average £310 million per year during 2007-2010.³⁵
- 4.2 Whilst the Government is proud of this record, there are opportunities to build on this strength. The primary objective of this review is to strengthen the competition regime by improving the speed and robustness of decisions. In applying these objectives to the reform of the mergers regime, the Government is considering options to improve the authority's ability to identify potentially problematic mergers and make merger remedies more efficient and effective.
- 4.3 The UK currently operates a voluntary notification system where businesses can choose to pre-notify a merger to the OFT and the OFT can choose to initiate an investigation of a merger.³⁶ There are two

³⁴ Peer Review of Competition Policy, KPMG, June 2007.

³⁵ Positive Impact 09/10, OFT, 2010.

³⁶ As long as the merger is captured by the jurisdictional threshold.

specific drawbacks to this system. First, there is a risk that some anti-competitive mergers escape review. Second, it leads to the investigation of a large proportion of completed cases, which in turn makes it difficult to apply appropriate remedies in the event that they are found to be anti-competitive.

- 4.4 On the first drawback, it is difficult to estimate the number of anti-competitive mergers escaping review by the authorities. Under the current regime, the OFT has four months to refer a merger after it has been completed (assuming it has been made public) and anyone who is concerned about a merger's effects (customers, suppliers, competitors) can draw it to the OFT's attention. A report prepared by Deloitte for the OFT suggested that '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'.³⁷ However, the average size of these mergers is generally smaller and the lack of third party complaints indicates that this does not represent a serious failing in the current regime. In recent years the OFT has improved its merger intelligence function through increasing its resource and taking a more targeted approach.³⁸
- 4.5 On the second drawback, the investigation of a high proportion of completed cases can hinder the effectiveness of the competition framework as the effects of the merger can sometimes be difficult to undo and appropriate remedies more complex to apply. Since 2004/5, of the 125 cases at phase 1, where the duty to refer arose, 60 were already completed.³⁹ At phase 2, 14 of the 25 cases resulting in a substantial lessening of competition (SLC) were completed at the time of reference.
- 4.6 The Government is consulting on how it can best address these issues through a continuum of options ranging from strengthening the voluntary notification regime to adopting a full mandatory notification regime with a short-form procedure with or without suspension, to a hybrid option where the notification regime is part mandatory and voluntary, depending on the size of the parties involved. The Government is mindful of the burdens and costs that different solutions may place on business, and invites your comments on how to balance these whilst achieving the overall objective of strengthening the merger regime and ensuring that the single CMA can identify problematic mergers and apply effective remedies where necessary.
- 4.7 Further areas for improving the merger regime include increasing the speed and streamlining the end to end merger review process. The Peer Review of Competition Policy by KPMG in 2007 found that the UK regime

³⁷ Deterrence effect of competition enforcement by the OFT: a report prepared by Deloitte on behalf of OFT, Deloitte. 2007, p. 41.

³⁸ The OFT has a stated policy of sending out enquiry letters only where it believes the merger may give rise to competition concerns.

³⁹ The OFT has a duty to refer when it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition (SLC).

was considered slow compared to other countries and ranked 7th out of 9 on speed of decision making. The Government is considering introducing further statutory timescales for specific parts of the merger process and extending information gathering and stop the clock powers to maximise efficiency of the process. The Government is also considering whether there should be an exemption from merger control for transactions involving small businesses.

- 4.8 The Government wishes to ensure that mergers add value to the economy and are driven by the longer term interests of the companies, their employees and wider stakeholders. The recent consultation 'The Long-Term Focus for Corporate Britain', which closed in January, looked at this issue and whether boards understand the long-term implications of takeover bids and communicated these effectively.
- 4.9 Appendix 1 sets out how the UK regime for merger control currently works and the roles of the OFT and CC. The Government has no plans to change the role of Ministers in relation to the merger cases raising public interest considerations.

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.*

Improving the voluntary notification regime

- 4.10 Whilst notification under the UK merger regime is voluntary, it is not intended to be risk or cost free for parties. Under the current regime these risks are borne by the wider economy because parties are able to complete and proceed to integrate immediately, potentially taking steps that cannot be easily reversed in the event that the merger is found to be anti-competitive.
- 4.11 Singapore, Australia and New Zealand operate voluntary notification regimes where the risk of completing a merger without notification falls on the merging parties. In these regimes giving effect to an anti-competitive merger is prohibited and penalties are attached to mergers that have not been notified but have completed and found to raise competition issues.

The Government is not minded to pursue this route as it would require a radical change to the nature of the regime. It is also likely to lead to uncertainty as to the validity and enforceability of the transaction (and of acts taken pursuant to such unlawful merger agreements) and would potentially enable third parties to bring damages actions against mergers.

Strengthened interim measures

- 4.12 One way of transferring the risk from the wider economy to the merging parties is to strengthen the legal powers available to the single CMA to make it easier to put a halt to integration and pre-emptive action that could prejudice the ability to obtain fully effective remedies in completed mergers. The current powers enable the OFT to seek initial hold separate undertakings to prevent 'pre-emptive action', where it is considering whether to make a reference, provided that it has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation has been created. The negotiation of hold separate undertakings can take some considerable time. Hold separate orders can only be put in place if the OFT has, in addition, reasonable grounds for suspecting that it is or may be the case that pre-emptive action is in progress or contemplation.
- 4.13 The Government is considering two potential options. First, whether there should be a statutory restriction on further integration that would apply automatically as soon as the single CMA commences an inquiry into a completed merger. This would be akin to a strengthened form of the restrictions in relation to completed mergers that apply automatically under the current merger control regime once a reference has been made to the CC. Alternatively the single CMA would have the ability to trigger these powers in its phase 1 investigation to suspend all integration steps pending negotiation of tailored hold separate undertakings.
- 4.14 The advantages of the first option would be that it would prevent the harm caused while initial undertakings are negotiated during which time integration may be continuing or key staff leaving. Whilst it would not eliminate the problem of the single CMA having to investigate completed mergers, it may mean that the ability to obtain effective remedies is enhanced (as less integration of businesses will have taken place in the interim period). However, there are drawbacks to this approach, namely that it might discourage parties from notifying completed transactions until they had already achieved a level of integration.
- 4.15 Under the second option the Government is considering clarifying the legislation to make clearer the type and range of measures that the single CMA could take, including at Phase 1, in order to prevent pre-emptive action. These would include the single CMA's ability to require reversal of action that had already taken place and to prevent further pre-emptive action notwithstanding the existence of any contractual obligations on the part of the merged entity.

Penalties

- 4.16 Currently, if parties continue with integration despite implementation of hold separate obligations, the only redress is civil proceedings. The Government would be minded to introduce financial penalties that would apply to integration measures taken in breach of these restrictions as this is likely to be a greater deterrent to companies taking such action. The Government is minded that such financial penalties should be up to 10% of aggregate turnover of the enterprises concerned.

Mandatory notification regime

- 4.17 An alternative approach to dealing with the drawbacks of the current voluntary notification regime would be to adopt a mandatory notification regime, where businesses would be required to notify the single CMA of all mergers captured by the jurisdictional threshold. The majority of merger regimes (for example the US, Germany and EU) adopt mandatory notification regimes.
- 4.18 The main advantages of a mandatory notification regime are that it would increase the single CMA's ability to identify problematic mergers, and would also reduce the proportion of completed cases that the CMA investigated. However, a mandatory notification regime would increase the regulatory burden and cost to both business and the CMA. Costs to business include legal, administrative, management time and delays in completing cases. These costs to both business and the CMA could be limited through the design of an effective short form notification process.
- 4.19 There is a spectrum of options for a mandatory notification regime, but these need to be considered against costs to business and effectiveness. Mandatory notification systems most commonly have a suspensory effect where the merger cannot proceed until clearance has been received. It is, however possible to design a system where businesses would be required to notify anticipated mergers to the single CMA but would then be able to complete the merger without waiting for clearance.
- 4.20 This approach would help ensure that potentially anti-competitive mergers did not escape review, as the CMA would be aware of all mergers within scope of the threshold, and could decide which ones merited further investigation. It may also reduce the number of investigated cases where there had been significant integration between the parties as the CMA would be aware of mergers early in the process and could call them in before integration had been progressed too far.
- 4.21 Alternatively, a suspensory effect, where a merger could not proceed without clearance, would ensure that all mergers captured by the

jurisdictional threshold were reviewed by the CMA thus significantly reducing the risk of missing potential anti-competitive mergers. In addition, as mergers would not be able to complete until they received clearance, the CMA would no longer need to investigate completed cases.

4.22 If mandatory notification were introduced, the Government would be minded to introduce penalties, where businesses failed to notify a merger, similar to those operated in the EU.⁴⁰ In addition, a suspensory obligation would need to be supported by a penalty where businesses did not respect the suspensory obligation and continued with a merger without waiting for clearance. There are also likely to be circumstances where it would be appropriate to permit derogation from the suspensory obligation, for example, to allow the merger to take place as a matter of urgency to save the acquired business from imminent financial collapse.

Jurisdictional thresholds in a mandatory regime

4.23 **The Government seeks views on an appropriate jurisdictional threshold in a mandatory notification regime.** A mandatory notification regime would need a clear and objective threshold to give sufficient legal certainty as to which transactions should be notified. This is particularly important as penalties would be applied for non-notification. The International Competition Network (ICN) recommends that notification thresholds should be based on objectively quantifiable criteria, which favours sales and assets tests over market share-based thresholds. Appendix 3 gives a comparative table of different merger control regimes.

4.24 The current jurisdictional thresholds were designed for a voluntary regime.⁴¹ They provide that a 'relevant merger situation' is created if two or more enterprises 'cease to be distinct' from each other and either:

- The value of the UK turnover of the enterprise being taken over exceeds £70 million (the 'turnover test'); or
- The merger would result in the creation or enhancement of at least a 25 per cent share of supply of goods or services in the UK, or in a substantial part of the UK (the 'share of supply test').⁴²

⁴⁰ 10% of aggregate turnover of the enterprises concerned for both of these situations referred to above. There have been few cases where these penalties have been imposed.

⁴¹ Section 23 of the Enterprise Act 2002 defines the transactions which may be subject to review by the UK competition authorities.

⁴² These jurisdictional tests need not be satisfied where intervention by the Secretary of State is made in a special public interest case (in relation to certain defence and media mergers). However, there is no competition assessment in such cases.

Box 4.1

The **turnover test**, which replaced the assets test of the previous regime⁴³, tends to catch large vertical and horizontal mergers. By contrast the **share of supply test**⁴⁴ captures only horizontal mergers, by enabling mergers that create a specified level of overlap between the activities of the parties to be assessed.

The share of supply test plays an important role in capturing problematic mergers. Since 2004-05, 71 (57%) of the 125 cases meeting the 'realistic prospect of SLC' test for reference at the OFT stage, qualified on share of supply. This percentage has increased over time, from 43% in 2004-05 to 68% in 2009-10, while the percentage of cases qualifying on turnover has fallen.

- 4.25 A test based on turnover is commonly used worldwide and is considered to be objective and appropriate to a mandatory notification regime. In contrast, a share of supply test is viewed as less appropriate as it is more subjective.
- 4.26 An appropriate notification threshold could range from full mandatory notification, where all mergers captured by the jurisdictional threshold would need to be notified to the CMA, to a hybrid mandatory notification, comprising mandatory notification of mergers over a set turnover (such as £70 million), complemented by a discretion for the CMA to consider mergers captured within another threshold (such as share of supply). These are considered further below.

Options for a jurisdictional threshold

- 4.27 **Option 1 - Full mandatory notification** – Mergers where the turnover of the target in the UK exceeds £5 million and the world wide turnover of the acquirer exceeds £10 million would be required to be notified. This option would require all mergers to be notified except those below the applicable thresholds (see paragraphs 4.40 - 4.42).
- 4.28 **Option 2 - Hybrid mandatory notification** – Mergers where the value of the UK target turnover exceeds £70 million would be required to be notified. In addition, the single CMA would retain the ability to initiate investigations and take action where appropriate for mergers that fall below the turnover threshold but are caught by the share of supply test.
- 4.29 The turnover threshold for the mandatory notification part of this option is suggested at £70 million, as this is the turnover threshold used in the current voluntary notification regime. The CMA would retain jurisdiction over mergers which qualified under the current share of supply test. As an alternative to this, the CMA could have jurisdiction over all mergers, except those qualifying under the proposed small merger exemption

⁴³ The turnover test was introduced by the Enterprise Act 2002 as a replacement for the assets test in the Fair Trading Act 1973.

⁴⁴ The share of supply test was retained from the Fair Trading Act 1973.

(described in paragraphs 4.40 - 4.42). This approach of enabling the authority to review non-notifiable transactions is somewhat similar to that adopted in the USA.

- 4.30 Option 1 would increase the regulatory burden and costs to both business and the CMA more than option 2. However, option 1 is likely to be more effective than option 2 in reducing the number of completed cases investigated by the CMA as business would have to seek clearance before proceeding with the merger. In option 2, although the CMA would have jurisdiction to investigate cases which qualified on the share of supply test, these transactions would be able to complete without clearance.

Nature of turnover test and mandatory notification

- 4.31 Many other jurisdictions use notification thresholds that have regard to the turnover of both the target and the acquirer. Having both elements ensures that mergers between enterprises that each have activities in the relevant jurisdiction are captured. Depending upon the level at which the turnover thresholds are set, it can enable mergers between small businesses to avoid being caught by the notification requirement, whilst still enabling consideration by the single CMA of mergers where large enterprises acquire small competitors as well as similarly sized competitors.
- 4.32 The current UK merger regime has sought to capture these types of mergers through the share of supply test. Under a mandatory notification regime, the jurisdictional threshold in Option 1 makes reference to the acquirer and target turnover to reduce the likelihood of anti-competitive mergers escaping review.
- 4.33 Option 2 retains the ability for the single CMA to investigate cases through the share of supply test. However, these transactions will be able to complete without clearance. This could be addressed by reducing the level of the turnover threshold and potentially referring to both acquirer and target turnovers. This could, depending on the level at which the thresholds are set, reduce the reliance on the share of supply test to establish jurisdiction over problematic mergers (as a greater proportion of such transactions could be caught by the revised turnover thresholds).

Material Influence and mandatory notification

- 4.34 **The Government wishes to retain the ability to look at mergers which give the acquirer the ability to exercise control over the target.** The OFT and CC are currently able to investigate transactions where the acquirer may obtain the ability to materially influence the policy of the target (materially influence), where the acquirer may obtain the ability to control the policy of the target ('de facto' control) or where the acquirer

may obtain a controlling interest in the target ('de jure' or 'legal' control).⁴⁵ 'De facto' control may be considered to be broadly comparable to the level of control that applies under the EU Merger Regulation (known as decisive influence).

- 4.35 Material influence most commonly arises where one company acquires a minority shareholding in another. However, there are other situations in which it can arise, including as a result of rights to appoint directors (often combined with a shareholding of some sort), rights arising through debt instruments and/or the likelihood that the acquirer of a minority stake would have material influence over the strategic decisions of the company due to its importance in the relevant industry.
- 4.36 Under a mandatory notification regime the Government is minded to require mergers that result in an acquisition of control of policy of the target (broadly equivalent to the EU Merger Regulation decisive influence threshold) or an acquisition of a controlling interest in the target to be notified. In addition, the single CMA would continue to have jurisdiction over transactions that give rise to material influence of one enterprise over another and such mergers could be notified voluntarily.
- 4.37 This would provide reasonable certainty as to the type of transactions subject to the mandatory notification requirement, whilst maintaining the single CMA's ability to review and, where appropriate, take action in relation to those transactions where the acquisition of material influence would give rise to competition concerns.

Jurisdictional threshold in a voluntary notification regime

- 4.38 **The Government seeks views on whether there should be changes to the jurisdictional threshold in the UK's voluntary merger regime.** The Government recognises that, on the whole, the business community would prefer a more objective test than that offered by the share of supply test. However, as already noted, the share of supply test plays an important role in UK merger control.
- 4.39 One possible approach would be to replace the current jurisdiction of both the share of supply test and turnover test with the ability for the single CMA to have jurisdiction over all mergers except for mergers between small businesses which would be exempted from merger control (as described below). Designing such a threshold would enable the single CMA to have jurisdiction over almost all mergers which raised competition issues, whilst eliminating the debate about whether a particular merger qualified under share of supply, and would provide certainty for mergers between small businesses that they would not be caught by merger control.

⁴⁵ Mergers: Jurisdictional and procedural guidance, OFT, June 2009, paragraph 3.14.

Small Merger exemption in both mandatory (hybrid) and voluntary regimes

4.40 The Government is considering introducing an exemption from merger control for transactions involving small business which would replace the current de minimis exception to the duty to refer.

This would reduce the burden on small business by giving certainty that the single CMA did not have jurisdiction over a merger that fell below a de minimis threshold. It would help ensure that the cost to business and the single CMA did not exceed the benefits generated from preventing potentially anti-competitive small mergers.

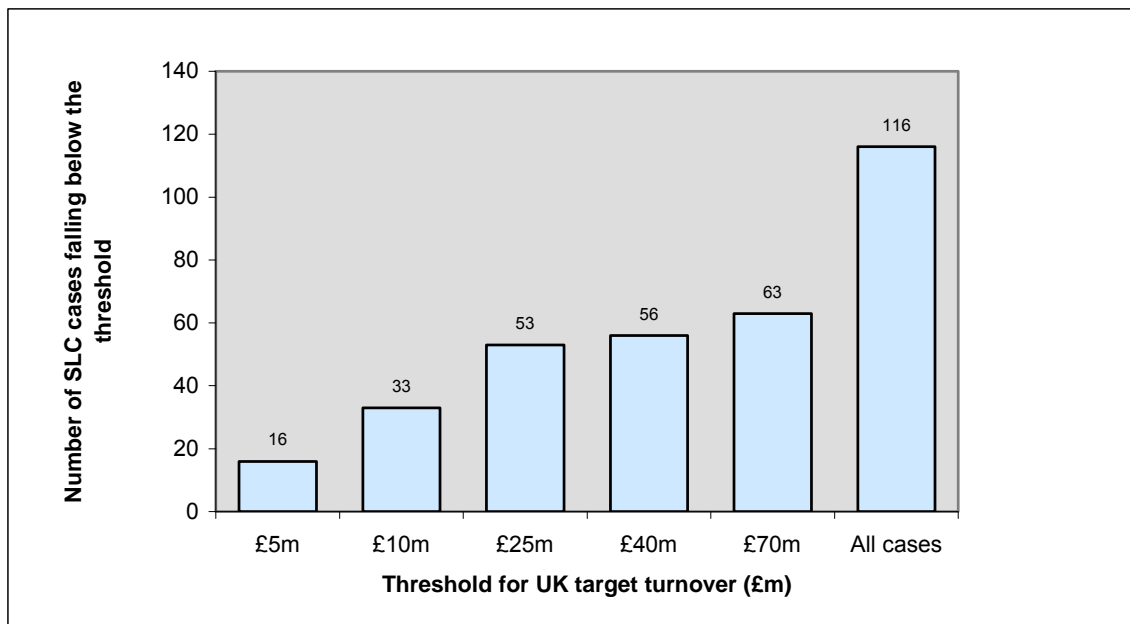
4.41 The CBI has argued that the exemption should be for mergers where the target's UK turnover is less than £5 million. However, as Figure 4.1 shows, had this exemption been in place since 2004, 16 of the 116 cases that met the realistic prospect of substantial lessening of competition would not have been investigated by the OFT.⁴⁶ Further data shows that for 8 cases since 2006, where the target's UK turnover was less than £5 million, the acquirer's worldwide turnover exceeded £10 million.⁴⁷ Therefore, setting the exemption where the target's UK turnover does not exceed £5 million and the acquirer's worldwide turnover does not exceed £10 million would exempt some small mergers whilst reducing the risk of anti-competitive mergers escaping review.

4.42 The Government believes this exemption could apply if we were to retain the current voluntary notification regime or, under option 2, a hybrid mandatory notification regime. Option 1, a full mandatory notification regime would not require an exemption as these mergers would not be captured by the threshold.

⁴⁶ 8 Of these cases were cleared on de minimis ground.

⁴⁷ These are the cases for which OFT have details of both the acquirer and target turnover.

Figure 4.1 Cumulative distribution of cases in which the duty to refer arose at the OFT stage based on UK target turnover for 116 cases since 2004.



Source: OFT

Streamlining the Merger Regime

Statutory timescales

4.43 **The Government is considering whether to introduce statutory timescales for phase 1 and the undertakings in lieu and remedies implementations stages of both phase 1 and phase 2.** As with the Markets regime the introduction of statutory timescales could achieve quicker results and outcomes for businesses and consumers. It could also give business certainty as to when decisions would be made and could incentivise a speedier end to end merger process.

4.44 Phase 1 of the merger regime does not have a statutory time limit (other than the four month time period within which completed mergers may be referred to the CC or the time limits imposed by use of the statutory merger notice). At phase 1 there is no time limit for negotiation of undertakings in lieu and on the time by which the OFT can stop the statutory clock.

4.45 The specific time limit for different aspects of phase 1 is likely to vary depending on whether we adopt a mandatory or voluntary notification regime. A mandatory regime is likely to require tighter timescales (for example 30 working days) to keep the suspensory period to a minimum. In a voluntary notification regime, an appropriate time period might be 40 working days. In setting time limits, it may also be useful to take into account factors such as the procedures and time limits for the Take Over Code.⁴⁸

⁴⁸ The Takeover Code, The Panel on Takeovers and Mergers, 2009.

4.46 Phase 2 has a 24 week statutory time limit (which can be extended once by up to a maximum of 8 weeks) which does not include remedies implementation. The Government is not minded to reduce this period as it believes this would compromise the quality and robustness of decisions. The Government is considering introducing a statutory timescale of 12 weeks on phase 2 remedies implementation between the publication of the final report and the single CMA making either an Order or accepting undertakings. This could be extended by up to 6 weeks.

4.47 Any changes to the timescales would need to ensure that the rigour and robustness of the regime were upheld. These could include:

- the ability to extend the time frames (for example up to a further six weeks for the remedies implementation stage) in the case of complex cases;
- information gathering powers for phase 1 to ensure that evidence can be gathered to determine whether the phase 1 threshold of referring a case to phase 2 is met within the set time period (see paragraph 4.48 – 4.49);
- extending information gathering powers for main and third parties and stop the clock mechanisms during the undertakings in lieu and remedies implementation⁴⁹ of both phase 1 and phase 2.

Information gathering and stop the clock powers

4.48 **The Government is minded to extend the powers to obtain information from main and third parties to Phase 1 of a merger review.** The powers would be the same as those currently applying to phase 2. Presently in phase 2, the CC has the ability to stop the clock if main parties do not comply. It can also issue penalties if main and third parties do not provide information. The OFT has neither the information powers nor the ability to impose a penalty, but is able to stop the administrative and statutory clock in order to seek to incentivise main parties to submit information.

4.49 The arguments for extending information powers in phase 1 are relevant to both voluntary and mandatory notification regimes. This would enable the single CMA to obtain information when main or third parties were not cooperating and could potentially allow the single CMA to complete phase 1 reviews more quickly. In certain circumstances, it might also reduce the likelihood of a merger being referred to phase 2 if the increased information enabled the single CMA to clear the case. If information powers were extended, these would need to be accompanied by stop the clock powers, if the main parties did not comply, as well as powers to impose a penalty if main parties or third parties did not comply.

⁴⁹ This issue is also relevant to market investigations and a similar approach is proposed for such cases, see paragraph 3.19.

Anticipated mergers in phase 2

- 4.50 **In the case of anticipated mergers, the Government is considering whether to introduce a discretionary ‘stop-the-clock’ power to enable the single CMA to suspend or extend its statutory review timetable for a period of three weeks should it believe cancellation or significant alteration to the merger is likely.** Following a reference of an anticipated merger to the CC, merger parties will often review their position and, on occasions, this may lead to the merger not proceeding. A ‘stop-the-clock’ power would enable the single CMA to stop issuing requests to merging parties and third parties and thus reduce the investigatory burdens for all parties, including the single CMA, where referred mergers were subsequently abandoned.

Enable single CMA to consider remedies earlier in Phase 2

- 4.51 **The Government is considering whether the single CMA should be able to consider remedies in phase 2 without having to decide whether the merger has or will result in a SLC.** It would do this when the merging parties were willing to offer remedies immediately following the initiation of the phase 2 process. While this would enable cases reaching phase 2 to be closed earlier, it may have the disadvantage that the remedy is less targeted to the actual competition problem because the remedies would be based upon the single CMA’s then understanding of the implications of the merger (which may be little more advanced than at the time the decision was taken to refer the merger). Such an approach may also change the incentives of parties to seek to agree undertakings in lieu of a reference to phase 2.
- 4.52 To avoid creating an incentive to pursue remedies in order to run out the clock on the investigation, it would be necessary to introduce an ability to suspend the deadlines for reporting so that, if appropriate remedies were not forthcoming, the investigation could continue. It may also be necessary to limit the amount of time available to parties to put forward acceptable remedies, after which the single CMA would continue with its usual investigative process.

Appeals in merger cases

- 4.53 The factors to be considered in making the final choices on the appropriate decision making structure for the CMA will include the need to ensure fair process and an ECHR compatible right of appeal to an independent and impartial tribunal. These are set out in chapter 10.

5. A Stronger Antitrust Regime

The Government is concerned that antitrust cases take too long, and result in too few decisions, thus having less deterrent effect on anti-competitive activity than they should. This may be in part due to the overall weight of procedural requirements. The Government seeks views on options to lighten these requirements by shortening either the investigation/decision stage or the appeal stage, while still retaining fairness and robustness of decisions.

These options are:

Option 1) Retain and enhance the OFT's existing procedures:

- Build on the streamlining and other procedural improvements which the OFT has in hand, whilst retaining full merits appeal to the CAT.

Option 2) Develop a new administrative approach:

- Create an Internal Tribunal in the single CMA: the CMA's Executive and the sector regulators would bring cases before the Tribunal with appeal being by way of judicial review.
- Variants for a new administrative approach would include modelling the UK regime more closely on appeal arrangements in the European regime while strengthening procedural safeguards at the administrative phase.

Option 3) Develop a 'prosecutorial' approach:

- The CMA and sector regulators would 'prosecute' cases before the CAT which would decide on infringement and penalty.

Introduction

5.1 Antitrust law in the UK concerns prohibitions against anti-competitive agreements and abuse of dominance in the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The potential consequences of breaches of the prohibitions are severe: fines of up to 10% of annual turnover, agreements being void, liability in damages and disqualification of directors.

- 5.2 The underlying law on the antitrust prohibitions derives from the TFEU and European case law, applies across the European Union and is enforced by national competition authorities in the member states and by the European Commission, but the enforcement arrangements vary.
- 5.3 In the UK, the OFT and the sector regulators with concurrent powers: (i) carry out **investigations**, including making statutory demands for information and carrying out any necessary on-site inspections; (ii) **prosecute** alleged infringements through a formal Statement of Objections – in effect a draft detailed and reasoned decision; (iii) then **adjudicate** as to whether an infringement has occurred by reviewing the parties' submissions in response to the Statement and in appropriate cases conducting an oral hearing, and then taking a decision on whether there has in fact been an infringement; and (iv) finally they **decide on the level of fine**, if any, that should be imposed. There is then a right to appeal the infringement decision and the fine on the merits to the CAT. This means that, in the many cases that are appealed, the CAT is effectively the decision-maker on the appealed issues.
- 5.4 The European Commission also acts as investigator, prosecutor and adjudicator. In contrast to our provision of appeal on the merits, the General Court (formerly the Court of First Instance) has full jurisdiction only over the amount of penalty; it has a more limited, judicial review-like jurisdiction over the actual infringement decision.⁵⁰ In practice, the Court gives a significant 'margin of appreciation' to the European Commission in making economic assessments.
- 5.5 The workings of the antitrust regime, the differences between judicial review and appeal on the merits, and the relevance of Article 6 (the 'right to a fair trial') of the European Convention on Human Rights (ECHR) are explained in Appendix 1.

Rationale for consulting on reform of antitrust enforcement

- 5.6 Combating anti-competitive agreements and abuse of dominance is a critical part of the competition regime. Harm caused to consumers and competing businesses (including new entrants) can be considerable. Competition authorities need to tackle, and be seen to tackle, such practices in order to deter, strongly, others from engaging in similar activities. A comparison of case numbers suggests that the UK brings fewer antitrust cases than a number of other EU member states.

⁵⁰ Article 263 TFEU.

Table 5.1 Aggregate figures on antitrust cases for selected member states (1 May 2004 to 28 February 2011)

Member state	New case investigations	Decisions notified to the European Commission
France	198	71
Germany	140	66
Italy	87	62
Spain	82	42
Netherlands	78	34
Denmark	64	34
Greece	33	25
Hungary	82	20
Sweden	36	17
Slovenia	26	15
UK	56	12
European Commission	198	N/A

Source: European Commission

- 5.7 The UK also seems to take significantly longer over both anti-competitive agreement and abuse of dominance cases than other member states: see Tables 1 and 2 in Appendix 2. Certain cases can be extremely protracted; for example, the tobacco price-fixing case is still at the appeal stage for some parties eight years after the OFT opened an investigation.
- 5.8 Questions can be raised over the comparability of these data as between EU member states – the UK’s competition authorities may for example be targeting particularly serious and complex cases more than those in other member states - and it is impossible to say what proportion of anti-competitive behaviour is being tackled in any particular jurisdiction since the number of potential cases is unknown and unknowable.
- 5.9 A number of commentators have identified the relatively low number of UK cases. For example, the KPMG Peer Review of Competition Authorities⁵¹ drew attention to survey evidence suggesting that the UK needed to improve the speed and number of antitrust cases. It has also been pointed out that there have been significantly fewer cases than had been anticipated when the Competition Act 1998 was introduced.⁵²
- 5.10 There is a common view, at least amongst those responsible for enforcing the antitrust prohibitions, that the paucity of cases and their length is due in part to the burden on the competition authorities in establishing and upholding a case. The NAO has noted, ‘[a] perception persists amongst Regulators and the Office of Fair Trading that the UK

⁵¹ KPMG (2007) *op cit*, footnote 4.

⁵² Margaret Bloom (2010), ‘The Competition Act at 10 Years Old: Enforcement by the OFT and the Sector Regulators,’ *Comp. L.J.* 2010, 9(2), pp 141-161.

enforcement system, including the likelihood of appeal, is an onerous process compared with the use of other powers.⁵³ The NAO has also noted that, '[t]he decision process itself is often lengthy; and following a decision, most Competition Act investigations are subsequently appealed. There is a risk that the length, and uncertainty of outcome, of the enforcement process in its entirety may reduce the appetite of the authorities for using their competition enforcement powers.'⁵⁴

5.11 There are a number of important considerations that would need to be taken into account in any reform aimed at easing the competition authorities' task in bringing cases and making them stand.

- Businesses rightly expect due process in the investigation of allegations that they have broken the law, especially when the potential consequences are so significant.
- Businesses are also protected by the ECHR and in particular the Article 6 'right to a fair trial' so procedural fairness must be built into the system.
- Antitrust cases often involve complex issues of law and economic analysis and this limits the extent to which the competition authorities' task can be made more straightforward.

5.12 In looking at these issues it is helpful to bear in mind two common but contrasting approaches to enforcing competition law which can be found in many legal regimes.

5.13 In an 'administrative model', the competition authority seeks to establish the truth and to take decisions itself. It gives a full and fair hearing to the alleged infringer, including by stating its concerns formally, providing access to the file and giving careful consideration to the alleged infringer's rebuttal before taking a decision. In effect, it operates as adjudicator as well as investigator and prosecutor. The European Commission follows this model as do many member states. In this model the authority is the primary decision-maker and the court plays a role only on appeal.

5.14 In a 'prosecutorial model' the administrative authority investigates suspected misconduct, builds a case and then in effect presses charges before a court or tribunal. This model can be used in a criminal or a civil enforcement context, but here it is intended only to describe a means of enforcing civil prohibitions.⁵⁵ The prosecutorial model is the approach adopted for civil as well as criminal antitrust prohibitions in other common law jurisdictions such as the United States, Australia, Canada, and Ireland. In this model the court is the real decision-maker.

⁵³ *National Audit Office Review of the UK's Competition Landscape*, March 2010, paragraph 3.8.

⁵⁴ *Ibid*, paragraph 10.

⁵⁵ For example it is used in the UK for enforcement in the criminal courts of offences, including the criminal cartel offence, and it is also used for enforcement in the civil courts of some breaches of consumer protection law.

- 5.15 Looked at in this light, the UK model appears to provide many of the procedural protections needed in an administrative model while also allowing the court to be the final decision-maker in cases that are appealed, as it would be in a prosecutorial model. The competition authorities follow the procedures outlined in paragraph 5.3 which involve protections of the rights of defence built into the detailed case handling processes. Then the parties have the right to appeal the decision and to argue the merits of it before the CAT which has full jurisdiction to substitute its analysis and to impose its decision. In the many cases which go to appeal, the CAT may be said to be the real decision-maker over the matters appealed.
- 5.16 Arguably, these successive processes can mean that the case is effectively run twice.⁵⁶
- 5.17 Business and practitioners have also expressed concerns that the procedures are too protracted and that the roles of the OFT and sector regulators lead to potential unfairness because of a lack of a separation of powers.
- 5.18 The Government considers that there ought to be scope to lighten the overall process and allow a swifter throughput of cases. Conceptually, this could be done by moving either to a more administrative or a more prosecutorial approach, subject to the considerations set out below, in particular the requirements of Article 6 of the ECHR.

Article 6 of the ECHR

- 5.19 Article 6 provides a right to a fair hearing within a reasonable time before an independent and impartial tribunal established by law. This is commonly referred to as the 'right to a fair trial'. Article 6 applies to decisions taken that determine civil rights and obligations or criminal charges.
- 5.20 Where the latter are at issue, Article 6 provides a number of additional rights. It is commonly recognised that antitrust decisions engage the 'criminal' rights under Article 6 even though they are administrative decisions and part of the civil law. The 'criminal' protections are applied because the penalties that can be imposed are essentially punitive in nature and designed to deter infringement.
- 5.21 Appendix 1 gives detailed guidance on the relevant Article 6 issues and case law. The Government considers that all of the following options could be implemented consistently with Article 6.

⁵⁶ Although the CAT has generally sought to focus appeals on the relevant and substantive disputes.

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 5.59, and the costs and benefits of these.*

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

Options

Option 1. Retain and enhance OFT's existing procedures

5.22 In the context of the issues raised earlier about the throughput of cases and the maintenance of a fair and rigorous decision-making process, the OFT has been developing proposals to streamline its procedures so as to improve case delivery. Some changes – described below – have already been introduced and the OFT has recently published new guidance on its antitrust investigation procedures⁵⁷ with the aim of giving businesses and their advisers greater clarity over how it handles antitrust cases in order to help the OFT to conclude investigations quicker and more efficiently. The OFT is also currently considering further measures.

5.23 Option 1 would capture these potential improvements as a way of addressing the concerns raised about antitrust enforcement. The sector regulators would be free to adopt or not adopt the OFT process changes, just as they are now.

5.24 The improvements that the OFT has put in place to date include:

- the establishment of a team to trial new methods of speeding up competition cases and ways of engaging with parties;
- methods to speed up the case-opening process with a view to encouraging more well-reasoned complaints: offering pre-complaint discussions to parties considering submitting a complaint, and committing to making a decision on whether to open a formal investigation within a maximum of four months of receiving a substantiated complaint;

⁵⁷ A guide to the OFT's investigations procedures in competition cases – Guidance - March 2011 (OFT1263)

- routinely considering narrowing the scope of its investigations throughout the case process, while maintaining impact in terms of precedent and deterrence;
- more sophisticated information gathering, for example generally providing parties with a draft information request to allow them the opportunity to comment on the scope of the request and the practicality of collecting the required information within the timescale proposed, so that requests for information can be better focused to collect relevant material for the investigation, less irrelevant material is collected and the timescales given for completion are achievable;
- more robust enforcement of deadlines for the provision of information and/or confidential versions of information supplied by parties to avoid delays to the OFT investigation;
- greater willingness to consider commitments⁵⁸ in appropriate cases, as a way of concluding cases more quickly;⁵⁹
- use of early resolution ('settlement') in appropriate cases, as a way of concluding cases more quickly;
- improvements to internal case-team efficiency, sharing of know-how and best practices.

5.25 In its new procedures guidance, the OFT has also committed to greater transparency in its antitrust investigations, with parties being informed of the identity of the decision-maker and key individuals in the case team at the outset of a formal investigation. The parties will be given access to the decision maker at the oral representations meeting and also the opportunity to have a 'state of play' meeting with senior OFT staff before a Statement of Objections is issued. The guidance provides greater transparency as to the OFT's internal processes, including the role of staff outside the case team in reviewing the case before a decision is taken.

5.26 The OFT has also announced a trial of a Procedural Adjudicator⁶⁰ for antitrust cases. The Procedural Adjudicator role will allow for the swift resolution of disputes between parties and the case team on procedural issues, such as deadlines for the provision of information and confidentiality redactions. This role is being trialled in response to a number of concerns expressed by respondents to the OFT's consultation on its draft procedures guidance that there was previously no effective way to resolve disputes on procedural issues quickly and

⁵⁸ Under section 31A of the Competition Act 1998.

⁵⁹ Note that it is for the party or parties to the investigation to offer commitments. The OFT cannot require parties to do so.

⁶⁰ The term Procedural Adjudicator is being used by the OFT to distinguish the role from the role of Hearing Officer at the European Commission since the roles and responsibilities are not identical.

that parties had to consider applying for judicial review of the OFT's decisions on procedural issues. The trial will enable the OFT to establish whether the existence of the Procedural Adjudicator role does indeed allow disputes to be resolved effectively, allowing cases to be progressed more quickly. If not, the role will be removed at the end of the trial period.

- 5.27 The OFT is also considering introducing transparent, administrative timetables in antitrust investigations. The OFT is assessing how this could assist in providing stakeholders with (i) greater clarity on an investigation's decision points and stages, and (ii) a commitment in terms of speed and resourcing.
- 5.28 This option would enable the single CMA to continue to build on the experience of the OFT over the last 11 years. The improvements the OFT is making are targeted towards improving the speed of the regime which is an issue of concern to the Government. The OFT considers that, collectively, these measures are already helping to deliver significant improvements in speed and efficiency in cases that it has opened more recently. This option may also entail less risk than those which involve more fundamental change.
- 5.29 On the other hand, the option may not be sufficiently radical to bring about significant improvements in the speed and throughput of antitrust decisions.

Option 2. Develop a new administrative approach:

- 5.30 An alternative approach would be to go further by strengthening the independence and impartiality of the decision-making stage within the single CMA, enabling appeal to be on a judicial review basis. However, to ensure procedural fairness and to meet ECHR requirements, some changes to the decision making stage within the CMA would be required.
- 5.31 This alternative approach would see the creation of an Internal Tribunal in the single CMA, whose membership would include independent persons appointed to adjudicate on cases. The first-phase decision-makers within the single CMA and the sector regulators would bring all cases before the tribunal for decision. This 'first phase' of investigation might be up to the Statement of Objections point, although there might be a need to cater for commitments at the first phase. The substantial independence of the decision-makers would guard against confirmation bias.⁶¹
- 5.32 The UK antitrust system currently meets the Article 6 ECHR requirements for decision making by an 'independent and impartial

⁶¹ Confirmation bias is the tendency to selectively search for, and give more weight to, evidence that confirms one's prior belief.

tribunal' with 'full jurisdiction' by providing for decisions to be appealed to the CAT on their merits.

5.33 The Article 6 case law demonstrates that it is possible to create a form of 'internal tribunal' which would adjudicate but not investigate and that will meet the Article 6 requirements when taking decisions at first instance. But there must be sufficient safeguards in place so that the decision-maker's independence and impartiality – in particular their separation from the investigation and prosecution function – are not in doubt. These safeguards might include ensuring that:

- one or more permanent tribunal members is suitably legally qualified and appointed by the head of the judiciary;
- the terms and process of appointment of members of the decision-making tribunal guard against concerns that they may be influenced to achieve particular policy goals, for example, through appointment by an external person or body;
- there is a clear and comprehensive policy on conflicts and bias;
- members of the tribunal are not involved in the investigation and prosecution of cases on which they are called on to adjudicate, or in the day-to-day governance of the investigation and prosecution function.

5.34 Safeguards could be set out in legislation or in the CMA's rules, as appropriate. The structure and governance of the body would need to ensure that the independence and impartiality of the Internal Tribunal were not in doubt (see chapter 10).

5.35 The potential advantages of the Internal Tribunal option are that:

- the views of the competition authority and business would be argued before the Internal Tribunal at an earlier stage than would be so, currently, in a case under appeal to the CAT. This could allow a swifter throughput of cases while still providing for a robust decision-making process;
- appeal could be by way of judicial review on the basis that an independent and impartial tribunal with full jurisdiction had been created internally;
- there could be greater consistency in decision-making and a reduced burden on sector regulators in progressing their cases (because the decision-making role would pass to an expert CMA after the first phase).

5.36 On the other hand, the CAT might apply a more intensive form of review over time, given the seriousness of the issues, and the loss of the CAT's ability to make its own decision rather than refer the case back to the competition authority might prolong some cases.⁶²

Variants on a new administrative approach

5.37 There could be more than one way to develop a new administrative approach to decision-making and appeals in antitrust cases.

5.38 Firstly, could decision-making follow the same process as phase 2 of mergers and markets cases and be led and determined by panels of independent office holders? The panel would have an investigatory as well as an adjudicatory role (unlike an Internal Tribunal which would be adjudicatory only). It could potentially take cases at an earlier stage than an Internal Tribunal: for example where a reasonable belief has been formed that a prohibition has been infringed.

5.39 This approach could also provide a higher degree of transparency, rigour, protections against confirmation bias and access to decision-makers. Like the Internal Tribunal, it could reduce the burden on the sector regulators in developing their cases. It would introduce a well established mechanism for effective, independent project management and robust evidential and economic analysis that has been shown to work for mergers and market investigations. Such a change would also enable antitrust effects cases and market investigations to be investigated in a similar way, improving the overall coherence of the regime. This would be novel for antitrust cases, would introduce a two-phase process of investigation and might be more resource intensive than current arrangements. It also might not provide sufficient separation between investigation and prosecution (on the one hand) and decision-making (on the other hand) to allow appeal by way of judicial review.

5.40 Secondly, could further protections be built in to the current OFT arrangements for antitrust enforcement? For example, adopting from the European Commission's procedures the use of Hearing Officers who are separate from the case team, report direct to the Commissioner and seek to ensure that due process is followed by the team; requiring decision-makers to be specified; or mandating oral hearings at which the parties are able to put their case to the actual decision-makers. Proposals such as these are being proposed or trialled by the OFT as part of its streamlining exercise, but are there other steps which could be taken in this direction?

5.41 If the administrative arrangements were reinforced in one of these ways, should the law provide that appeals be on the same basis and grounds as those made to the European General Court against decisions of the

⁶² The CAT has however only substituted its own infringement decision in two cases to date so the significance of this should not be exaggerated.

European Commission? The standard of review applied by the General Court on cases involving an appraisal of complex economic matters has been held by the court to be:

*'limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error or a misuse of powers.'*⁶³

- 5.42 In practice, the General Court has, under its unlimited jurisdiction in respect of fines,⁶⁴ the ability to quash or amend fines, and it is this which ensures the system provides the full jurisdiction which ensures a fair trial. As indicated in the quotation above, when applying its more limited jurisdiction to review the legality of acts⁶⁵ the General Court has consistently held that it must give the Commission a 'margin of appreciation' over complex economic matters.
- 5.43 The Commission deals with many of the most significant antitrust cases, and these are the appeal rights which UK businesses have in those cases, as opposed to the full merits appeal they may invoke when the decision is taken by the OFT or the sector regulators. By aligning appeal rights with those applied under the TFEU, this option would follow the current logic of the UK's domestic competition regime under which the jurisprudence is essentially European. This would automatically import any more stringent role the European courts developed in the future, including, potentially, in response to any concerns about human rights.

Option 3: A prosecutorial system

- 5.44 Under this option, the single CMA or sector regulator would not decide on infringement or penalty but would 'prosecute' cases before the CAT, which would decide both matters. By taking away their adjudicatory function and giving this to the CAT, the burden on the CMA and the sector regulators of combining adjudication with the role of investigator and prosecutor would be lightened. Other things being equal, this would enable cases to reach the ultimate decision-maker at an earlier stage and should enable more decisions to be taken.
- 5.45 Option 3 would also clearly be compliant with Article 6 of the ECHR. It would be a big change from the UK's current system for antitrust, although in principle relatively straightforward.
- 5.46 Certain processes (such as access to the file or, in a court-run process, disclosure) would remain in some form so the differences in weight of procedure should not be exaggerated. Careful thought would need to be

⁶³ See, for example, *Van den Bergh Foods Lt v. Commission* (Case T 65/98) [2003] ECR II 4653, at paragraph 80.

⁶⁴ Article 261 TFEU and Article 31 of Regulation 1/2003.

⁶⁵ Under Article 263 TFEU.

given to if and how the CAT could be guided on fining levels,⁶⁶ and to what if anything could replace the guidance business can now receive by way of a non-infringement decision by a competition authority. Finally, there may be advantages in a system in which the competition authority rather than the court is the centrepiece of the system, as the decision-maker, and perhaps more readily the driver of policy. This view has been expressed, in the European Union context, by the Commissioner for Competition, Joaquín Almunia,⁶⁷ who has argued in favour of an administrative approach on the basis that it would have been difficult for the General Court and its predecessor to lead the move towards a focus on the effects of conduct.

5.47 However, advantages of the prosecutorial approach might be that:

- Unlike the stages of any administrative procedure (Statement of Objection, oral hearing, access to file etc.) court procedures are flexible and can be geared to the needs of the particular case. A prosecutorial system would enable evidence to be heard just once (rather than before the authority and again on appeal) and in open court. There should therefore be scope for streamlining both in general and in the circumstances of the individual case.
- The process of establishing and working up a case for 'prosecution' would be a wholly different process with a very different dynamic in terms of the effort and resources needed and the interaction with the subject of the investigation. Moving to a prosecutorial system has the potential to provide the CMA with a greater degree of focus in its task of enforcing competition law. Instead of having to investigate, prosecute and decide it could concentrate its energy on the entirely partial activities of investigation and prosecution without needing to be drawn into acting in a quasi-judicial capacity. Whilst a case would have to be made out, there would be no need for a full Statement of Objections or a reasoned decision of the kind the competition authorities now have to provide. All this could save time and money for business as well as the authorities.

Other changes to the antitrust arrangements

Timetables

5.48 **The Government seeks views on the scope for introducing statutory or administrative deadlines for antitrust cases** under any of the three options set out above. (We seek views elsewhere in this

⁶⁶ In the Competition Bill as introduced in 1997 the CAT was bound by the statutory guidance on the appropriate amount of a penalty. Following opposition in Parliament, this provision was removed by means of a Government amendment. In practice, the CAT has not disregarded the guidance when considering fines, but this is likely because the OFT and the sector regulators are bound by it.

⁶⁷ Joaquín Almunia, *Due process and competition enforcement*, IBA 14th Annual Competition Conference, Florence, 17 September 2010.

document on introducing more, and tighter, statutory deadlines for markets and merger cases). The OFT is considering introducing administrative timetables for antitrust cases. There may be difficulties with statutory deadlines for investigations concerning potential infringements of the antitrust prohibitions, where significant fines may be payable (as distinct from inquiries under the mergers and markets regimes where even though regulatory remedies may be imposed there is no breach of the law) as the incentives to game play may be high, in particular in an administrative model.

Private actions

- 5.49 In 2007, the OFT published a report looking at options for improving access to redress for those who have suffered loss as a result of breaches of competition law.⁶⁸ The OFT recommended a number of measures that it believed would reduce barriers to consumers and businesses wishing to bring legal proceedings. Additionally, in 2008, the European Commission published a White Paper⁶⁹ on Damages Actions for Breach of the EC antitrust rules. The White Paper suggests specific policy options and measures that would help giving all victims of European Union antitrust infringements access to effective redress mechanisms so that they can be fully compensated for the harm they suffered. Both papers looked in particular at models for collective redress.
- 5.50 More recently, Commissioner Almunia set out the intentions of the current College in this regard.⁷⁰ Rather than pursue an approach aimed solely at breaches of competition law, the Commission is keen to develop a coherent European framework to strengthen collective redress drawing as much as possible on the different national traditions.
- 5.51 The European Commission published a consultation on this issue on 5 February 2011.⁷¹ The Government notes that it considers collective redress in a horizontal context rather than looking at competition alone (highlighting consumer, environmental and financial services law as other examples where such an approach may be considered). The Government is considering the implications of this new approach in developing a way forward, in terms of its thinking about collective redress both at European and domestic level. In doing so, it will also take account of the OFT's 2007 recommendations, as well as evidence gained through parallel work in the consumer field and on alternative dispute resolution, to identify an appropriate mechanism.
- 5.52 The Government's consideration will also cover the implementation of section 16 of the Enterprise Act 2002 (which empowers the Lord

⁶⁸ Private actions in competition law: effective redress for consumers and business, OFT, 2007.

⁶⁹ <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1>

⁷⁰ <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/554>

⁷¹ http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/cr_consultation_paper_en.pdf

Chancellor to make regulations to enable the court, of its own accord, to transfer to the CAT any proceedings where infringement of an antitrust prohibition is alleged), the possibility of 'stand alone'⁷² actions being commenced in the CAT (as an alternative to the ordinary courts) and whether the CAT's jurisdiction should cover, on a judicial review basis, a procedural challenge against the handling of antitrust investigations by the OFT/single CMA or the sector regulators.

Offences under the Competition Act 1998 and the Enterprise Act 2002 for non-compliance with an investigation

- 5.53 The OFT has a range of powers for investigating suspected infringements of the antitrust prohibitions and the criminal cartel offence. There are criminal offences for non-compliance with these investigatory measures. Section 42 of the Competition Act 1998 provides for criminal prosecution where parties do not comply with investigatory measures in relation to the antitrust prohibitions. Criminal investigations and prosecutions are resource intensive and time-consuming and may in practice not be feasible in many cases. The OFT has not to date pursued a criminal prosecution for non-compliance. In addition, there may be questions around identifying the appropriate individual to prosecute, or difficulties around prosecuting a company, as well as questions as to whether prosecution would be an appropriate measure or would meet the public interest test in relation to every instance of non-compliance. The OFT would have to prove intention and the prosecution would need to be prioritised by the prosecuting authority. Also, the relevant standard of proof would be the higher criminal standard of 'beyond reasonable doubt'. These difficulties potentially undermine the effectiveness of the sanction.
- 5.54 The same issues arise in relation to offences for non-compliance with other requirements under the regime, including the offences in section 201 of the Enterprise Act 2002 (in respect of investigatory measures under the criminal cartel offence).
- 5.55 The Government accordingly proposes to amend the legislation to allow the OFT to impose financial penalties on parties who do not comply with the requirements in question in addition to the existing possibility to prosecute. The fines could be similar to the daily fines the Commission can impose.⁷³ This would encourage parties to provide information more fully and in a more timely fashion.

Powers of investigation including powers of entry

- 5.56 The Government is committed to rolling back intrusive state powers and repealing unnecessary laws and regulations. The Protection of

⁷² Where there is no prior infringement decision of the OFT, a sector regulator or the European Commission.

⁷³ See Article 24 of Regulation 1/2003.

Freedoms Bill repeals a number of powers of entry and includes amongst other things a new power enabling the relevant Secretary of State (or other responsible Minister) to:

- repeal specific powers of entry where they are judged unnecessary;
- add safeguards or limitations to existing powers where appropriate, such as a requirement of a judicial warrant for use of the power, or adding explicit exclusions, such as ruling out use of the power for private homes where this is not essential;
- consolidate groups of powers where appropriate in order to improve transparency for the citizen.

5.57 The Bill also imposes a statutory duty on Secretaries of State (or other responsible Ministers) to review all the powers of entry within their policy responsibilities and to report to Parliament within two years of Royal Assent of the Bill (expected to be late 2011 or early 2012). As preparation for that review in the field of competition law, the Government invites views on the powers of entry in the Competition Act 1998 and the Enterprise Act 2002.

5.58 There are powers of entry for OFT officers under the Competition Act 1998 in relation to antitrust investigations that they conduct,⁷⁴ in relation to antitrust investigations conducted by the European Commission,⁷⁵ and in relation to antitrust investigations conducted by the national competition authorities of other EU member states.⁷⁶ These powers apply to both business and domestic premises (defined as 'non-business premises' in the case of a European Commission investigation) and a warrant must be obtained in the High Court before the OFT's officers can exercise the powers. OFT officers can also enter business premises without a warrant, if they give two working days' notice of the intended entry, when conducting their own investigation, or assisting another EU national competition authority with its investigation. OFT officers (and other competent persons authorised by the OFT) have powers of entry in relation to the criminal cartel offence under the Enterprise Act 2002.⁷⁷ These comprise the power to enter any premises (whether business or domestic premises) under a warrant.⁷⁸

5.59 These powers of entry are part of a wider set of powers which enable the OFT and the sector regulators to investigate suspected infringements of competition law and of the cartel offence and to enforce the antitrust prohibitions. The powers that allow the OFT to assist the

⁷⁴ Sections 27 to 28A Competition Act 1998.

⁷⁵ Sections 62 to 63 Competition Act 1998.

⁷⁶ Sections 65F to 65H Competition Act 1998.

⁷⁷ Under section 194.

⁷⁸ The OFT also has powers of intrusive surveillance under the Regulation of Investigatory Powers Act 2000 for the purpose of investigating the criminal cartel offence. There are related powers to interfere with property under sections 93 to 94 of the Police Act 1997.

European Commission in its investigations are a requirement of EU law. In relation to the powers governed solely by national law, the Government's current view is that they are necessary in the light of the damage caused by anti-competitive agreements and conduct, including cartels, and the fact that in many cases infringing businesses will take great care to keep their activities secret. The Government sees value in maintaining powers that are equivalent to those available to overseas competition authorities so that our regime can play an appropriate part in the detection and punishment of infringements that operate internationally. The Government also notes that there are already safeguards in place to control the exercise of the powers. For example, warrants authorising entry by force need to be issued by the High Court or Court of Session (rather than the Magistrates Court, which is more usual for such powers). Entry into domestic premises only covers private dwellings where they are used in connection with the affairs of an undertaking or association of undertakings, or where documents relating to their affairs are kept there. The Government would however welcome consultees' views.

6. The criminal cartel offence

The cartel offence helps to deter the most serious and damaging forms of anti-competitive conduct: hard core cartels. The possibility that business people will face imprisonment if found guilty of the offence should radically alter the incentives to engage in cartels.

Experience shows that the offence is capable of being applied to the biggest international cartels and in parallel with criminal investigations in the US and with Article 101 investigations in Europe. Nonetheless, there have been only two cases prosecuted since 2003 and this weakens the offence's deterrent effect.

There is a 'dishonesty' element in the offence that seems to make the offence harder to prosecute. It also puts the UK at odds with developing international best practice on how to define a hard core cartel offence.

The Government is considering the following options:

- *Option 1:* removing the 'dishonesty' element from the offence and introducing guidance for prosecutors.
- *Option 2:* removing the 'dishonesty' element from the offence and defining the offence so that it does not include a set of 'white-listed' agreements.
- *Option 3:* replacing the 'dishonesty' element of the offence with a 'secrecy' element.
- *Option 4:* removing the 'dishonesty' element from the offence and defining the offence so that it does not include agreements made openly.

Subject to considering the views expressed in this consultation, the Government favours adopting Option 4. This is because this Option appears to decrease the likelihood of defendants seeking to rely on complex economic evidence that juries will find difficult to understand whilst also striking a good balance between:

- excluding from the scope of the offence the kinds of agreement that might have countervailing benefits under the civil antitrust prohibitions; and
- differentiating the offence from those prohibitions to reduce the risk that the offence would be categorised as 'national competition law' (in which case it would not be possible to prosecute whenever there was a parallel European Commission investigation).

Introduction

- 6.1 Hard core cartels⁷⁹ are typically secret and unlawful arrangements under which competitor businesses agree to coordinate their activity, usually in order to drive up prices. They are highly damaging to consumers at all levels of the supply chain and to the wider economy.⁸⁰ The US competition authorities estimate that that there is a gain to cartel members, on average, of a 10% increase in the price of the goods or services affected. By adversely affecting the efficient running of the economy, the potential harm to society could be much greater: the harm can be assumed to be 20% of the volume of affected commerce.⁸¹
- 6.2 In recognition of the great harm that cartels cause, the Enterprise Act 2002 introduced a criminal cartel offence for 'hard core' cartel activity. The offence is committed where an individual dishonestly agrees with another person to make or implement arrangements that would lead to competing businesses fixing prices, restricting production or supply, sharing customers or markets or rigging bids in a competitive tender situation.⁸²
- 6.3 The offence should radically alter the incentives against engaging in 'hard core' cartel activity by providing for imprisonment of individuals found guilty of the offence. In the most serious cases, individuals can be imprisoned for up to five years. Executives take the threat of personal imprisonment much more seriously than the threat of civil fines alone, which they may view simply as a cost of doing business.

Rationale for consultation on reform of the criminal cartel offence

- 6.4 A 2007 report by Deloitte for the OFT⁸³ suggests that the cartel offence has begun to have the desired effect: competition lawyers and companies surveyed by Deloitte said that criminal penalties have a higher deterrent effect than other sanctions applicable to anticompetitive conduct.⁸⁴
- 6.5 The deterrent effect of the cartel offence is weaker than was intended because there have been so few completed cases to date: only two cases have so far reached trial stage and only one of them resulted in

⁷⁹ The OECD defined 'hard core' cartels in its paper *Hard Core Cartels: Meeting of the OECD Council at Ministerial Level*, 2000.

⁸⁰ An OECD Recommendation proclaimed them as 'the most egregious violations of competition law,' OECD Council (1998), *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*.

⁸¹ US Sentencing Guidelines: 2007 Federal Sentencing Guidance, §2R1.1, comment no. 3.

⁸² Section 188 Enterprise Act 2002.

⁸³ Deloitte (2007) *op cit*, footnote 36.

⁸⁴ See paragraph 5.58 and 5.59 and Table 5.11.

convictions.⁸⁵ The Deloitte report sets out that bringing more criminal cases will be a key way to significantly increase deterrence.⁸⁶

- 6.6 One of the reasons that has been suggested for the small number of cases is that the definition of the offence, and particularly the need to prove dishonesty on the part of defendants, may artificially limit the scope of cases that can be brought and make those cases disproportionately difficult to prove.
- 6.7 The legal test for ‘dishonesty’ was established in 1982 in the leading case of *Ghosh*.⁸⁷ It is in two parts:
- i. whether what was done was dishonest according to the ordinary standards of reasonable and honest people; and
 - ii. whether the defendant realised that reasonable and honest people would regard what he did as dishonest.
- 6.8 The ‘dishonesty’ element was included in the offence for a number of reasons. First, to ensure that the offence did not apply to agreements that would be lawful under the civil antitrust prohibitions. Competition law in general distinguishes between agreements which are anti-competitive and harmful and those which are pro-competitive or have strong offsetting or countervailing benefits which outweigh their harmful effects. Including ‘dishonesty’ was a way to ensure that the offence only applies to harmful agreements that are unlikely to have countervailing benefits.
- 6.9 Second, it was included to reduce the likelihood that conviction would depend on judgments taken on detailed economic evidence. The requirement to prove ‘dishonesty’ would largely exclude potentially beneficial agreements from the offence and there would usually be no need for juries to consider the economic effects of agreements. There was a concern that juries would find it difficult to understand such evidence and this would make the offence very difficult to prosecute.⁸⁸ An alternative option of expressly linking the cartel offence to proving an infringement of the civil antitrust prohibitions was ruled out for this reason.
- 6.10 Third, the ‘dishonesty’ element was intended to provide juries with a test that they would recognise and to signal the seriousness of the offence

⁸⁵ The first case resulted from a world-wide cartel in the marine hose market. The OFT investigation was run in parallel with investigations by the US Department of Justice and the European Commission. Three UK executives filed plea agreements in the US agreeing to return to the UK in custody, cooperate with the OFT’s investigation and plead guilty to the UK cartel offence. All three were sentenced to imprisonment for between two and a half and three years (reduced on appeal to between 20 and 30 months), and were disqualified from acting as directors for between five and seven years. The second case concerned an alleged fuel surcharge price fixing agreement entered into by employees of British Airways and Virgin Atlantic. The case collapsed for procedural reasons before the main trial.

⁸⁶ See paragraphs 5.101 and 5.109 to 5.110 and Table 5.13.

⁸⁷ 2 All ER 689. [1982]

⁸⁸ See paragraph 7.30 of the Enterprise Act 2002 white paper ‘A World Class Competition Regime’.

and correspondingly weighty penalties – so as to enable the offence to have maximum deterrent effect.⁸⁹

- 6.11 It was recognised at the time that the dishonesty element was an imperfect means of achieving these objectives.⁹⁰ The evidence now suggests that having a dishonesty element in the offence may no longer be the best way to meet the three aims discussed in paragraphs 6.8 to 6.10 above.
- 6.12 In relation to the first aim, while including a dishonesty element clearly narrows the category of agreements captured by the offence, it does so in a way that introduces significant lack of certainty – especially for businesses and their executives on whom the offence bites. Defining the offence by reference to dishonesty is not the only way to carve out potentially beneficial agreements.
- 6.13 In relation to the second aim, the pre-trial rulings in the *British Airways/Virgin* criminal case⁹¹ suggest that evidence of effects, including economic evidence, would be relevant to the issue of dishonesty. The courts recognised the likelihood that defendants might contend that they were not dishonest because an arrangement had or was believed to have had no detrimental effect on consumers.
- 6.14 Criticism of the *Ghosh* test has persisted and intensified and in the field of cartels specifically a 2007 report⁹² found that only around six in ten people in Britain believe that price-fixing is dishonest and two in ten people believe that it is not. This suggests, in relation to the third aim, that there is only moderate support for a criminal cartel offence defined around dishonesty – and that juries may not be as ready to convict for an offence based on dishonesty as was originally hoped.
- 6.15 In addition, though this is yet to be properly tested, proving dishonesty in criminal cartel cases may be particularly difficult because cases may not always involve an individual who is clearly motivated by personal gain. Arguably, in the context of cartels, dishonesty would be better considered as a factor in determining whether to prosecute a case in the

⁸⁹ See, e.g. Sir Anthony Hammond KCB QC⁸⁹ and Roy Penrose OBE QPM⁸⁹ 'Proposed criminalisation of cartels in the UK' and Hansard, House of Lords Committee, Thursday 18 July 2002, Column 1539.

⁹⁰ The test in *Ghosh* had already been criticised for:

- confusing state of mind with the concept of dishonesty;
- leaving a question of law to the jury, which in turn raises concerns about compliance with Article 7 of the European Convention on Human Rights (which has been interpreted as meaning individuals should be able to determine from the wording of an offence which acts and omissions can make them criminally liable);
- leading to more trials as defendants have little to lose by pleading not guilty hoping that the dishonesty element is not made out;
- leading to longer trials as the dishonesty element is a live one in all cases;
- assuming a community norm within the jury in that they must agree on the ordinary standards of honesty;
- assuming that jurors are honest or at least that they can apply ordinary standards of honesty even if they do not adhere to them.

See Ormerod, D (2008), *Smith and Hogan Criminal Law* (12th Ed), OUP, at pages 785 to 786 and the 1999 Law Commission Consultation Paper 155 *Legislating the Criminal Code: Fraud and Deception*.

⁹¹ *IB v The Queen* [2009] EWCA Crim 2575, on appeal from the Crown Court ruling in *R v George, Crawley, Burnett and Burns* [2010] EWCA Crim 1148.

⁹² Stephan, A. (2007) 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' ESRC Centre for Competition Policy and Norwich Law School, University of East Anglia.

first place or in determining the severity of the penalty on conviction rather than being an element in the offence itself. There is a risk that the dishonesty element in the criminal cartel offence may be impeding the ability of prosecutors to deliver maximum deterrence against the most serious forms of anti-competitive activity.

- 6.16 The UK is unusual in having an express requirement to prove dishonesty built into its criminal cartel offence. Other common law jurisdictions such as the USA, Canada, and Australia do not approach the cartel offence in this way.⁹³ Legislators in Australia expressly considered and rejected the inclusion of dishonesty as a requirement in the new Australian cartel offence precisely because they were concerned that it would make the offence harder to prove.
- 6.17 In the light of these comparators and the difficulties described above, the Government is considering whether there might be other options for defining the offence in a way that achieves the aims set out above and that meets the wider objectives of competition reform set out in chapter 1.
- 6.18 It is important not to lose sight of the need for any alternative to sufficiently differentiate the cartel offence from the civil antitrust prohibitions that it can be prosecuted in parallel with enforcement action taken under them. Only if this is possible can the offence continue to target the most serious and damaging international cartels, as it did in the *Marine Hose*⁹⁴ case. The options under consideration are described and evaluated below.

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.*

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

- 6.19 In the UK, section 188(1) of the Enterprise Act 2002 provides that an individual is guilty if he ‘dishonestly agrees’ with one or more other

⁹³ Nor is ‘dishonesty’ an element of the offence in other EU member states.

⁹⁴ *R v Whittle, Allison and Brammar* [2008] EWCA Crim 2560.

persons to make or implement or cause to be made or implemented certain anti-competitive arrangements of the type listed in section 188(2).

- 6.20 Under this option the offence would be revised by removing the word 'dishonestly'.
- 6.21 This would bring the UK offence more into line with its counterpart in the US where an offence is committed, in essence, if there is an agreement to conduct hard core cartel activities.
- 6.22 The making of an agreement of the relevant type would constitute both the physical and the mental elements that are required to prove an offence. While the making of an agreement appears to be primarily a physical element, it is clear from parallels with the English crime of conspiracy (which involves an agreement to commit a crime) that in English law it also incorporates the mental element of intention.⁹⁵ Accordingly removing 'dishonesty' would not result in a crime that was lacking in an appropriate mental element.
- 6.23 Removing the dishonesty element would be combined with introducing clear guidance for prosecutors (to which prosecutors would have to have regard) as to the types of agreements that are most likely to warrant investigation and prosecution.
- 6.24 Option 1 removes the problems associated with the dishonesty element of the offence and it provides much greater clarity for business, by way of prosecutorial guidance. However it carries the risk of making the offence itself too broad.
- 6.25 In the US all seriously anti-competitive agreements without countervailing benefits are '*per se*' infringements. Those that may have countervailing benefits are assessed on the basis of a 'rule of reason' – i.e. by reference to their economic effects.
- 6.26 By contrast, under EU and UK law there is a distinction between agreements whose 'object' is anti-competitive and those whose 'effects' are anti-competitive, but this does not provide an equivalent dividing line: any agreement that infringes by 'object' can, in principle, benefit from exemption from the civil prohibitions if its countervailing benefits are sufficient. There are also block exemptions for certain categories of agreement whose benefits tend to outweigh their negative effects.
- 6.27 The dishonesty element was intended in part to narrow the scope of the offence so that it was very unlikely to apply when the agreements in question could be exempt under the civil prohibitions.
- 6.28 Removing the dishonesty element could mean that the offence would be more likely to capture some forms of agreement that are capable of

⁹⁵ The mental elements of conspiracy are: (i) an intention to agree, (ii) an intention to carry out the agreement; and (iii) intention or knowledge as to any circumstance forming part of the substantive offence.

exemption under the antitrust prohibitions on the basis of their countervailing beneficial effects.

- 6.29 It is extremely rare for the most serious categories of hard core cartel agreements to be exempt, but even in relation to price fixing agreements it is not impossible.⁹⁶
- 6.30 The prosecution guidelines proposed under this Option could make clear that such agreements would not be prosecuted. However, even with such guidelines in place, there may be concern that it is inappropriate to include within the scope of the offence conduct that would not in practice be prosecuted. Using prosecution guidelines as a practical measure to narrow the effective scope of the offence could also be criticised under Article 7 of the European Convention on Human Rights.⁹⁷
- 6.31 Removing the dishonesty element of the offence without making other changes to the offence could also make it more likely that the revised offence would be 'national competition law' for the purposes of the EU Modernisation Regulation. This could result in it not being possible to prosecute the offence whenever there was a parallel European Commission investigation of the businesses involved in the same alleged cartel.⁹⁸

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

- 6.32 Under this option the 'dishonesty' element in the offence would be removed but a set of 'white-listed' agreements would be carved out from the arrangements described as falling within the offence.
- 6.33 White-listed agreements would be defined by type rather than by reference to their economic effects. For example, joint venture agreements could be expressly carved out.

⁹⁶ See for example the case of *Visa International Multilateral Interchange Fee* OJ [2002] L 318/17 in which the European Commission granted individual exemption to an agreement that fixed a standard multilateral interchange fee between acquiring and issuing banks within the Visa system. See also the early case of *Re National Sulphuric Acid Association Ltd* (OJ (1980) L 260/24) and *Uniform Eurocheques* (OJ (1985) L 35/43). In addition, more recently, in a staff working document accompanying the EU White Paper on Sport, the European Commission has noted that joint selling arrangements for media sports rights apply a single price to all rights collectively 'which constitutes price fixing' but that nevertheless in several recent cases the European Commission has recognised that such arrangements may create efficiencies that meet the criteria for exemption under Article 101 (3). 2007 Commission staff working document *The EU and Sport: Background and Context Accompanying document to the White Paper on Sport* SEC(2007) 935, at page 81.

⁹⁷ Article 7 of the ECHR provides that no one shall be held guilty of any criminal offence on account of an act or omission that did not constitute a criminal offence at the time when it was committed. The case law makes clear that it is a requirement under Article 7 of the ECHR that individuals should be able to determine from the wording of an offence (with the assistance of interpretation by the courts if necessary) which acts and omissions can make them criminally liable.

⁹⁸ This issue was considered in the preliminary rulings in the *British Airways/Virgin* case. The court held that the offence was not 'national competition law'. This was not *because* the cartel offence contains the requirement of 'dishonesty' though the presence of the 'dishonesty' element in the offence was 'not unimportant', in essence because it was an element that differentiated the offence from the civil prohibitions.

- 6.34 This option has similarities with the way the offence is framed in Australia and in Canada. In Australia, the offence consists essentially of entering into or giving effect to an agreement containing a 'cartel provision' but certain types of 'cartel provision' are carved out from the offence, for example resale price maintenance provisions and certain joint venture provisions. Similarly in Canada, agreements that are ancillary to other lawful agreements are carved out from the offence.
- 6.35 This Option would limit the offence by making clear that it does not apply to certain kinds of arrangements in respect of which it may be easiest to argue that they have countervailing beneficial effects that outweigh any detriment to competition. In this way it would avoid some of the drawbacks of Option 1.
- 6.36 It would also provide added business certainty by excluding the commonest forms of potentially beneficial arrangements from the scope of the offence.
- 6.37 The white list would be defined by type of agreement so as to avoid wherever possible having to consider economic argument in order to establish whether the offence had been committed or not. For this reason, the white list would be likely to be wider than the category of agreements that would, on analysis of their economic effects, actually be beneficial. But the most harmful agreements would still be caught within the offence.
- 6.38 The success or failure of this Option could depend on the ability to define a set of white-listed agreements sufficiently clearly; however clearly they were defined there would always be scope for argument about interpretation. But it may be possible to mitigate this risk to some extent by prosecutorial selection. The Government could also take a power in the legislation to revise the white list by Order if necessary. This would allow flexibility to ensure that the category of white-listed agreements remained consistent with emerging law and policy.
- 6.39 Although this Option would not define the white list by reference to economic effects, it would clearly be much closer to an antitrust style approach. There would not be a defined additional element that sets the cartel offence apart from the Chapter I and Article 101 antitrust prohibitions. Under this Option it may be more likely that the revised offence would be 'national competition law' for the purposes of the Modernisation Regulation and that the offence could not be prosecuted in parallel with an ongoing EU infringement case against the businesses involved in the alleged cartel.

Option 3: replacing the 'dishonesty' element of the offence with a 'secrecy' element

- 6.40 This Option would replace the 'dishonesty' element in the offence directly with a requirement of secrecy. The offence would be committed where

an individual 'secretly agrees'.⁹⁹

6.41 There might then be a statutory definition of 'secretly,' possibly along the following lines:

'an agreement may be proved to have been made secretly where the persons who make the agreement take measures to prevent the agreement or the intended arrangements becoming known to customers or public authorities.'

6.42 Many commentators note that arrangements that constitute hard core cartels are typically covert. This is because the perpetrators know that what they are doing is wrong and could attract significant penalties so hard core cartel members tend to take great care to keep their arrangements secret from customers and from public authorities. Arguably it is just these kinds of covert arrangements that the offence is intended to capture.

6.43 This suggests that including an element of 'secrecy' in the offence might be a good substitute for the element of 'dishonesty' as a means both of narrowing the categories of agreement caught by the offence and of ensuring that the offence has an additional element that helps to distinguish it from the civil antitrust prohibitions.

6.44 Whether an agreement had been entered into secretly would be a question of fact based on the evidence. The disadvantages of the *Ghosh* test would be removed: the jury would no longer have to apply a complicated test involving an objective and a subjective moral assessment.

6.45 The offence would not have been committed wherever the defendant had been open about the agreement or arrangements in question. This would have some similarities to the notification regime that previously operated in relation to potentially exempt agreements under Article 101 and Chapter I, so businesses might more readily understand it than they do the notion of 'dishonesty'.¹⁰⁰

6.46 One question that would need to be settled is whether it should be necessary for the prosecution to prove active measures to maintain secrecy (this might be needed under the draft definition set out above) or whether passive secrecy should be enough. Arguably, requiring the prosecution to show active secrecy might make the offence too difficult to prove and would not make sense in policy terms. A threshold based on passive secrecy may be preferable but arguably this would not provide enough clarity for business and it could criminalise potentially benign agreements which businesses did not see a need to announce (without necessarily seeing a need to keep them secret).

⁹⁹ Under an amended section 188(1).

¹⁰⁰ Following modernisation under Regulation 1/2003/EC, the process for notifying arrangements for individual exemption no longer exists.

6.47 There would also be the risk of the offence capturing the (very rare) cases where the defendant acted secretly believing his agreement to be illegal but where it was not in fact illegal. Such cases are less likely to arise under the *Ghosh* ‘dishonesty’ test because it involves both an objective and a subjective element.

6.48 In addition, it is possible that including a ‘secrecy’ element would not be as effective as the ‘dishonesty’ element in distinguishing the criminal cartel offence from the antitrust prohibitions, since the notion of secrecy has some parallels with the concept of ‘concerted practice’ – one of the types of arrangements that may infringe the Article 101 and Chapter I antitrust prohibitions. The classic definition of ‘concerted practice’ is:

‘a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.’¹⁰¹

However, the inclusion of ‘concerted practices’ in Article 101 and Chapter I is not directly aimed at capturing secret arrangements per se, rather it is aimed at capturing arrangements that fall short of being agreements. Accordingly the Government considers that a ‘secrecy’ element may be as effective as the ‘dishonesty’ element in distinguishing the criminal cartel offence from the antitrust prohibitions and would avoid the difficulties associated with prosecuting a ‘dishonesty’ based offence.

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

6.49 Under this Option, the list of types of arrangement that fall within the offence¹⁰² would be modified so that arrangements entered into overtly do not fall within the offence.

6.50 The list would be amended to provide that for subsections 188(2)(a) to (e) the offence will not be committed where the customers would be told about the arrangements to fix prices, limit production or supply or share markets or customers at or before the time of purchase of the relevant product or service.

6.51 This Option would avoid the difficulties of proving active secrecy and the problems with an offence based on passive secrecy described under Option 3. It would also have the other benefits of Option 3.

6.52 The policy rationale for this approach would be that ultimately consumers who are informed about arrangements can choose to contract elsewhere. It would be important to find some way of clarifying that informing one customer would not be sufficient: the expectation would be that all customers would be informed.

¹⁰¹ *ICI v Commission* [1972] CMLR 557.

¹⁰² Under section 188(2).

6.53 This might be the simplest of the Options to enact as there is already a model for it in section 188(6) of the Enterprise Act 2002 which takes out of the scope of the offence as it applies to bid-rigging arrangements that the person requesting bids would be informed of at or before the time when a bid is made.

7. Concurrency and the sector regulators

Many of the sector regulators have duties to promote competition under their sector-specific legislation and have also been assigned competition powers concurrently with the OFT. Commentators have noted that the relative paucity of Competition Act 1998 cases completed, and MIRs made, in the regulated sectors is a weakness in the competition regime.

- The Government's view is that the sector regulators should retain their concurrent antitrust and MIR powers.
- Chapters 3 and 5 set out options for modifying the markets and antitrust powers so that they may be applied more swiftly. The Government seeks views on the impact of these options on the CMA's role in the regulated sectors, and on the incentives on the sector regulators to use sectoral or competition powers in carrying out their duties.
- The Government seeks views on whether:
 - 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 landscape of the CMA and sector regulators.

Introduction

- 7.1 When the government-owned utilities were privatised, licensing regimes and other powers were introduced as the existing body of competition and consumer law was not regarded as providing sufficient protection for consumer interests. As originally established, sector regulators were given a mandate to encourage competition in those parts of the regulated sectors where competition was feasible. It was envisaged that there would be a period where effective competition would develop and that over time the need for sectoral regulation would reduce as the generally applicable competition and consumer law took over.
- 7.2 Sector regulators have a range of economic and social duties and for most of them this includes a primary duty to further the interests of

consumers, where appropriate through the promotion of competition. Sectoral regulation prescribes the frameworks within which market participants in regulated sectors may operate. The regulators generally have substantial sectoral enforcement powers, including powers to remedy non-competitive market structures (permitting new entrants) as well as to apply price controls. Most, but not all, were also given concurrent powers to use the antitrust prohibitions and make MIRs because of an overlap between the purposes of the regulatory regimes and competition law, and to take advantage of their expertise and resource in applying competition principles. (See Appendix 1 for a description of the landscape of concurrent powers.)

- 7.3 General competition law provides a framework that can be used by companies across all economic sectors to guide their compliance even in the absence of detailed rules. It is largely about regulating conduct which has an adverse effect, except in merger matters. The competition regime requires a rich body of case law to maximise its effectiveness - cases establish the bounds of competition law, help explain the rules of the market and deter anti-competitive behaviour.
- 7.4 The interrelationship between specialist sectoral law and regulators, and general competition law and institutions requires careful management. In terms of the legal framework, in some situations, the sector regulators are legally obliged to undertake specific regulatory action rather than use their general competition powers, but in other situations there might not be a need to take regulatory action under sectoral powers if the prohibitions under competition law were effectively applied. In such situations the sector regulators may have a choice between the use of sectoral or competition powers and are subject to incentives for and against the use of their antitrust and MIR powers.
- 7.5 In institutional terms, there needs to be close cooperation between the sector regulators and the general competition authorities in order to avoid conflicting or overlapping engagement with regulated businesses. This is important, as while both competition law and sectoral regulation have a common objective of promoting or enabling fair competition, the mandate and approach of general competition authorities is quite different from those of the sector regulators.

Table 7.1 Institutional characteristics of sector regulators and competition authorities

	Sector Regulator	Competition Authority
Mandate	<ul style="list-style-type: none"> • Promote interests of consumers; • Promote competition where appropriate; • Apply price controls and other specific measures where competition is absent; • Other socio-economic goals. 	<ul style="list-style-type: none"> • Promote and maintain fair, competitive markets.
Approach	<ul style="list-style-type: none"> • Attenuate effects of market power wielded by dominant incumbent companies • Impose and monitor behavioural conditions on dominant companies • <i>Ex-ante</i> prescriptive approach • Frequent interventions requiring continual flow of information 	<ul style="list-style-type: none"> • Deter and penalize anticompetitive conduct • Impose structural (and behavioural) remedies where necessary • <i>Ex-post</i> enforcement (except with merger review) • Information gathered in course of investigation • More reliant on complaints • Use of leniency applications

Source: Adapted from *Best Practices for Defining Respective Competences And Settling Of Cases, Which Involve Joint Action By Competition Authorities And Regulatory Bodies*, UNCTAD, 2006

Rationale for consultation on reform of the concurrency regime

- 7.6 While the competition framework provides for concurrent jurisdiction over general competition law issues in the regulated sectors, in practice the default position has generally been that the sector regulators take responsibility for cases in their sectors.
- 7.7 In practice, however, sector regulators have made only two antitrust infringement decisions (and many more non-infringement decisions) and two MIRs, although there are also cases of commitments being accepted in lieu of MIRs. The two antitrust cases have both been abuse of dominance cases (Chapter II / Article 102) with fines of £15m for National Grid¹⁰³ and £4.1m for EWS. This compares with 25 infringement decisions (21 for Chapter I / Article 101 and 4 for Chapter II / Article 102) and 9 MIRs made by the OFT across the economy as a

¹⁰³ Following appeals.

whole.¹⁰⁴ Given that regulated sectors contain many of the most dominant companies and uncompetitive market structures and cover services of considerable consumer interest, this comparative lack of activity in the regulated sectors seems surprising.

- 7.8 As noted in chapter 1, the relative paucity of antitrust cases and MIRs in regulated sectors is regarded by a number of commentators as a particular weakness in the regime.¹⁰⁵ These commentators are concerned that the opportunity to make generally applicable rules may have been missed and the deterrent effect of infringement decisions undermined. Others would point out that the regulated sectors are different to the rest of the economy in the degree of transparency and scrutiny they face and the structure of the industry following liberalisation where some of the big monopoly elements have been broken up. In addition, the specialist regulatory tools available to the sector regulators offer them an alternative – and often speedier – means to deal with issues of concern in these markets. These factors could explain the absence of a significant number of cases brought under general competition law in the regulated sectors.
- 7.9 There is also debate over the causes for the small number of antitrust cases in the regulated sectors: it may be because in most cases regulators have a duty to use their sectoral powers or have other, possibly easier, tools to resolve competition issues in their sectors or because they lack the depth of skills and resources to bring cases where there is evidence of a breach. Executives of regulated businesses themselves may prefer regulators to apply regulatory law because where they are required to behave in a specific way in the market they run no risk of challenge for breach of competition law. The net result may be that detailed behavioural regulation is imposed and/or maintained for longer than it needs to be as regulated markets become more competitive. Such regulation could dampen innovation and deter the development of rivalry or scope for new entry in markets.
- 7.10 The small number of cases may also be partly caused by, and further lead to, a subsidiary problem of a lack of critical mass of competition expertise within some sector regulators. This is because competition cases often require specialist teams of lawyers, economists, accountants and experienced investigators. Extensive resources are required to prosecute antitrust cases not least because of the adversarial nature of the enforcement process, which often involves large and well-resourced investigatees.
- 7.11 While sector regulators with powers to impose ex ante conditions and obligations as well as powers to enforce antitrust law may feel this gives them sufficient tools to address any problems they observe, the option of

¹⁰⁴ See the OFT's public register of Competition Act 1998 decisions, <http://www.of.gov.uk/OFTwork/cartels-and-competition/ca98/decisions/> and the Competition Commission's market reference list, http://www.competition-commission.org.uk/inquiries/reference_type/market.htm.

¹⁰⁵ See for example, *Review of the UK's Competition Landscape*, NAO, 2010, p.14 and *UK Economic Regulators*, House of Lords, 2007, Vol.1, p.67.

a MIR is important both in itself and as a backstop for market reviews and follow-up action. There may be particular disincentives for regulators to make MIRs to the CC. For example, the regulator may be concerned about: the typical length of time taken by the CC in conducting market investigations, especially if regulatory action can produce a swifter and often similar result; the risk of a lengthy investigation deterring private investment; and, the difficulties of conducting a MIR in a sector in which government policy plays a strong role. Finally, there may also be a concern that in some circumstances, in looking at a market the CC might be perceived as commenting on the performance of the regulator.

- 7.12 These concerns would be unfortunate because there is considerable scope for the use of MIRs to take a fresh look at how markets are working, or not working as effectively as they should. For example, the separation of wholesale from retail markets which led to the creation of BT Openreach was made possible as a result of the threat of a MIR (undertakings were given by BT in lieu of a reference). Similarly, the requirement for BAA to divest itself of a number of its airports was imposed by the CC following a MIR. The ability of MIRs to look at the structure of markets, as well as conduct in them, makes them a tool that is particularly suited to identifying ways of improving competition in regulated markets.

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

Q15 *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.*

Options

- 7.13 The concurrent competition powers are generally regarded as being very resource intensive to utilise. The Government's view is that there is therefore scope to make their use by the CMA and sector regulators less burdensome and also to improve the practice of concurrency.
- 7.14 Implementation of antitrust reform options described in chapter 5 which led to the development of an Internal Tribunal in the CMA (Option 2) or making the regime prosecutorial (Option 3) would remove the sector

regulators' decision-making role. It would, however, leave them with concurrent antitrust powers to bring cases.

- 7.15 If concurrent antitrust and MIR powers were ended, this would mean the CMA would have sole *ex post* competition law powers in the regulated sectors. This may lead to more competition cases being brought, bring greater consistency to the application of competition powers and would simplify the landscape of competition authorities. It would also bring the UK into line with the way the interfaces between competition and sectoral regimes are handled in most other countries. On the other hand, it may also impede the integrated application of sectoral and competition law powers, reduce the scope to apply the sector regulator's industry expertise and ongoing sector surveillance to competition cases and force regulated businesses to deal with two separate bodies with different objectives and approaches. It might also have the effect of causing the regulators to rely even more heavily on their sector-specific powers than they do now to fulfil their duties, as they would not have access to *ex-post* competition powers.
- 7.16 If concurrency were ended, it may be possible to put in place arrangements to manage the relationship between the CMA and sector regulators, so that the CMA had access to the sector regulators' specialist expertise when taking forwards competition cases in their sectors. A highly complex interface between the sector regulators' duties and powers on the one hand and the duties and powers of the CMA would remain in this case. On balance, therefore, the Government believes that it would be counter-productive to end concurrency for the sector regulators.

Make competition powers easier for the CMA and sector regulators to use

- 7.17 In response to concerns about the cost and difficulty of bringing competition cases, some reforms to their application are already underway. For example, the OFT is considering how to speed up its antitrust cases and the CC has introduced new procedures to speed up its market investigations.
- 7.18 Further options for change set out in the chapters on markets (chapter 3) and antitrust enforcement (chapter 5) could make their use easier by the CMA and sector regulators and strengthen the incentives on sector regulators to use competition powers rather than sectoral regulation when they have a choice over which approach to take.
- 7.19 Other reform options set out below could improve the practice of concurrency in order to encourage more proactive use of competition powers in the regulated sectors. The reform options set out in this chapter are not mutually exclusive and could be combined to increase their impact.

Strengthening the primacy of competition law over sectoral regulation

- 7.20 Each of the regulated sectors has its own structural features and the sector regulators have certain duties in respect of competition and other issues that together affect the competition caseload. A number of regulators have duties to consider whether they should use competition powers before using their sector powers. For example, before Ofcom exercises any of its Broadcasting Act 1990 and 1996 powers for a competition purpose, the Communications Act 2003 requires it to consider whether a more appropriate way of proceeding would be under the Competition Act 1998.
- 7.21 The Railways Act 1993 sets out that the ORR is required to take enforcement action in certain circumstances. The ORR is relieved of its duty to take enforcement action by way of a provisional or final order 'if it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998'.¹⁰⁶ ORR guidance further sets out that one of the factors that it will take into account in deciding which type of enforcement power to use is whether 'there may be benefit in establishing a precedent in competition law'.¹⁰⁷ Ofgem may also not take enforcement action under the sector-specific Acts if it is satisfied that it would be more appropriate to address the issue under the Competition Act 1998.¹⁰⁸
- 7.22 The sector regulators could be required to work together towards a common set of factors (subject to EU requirements) for deciding which of their powers to use. This could help increase consistency of approach across sectors, increase understanding of the suitability of competition powers for resolving particular issues and require all the regulators to consider the benefit of establishing a precedent in competition law.
- 7.23 The Government could go further by establishing a consistently strong obligation on all the sector regulators, as a matter of policy or as a statutory duty, that they will use their competition powers in preference to their sectoral powers wherever legal and appropriate. This option could encourage the sector regulators to be more proactive in their use of competition powers and would be self reinforcing as more cases would help strengthen the competition regime, potentially increasing its appropriateness as a tool for the regulators in the future and helping build up their expertise. While this option may have little impact in some sectors such as broadcasting, it could change the position of competition law in others.

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

- 7.24 One way to address the question of incentives as well as the capacity issues in the sector regulators is for there to be more resource sharing

¹⁰⁶ Section 55(5A) of the Railways Act 1993.

¹⁰⁷ *Economic enforcement policy and penalties statement*, ORR, April 2009, p. 14.

¹⁰⁸ Section 28(5) of the Gas Act 1986 and section 25(5) of the Electricity Act 1989.

among the competition authorities. This would also make the competition system as a whole more efficient by smoothing workloads of the different bodies and improving cooperation and understanding between the different bodies involved in competition issues.

7.25 Currently, the Concurrency Working Party (CWP) provides a vehicle for co-ordination between the OFT and the sector regulators.

7.26 The CWP is a forum set up to facilitate a consistent approach by the sector regulators and the OFT in the exercise of their functions and powers under the Competition Act 1998, to consider the practical working arrangements between them, to provide a vehicle for the discussion of matters of common interest and the sharing of information where appropriate and where legally permitted and to coordinate the provision of advice and information on the application of antitrust powers.

7.27 The system for sharing resources could potentially be improved by:

- The CMA providing a central core of expertise so that it can work more closely with, or even on behalf of, the sector regulators, who might or might not retain a decision-making role. This would help overcome the capacity constraints and relative lack of competition experience of some of the sector regulators. As such, the CMA would become a central resource, which could make it significantly easier for the sector regulators to use their competition powers. This system could potentially work in a variety of ways:
 - the CMA is obliged to act if a sector regulator demands it;
 - the CMA could run the case and the sector regulator make the decision;
 - the CMA could act as an advisor or source of expertise;
or
 - the CMA could maintain enough resource to 'hire' them out to sector regulators to use.
- changing the legislation to permit joint sector regulator/CMA antitrust investigations. Responsibility for decision-making would have to be carefully considered and would need to be flexible to accommodate different situations;
- less radically, increasing the number of secondments between the competition authorities to help with particular cases. This would allow more sharing of sectoral and competition expertise, thereby improving the whole regime.

Giving the CMA a bigger role in the regulated sectors

- 7.28 The Concurrency Regulations¹⁰⁹ set out the process for how the authorities share their concurrent antitrust powers. Current OFT guidance (agreed with the regulators) sets out the factors that influence the decision over which authority takes responsibility for a case.¹¹⁰ In the event of a dispute, the Secretary of State has powers to decide which body will bring a case. For MIRs there is a statutory requirement for the regulator and the OFT to consult each other prior to making an MIR in the concurrent sector, no detailed regulations and only brief guidance from the OFT (agreed with the regulators) on the application of the concurrent statutory powers.
- 7.29 The CMA could potentially be given a bigger role in bringing cases by altering the OFT's concurrency guidance. A more powerful option would be a European Competition Network (ECN) type model in which the CMA would have a case allocation and oversight role. The regulators would notify the CMA before they open and close a competition case but unlike under the current Concurrency Regulations, there would not need to be any formal decision on case allocation before the regulator could use its formal powers. The CMA and concurrent regulator under this system could agree at an early stage to transfer cases between themselves. Crucially, however, the CMA could, following consultation with sector regulator, take over an ongoing case in a concurrent sector when it considered that it was better placed to take the case or where there were concerns about the approach the regulator was taking. As such, the Secretary of State's power to resolve disputes on which body has jurisdiction would be removed.
- 7.30 The CMA might be better placed to take the case where: there were resource constraints on the regulators; the case concerned an issue in respect of which the CMA had demonstrably greater expertise or experience (such as cartels); the case had novel features or wider strategic implications; or there was a need to adopt a decision to develop competition policy. For this type of model to work there would have to be effective, and ongoing, communication between the CMA and sector regulators about potential competition cases and the envisaged approach to dealing with them. The regulators, for example, would need to keep the CMA informed of relevant complaints, case openings and use of investigative powers, case progress and all choices not to use the Competition Act 1998 to address antitrust problems (see below). It would also need to provide copies of any Statement of Objections and proposed decisions to the CMA upon which it could provide comments.
- 7.31 To the extent that the CMA is more proactive and better equipped to manage cases than the sector regulators, this could lead to more competition cases with resulting benefits for consumers and the wider economy. This option could have the added advantage of taking the

¹⁰⁹ *Competition Act 1998 (Concurrency) Regulations*. SI 2004/1077.

¹¹⁰ Though as noted above, the essentially default position is that the sector regulators will take cases in their sector rather than the OFT.

Secretary of State out of the case allocation process, as opposed to the current situation under the Concurrency Regulations where the Secretary of State decides in cases where there is a dispute between a concurrent regulator and the OFT as to who should take the case.¹¹¹

- 7.32 The ECN type model could also be applied more fully in that the sector regulators could be required to inform the CMA of cases where competition powers might be applicable alongside sectoral powers, even if the sector regulator considers that regulatory powers are more appropriate. The sector regulators and CMA would be required to keep each other informed of progress on the case, consult each other before making a decision on whether an infringement may have occurred or making a MIR. Sector regulators in particular could be required, subject to EU requirements on the independence of National Regulatory Authorities, to consult or inform the CMA before taking a decision on whether to proceed on a case by making use of their sectoral or competition powers. This would be a significant change to the competition regime as currently the OFT may never become aware of competition issues that are dealt with by the regulators under their sectoral powers.
- 7.33 While there is already some coordination of activity across the concurrent competition authorities, the CMA could be given more authority to drive the strategic direction of competition work and ensure greater consistency of approach. For example, by publishing an annual review of the use of competition powers across the concurrent competition authorities.
- 7.34 Although it is the view of the Government that CMA decision-making should be independent and free from political interference, we are considering whether one of the high level objectives of the CMA should be to keep economically important markets or sectors under review or alternatively whether it should have a duty to review economically important markets or sectors (see chapter 9). This approach could also be applied to economic sectors subject to concurrent competition powers. Any such work would have to be conducted in such a way that it did not overlap with work that the sector regulators must undertake under EU requirements or other regulatory duties.

¹¹¹ The framework for co-operation and case allocation could be set out in guidelines, in a manner similar to the ECN process discussed in the *Notice on Co-operation Within the Network of Competition Authorities* OJ 2004 C101/3es.

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

Under sector specific legislation, the CC hears licence modification references for regulated entities, Energy Code modification appeals and price determination appeals for regulated utilities.

- The Government's view is that the sectoral reference/appeal jurisdictions of the Competition Commission should be transferred to the CMA.
- The Government seeks views on creating model regulatory processes that set out the core requirements that regulatory reference/appeals processes should have.
- The Government is considering whether and how certain ancillary functions of the OFT and CC should continue to operate.

Introduction

- 8.1 The CC has a number of functions under sector specific legislation. These include licence modification references for regulated utilities, Energy Code modification appeals and price determination appeals for regulated utilities. In each of these, the issues that the CC must take into consideration in carrying out its inquiry are adapted according to the particular regulatory regime and usually reflect the considerations to which the relevant regulator is required to have regard in reaching the decision that is subject to the reference or appeal.

Rationale for reform of regulatory references and appeals

- 8.2 The processes that the CC is required to follow in carrying out regulatory inquiries vary (to some extent because of EU requirements) and as new regulatory reference and appeal functions have been added, the number and variety of processes that it is required to follow have increased.
- 8.3 It is possible that in the future the CMA will have additional or amended functions in relation to regulatory references and appeals. For example, there are proposals for the CC to investigate references from the health services economic regulator (Monitor) and the powers of the CC in the postal and energy sectors are being reformed.
- 8.4 The proposed creation of the CMA requires us to consider which body is best placed to carry out the CC's regulatory reference and appeal functions.

- 8.5 While the various sectoral processes differ to some degree because of EU requirements and the nature of the issues being considered, some differences may be due to the uncoordinated way in which the regimes have been developed over time. These differences may create unnecessary regulatory complexity with resulting inefficiency. Unless variations are constrained the diversity of regimes may increase in the future with further inefficiencies for the CMA, sector regulators and affected businesses.
- 8.6 The Government's proposals for reforming the approach to costs in telecom price control appeals heard by the CC are set out in chapter 11.

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.*

Options

Jurisdiction over regulatory references and appeals

- 8.7 There would be considerable benefit in the CMA continuing to perform the current functions of the CC in regulatory references and appeals. It would have the expertise, resources and procedures in place to handle a highly variable regulatory caseload and there should be synergies from its competition expertise and skills in economic analysis of markets. There are a variety of ways in which such regulatory cases could be handled by the CMA, depending upon the ultimate structure of that body. A more complex alternative proposal for structural reform would be for appeals to be made to the CAT or a separate new appellate body. The creation of a new appellate body would, however, run counter to the Government's aim of having fewer, more streamlined, public bodies.
- 8.8 If the appellate functions are exercised by the CMA, the corporate governance and staffing arrangements will need to provide independence for the decision makers and staff supporting them in such cases.

Harmonisation of processes

- 8.9 The creation of the CMA provides an opportunity to harmonise the regulatory appeal procedures to a certain degree (the scope for doing

this is limited by EU obligations and the nature of the sectoral regimes) to enable the CMA to operate more efficiently. However, the Government's view is that given the limited scope for harmonisation and simplification, and the highly uneven flow of cases in particular sectors, the potential benefits to be achieved are likely to be outweighed by the costs. These costs would relate to transitioning to new statutory regimes that work for each sector, developing new procedures and the undermining of precedents.

Model processes

8.10 The Government is therefore considering whether instead of harmonisation it would be appropriate for a limited reform under which model processes might be developed. These could set out the high level procedural requirements that would be expected to apply where additional or regulatory functions are conferred on the CMA, or sectoral regimes are otherwise being updated, unless there are special reasons (such as EU obligations) why such a model would not be appropriate.

8.11 The models would not be intended to revisit any recent changes to reference or appeals processes or any proposed changes that have been agreed and are in the process of being implemented, such as in the postal and health sectors. The appeals processes in the airports, energy, telecoms and water sectors are, or have recently been, subject to separate consultations – this consultation will not reopen the issues considered in them.

8.12 The elements of the models could include:

- the initiation process (reference from regulator, reference from the CAT or direct appeal);
- whether there is a filter for appeals lacking merit (at present this only applies on Energy Code modifications);
- the 'approach':
 - rehearing: full redetermination where the appeal body may consider all aspects of the original decision; or
 - review: adjudication based on the parties' pleadings, where the appeal is confined to the grounds of appeal raised in the appellant's notice of appeal(within both of these approaches there are a number of variations);
- whether the CMA is expected to seek a definitive solution, replacing the regulator's decision with one of its own or whether

the CMA is expected to normally remit to the regulator should the CMA find in favour of the appellant;

- the preferred appeal route against the CMA's determination (e.g. judicial review to the CAT or to the High Court);
- who publishes/takes decisions on confidentiality;
- cost recovery arrangements for both the CMA's costs and potentially the parties' costs.

Other Functions of the OFT and CC

8.13 The OFT and CC also have ancillary competition functions in a number of areas (see Appendix 1). The Government will be considering whether and how these functions should continue to operate.

9. Scope, objectives and governance

The Government considers that a single Competition and Markets Authority should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA from political interference.

The Government further proposes that the single CMA will:

- have clear, and potentially statutory, objectives to underpin prioritisation.
- be accountable to Parliament.
- have an appropriate governance structure for a single, decision making body.

Competition and consumer issues can be closely intertwined and market analysis will often necessarily involve consideration of a range of consumer behavioural issues and remedies as well as competition issues and remedies. The Government will separately be seeking views on where various functions in the consumer domain should be best performed in its parallel '*consultation on institutional changes for the provision of consumer information, advice, education, advocacy and enforcement*'.

Introduction

- 9.1 In creating the CMA, the Government will set out the scope of the functions of the Authority and what the objectives of the CMA should be in carrying out those functions. In doing so it will have regard to the need to secure the independence of the CMA from Ministers in relation to its decisions on individual cases.

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.*

Scope of the Authority

9.2 **The Government believes that single CMA should have a primary focus on competition:** ensuring fair and effective competition between companies and promoting competitive markets conducive to stability, growth, innovation and consumer welfare. We envisage that the main scope of the single CMA's activity will be:

- Antitrust cases;
- Merger cases;
- Market studies and Market Investigations where there is concern that there may be competition problems;
- Reviews of undertakings and orders;
- Assessing challenges to sector regulators' decisions and resolving disputes relating to licence and price modification proposals;
- Competition advocacy, including across government and internationally.

Institutional Objectives and Prioritisation

9.3 **The Government would welcome views on appropriate objectives for the single CMA and whether these should be embedded in statute.** Institutional objectives are important as they express a clear mission for the organization and sit at the heart of its wider corporate governance. The Government are considering, and would invite responses, as to whether these objectives should be included on the face of the legislation, as is currently the case for the Financial Services Authority (FSA),¹¹² and Ofcom.¹¹³ One such duty for a single CMA could be a primary duty to promote competition.

9.4 Currently neither the OFT nor the CC's objectives are enshrined in the legislation as a set of objects / duties. The advantages of stipulating the CMA's duties on the face of the legislation include that this provides a strong, clear mandate and purpose for the organization, provides guidance on its role and priorities to its Board, staff, business and other stakeholders, and provides a strong lever for Parliament to hold it to account. The disadvantages include that it may in the longer term prove to be less flexible to future changes in the economy and the CMA's own growing expertise. The institutional objectives would have to be set in

¹¹² Section 2 of the Financial Services and Markets Act 2000.

¹¹³ Section 3 of the Communications Act 2003.

such a way so that they did not compromise independent and impartial decision making according to the facts of particular cases.¹¹⁴

Prioritisation

- 9.5 As noted above (in para 9.4), statutory objectives would be one means of giving broad guidance to the Board on the priorities for the organisation. As part of this the Government is also considering whether the high level objectives for the single CMA should include keeping economically important markets or sectors under review. This could help to address the comment in international reviews regarding the relevance and importance of subject matter examined, and ensure that the Authority regularly 'looked up' to consider whether or not an economically important market or sector was worthy of further examination in, for example, a market study. A current example of this would be the way the OFT keeps the audit market under review.¹¹⁵
- 9.6 The definition of economically important market would need to be carefully defined to give reasonable scope for flexible interpretation by the Authority over time: the Government does not envisage that it would seek a power to specify individual markets.
- 9.7 There is an alternative way of securing the same prioritisation objective of ensuring that the Authority regularly 'looked up' to consider economically important markets. This would be to give the single CMA a duty to keep such markets under review. Again the Government does not envisage that it would seek a power to specify individual markets.
- 9.8 If either of these options were adopted, the Government envisages that the single CMA would report on its delivery of the objective, not to Ministers but to Parliament and/or in its published Annual Plan.

Constitutional Form of the CMA

- 9.9 **The Government proposes that the CMA will be independent of Ministers, but accountable to Parliament.** As noted in chapter 2, the objectives of reform include embedding the principles of public accountability, independence and transparency. There are various potential constitutional forms for the CMA – the three main ones are as a non ministerial department (such as the OFT), a non departmental public body (such as the CC), or a public corporation (such as Ofcom). The form of the CMA will be the one that best promotes these principles and delivers the Government's other objectives for competition reform.¹¹⁶

¹¹⁴ OFT's objectives for 2010-11 are set out in its annual plan (http://www.of.gov.uk/shared_of/about_of/706647/oft1215.pdf). The CC's objectives for 2010-11 are set out in its corporate plan (http://www.competition-commission.org.uk/our_role/corporate_plan/corporate_plan_10_11.pdf).

¹¹⁵ <http://www.of.gov.uk/OFTwork/markets-work/othermarketstwork/accountancy-audit/>

¹¹⁶ *Managing Public Money, Annex 7.2, Setting Up New ALBs*, HM Treasury, provides guidance on the matters to be taken into account in deciding the constitutional form of public bodies.

Governance

9.10 The Government seeks views on governance arrangements for a single CMA which will deliver durable independence for the authority, both in decision-making and resource allocation.

The current organisational and decision-making structures

9.11 The organisational and decision-making structures of the OFT and the CC are described below. Additional information on the Governance structure and composition of the OFT, the CC and the CAT is set out in Appendix 1.

The OFT

9.12 **OFT Governance** - The OFT Board gives the OFT strategic vision and perspective, plus the range and depth of experience to ensure that its powers are matched by proper accountability. Certain matters are reserved for Board involvement.

9.13 The OFT Executive Committee has responsibility for running the day to day functions of the OFT and reports to the Board.

The CC

9.14 **CC Governance** –The CC Council is the CC’s strategic board and is responsible for the efficient discharge of the CC’s statutory functions and ensuring that the CC complies with any statutory or administrative requirements for the use of public funds.

9.15 The Chief Executive, supported by the Senior Management Team, is the CC’s Accounting Officer and is responsible for managing the day to day activities of the CC and providing advice on strategic management issues to the Council.

The overall institutional design for the CMA

9.16 Although there are a number of models which could be adopted, at an institutional level the Government proposal envisages that the CMA will have a supervisory board, and an executive board, with separation of phase 1 and phase 2 investigations for at least mergers and markets cases.

9.17 The **Supervisory Board** would have overall responsibility for the CMA, including overall governance, resourcing, strategy and policy, including the development of rules and guidance.

- 9.18 The composition of the Supervisory Board might include a combination of Non-Executive Directors (who would be the majority) and Executive Directors of the CMA, including the Chief Executive. The Supervisory Board will be chaired by a Non-Executive Director. Ultimately it is the Supervisory Board which will be accountable to Parliament for the overall performance of the CMA – although it would not be answerable to Parliament for individual case decisions by the CMA.
- 9.19 The Executive Board, chaired by the Chief Executive, will be responsible for the day to day running of the CMA, and could take certain casework decisions depending on the decision-making model adopted.
- 9.20 **Phase 1 and Phase 2** – This separation of initial Phase 1 and in-depth Phase 2 investigations would be retained for markets and mergers, although the actual process for ‘filtering’ cases can be delivered in a variety of ways to improve efficiency, as discussed below. For antitrust cases, there is not currently a formal separation of phase 1 and phase 2 investigations and decision-maker as is the case with merger and market cases. There may be advantages in moving to some form of two phase investigation along similar lines to the separation seen in merger and market cases and we consult on these options in chapter 5 of this document.

Competition and Consumer Landscape Reviews

- 9.21 Alongside this review of the competition landscape, Ministers have also announced plans for reform of consumer bodies.¹¹⁷ It is planned that most or all of the OFT’s consumer enforcement powers and its estate agency function will transfer to Trading Standards (TS); and its consumer advice (Consumer Direct), information, and education role will pass to Citizens Advice and Citizens Advice Scotland. The Government also plans to transfer the functions of Consumer Focus and a number of sectoral consumer advocacy bodies into Citizens Advice. The Government will consult on the reform of the consumer landscape separately. Additionally, the Government is consulting on the transfer of the OFT’s consumer credit function to the proposed new Financial Conduct Authority.¹¹⁸
- 9.22 Sector regulators will continue to be responsible for keeping their markets under review, and are expected to retain their current powers to refer markets to a single CMA for in-depth investigation. The Government also takes the view that sector regulators should retain concurrent consumer enforcement powers. Performing these functions in the regulated sectors ensures the application of specific expertise in the operation of those sectors, which would be lost by transferring the

¹¹⁷ Statement by Vince Cable, Secretary of State, Department for Business, Innovation and Skills, 14 October 2010.

¹¹⁸ This is subject to a joint consultation by BIS and HMT, issued on 21 December 2010. Details can be found at <http://www.bis.gov.uk/policies/consumer-issues/consumer-credit-and-debt/consumer-credit-regulation>.

functions away (see chapter 7 on Concurrency and the sector regulators).

9.23 These changes to the competition and consumer landscape give rise to the question of whether some, limited, consumer powers or functions should be available to the CMA or whether these responsibilities should rest elsewhere in the reformed consumer landscape.

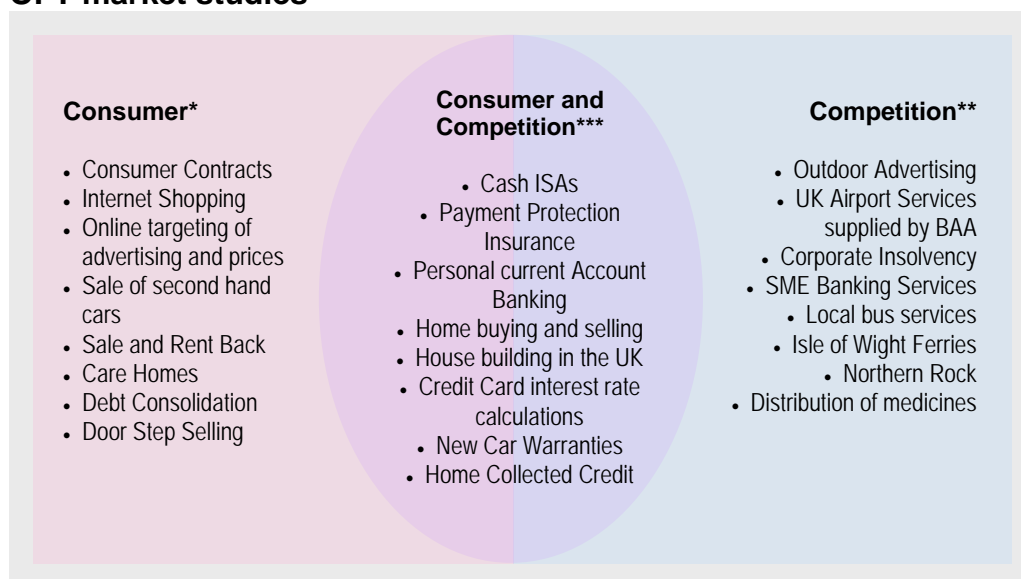
Consumer market studies

9.24 The CMA may need to consider both supply-side (market structure and business conduct) and demand-side (consumer behaviour) factors in assessing failures in markets in order to effectively identify a particular problem and the action that should be taken to remedy the adverse effects that arise. This will necessarily include examining a wide range of markets, services and practices that are important to consumers and which impact on choice, quality and price.

9.25 In recent years, approximately 20% of the OFT market studies have focused predominantly or entirely on consumer issues (where consumer detriment has been investigated for reasons other than a lack of competition). These cases typically result in one or a combination of: consumer enforcement action; consumer advice and education; consumer codes; and recommendations to Government and business. Examples of such market studies include door step selling, care homes and internet shopping. A substantial further tranche of OFT market studies have considered such issues alongside competition issues (see Figure 9.1, consumer and competition market studies). Consumer studies are also currently carried out by other consumer bodies such as Consumer Focus, sectoral consumer bodies and Citizens Advice.¹¹⁹

¹¹⁹The Government has committed to respond to OFT market studies within 90 days. There is no equivalent Government commitment to respond to studies carried out by these other consumer bodies.

Figure 9.1 Examples of consumer and competition outcomes of OFT market studies



* Market studies, which had predominantly consumer aspects
 ** Market studies, which had predominantly competition aspects
 *** Market studies, which had competition and consumer aspects

9.26 More broadly, market studies of competition issues may highlight a problem that is best addressed through consumer remedies or enforcement.

9.27 Market studies that consider consumer issues, of the kind currently undertaken by the OFT, and associated national enforcement, will need to continue in a reformed competition and consumer landscape. There is an issue, however, of how responsibility for these is allocated between competition and consumer bodies. This will be in part a function of the most efficient allocation of resource and availability of expertise to achieve effective prioritisation and execution of the relevant functions, without duplication and without leaving gaps.

9.28 As noted above (para 9.21), consumer bodies already undertake some market analysis in their role as advisers to regulators, or, where appropriate, in order to bring forward a super-complaint. For example, Citizens Advice publishes a wide range of reports on consumer matters, including on consumer debt and the housing market. Recent reports from Consumer Focus have included the consumer experience of buying digital goods. These reports are not entirely analogous to OFT market studies in terms of analytical approach; conducting the kind of consumer market studies currently delivered by the OFT could therefore require Citizens Advice to build further expertise and capacity. The question is whether consumer landscape reform offers the opportunity to build this capacity and expertise and whether consumer advocacy and welfare would be strengthened by placing responsibility for pure consumer studies and appropriate remedies more clearly with these bodies, as opposed to the CMA.

9.29 If the Citizens Advice route is favoured, the point at which the CMA would determine whether a case should be pursued by it or referred instead to the relevant consumer body will vary according to the case. In some cases, the CMA may be in a position to determine whether the market under review is affected by competition problems only towards the end of the study, at which point it might make sense for the CMA to present completed analysis to the consumer policy bodies, which could be used by them as the basis for further investigation or enforcement action. In other cases, it may become clear early on that consumer policy issues will be the sole focus of attention and such studies could then be referred to the appropriate consumer bodies. Some market studies currently performed by the OFT might not be started at all by the CMA, if there were no indication of any competition concerns.

National consumer enforcement

9.30 There remains, however, the issue of who should be responsible for enforcement of consumer law outside regulated sectors. Trading Standards and the OFT currently have a wide number of concurrent powers. In practice, currently the TS mainly take on cases with a strong local dimension, together with some cases with a regional or national dimension. To support TS there are a number of BIS-funded regional teams working with them to provide investigative capacity to take larger, more resource-intensive cases, especially those with a cross-regional dimension. The OFT prioritises those national enforcement cases which have a wider market changing effect, or which set an important precedent, or address complex issues of law or economics. The OFT has reduced the number of consumer enforcement cases it has brought in recent years in order to focus on such high impact cases.

9.31 The Government is proposing¹²⁰ that in the future almost all consumer enforcement cases should be undertaken within the Trading Standards network, bolstered with an appropriate mechanism for collaboration in order to ensure that appropriate resources and skills are devoted to cases with a significant national and regional dimension. The forthcoming consultation document on '*institutional changes for the provision of consumer information, advice, education, advocacy and enforcement*' will discuss further the question of how and where consumer enforcement and pure consumer market studies might be best dealt with.

¹²⁰ Statement by Vince Cable, Secretary of State, Department for Business, Innovation and Skills, 14 October 2010

10. Decision-making

The Government intends that as a core principle the governance arrangements for the single CMA will deliver durable independence for the authority, both in decision-making and resource allocation.

The creation of the single CMA, combining functions currently carried out by separate organisations, will require new structures to be put in place for decision-making in relation to the various competition tools available to the single CMA.

The Government seeks views on the appropriate decision-making structure for the single CMA for each of the tools available to it, having regard to the overriding requirement to deliver robust decisions through a fair and transparent process, in line with the objectives for the single CMA described in chapter 1.

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.
- The role and nature of panels and the role of executives in the different tools available to the single CMA.
- The steps necessary to ensure that for each of these tools, the overall process complies with the requirements of the ECHR.

Why is the decision-making structure of the single CMA important?

10.1 The Government considers that the decision-making processes and governance structure of the single CMA should be both efficient in carrying out its functions and arrive at robust evidence based decisions. The success of the CMA will be judged largely by the quality of the decisions it makes and the process through which these decisions are reached.

10.2 As discussed in chapter 1, the current regime is one of the leading regimes internationally. The robustness of the OFT's and the CC's decisions plays an important role in this assessment. The current regime is noted for the objectivity enshrined via the two phase system in markets

and mergers, the independence of decision-making achieved by decisions being taken by separate organisations under that structure and by the oversight of the OFT non-executive directors in the phase 1 process and the role of independent CC panel members in phase 2. These factors, taken alongside the rigour of the in-depth analysis undertaken at each stage are core components which deliver a well respected regime. In bringing together the OFT and the CC the Government will ensure that the regime's strengths are not lost.

10.3 The in-depth investigation and rigour of analysis within the regime is a key strength. However the time taken to deliver cases, and the need for business to engage separately with two entirely distinct teams with difference processes, have been criticised by some commentators as imposing too high a burden on the public purse and on the parties involved in cases. Although the focus of the regime quite rightly should be on outcomes and the robustness of the decisions taken, long timescales reduce the efficient throughput of cases, delay the implementation of remedies, and risk diluting the deterrent effect of decisions. In addition to robust analysis, an adequate flow of cases is needed to secure good quality decision making that influences behaviour in the market.

10.4 On average the time taken for cases to go from start to completion is lengthy; this is the case for all the tools used in the regime (see Appendix 2).

Key considerations

10.5 The creation of the single CMA will deliver a decision-making process which strikes the balance between two important principles, namely:

- Robustness of decision-making – it is vital that single CMA takes the right decisions that deter and prohibit anti-competitive practices where appropriate, without unnecessary interference or chilling of legitimate or pro-competitive business practices.
- Speed – it is a critical success measure of the project that the single CMA is able to deliver faster decision-making.

Each of these require that the decisions of the single CMA are taken fairly and based on a rigorous factual and economic assessment that can stand up to judicial scrutiny

10.6 These goals are derived from the overall objectives of the creation of a single CMA, (see chapter 1), which underpin the project as a whole. More than one option for the decision making structure of the single CMA could accord with these principles. Consideration will also be given to how to:

- incorporate the best of the current regime, whilst maximising efficiencies;

- have clear accountability whilst recognising the single CMA's independence from Ministers in relation to the decisions that it takes in individual cases;
- have appropriate checks and balances;
- be cohesive and deliver robust decisions using a predictable framework;
- command the confidence and respect of external stakeholders.

10.7 This chapter considers the different decision-making structures which could be adopted for particular tools and relevant consultation questions.

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

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

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

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 that is compatible with ECHR requirements.*

The current overall framework

10.8 The current merger and markets regimes are structured around three decision-making stages:

- Phase 1 – undertaken by the OFT and sector regulators in markets and by the OFT for mergers;
- Phase 2 – undertaken by the CC in markets and merger cases;
- Appeals – undertaken by the CAT in markets and merger cases (applying judicial review principles).

10.9 There is currently no equivalent separation of phase 1 and phase 2 decision-maker for antitrust cases undertaken by the OFT and sector

regulators, whose decisions are subject to appeal on the merits to the CAT.

- 10.10 In the regulated industries, the sectoral regulators take decisions on licence modifications and price reviews, and (in most cases) their decisions can be appealed to the CC (with subsequent review on judicial review grounds, generally to the administrative courts).¹²¹

The current organisational and decision-making structures

- 10.11 The decision-making structures of the OFT and the CC are described below. Additional information on the governance structure and composition of the OFT, the CC and the CAT is set out in chapter 9 and Appendix 1.

The OFT

- 10.12 OFT decision-making - Parties to cases investigated by the OFT have access to the relevant case team (i.e. the ability to make written and oral representations, including where appropriate, by face-to-face meeting). The extent to which parties have access to the decision-maker will depend on the legislative tool.
- Markets studies/MIRs - The OFT Board takes decisions on whether to initiate market studies and whether to make market investigation references to the CC. Parties occasionally ask to put written representations directly to the OFT Board. Otherwise, they do not have access to the ultimate decision-maker in such cases.¹²²
 - Merger – Where decisions on mergers require a case review meeting and consideration of a reference to the CC for in-depth investigation or the acceptance of undertakings in lieu of a reference, the decision-maker will be either the OFT Chief Economist, or the OFT Senior Director of Cartels and Criminal Enforcement. Parties do not currently have access to the decision-maker in such cases.
 - Antitrust - When the OFT opens an investigation under its antitrust powers it allocates a Team Leader, a Project Director and a Senior Responsible Owner (SRO). Decisions relating to antitrust enforcement are taken by the SRO. The SRO will not be involved in day-to-day matters during the investigation but is kept informed of case progress and has access to all of the evidence and analysis on which to base their decisions. The SRO will

¹²¹ Appeals of CC decision in Communications Act 2003 cases are to the CAT on judicial review grounds.

¹²² The OFT issues a consultation when it decides to initiate a market study to allow comments on the scope of that study and consults when it is considering a decision as to whether to make a market investigation reference to the CC.

typically attend the oral representations meeting in antitrust cases.

The CC

- 10.13 CC decision-making - The decision-making body for each inquiry is a group of usually three to five independent experts (the Inquiry Group), drawn from a wider panel of just under 40 appointed members. Inquiry Groups are usually led by the CC's Chairman or one of the Deputy Chairmen. Appointments to Inquiry Groups are publicly announced. The Chairman and Deputy Chairmen are also appointed as members of the CC.
- 10.14 Members are supported by a specialist staff team on each inquiry. The staff team is led by the Inquiry Director, supported by an Inquiry Manager. The Inquiry Manager is the principal point of contact for parties to inquiries. Parties have access to the Inquiry Group at various points during the inquiry.

Separation of decision-making in the current regime

- 10.15 The current regime is predicated on the separation of decision-making as between phase 1 and phase 2 when investigating mergers and markets. In these cases, the OFT takes the decision that the transaction or market under investigation gives rise to competition concerns that merit in-depth investigation by applying the relevant statutory test.¹²³ The CC conducts an in-depth investigation – starting afresh as decision maker, but having regard to the analysis carried out by the OFT during phase 1 and information passed to it by the OFT at the end of phase 1. It decides whether there is an 'adverse effect on competition' in market cases or a 'substantial lessening of competition' in merger cases. If it reaches an adverse competition finding it must decide on appropriate remedies to the competition problems it has found. Any person aggrieved by a decision of the OFT at phase 1 or the CC at phase 2 can apply to the CAT to have that decision reviewed. The CAT applies judicial review principles and does not consider the full merits of the case.¹²⁴
- 10.16 The two-stage decision-making process applies a filter, to ensure that only appropriate cases are subjected to a full inquiry and remedy powers at phase 2. It also helps to guard against the potential risk of 'confirmation bias' – i.e. the risk of the initial set of decision-makers having an interest in having their original concerns about mergers and markets confirmed in the eventual decision.

¹²³ The sector regulators have concurrent powers to make market investigation references to the CC but the OFT has sole jurisdiction in mergers (except in cases raising specified public interest considerations where the Secretary of State has a power to refer mergers to the CC for in-depth investigation).

¹²⁴ Except in relation to appeal relating to the imposition of penalties for failure to comply with the CC's formal information gathering powers, where an appeal can be made as to the imposition of or nature of the penalty, amount or the date by which it is to be paid, where the CAT can substitute its own decision (section 114 of the Enterprise Act 2002).

- 10.17 The two-stage decision-making process in merger and market cases helps to ensure that the overall process of decision-making, in combination with an appeal mechanism where judicial review principles are applied, satisfies the requirements in Article 6 ECHR as regards the right to a fair trial.
- 10.18 In relation to antitrust cases, the OFT and sector regulators use their Competition Act 1998 powers to investigate whether there has been an infringement of the Chapter I or the Article 101 prohibitions, or the Chapter II or Article 102 prohibitions (these relate to anticompetitive agreements and to abuses of a dominant position). They have to prove infringement to the civil standard of proof (on the balance of probabilities), although, due to the nature of the issues involved in such cases, including the potential penalties, the OFT and sector regulators need to be specifically able to show that the evidence has been carefully considered.¹²⁵ During the process, parties have a right to make representations to the OFT. Unlike in markets and mergers cases, there is no formal two phase system with separation of decision-maker at each phase: in antitrust cases the OFT (and sector regulators) are both the investigator and decision-maker. However, their decisions may be appealed on the merits, and are not restricted to an appeal on judicial review grounds.

Guiding Framework for the decision-making structure of the single CMA

- 10.19 There is more than one option for the decision-making structure of the single CMA. The following factors will guide the final choices:
- degree of independence of phase 2 decision-making;
 - degrees of difference or uniformity of approaches that is desirable between the investigative tools available to the single CMA;
 - role of panels as part of the decision-making process;
 - nature and composition of such panels;
 - the need for a fair process, including ECHR compatibility.
- 10.20 Figure 10.1 illustrates the spectrum of approaches that could be adopted. **The Government invites views on each of these elements, across the full spectrum and in particular on the extent to which the various options would deliver robust and independent decision-making by the single CMA.**

¹²⁵ Re Doherty [2008] UKHL 33 (11 June 2008).

Figure 10.1 Guiding Framework for decision-making structure

Complete separation	Complete separation phase 1 and phase 2 decision-making	New decision-maker at phase 2	No separation of phase 1 and phase 2 decision-maker	No separation
	Existing levels of information sharing	Phase 1 case team join phase 2 case team	Same case team and decision-maker in both phases	
	No overlap of case teams			
Uniformity	Identical decision-making all tools	Commonality of process for tools with similar characteristics	Specific decision-making structure for each tool	Tailored
	Phase 1, phase 2 panel structure	Some adaptation of process by tool		
	High degree of commonality of process			
Decision making only	Panels do not take part in investigation at phase 2	Panels take limited role in directing investigation at phase 2	Panels take a full role in the investigation at phase 2	Investigatory
	Panels adjudicate on case presented to them	Panels make final decision	Panel make final decision	
Fixed	Fixed panels for each tool, full time commitment	Higher proportion of panellists with greater time commitment than currently	Large pool of part time panellists	Fully flexible
	Terms of office of panellists designed to ensure objectivity preserved	Panellists allocated to specific pool for specific tools	Any panellist can sit on any panel for any tool	
Very limited appeals	Judicial review for all tools	Partially ECHR compliant processes within a single CMA*	Merits appeals for all tools	Full merits review via court
	All tools are ECHR compliant within the single CMA	Judicial review for some tools and full merits review for others		

* Full ECHR compliance assured by single CMA processes combined with appropriate appeal rights to independent and impartial tribunal.

10.21 The Government's view is that change should be considered only where it can be expected materially to contribute to the objectives set out in chapter 1. The Government's preliminary view is that in relation to:

- **Independence at second stage decision-making** – the creation of the single CMA provides an opportunity for more continuity in staff teams between phase 1 and 2 in mergers and markets cases than is currently the case and consideration will be given to how best to achieve this, whilst preserving effective independence of decision-making. In considering responses to this consultation, Government will also explore whether there is a case for considering a change to the decision maker on mergers and in antitrust cases. [The Government intends to maintain the distinction between an initial phase 1 review and an in-depth phase 2 investigation in mergers and markets cases.](#)
- **Different approaches to tools** – adopting different approaches to decision-making (where appropriate) to the different tools available to the single CMA may mean better and / or more efficient decisions, provided this does not lead to undue organisational complexity. [The Government considers the creation of the single CMA provides opportunities for process synergies which it would wish to seek to achieve where appropriate.](#)
- **Role of panels** – the role of panels in the decision-making process is dependent on the tool. [For markets: the Government considers that panels should be both investigators and decision makers in phase 2 market investigations, with safeguards to ensure independence of decision-making. For mergers: the Government considers it worth exploring the relative advantages of executive decision-makers and panel decision-making structures. For antitrust cases, the Government seeks views and evidence on a range of options and whether they could assist speed and throughput of cases whilst maintaining or enhancing robustness of decision-making \(see chapter 5\).](#)
- **Nature of panels** – for panels made up of independent members (similar to the current CC model) [the Government wishes to consider the benefits and costs of a higher proportion of the panellists making a significantly greater time commitment than is currently the case \(currently CC members typically work on one or two cases at time, with the exception of the Chairman and Deputy Chairs\).](#)
- **Appeals and ECHR compliance** – whichever decision-making structure is put in place, it will need to be part of an overall ECHR compliant process. For antitrust decisions, it may be possible to change the scope of review on appeal so that it mirrors the

jurisdiction of the General Court or (under the Internal Tribunal model) to allow appeal on judicial review principles, rather than full merits appeal. However, such change would only be worthwhile if it was not at the expense of for example, the quality of decision-making in the regime or the overall time taken to conclude a case. Review of mergers and markets decisions would remain as now: a review applying judicial review principles.

Decision-making procedures

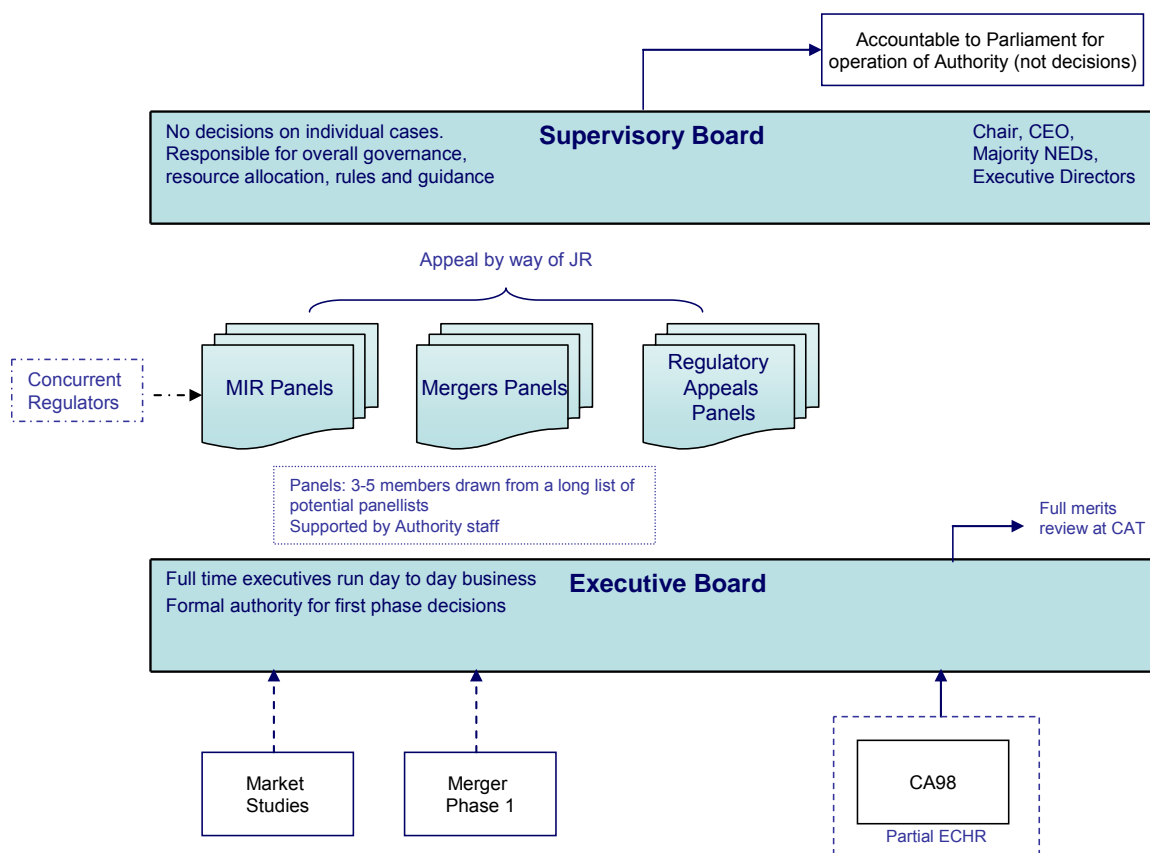
- 10.22 **The Government seeks views on options for decision-making structures that could deliver the objectives of the single CMA outlined in chapter 1.** The creation of the single CMA will require some changes to the current decision-making process to reflect the fact that decisions would no longer be taken by separate organisations. It provides an opportunity to make improvements to the competition regime and to consider whether there are alternative decision-making processes that would deliver the objectives for the single CMA described in chapter 1. It is possible that some of these changes could be effected without legislation, nevertheless the Government invites views on these issues to ensure that all possible options are identified and properly considered.
- 10.23 This chapter considers a base case decision-making model for each of the competition tools, which involves making the changes necessary to reflect the combination of decision-making functions within a single CMA with only limited additional changes to improve the regime. In addition, alternative decision-making models are described as illustrations of ways in which the decision-making structure could be reformed. This is not intended to suggest that these models are the only options available for robust and efficient decision-making.
- 10.24 As discussed in chapter 9, at an institutional level the Government proposal envisages that the single CMA will have a Supervisory Board, and an Executive Board, with separation of phase 1 and phase 2 investigations for at least mergers and markets cases. The Supervisory Board¹²⁶ would have overall responsibility for the single CMA, including overall governance, resourcing, strategy and policy. The Executive Board, chaired by the Chief Executive, will be responsible for the day to day running of the single CMA, and could take certain casework decisions depending on the tool and final decision-making model adopted.

¹²⁶ The composition of the Supervisory Board might include a combination of Non-Executive Directors (who would be the majority) and Executive Directors of the single CMA, including the Chief Executive. The Supervisory Board will be chaired by a Non-Executive Director.

Base case decision-making model for the single CMA

10.25 Figure 10.2 shows the type of structure that might be put in place as a result of a merger of the OFT and the CC to create the single CMA, but with limited other changes to the overall framework. If the single CMA retains the CC's current regulatory appeals functions, the Government does not propose to make any significant changes to the regulatory appeals process, which is discussed in chapter 8.

Figure 10.2 Base case



The markets regime

10.26 **Figure 10.2 – base case** - Under this model, the markets regime would remain largely unchanged in relation to decision-making, although there may be other process improvements (see chapter 3), for example tighter statutory deadlines. The decision to initiate a market study would be taken by the executive, as would the decision to make a MIR (under the OFT Board's Rules of Procedure, the decision to make a referral to the CC is currently a reserved power for the OFT Board, and therefore includes the insight of Non-Executive Directors).

10.27 A MIR would be conducted, as now, by an investigatory panel (in the 'investigatory panel' model the panel takes a full role in the investigation, working closely with the case team, directing the nature of the analysis and investigation) made up of independent members from a list of available panel members, some of whom may be effectively full time, with others who work for the single CMA as and when needed. The Panel would be required to work within the guidance set by the Supervisory Board, but would ultimately come to its own independent decision based on the particular facts of the case. Any resulting appeal would also remain as is now: appeal on judicial review principles before the CAT, (other than appeals to decisions of the regulatory appeals panels which would continue to be made by application for judicial review to the administrative courts¹²⁷).

Mergers

10.28 **Figure 10.2 - base case** - Under this model, decision-making in the merger regime is assumed to operate as now, subject to wider process improvements. The phase 1 process, including undertakings in lieu of a reference, clearances and references, would be undertaken by the executive, with one or more senior members of the executive taking the decision-making role.¹²⁸

10.29 The decision maker would be the panel at phase 2, as is the case now. The panel is investigatory, made up of part time panel members, and working within the guidance set by the Supervisory Board.

Antitrust options

10.30 **Figure 10.2 – base case** – Under this model, the decision-making processes for civil antitrust cases remain as they are now, with the single CMA carrying out the current role of the OFT, albeit with the realisation of improvements to the way in which the cases are delivered. The current arrangements involve the OFT undertaking the investigation and reaching a decision. This decision is appealable to the CAT on the basis of a full merits review. This model seeks to resolve the key issue with antitrust cases – that being the length of time taken to complete cases from initiation through to end of any appeals – via the measures in hand around streamlining administrative process.

¹²⁷ Decisions to reviews of remedies that relate to undertakings accepted, or orders made under the Fair Trading Act 1973 are also subject to appeal via application for judicial review to the administrative courts.

¹²⁸ Under the current regime, the OFT has indicated that the decision-maker in mergers cases is either the OFT's Chief Economist or the OFT's Senior Director of Cartels and Criminal Enforcement.

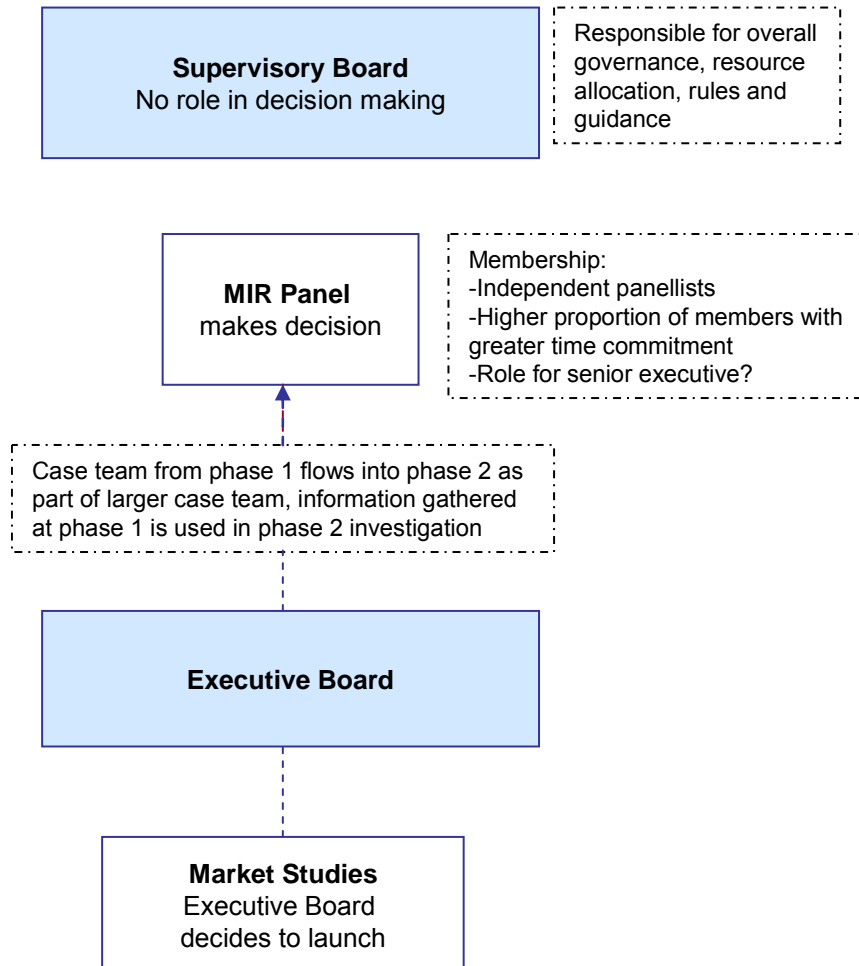
Potential further changes to the decision-making structure of the single CMA

10.31 Beyond the base case option outlined above (para 10.30), the Government seeks views on the full range of deeper and broader changes to decision-making illustrated in Figure 10.1. An illustration of potential further changes that could be made to the decision-making structure for the different competition tools is described below.

Markets

- 10.32 In relation to the markets tool, potential changes to the nature of the panel could be considered – i.e. who should make up the panel and the degree of separation between phase 1 and phase 2 at an executive level. A possible illustrative approach is set out in Figure 10.3.

Figure 10.3 Markets



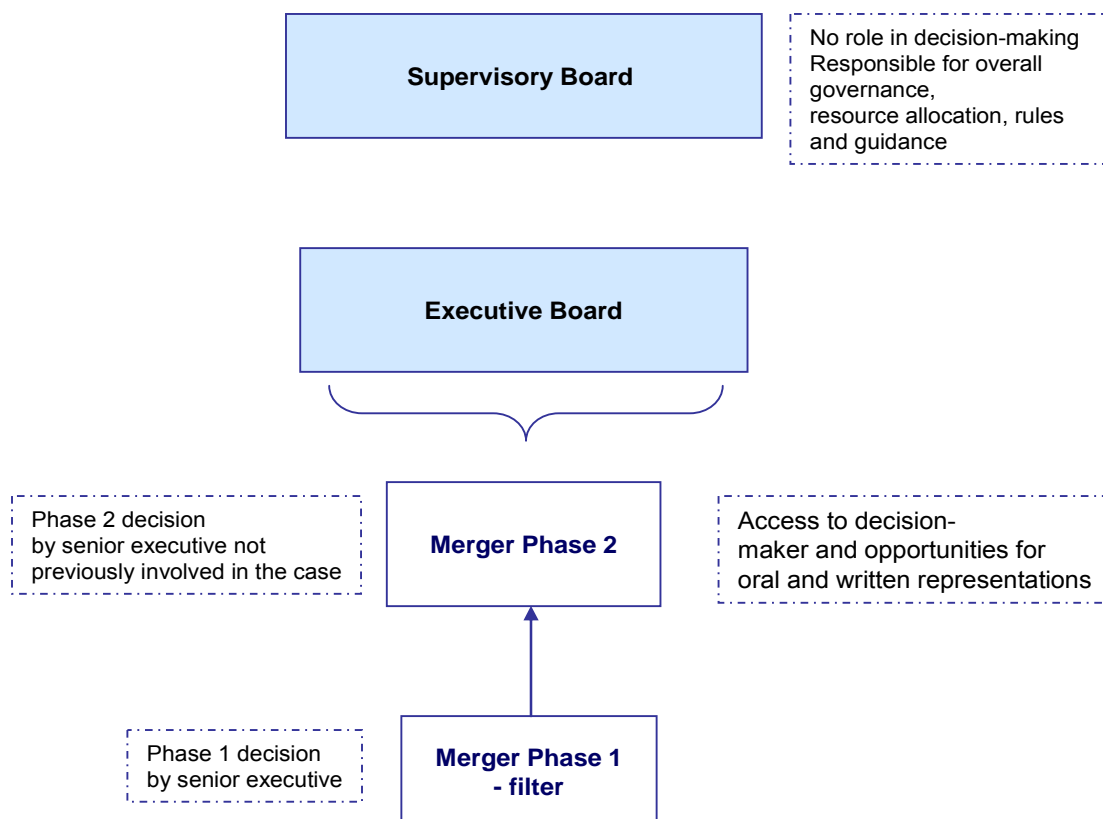
- 10.33 In this illustrative model the phase 1 process remains as described in the 'base case'. Once a Market Investigation Reference has been made, some or all of the phase 1 market study team would continue work on the phase 2 investigation, taking with them their existing knowledge of the case and market. This team would join a larger investigatory team, thereby balancing out the potential for 'confirmation bias'. However the decision-maker at phase 1 is not the decision maker in phase 2 – this role rests with the panel. Other issues to consider are the appropriate role of the panel and the balance between investigation and adjudication and whether there is some role for the executive in this model (either as part of the decision-making panel, or with an enhanced ability to advise the decision-making panel).

10.34 The panel's¹²⁹ involvement in the investigation at phase 2 in this model may replicate the current arrangements or may move to being more adjudicatory. In either case the panel would form its decision and determine remedies. In this option, the possibility that decision-making panels could include a senior member of the executive of the Authority could also be considered and the Government seeks views on the appropriate role of the decision-making panel and the advantages and disadvantages of adding an executive to the predominantly non-executive panel of decision-makers. In addition, the Government seeks views on whether there are alternative ways in which the input of executives could be obtained, to ensure the appropriate balance between high quality decision-making across all of the single CMA's competition tools, whilst preserving independence of the decision-maker

Mergers

10.35 As for the markets regime, there is a broad spectrum of alternative potential decision-making structures for merger cases. One alternative to the base case described above would be for both phase 1 and phase 2 decisions to be undertaken by a (different) senior member of the executive, with no involvement of a panel. This is illustrated in Figure 10.4.

Figure 10.4 Mergers



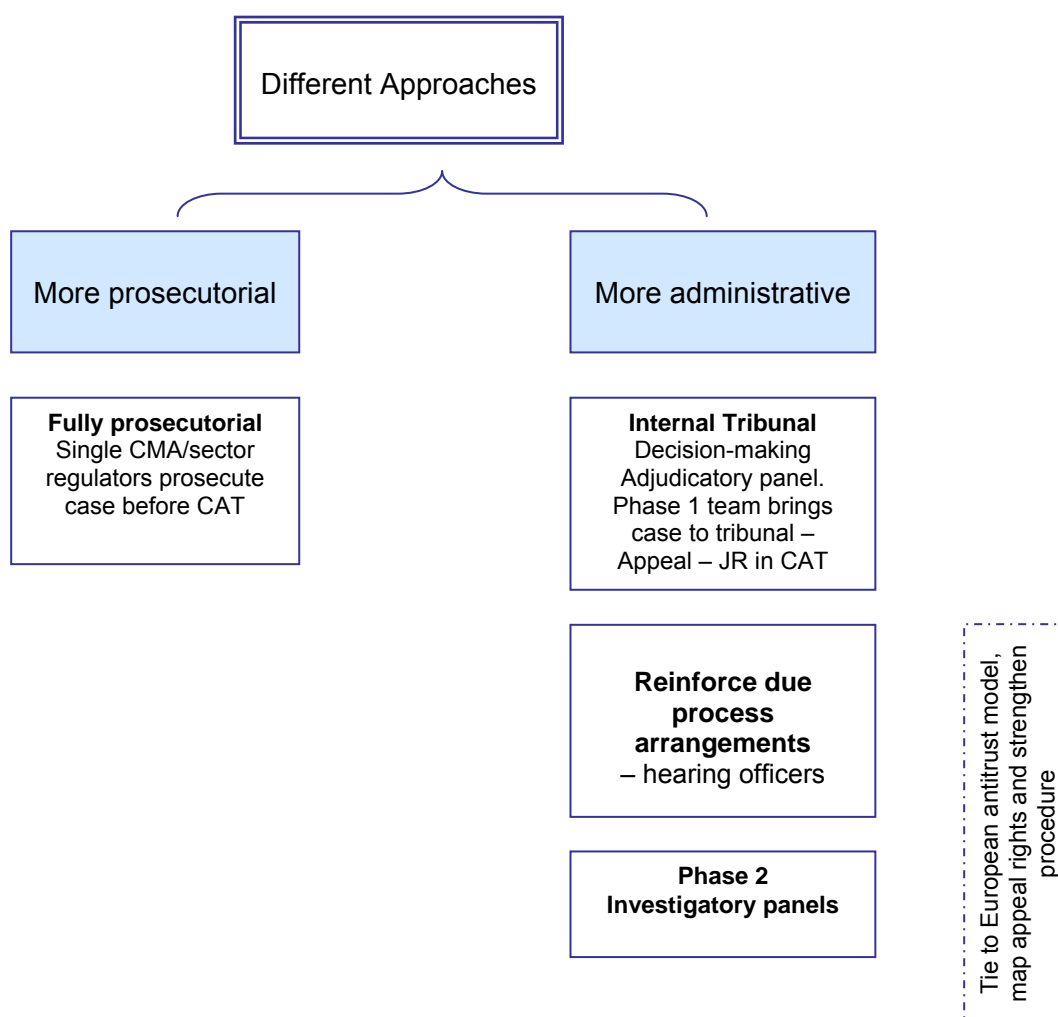
¹²⁹ It is envisaged that this panel is not a single fixed group of members, all of whom undertake all investigations. Rather we imagine a panel being created from a list of relevant panel members for the purposes of a specific investigation, much as the case is now.

- 10.36 In this model, the phase 1 decision would be made by a senior member of the executive who would apply the current test for referral to phase 2. The phase 2 decision could be made by an independent member of the executive – someone not previously involved in the case. As an alternative, this executive could take decisions in conjunction with a Non-Executive Director from the Supervisory Board (selected for their competition expertise) or an independent panellist. The executive decision-maker model mirrors many international comparators, including DG Competition, whose regime is regarded as being on par with the UK.
- 10.37 However, it involves less independence in decision-making than in the current decision-making structure and in some other major jurisdictions such as the USA.
- 10.38 If this model were adopted, consideration would need to be given to how this decision-making structure would work in practice to ensure that the regime is able to deliver necessary access to decision-makers, transparency and independence of decision-making.
- 10.39 Further alternative approaches might include:
- retention of a panel as the final decision-maker, but not as an investigatory panel, with the analysis and case development undertaken solely at the staff level. Under this model, once the phase 2 case team reaches a conclusion, this is put before a panel which ‘hears’ the evidence, and makes the final decision and approves the remedies (the panel having a more adjudicative role than the investigative role in the current regime). This might offer streamlining in the analysis stages, whilst still enabling independence of decision-making. However, it could lengthen the process or reduce the robustness of decisions as it may be that the decision-making group would be less familiar with the detail of the case than the current system (investigatory panel) and as a result, less well equipped to ensure that the case is dealt with efficiently, focusing on the right issues and avoiding exploration of irrelevant considerations; or
 - adoption of a decision-making structure similar to that envisaged for market investigations in Figure 10.3, but with an enhanced role for executives.

Antitrust options

- 10.40 There are a range of alternative decision-making structures that could be adopted for antitrust cases. No one model appears, at this stage, to stand out as being preferential. As discussed in chapter 5 there are broadly, in addition to the base case set out in Figure 10.2, two approaches which could be taken – making the regime more prosecutorial or more administrative in nature (see Figure 10.5).

Figure 10.5 Antitrust



10.41 Some of these approaches are novel in the antitrust field, as such the Government seeks views on the expected effects particularly of the more administrative options – positive or otherwise. It is crucial that the effects of any changes are fully understood so as to avoid the potential of negative unforeseen effects.

10.42 There are advantages and disadvantages for each model. The final approach taken will depend on the overall balance of the advantages and disadvantages of each approach, the fit with the single CMA as a whole, and the broader regime – including concurrency arrangements with sector regulators.

Appeals and ECHR compliance

10.43 As indicated above, whichever decision-making structure is put in place for the different tools, it will need to be part of an overall ECHR compliant process.¹³⁰ In civil and in some non-criminal cases, where the

¹³⁰ See Appendix 1 for further information on these requirements.

requirements for an 'independent and impartial' tribunal are fully not met by the first-instance decision-taker, Article 6 can be satisfied if there is a right of appeal of the first instance decision before an independent and impartial tribunal that has 'full jurisdiction'.¹³¹ The Government believes that it is possible to structure the decision-making processes for mergers and market cases within the single CMA in such a way that the existing rights of appeal on judicial review processes remain the appropriate means of ensuring that the decision-making process for such cases is ECHR compliant. It may be possible to make changes to the current processes to allow appeals on judicial review principles, rather than full merits appeal, to be the appeal mechanism in antitrust cases as well as merger and markets cases, whilst maintaining compliance with ECHR requirements. This is considered in more detail in chapter 5.

Transition arrangements

- 10.44 Subject to legislative timetables, current assumptions expect the earliest date for the single CMA to assume its full competition functions to be between January and September 2013.
- 10.45 BIS is currently considering with the Competition and Consumer bodies and other Departments issues of transition planning and phasing of transitional arrangements should the Government decide to establish a single CMA. This includes issues of status of the single CMA, Departmental sponsorship and planning an orderly process and timetable to bring together the OFT and the CC and to set up the single CMA.
- 10.46 The Government has indicated that the Groceries Code Adjudicator will be established within the OFT, but it will have decisional autonomy and will act independently of the OFT Executive. The transitional arrangements put in place for the creation of the single CMA, will take into account the arrangements necessary for the Groceries Code Adjudicator.
- 10.47 Due consideration will also be given to the continuing management of competition cases during the transition period between announcement of changes to competition law and its date of enactment.

¹³¹ *Bryan v UK* [1996] 21 E.H.R.R. 342, *R (on the application of Bewry) v Norwich City Council* [2002] H.R.L.R. 2, *Kinsley v UK* [2009] 48 E.H.R.R. 18.

11. Merger Fees and Cost Recovery

While bringing undoubted benefits, the competition regime is expensive to run and administer. In addition to changes aimed at improving the speed and efficacy of the regime, the Government is looking at options for amending the way the costs involved in regulating mergers are recovered through fees and considering ways to improve incentives and recover costs from those found to have broken the law. The challenge is to do this in a way which does not prejudice access to justice nor detract from the reasonable safeguards within the system.

There are four proposals:

- **Options for the future funding of the merger regime.**
- **The potential introduction of recovery of some or all of the competition authority's antitrust investigation costs where there has been a finding that competition law has been infringed.**
- **The ability for the CC to reclaim its costs in telecom price control appeals.**
- **Reclaiming the cost for the services of the CAT.**

Introduction

11.1 There is a clear corollary between effective enforcement action, benefits to business generally and benefits to the consumer. In essence, everyone benefits from effective action against anti-competitive behaviour.¹³²

11.2 Against this benefit to business and the wider economy sits the cost to the exchequer of the investigation in antitrust, the appeal process and the merger control process generally. These investigations and processes tend to be lengthy and expensive and the Government is considering ways of ensuring the costs are met by the parties concerned rather than being met by taxpayers generally.

11.3 Historically, the use of charging has been limited to the award of parties' court costs for a number of reasons. The current fiscal position and general principles of fairness however dictate that the Government must give due consideration to all available options for a fairer system which works to the benefit of the public good. The financing of that system

¹³² The OFT 2010/11 Annual Plan estimates their benefit to the economy to be around £409m.

should fall, as far as possible, on those whose behaviour has either led to a fine following an investigatory process or upon those who directly use the regime.

11.4 The competition regime is expensive to run and maintain. In the 2008/9 financial year the Office of Fair Trading and Competition Commission jointly cost £51.5m. These cost can be broken down as follows:

Merger Control	£14.5m
Enforcement	£19m
Market Studies	£6m
Market Investigations	£10m
Advocacy	£2m
	£51.5m

11.5 Additionally, running costs for the Competition Appeal Tribunal are in the area of £4 million for 2009/10.

11.6 Ordinarily, full cost recovery would be the Government's preferred option but in these particular situations this will not be possible for a number of reasons related to principles of fairness and access to justice which are addressed below.

Merger Fees

11.7 The current regime differentiates between the level of the merger fee applicable based on the annual UK turnover of the enterprises being acquired. The three turnover bands are:

- £30,000 payable where the value of the UK turnover of the enterprises being acquired is £20 million or less;
- £60,000 payable where the value of the UK turnover of the enterprises being acquired is over £20 million but not over £70 million; and
- £90,000 payable where the value of the UK turnover of the enterprises being acquired exceeds £70 million.

11.8 While merger control legislation applies to small business, all businesses that qualify as Small or Medium Sized Enterprises (as defined respectively in Sections 382 and 465 of the Companies Act 2006) are exempt from paying merger fees.

Setting merger fees to recover the full costs of the merger control regime

- 11.9 Despite substantial recent increases in the levels of merger fees, the fees do not produce sufficient income to meet the total costs involved in operating the merger control regime. For the purposes of assessing cost recovery requirements, BIS estimates, following recent discussions with the OFT and the CC, that the total annual cost of the merger control regime is likely to be in the region of £9 million¹³³ in coming years. This is a necessarily broad estimate since the actual costs incurred each year will vary depending on the total number and the nature of cases considered. The cost also depends on the number of mergers that are referred for a phase two investigation, which determines the proportion of its overheads the CC attributes to its merger control functions. Nevertheless, for the purposes of making decisions about necessary fee structures, we are assuming the target income to be achieved is around £9 million annually.
- 11.10 The Government is not minded to introduce a flat fee under a voluntary merger regime. Removing any differentiation between the fee payable when acquiring a smaller and larger enterprise could place disproportionate costs on smaller mergers and may discourage some smaller transactions.

Option 1: increase fees within a three band fee structure

- 11.11 One option to achieve full cost recovery would be to increase the level of fees payable in each of the three existing fee bands, which the Government believes provides an appropriate level of differentiation between smaller and larger mergers. To estimate the appropriate fee levels needed to recover the full, approximately £9 million cost of the merger regime, the number of mergers taking place within each of the respective fee bands is estimated as an average of the past 3 years. On this basis, costs may be recovered if fees were increased to £65,000, £130,000 and £195,000 within each of the three fee bands.

Option 2: increase fees within a four band fee structure

- 11.12 Alternatively, an additional higher fee band could be introduced for mergers involving acquisitions of enterprises with an annual UK turnover that exceeds £120 million. In this case, we believe full cost recovery could be achieved by setting the fee levels in the four fee bands at £60,000, £120,000, £180,000 and £220,000 respectively.

¹³³ £3m OFT and £6m CC. Please note this is different from the cost detailed in paragraph 11.4. However, this is a forecast of annual chargeable merger control costs and we believe this is a more robust basis on which to calculate merger fees.

Merger fees if there was mandatory notification of mergers

- 11.13 If mandatory notification of mergers was introduced, the total number of mergers coming within the system and qualifying to pay a fee would increase. It is also likely that costs to the single CMA would increase as a result of reviewing more cases under a mandatory notification regime.
- 11.14 The Government is exploring two possible options on merger fees under mandatory notification. Option 1 would be to have a flat fee, where each notified merger paid the same amount. This is feasible under a mandatory notification regime as the numbers notifying will be considerably higher than under a voluntary notification regime so a relatively lower fee can be charged. Based on our estimate of the number of mergers qualifying to pay a fee under the full mandatory notification option, a flat fee of approximately £7,500 would be sufficient to achieve the full, approximately £9 million cost of the merger regime. Under the hybrid mandatory notification option, based on our estimate of the number of mergers qualifying to pay a fee, a flat fee of around £23,000 would achieve full cost recovery. However, given that mandatory notification may increase the cost of merger control to the single CMA, fees may need to be higher.
- 11.15 Option 2 would be to retain the differentiation of fees by turnover. The bands could be as set out under the voluntary regime, but the fees charged would be much lower, given more mergers would qualify to pay a fee under mandatory notification. Based on our estimates of the number of mergers occurring within each of the three current fee bands under the full mandatory notification option, fees of approximately £4,000, £8,000 and £12,000 respectively would be sufficient to recover the full cost of merger control. Under the hybrid mandatory notification option, fees of approximately £9,000, £18,000 and £27,000 charged to mergers with a UK target turnover of less than £25 million, £25 million to £70 million and more than £70 million¹³⁴ respectively would be adequate to recover the full cost of merger control. Alternatively different fees could be charged to mergers qualifying on the turnover test and share of supply test. Fees of approximately £26,000 charged to mergers qualifying on the turnover test¹³⁵ and approximately £13,000 charged to mergers qualifying on the share of supply test, would be sufficient to achieve full cost recovery. However, as already noted since mandatory notification may increase the cost of merger control to the single CMA, fees may need to be higher.

¹³⁴ These turnover bands have been used as due to data limitations these are the bands by which we have been able to estimate the number of mergers.

¹³⁵ Mergers with a UK target turnover greater than £70m.

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?*

The Possible Introduction of a Power to Reclaim the Cost of Antitrust Investigations

- 11.16 The aim of this proposal is to recover, at the end of the process, the investigation costs following a finding of infringement from the infringing party or parties pertaining to the particular infringement(s). Normally, the financial objective would be to recover the full costs of the regime from infringers but in the area of antitrust where not every investigation leads to a finding of infringement full cost recovery is not achievable. The next best option would be that infringers are held responsible for the costs of their own investigation. The cost would go directly to the Government's consolidated fund, not to the competition authority.
- 11.17 This approach is radical but it is not without precedent and would be a way of directing the bulk of the costs of the antitrust regime onto those found to be in breach.

Costs of Antitrust Investigation

- 11.18 Antitrust investigations can take a long time and do not necessarily sit in well defined financial years, however, in the year 2008/9 the OFT spent an estimated £11.7m on antitrust investigations. It is independently estimated that the rate for cartel detection and successful prosecution in the EU is around 15%,¹³⁶ although most of these cases have been in France, Germany and Italy.¹³⁷ Given the advantages to business and the wider economy of effective antitrust action there is a strong argument for looking at ways to improve the detection rate, which are addressed by proposals elsewhere in this consultation, and ways to incentivise whistleblowers which is part of the rationale in considering giving the competition authority the power to recover their investigation costs.
- 11.19 It should be made clear that not every investigation leads to a decision against the parties. It is possible that, having conducted an investigation, it is found that one or more of the parties has not committed an infringement, that there is insufficient evidence to proceed further, or the investigation is dropped for administrative reasons. The enforcement authority also has the option of making a non-infringement decision. It is

¹³⁶ http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf

¹³⁷ In the USA where they have private enforcement and triple damages the rate is estimated to be around 20%.

not intended that costs are recovered from any party where there is not an infringement decision against them.

- 11.20 In considering this issue, the Government seeks stakeholders' views on the type of cases where it would be appropriate to reclaim the cost of an investigation, and the effect on immunity, leniency, settlement and appeals.

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

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

Immunity, Leniency, Settlement and Commitments

- 11.21 The immunity and leniency programmes are a major factor in encouraging parties who are e.g. members of cartels, to come forward and provide details of anti-competitive behaviour by other cartel members. For the programme to work effectively it will be necessary for the competition authority to have discretion over whether or not costs should be recovered in that particular case. If the competition authority was required to recover costs there would be potential implications for immunity/leniency incentives.
- 11.22 Granting immunity and leniency applicants an immunity from, or reduction in, costs would have the benefit of supporting and enhancing the leniency regime but would require the competition authorities to have a degree of discretion over the level of costs recovered.
- 11.23 Parties to early resolution agreements (settlements) could potentially benefit from immunity from, or a reduction in, the proportion of costs reclaimed which have been incurred up to the date of the early resolution agreement. This, again, could encourage the early resolution of cases but would also require the competition authorities to have discretion over the levels of costs recovered.
- 11.24 Similarly, parties who, following an investigation, have offered commitments under section 31A of the Competition Act 1998 to address competition concerns on the basis that the enforcer closes its investigation could potentially be granted immunity from or a reduction in the investigation costs incurred.

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

Payment of fines

11.25 At this stage, it is envisioned that, as part of the infringement decision, an additional element for the costs of investigation will be added to the fine to make the final total payable. Because the costs recovered, in addition to the fine, will go into the Government's consolidated fund, not back to the competition authority, the authority has no direct financial incentive to reach infringement decisions and would prioritise cases on merit, impact and assessment of consumer detriment.

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?

Costs on Appeals

11.26 At present, a party can appeal on the substance of the decision and/or against the level of the fine for the infringement. It is envisaged that the figure for costs could also be appealed.

11.27 The Government's current view is that a wholly successful appeal on the substance should mean that the appellant should not be liable for the costs element. Where the appeal is only partially successful and the decision has not been overturned, the party should still be liable for a costs element the level of which should be decided by the appeal body, currently the Competition Appeal Tribunal. In instances such as this, the party should be liable for the costs of investigating the upheld infringements, but not for costs of investigating the findings which were overturned.

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?

How should the Legal Basis for Cost Recovery be established?

11.28 If the Government were to pursue some of the Options outlined above it would be a matter for further detailed consultation on the specifics of implementation. What is clear at this stage is that there is no current legislative provision to allow the enforcer to recover the costs of its antitrust investigations.

- 11.29 This could be addressed by introducing an enabling power to allow the competition authority to recover its costs. This might also contain a requirement on the competition authority to publish guidance on how such costs would be assessed.
- 11.30 Another option would be to amend sections 36-38 of the Competition Act 1998 to make it clear that the costs of the investigation can be taken into account in ascertaining the appropriate amount of penalty and that the guidance should include material on how investigation costs are to be considered in assessing the appropriate amount.
- 11.31 The OFT has the power to fine up to 10% of worldwide turnover but in practice antitrust fines, while significant in monetary terms, are usually only around 3-4% of turnover within the relevant market. This provides a great deal of flexibility to increase fines to reflect the cost of the investigation by amending the OFT's guidance as to the appropriate amount of penalty.
- 11.32 Nevertheless, the statutory provisions allowing the competition authorities to impose financial penalties¹³⁸ do not expressly allow costs and it would be *ultra vires* to use this provision other than to impose a penalty, unless the Act was amended. As a consequence of this, any amendment to the penalty guidance (a non-legislative option) to include an adjustment to cover the costs of the investigation would still require any penalty to be set with reference to, and assessed against, the overriding considerations of seriousness and deterrence. It would not allow the simple recovery of the actual costs incurred (without an amendment to the statute itself) and would add a potential complication to the appeal process by not separating the amount of the fine from the costs incurred by the investigation.

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?*

Telecom Price Control Appeals Heard by the Competition Commission

- 11.33 Currently these regulatory appeal cases, anomalously, do not provide the statutory basis for the CC to reclaim its own costs. Full cost recovery is not achievable without seriously compromising Ofcom's ability to fulfil its statutory duties, but the Government proposes the introduction of an innovative asymmetric approach, which echoes qualified one-way cost shifting,¹³⁹ and will go some way to covering the costs of the case while

¹³⁸ Sections 36 to 38 of the Competition Act 1998.

¹³⁹ R Jackson, *Review of Civil Litigation Costs: Final Report*, The Stationery Office, 2010.

protecting the regulator's ability to carry out its statutory duties and leave business in a similar position to the more common, symmetrical, costs following the event ("polluter-pays") system.

- 11.34 The CC is responsible for hearing a number of regulatory appeals including telecoms appeal cases involving price controls (See Chapter 9). In other regulatory appeals that the CC hears (e.g. energy and water cases), the CC has the ability to reclaim its own costs at the end of the hearing.
- 11.35 These costs can be considerable and vary depending on the reference under consideration; however, while there are parallels with telecoms, the issues being adjudicated are quite different. For example, in a water licence modification reference, the water company's licence contains high level provisions covering the calculation of these costs.¹⁴⁰ What is effectively being adjudicated in these cases is a reconsideration of a licence modification and the CC has the power to recoup its costs either directly from the water company if the appeal fails, or from the water company, via a charge on consumers if it is upheld.
- 11.36 Similarly, the CC can recover its own costs with electricity price control appeals which follow a redetermination along similar lines to the water regime. The key issue is that the public authority's ability to perform its functions is not affected because, while the CC's costs fall on Ofgem, they in turn use a standard licence condition (Condition 4) to recover the money from the licensee.¹⁴¹
- 11.37 This is not the position in telecoms cases because there is no statutory provision within the Communications Act 2003 allowing this. The reason for this inconsistency is unclear however these cases are heard on the full merits, can be complex and can run for some time which has serious consequences for the CC's budget. Until recently it has not been much of a drain on the CC because there had only been two cases but that number has now risen to five with potentially nine more in the next year. This would form a significant proportion of the CC's caseload and expenditure at a time of shrinking budgets.
- 11.38 It is important to keep in mind that Ofcom has a statutory duty to make decisions in these cases, thus it is impossible for it to simultaneously exercise its duties, including its duty to consumers, and control its risk of appeal e.g. by not taking cases forward under a prioritisation programme or, as with OFT antitrust cases which can be dropped on administrative priority grounds. It is also important to note that what is being adjudicated is Ofcom's exercising of its judgement in a particular case which, again,

¹⁴⁰ In a recent case (SES Water) costs of £430,000 covering direct salaries (CC staff and Members remuneration), an allocation for central costs (office rental costs and general support services) and direct expenses (photocopying and other ancillary costs) were reclaimed by the CC.

¹⁴¹ The basis for recovery of the CC's costs is provided for by s.177(3) Energy Act 2004. The standard conditions of electricity supply contain provisions (Condition 4) for payment by the licensee to Ofgem for certain costs. This includes relevant costs incurred by the CC in connection with any reference made to it with respect to the relevant licence or any other licence granted under the Electricity Act.

is rather different from the Court adjudicating the application of law. There has to be some degree of consideration by the CC for Ofcom's judgement but inevitably, there are likely to be differences of judgement.¹⁴²

- 11.39 Given that the basis of appeal is on the full merits of the case it then presents the possibility, if the Government were to adopt the principle that costs should follow the event, of Ofcom losing all or part of an appeal then having to cover all or some of the costs of the CC, and then being unable to fund its statutory duties due to a funding cap preventing it from raising more income.
- 11.40 It is the Government's clear view that the imposition of costs for these proceedings should not have a chilling effect on Ofcom's ability to carry out its statutory duties. Given that the CC has no control over its workload and that its funding is also limited it is also the Government's view that there should be some way of the CC covering, or partially covering these costs. Consequently it is proposed that the CC should have the ability to reclaim its own costs from the appellant when the appeal is unsuccessful.
- 11.41 It is important to note that substantive appeals on the merits should have some sort of proportionality in the CC reclaiming its costs. Given it is an adjudication of Ofcom's judgement and the CC would give a degree of consideration to Ofcom in exercising its judgement, it is not uncommon that an appellant appeals many points of Ofcom's original decision and the CC finds in the appellant's favour on only one or two.
- 11.42 In these circumstances where the appeal has been partially successful, it would then be inequitable for the appellant to be held responsible for the entire cost of the hearing and the costs payable by the appellant should be reduced proportionately with the success of the appeal. This decision itself should be subject to appeal to the appropriate body, currently the Competition Appeal Tribunal.
- 11.43 If the appeal is wholly successful the appellant should pay no costs.

Q.32 *Do you agree that telecoms 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.*

¹⁴² In the four references (5 cases, BT and Hutchinson GT were consolidated) made to the CC, Ofcom's position has been upheld in full in two cases. In the remaining three cases the CC found in Ofcom's favour on many points; however in each of the three references where the CC found partly in favour of the appellant these findings related to important decisions on matters related to the factual and economic analysis that Ofcom had undertaken, together with how Ofcom had assessed the evidence before it.

The Competition Appeal Tribunal (CAT)

11.44 The CAT currently has the power to award costs to parties following an appeal but does not have the power to recover its own costs which in the 2009/10 financial year amounted to approximately £4m.

11.45 The CAT was created by s.12 and Schedule 2 of the Enterprise Act 2002.

11.46 The current functions¹⁴³ of the Tribunal are:

- to hear appeals on the merits in respect of decisions made under the Competition Act 1998¹⁴⁴ by the OFT and the regulators in the electronic communications, electricity, gas, water, railways and air traffic services sectors;
- to hear actions for damages and other monetary claims under the Competition Act 1998;
- to review decisions made by the Secretary of State, OFT and CC in respect of merger and market references or possible references under the Enterprise Act 2002;
- to hear appeals against certain decisions made by Ofcom and/or the Secretary of State under:
 - i. Part 2 (networks, services and the radio spectrum) and sections 290 to 294 and Schedule 11 (networking arrangements for Channel 3) of the Communications Act 2003;
 - ii. The Mobile Roaming (European Communities) Regulations 2007 (S.I. 2007 No. 1933).

11.47 In hearing these appeals, the CAT has the ability to award costs against the losing party, these costs are related to the expenses of the winning party and are payable to the winning party. The CAT currently has no power to reclaim its own costs other than in prescribed circumstances e.g. in summoning a witness or instructing an expert.

11.48 Caseload is of course variable, but in the last financial year it cost approximately £4m to operate the CAT and it seems equitable that the CAT have the power to reclaim its expenses from the losing party, or in some cases, all parties. An exception to this would be Ofcom for the reasons given in paragraphs 11.38 to 11.40.

¹⁴³ The Postal Services Bill which is currently before Parliament gives those affected by regulatory decisions the right of appeal to the CAT on judicial review grounds. Appeals on price control matters are to the CC as they are now. The Bill is expected to receive Royal Assent by summer 2011.

¹⁴⁴ As amended by the Competition Act 1998 and other enactments (Amendment) Regulations 2004.

11.49 The change to give the CAT this power would be effected by an amendment to the CAT's Rules of Procedure ("the Rules"). Any amendment to the Rules would be by way of statutory instrument subject to the negative resolution Parliamentary procedure.

11.50 The Government is conscious of the issue of access to justice for parties who may be small companies and the costs may potentially be prohibitive to allow them to exercise their rights. Consequently it is proposed that the Rules be amended to allow the CAT the flexibility to decide whether the CAT's costs in the action should be enforced or not.

The level of CAT costs

11.51 There are two options, one to recover the full cost of running a case and a second where only a proportion would be recovered. HM Treasury guidance is to recover full costs where possible.

11.52 By way of providing indicative figures, Table 11.1 presents the costs of the CAT operation between 2006/7 and 2008/9 with the full costs recovery figures for the same period in parenthesis.

Table 11.1 Costs of CAT operations

Year	Transcripts and photocopying (inc. o'heads)	Staff and members' costs (inc. o'heads)	Other incl. T&S, postage etc (inc. o'heads)	Totals (inc. o'heads)
2006/7	£57,200 (£255,000)	£822,100 (£3,658,300)	£43,000 (£191,400)	£922,300 (£4,104,700)
2007/8	£56,800 (£366,400)	£527,000 (£3,398,700)	£26,660 (£171,900)	£610,460 (£3,937,000)
2008/9	£81,000 (£359,500)	£814,200 (£3,614,600)	£35,900 (£159,400)	£931,100 (£4,133,500)
Totals	£195,000 (£980,900)	£2,163,300 (£10,671,600)	£105,560 (£522,700)	£2,463,860 (£12,175,200)

Source: CAT

11.53 Figures vary from year to year with caseload but it should be noted that any legislative changes (e.g. standalone damages) which lead to an increase in caseload would have an affect on projections.

11.54 It should also be noted that the CAT would set aside its costs where the interests of justice dictated this should be so, therefore full cost recovery is, in practice, unlikely. It would however, be fair to say that the large majority of cases are brought by very well resourced appellants but it is estimated that the totals might reduce by around 10 to 15%.

- 11.55 In setting aside and issuing judgments for costs the CAT should also have regard to the substance and degree of success of the appeal. If, for example, an appellant has appealed 20 points but has only been successful in 3 minor points the CAT might take into account the time spent on the case, the merit of each individual point, whether the CAT finds there has been a degree of vexation in the appeal and whether the successful points have been on a technicality, a difference of view on the exercise of the regulator's judgement between the CAT and the regulator, or if the CAT find that the regulator has erred in law or a finding of fact.
- 11.56 It could be foreseen in the above example that the CAT might find the appellant, being successful in only 3 of the 20 points and the substance of the enforcer's decision being upheld, should be held responsible for the majority of the applicable costs. On the other hand, if the CAT finds that an appeal on 5 points was successful on 3 of the points the appellant would pay less, and an appeal where the decision was overturned would be funded from the public purse and the appellant would pay nothing.

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?*

12. Overseas Information Gateways

- 12.1 The OFT and CC each receive a significant amount of information in the course of their investigations. It is an offence for the OFT and the CC to disclose such information unless the disclosure is permitted under an information gateway¹⁴⁵ and consideration has been given to section 244 of the Enterprise Act 2002 which relates to the potential for disclosure to be harmful to the public interest, interests of individuals or legitimate business interests.
- 12.2 The overseas disclosure information gateway (section 243 of the Enterprise Act 2002) permits information secured during an investigation in a Competition Act 1998 case to be disclosed to overseas public authorities for the purpose of civil and criminal antitrust cases in those jurisdictions. In common with a number of other gateways, such information may be disclosed without the permission of the party from whom it was obtained, subject to considering section 244 of the Enterprise Act 2002. The overseas disclosure gateway does not currently allow the disclosure to overseas public authorities of information obtained during mergers and markets investigations. Such information can only be disclosed to an overseas public authority where other gateways permit, namely with the consent of the person to whom it relates or where disclosure is necessary to facilitate the exercise by the OFT or the CC of its own functions. For example to enable discussions of a merger case.¹⁴⁶
- 12.3 The Government is seeking views on how well the 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.

Q.34 *The Government seeks views on how well is the current overseas information disclosure gateway working and whether there is a case for reviewing this provision?*

¹⁴⁵ These are: disclosure with the consent of the person to whom the information relates (section 239 of the Enterprise Act 2002); disclosure required for the purpose of a Community obligation (section 240); disclosure to facilitate the exercise of statutory functions (section 241); disclosure for the purposes of civil proceedings (section 214A); disclosure in connection with criminal proceedings (section 242); disclosure to an overseas public authority (section 243).

¹⁴⁶ Unless disclosure is required to comply with a Community obligation.

The UK Competition Framework

Current competition framework in the United Kingdom

1. The principal bodies charged with enforcing competition law are the Office of Fair Trading (OFT) and the Competition Commission (CC), although sectoral regulators, such as the Office of Communications and the Office of Gas and Electricity Markets, have particular responsibilities in relation to their sectors and have powers that are concurrent with those of the OFT in respect of civil antitrust enforcement and making market investigation references to the CC.
2. The OFT was established as a body corporate under section 1 of the Enterprise Act 2002. It succeeded the Director General of Fair Trading (DGFT) established under the Fair Trading Act 1973. The functions of the DGFT were transferred to the OFT under section 2 of the Enterprise Act 2002.
3. The CC is established under section 45 of the Competition Act 1998 and succeeded the Monopolies and Mergers Commission.
4. The Enterprise Act 2002 brought about a significant change in the way that decisions on merger and market cases were made. Under the previous Fair Trading Act merger and monopoly regimes, the DGFT would advise the Secretary of State whether the conditions for a reference for in-depth investigation appeared to be satisfied. It was for the Secretary of State to decide, having regard to that advice, whether such a reference should be made. The function of the Monopolies and Mergers Commission/CC was to investigate the merger or market that had been referred to it and to report its findings to the Secretary of State, along with its recommendations for remedial measures. The final decision on what action should be taken was for the Secretary of State. The Enterprise Act 2002 largely removed Ministers from the decision making process. The decision to refer mergers or markets is taken by the OFT. The CC then investigates and decides whether there is a competition problem. If it finds that there is, it decides on the appropriate remedial measures for any competition issues identified.
5. The substantive test applied by the DGFT and then by the Monopolies and Mergers Commission/CC, under the Fair Trading Act regime was whether the merger operated against the “public interest”. A public interest test also applied in monopoly cases.¹⁴⁷ In practice, successive

¹⁴⁷ The Fair Trading Act 1973 identified two types of monopoly that could be referred to the CC for in-depth investigation: scale monopolies where one party accounted for 25% or more of a relevant market; and complex monopolies, where a number of companies collectively accounted for 25% or more of a relevant market. The scale monopoly provisions were considered to be redundant once the Chapter 2 prohibition, prohibiting abuse of dominance was introduced into UK legislation. The current market investigation regime was intended to address problem oligopolies, previously covered by the complex monopoly regime. In addition, the market investigation

Secretaries of State had applied the public interest test as a competition based test. The Enterprise Act 2002 formalised this by making the substantive test a competition test. As a result the substantive test in merger cases became whether the merger gives rise to a substantial lessening of competition within any market or markets in the UK for goods or services. The substantive test in market investigations became whether there are features of the relevant market that prevent, restrict or distort competition in any market for goods or services in the UK or a part of the UK.

The OFT

6. The OFT is a Non Ministerial Government Department. It has a range of powers connected with its competition and consumer tools. It also has a number of general functions, listed in sections 5 to 8 of the Enterprise Act 2002, to acquire information in connection with its other functions, to provide information to the public, to advise Ministers, and to promote good consumer practice.
7. In law, the powers and duties of the OFT vest in its Board, but the Board delegates the performance of functions to the OFT executive and staff by means of statutory authorisations. Certain matters are reserved for Board involvement under the Board's Rules of Procedure. These include: approval of market studies, and approval of market investigation references to the Competition Commission.
8. The OFT Board sets the strategic vision for the OFT. It currently comprises the Chairman and Chief Executive of the OFT, 3 Executive Directors and 7 Non-Executive Directors.
9. The OFT Executive Committee has responsibility for running the day to day functions of the OFT and reports to the Board. It currently comprises the Chief Executive, General Counsel, Chief Economist, Senior Director of Strategy and Communications and 3 Executive Directors.

The CC

10. The CC is a Non-Departmental Public Body. The CC Council is the CC's strategic board and is responsible for the efficient discharge of the CC's statutory functions and ensuring that the CC complies with any statutory or administrative requirements for the use of public funds. It comprises the Chief Executive, the Chairman, the 3 Deputy Chairmen and 3 Non-Executive Directors. The CC's Chief Legal Adviser, Senior Inquiry Director and Director of Corporate Services will also normally attend the Council's meetings. Other executive staff are asked to attend as required.

regime can also sweep up scale monopoly issues that are not capable of resolution by applying the Chapter II prohibition.

11. The Chairman of the CC also has specific responsibilities, including a statutory duty to make Rules of Procedure for merger reference groups, market reference groups and special reference groups. The Chairman may also issue guidance on the carrying out of the CC's functions, and before doing so, must consult the members of the CC and any persons he considers appropriate.
12. The Senior Management Team has responsibility for the day to day management of the CC. It is chaired by the Chief Executive and participants are the Chief Legal Adviser, Chief Economic Adviser, Chief Business and Finance Adviser, Senior Director (Inquiries), Director of Corporate Service and Director of Policy (or their respective nominees). Other members of staff attend meetings as required to provide advice, guidance and support.
13. The CC conducts its investigations through Inquiry Groups which are created for the purposes of the particular investigation from among the CC's members.¹⁴⁸ CC members are appointed by the Secretary of State. With the exceptions of the Chairman and the Deputy Chairmen (who are also members), they work part time when required for an inquiry. Following a reference, the Chairman of the CC will select a group of 3 to 5 of these members to form the Inquiry Group. A chairman is appointed for each group (usually the Chairman of the CC or one of the Deputy Chairmen). Groups must comply with statutory procedural requirements and published CC Rules and must have regard to Chairman's guidance, but are otherwise free to establish their own procedures for inquiries. In practice, there is consistency in procedures as between inquiries. The members of the Inquiry Group direct the investigation and analysis to be carried out by CC staff and are the ultimate decision makers on the competition issues arising in the relevant market and remedies required to address any such issues.

The CAT

14. The CAT is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy whose function is to hear and decide cases involving competition or economic regulatory issues. The CAT is headed by the President. The membership consists of two panels: a panel of chairmen and a panel of ordinary members.
15. The President must be a lawyer qualified in any part of the United Kingdom and of at least 10 years standing. The President is appointed by the Lord Chancellor (upon the recommendation of the Judicial Appointments Commission) and must appear to the Lord Chancellor to have appropriate experience and knowledge of competition law and practice.

¹⁴⁸ Competition Act 1998, schedule 7 sets out the requirements for the appointment of members to Inquiry Groups.

16. In addition to the President, there are currently 3 part-time Chairmen. The Judges of the Chancery Division of the High Court are also able to chair cases on an occasional basis. There are currently 31 Ordinary Members (also part-time) with expertise in a number of fields including, economics, accountancy and business, although this is expected to reduce to 14 Ordinary Members as the terms of serving members come to an end. A panel comprising a Chairman and two Ordinary Members is appointed to each case heard by the CAT.

Background on Enterprise Act 2002

Market investigations:

17. Market investigations are a two stage process involving the OFT and CC. In the first stage, the OFT considers under section 131 Enterprise Act 2002 whether it has reasonable grounds to suspect that one or more feature(s) of a market in the United Kingdom prevents, restricts or distorts competition, and whether to exercise its discretion to refer.¹⁴⁹ Sector regulators also have the power to make market investigation references to the CC, applying the same test.
18. This consideration often occurs during the course of a market study by the OFT conducted under the OFT's general information-gathering function under section 5 of the Enterprise Act 2002. But it can also happen during the OFT's consideration of a super-complaint made by a designated consumer body, or in the course of a review by the OFT of remedies put in place by the CC following a merger inquiry or market investigation reference or of monopoly or merger remedies put in place by the Monopolies and Mergers Commission under the Fair Trading Act 1973.
19. The Secretary of State can also make a market investigation reference (under section 132 of the Enterprise Act 2002) when the OFT decides not to refer but the Secretary of State disagrees, or when the Secretary of State has brought a matter to the attention of the OFT, and is not satisfied that the OFT will decide within a reasonable period whether or not to refer it under section 131 of the Enterprise Act 2002. The Secretary of State also has a discrete role in relation to market investigations involving specified public interest considerations.¹⁵⁰
20. Where the statutory test for reference is met, the OFT (or sector regulator) can accept undertakings in lieu of making a reference from the parties that would be the subject of the reference.¹⁵¹ In doing so, the OFT must have regard to the need to achieve as comprehensive a

¹⁴⁹ The OFT has a discretion rather than a duty to refer, unlike the position in relation to merger references. The OFT has published guidance that describes, non-exhaustively, the factors it will take into account in considering the discretionary element of the test for making a reference (OFT 511 "Market investigation references").

¹⁵⁰ These are specified in section 153 of the 2002 Act, which currently specifies only "national security" (this includes "public security", which includes, but is broader than, defence issues – it could for example include security of supply issues, or public safety issues on a national scale e.g. availability of vaccines).

¹⁵¹ Under section 154 of the Enterprise Act 2002.

solution as is reasonable and practicable to the adverse effect on competition concerned, and any detrimental effects on consumers resulting from that adverse effect.

21. In practice the OFT has only accepted undertakings in lieu of making a reference once, in relation to postal franking machines. The OFT's experience of the statutory provisions around accepting undertakings in lieu of making a reference is that it is likely to be difficult to get satisfactory undertakings from all the relevant parties. This is different from the merger regime where usually there are only two parties involved. In addition, the considerations the OFT has to have regard to in accepting such undertakings set quite a high threshold when compared to the statutory test for reference, which only requires the OFT to have 'reasonable grounds to suspect' that there is a competition problem caused by features of the market. In many cases at the time it is considering making a reference, the OFT will not have a sufficiently strong belief as to the adverse effects on competition caused by the features it has found to reach a decision on whether a proposed solution is sufficiently comprehensive to address any problems.
22. Upon referral under section 131 or 132 of the Enterprise Act 2002, the CC determines whether there is an adverse effect on competition in the market concerned. In such cases, the CC must take remedial action, which includes accepting undertakings to take specified action or making enforcement orders (which can among other things require the divestment of business or assets, regulate prices, and impose behavioural measures aimed at improving the way in which goods or services are supplied).¹⁵² In practice, given the difficulties in obtaining undertakings in acceptable form from every participant in the market, and in ensuring that future market entrants comply with the same obligations, it is more usual to impose remedies through an order in market investigation cases than to seek undertakings.¹⁵³
23. Market investigation remedies, once put in place by way of undertakings or orders, are monitored by the OFT,¹⁵⁴ and can be enforced in civil proceedings by both the OFT and the CC or in private law actions for breach of statutory duty.¹⁵⁵ The OFT has an ongoing duty to keep market investigation remedies under review and from time to time to consider whether they need to be revoked, varied, released or superseded by reason of a 'change of circumstances' and to advise the CC accordingly. The CC considers the OFT's advice and is empowered to revoke, vary, release or supersede any remedy if it concludes that this is necessary in the light of any change of circumstances.¹⁵⁶ In addition, persons who have given undertakings to the CC, or who are subject to

¹⁵² See sections 159 and 161 and Schedule 8 of the Enterprise Act 2002.

¹⁵³ The content of undertakings is not restricted – although it must be aimed at addressing the competition problems that the CC has identified. By contrast, the content of orders is restricted and must comply with the requirements of Schedule 8 of the Enterprise Act 2002. This can limit the scope of remedies that the CC is able to impose.

¹⁵⁴ The OFT has a duty to monitor under section 162 of the Enterprise Act 2002.

¹⁵⁵ See section 167 of the Enterprise Act 2002.

¹⁵⁶ There is a Memorandum of Understanding between the OFT and the CC concerning remedy reviews.

orders made by the CC, may seek variation of, or release from the undertakings or order at any time. These provisions prevent undertakings or orders remaining in place when there is no longer a need for them.

24. Decisions in connection with a market investigation reference or possible reference (whether by the OFT, CC or Secretary of State) are subject to review by the CAT. Unlike appeals against OFT antitrust decisions, the CAT applies judicial review principles in considering applications to challenge decisions relating to market investigation references under section 179.¹⁵⁷ The CAT may wholly or partially quash the decision in question and direct the decision-taker to reconsider in accordance with the CAT's ruling.

Merger Regime:

25. The operation of the UK mergers regime is primarily the responsibility of the OFT and CC. There is a residual role for the Secretary of State in certain specified public interest cases.¹⁵⁸ The sectoral regulators have no concurrent powers in this field.
26. Where a merger is a concentration with a Community dimension as defined in the EU Merger Regulation,¹⁵⁹ assessing the effect on competition of the merger ordinarily falls to the European Commission.
27. The OFT has a duty (subject to certain exceptions) to refer a merger or contemplated merger to the CC if it believes it is or may be the case that a relevant merger situation has been created (or in the case of an anticipated merger will be created)¹⁶⁰ and the merger results or may be expected to result in a substantial lessening of competition within any United Kingdom market(s). In essence the OFT conducts a "first phase" investigation to determine whether there is a qualifying merger that leads to a realistic prospect of a substantial lessening of competition.¹⁶¹ Where it finds that both limbs are satisfied it has a duty to refer the merger to the CC. Where that duty arises, the OFT may seek undertakings from the merging parties in lieu of a reference to the CC.¹⁶²

¹⁵⁷ Decisions on penalties imposed as a result of a failure to comply with the requirements of a notice issued under section 109 of the Enterprise Act 2002, are subject to a full appeal on the merits (see sections 109 to 114 of that Act, which apply to market investigation references by virtue of section 176 Enterprise Act 2002).

¹⁵⁸ This covers: national security (this includes, but is broader than, defence issues – it could for example include security of supply issues, or public safety issues on a national scale e.g. availability of vaccines); issues relating to free expression of opinion, accuracy of news presentation and sufficient plurality of ownership of newspapers; broadcast media public interest considerations relating to plurality of ownership of broadcast media, broad range of programming and commitment to broadcasting standards objectives; and financial stability (section 58 of the 2002 Act).

¹⁵⁹ Council Regulation 139/2004/EC on the control of concentrations between undertakings.

¹⁶⁰ Under section 23 of the Enterprise Act 2002, there are two jurisdictional thresholds. The satisfaction of either of the thresholds will mean that there is a 'relevant merger situation' that can qualify for reference (depending on the prospects of a substantial lessening of competition): first, the turnover in the UK of the target business exceeds £70 million; or second, as a result of the merger, at least 25% of goods or services of any description will be supplied in the UK (or a substantial part of the UK) by or to the merged entity and there is an increment in this share of supply caused by the merger.

¹⁶¹ The precise ambit of the duty was considered in more detail by the Court of Appeal in *IBA Health v Office of Fair Trading* [2004] EWCA Civ 142.

¹⁶² Section 73 of the Enterprise Act 2002.

Undertakings in lieu of a reference may be appropriate where there is a clearly identifiable solution to any competition problems that may exist.

28. The CC, when cases are referred to it, conducts the “second phase” of the investigation. The CC determines whether a relevant merger situation has been created and whether there is an anti-competitive outcome (i.e. that the merger does, or is expected to, give rise to a substantial lessening of competition). The CC is required to meet the civil standard of proof and establish its case on the basis of the balance of probabilities. In such cases, the CC has a duty to take remedial action to seek to achieve as comprehensive a solution to the identified competition issues as is reasonable and practicable. In this way it can block a merger or it can put in place remedies designed to address the anti-competitive outcome. These can be by way of undertakings given by the parties to take specified action or by the CC making enforcement orders¹⁶³ (which can among other things require the divestment of business or assets, regulate prices, and impose behavioural measures aimed at improving the way in which goods or services are supplied).
29. Merger remedies, once put in place by way of undertakings or orders, are monitored by the OFT,¹⁶⁴ and can be enforced in civil proceedings by both the OFT and the CC or by third parties in private law actions for breach of statutory duty.¹⁶⁵ The OFT has an ongoing duty to keep merger remedies under review and from time to time to consider whether they need to be revoked, varied, released or superseded by reason of a ‘change of circumstances’ and to advise the CC accordingly. The CC considers the OFT’s advice and is empowered to revoke, vary, release or supersede any remedy if it concludes that this is necessary in the light of any change of circumstances.¹⁶⁶ In addition, persons who have given undertakings to the CC may seek variation of, or release from the undertakings at any time. These provisions prevent undertakings remaining in place when there is no longer a need for them.
30. Decisions in relation to mergers (whether by the OFT, CC or Secretary of State) are subject to review by the CAT. Unlike appeals against OFT antitrust decisions, the CAT applies judicial review principles in considering applications to challenge a merger decision under section 120.¹⁶⁷ The CAT may wholly or partially quash the decision in question and direct the decision-taker to reconsider in accordance with the CAT’s ruling.

¹⁶³The content of undertakings is not restricted – although it must be aimed at addressing the competition problems that the CC has identified. By contrast, the content of orders is restricted and must comply with the requirements of Schedule 8 of the Enterprise Act 2002. This means that remedies imposed by way of order are less flexible than undertakings. In merger cases, CC remedies are usually implemented by means of undertakings.

¹⁶⁴ Section 92 of the Enterprise Act 2002.

¹⁶⁵ Section 94 of the Enterprise Act 2002.

¹⁶⁶ There is a Memorandum of Understanding between the OFT and the CC concerning remedy reviews.

¹⁶⁷ Decisions on penalties imposed as a result of a failure to comply with the requirements of a notice issued under section 109 of the Enterprise Act 2002, are subject to a full appeal on the merits (see sections 109 to 114 of that Act).

Public interest considerations

31. Both the markets and the mergers regimes under the Enterprise Act 2002 contain provisions allowing for Ministers to intervene in cases involving specified public interest considerations. However the operation of the public interest markets regime and the public interest mergers regime differ significantly.

Markets public interest regime

32. Under the markets public interest regime, the Secretary of State may issue an intervention notice when a market investigation reference has been made to the CC on competition grounds, or where the OFT (or concurrent regulator) is considering undertakings in lieu of such a reference. The intervention notice must indicate the public interest consideration that he considers is relevant to the case. That public interest consideration must be one specified in section 153 of the Enterprise Act 2002, or one which the Secretary of State proposes to add to section 153 (subject to Parliamentary approval).¹⁶⁸ Currently, the only public interest consideration specified in section 153 is “national security”. This includes, but is broader than the notion of defence interests. It includes public security¹⁶⁹ which could for example include security of supply issues, or public safety issues on a national scale e.g. availability of vaccines.
33. The effect of issuing a public interest intervention notice is to make the Secretary of State the decision maker on any remedies necessary to address identified competition concerns, having regard both to the competition issues and the specified public interest issues.
34. Where a public interest intervention notice has been issued by the Secretary of State, the CC¹⁷⁰ continues to investigate and prepare a report on the competition issues arising in the relevant market. It does not investigate the public interest issue specified in the intervention notice. The CC’s report is submitted to the Secretary of State and sets out its findings on whether there is an adverse effect on competition in the market concerned. It also sets out its decisions on whether the Secretary of State should take action to remedy the adverse effect on competition (or resultant detrimental effect on customers) and on whether to recommend action by others.
35. In addition, the CC’s report will contain its decisions on what action the CC should take to remedy the identified competition problems in the event that the matter is remitted back to the CC for action. This could occur if the Secretary of State fails to make and publish his decision

¹⁶⁸ Additional public interest considerations can be added by the Secretary of State by Order laid before and approved by both Houses of Parliament (section 153(3) and sections 181(3) and (6) to (10) Enterprise Act 2002).

¹⁶⁹ Public security has the same meaning as in Article 21(4) Council Regulation (EC) No 139/2004 of 20th January 2004 on the control of concentrations between undertakings.

¹⁷⁰ Or the OFT or concurrent regulator where undertakings in lieu of a reference are concerned.

within 90 days of receipt of the CC's report or if he decides that no eligible public interest consideration is relevant to the matter.¹⁷¹

36. In deciding on what action should be taken to address the adverse effect on competition, having regard to the specified public interest consideration, the Secretary of State must accept the CC's findings on whether there is an adverse effect on competition in the market concerned.

Mergers public interest regime

37. Under the mergers public interest regime, the Secretary of State may issue an intervention notice in relation to:
- a relevant merger situation - i.e. a merger that satisfies the jurisdictional thresholds for the OFT to investigate the transaction and make a reference to the CC if appropriate;
 - a special merger situation - i.e. a merger that does not satisfy the jurisdictional thresholds of investigation by the OFT, but which involves:
 - a relevant government contractor;¹⁷² or
 - a person who accounts for at least 25% of the supply of newspapers of any description in the United Kingdom (or in a substantial part of the United Kingdom);¹⁷³ or
 - a person who accounts for at least 25% of the provision of broadcasting of any description in the United Kingdom (or in a substantial part of the United Kingdom);¹⁷⁴
 - a European relevant merger situation – a merger that satisfies the jurisdictional thresholds for the OFT to investigate the transaction and make a reference to the CC is appropriate, but which is subject to review by the European Commission under the EU Merger Regulation 175.
38. The Secretary of State may issue an intervention notice specifying a public interest consideration listed in section 58 of the Enterprise Act 2002 or one which the Secretary of State proposes to add to section 58

¹⁷¹ Section 148 of the Enterprise Act 2002. The Secretary of State could decide that there is no eligible public interest consideration if the specified public interest consideration is one that he had sought to add to section 153 Enterprise Act 2002, but this was not approved by Parliament.

¹⁷² A relevant government contractor is one who has been notified by or on behalf of the Secretary of State or information or documents or other articles relating to defence and of a confidential nature which the government contractor or an employee of his may hold or receive in connection with being such a contractor (section 59 Enterprise Act 2002).

¹⁷³ Section 59(3C) of the Enterprise Act 2002.

¹⁷⁴ Section 59(3D) of the Enterprise Act 2002.

¹⁷⁵ Council Regulation 139/2004(EC) on the control of concentrations with a Community dimension.

Enterprise Act 2002 (subject to Parliamentary approval).¹⁷⁶ The public interest issues specified in section 58 are:

- national security;
 - accurate presentation of news in newspapers;
 - free expression of opinion in newspapers;
 - plurality of control of media enterprises;
 - the need for a wide range of broadcasting of high quality and calculated to appeal to a wide variety of tastes and interests;
 - genuine commitment to broadcasting standards objectives by those with control of media enterprises;
 - financial stability.
39. The effect of issuing the intervention notice is that the decision whether or not to refer the merger to the CC or to seek undertakings in lieu of a reference is taken by the Secretary of State and not by the OFT. In the event that the merger is referred to the CC, the Secretary of State decides on what action should be taken, if any, to address the issues identified by the CC.
40. The intervention notice must be issued before the OFT has made any decision whether or not to refer the merger to the CC or seek undertakings in lieu of a reference. Issuing the intervention notice obliges the OFT to consider whether the appropriate jurisdictional thresholds are met, and in the case of a relevant merger situation, to set out its views on whether the merger gives rise to a substantial lessening of competition. Its report will also include advice on the specified public interest consideration and a summary of any representations that it has received on the public interest consideration. In mergers raising newspaper or media public interest considerations, the obligation to provide advice on the public interest issues lies with Ofcom instead of the OFT.
41. Where the merger is a relevant merger situation, the Secretary of State must accept the OFT's findings on whether the merger would give rise to a substantial lessening of competition but may balance this against the public interest consideration in deciding whether or not to make a reference to the CC. Where the merger is a special merger situation, or a European relevant merger situation, no examination of the competition issues take place and the Secretary of State's decision is on the public interest issue only.

¹⁷⁶ Additional public interest considerations can be added by the Secretary of State by Order laid before and approved by both Houses of Parliament (section 153(3) and sections 181(3) and (6) to (10) of the Enterprise Act 2002).

42. If the Secretary of State decides to refer the merger to the CC, the CC is required to carry out its investigation and to report to the Secretary of State on its findings. Where the merger is a relevant merger situation, and the reference has been made on both competition and public interest grounds, the CC will report on whether the merger does or may be expected to give rise to a substantial lessening of competition and whether having regard to any such SLC finding and its findings on the public interest considerations, the merger would operate against the public interest. For special merger situations and European relevant merger situations, the CC's investigation is confined to the public interest issues identified in the intervention notice.
43. Where the CC's report contains a finding that the merger does, or may be expected to, operate against the public interest, the CC must also set out its decision on appropriate remedies. The Secretary of State must accept the CC's findings on the competition issues arising from the merger (if any). The decision on the appropriate remedial action is for the Secretary of State, balancing the competition findings and the admissible public interest issues.¹⁷⁷
44. The Secretary of State is required to make and publish his decision within 30 days of receipt of the CC's report. If he fails to do so or decides that there is no public interest consideration that is relevant to the merger in question, then in cases in which the CC has determined that the merger would lead to an anticompetitive outcome, the ability to take remedial action reverts to the CC.¹⁷⁸

Background on antitrust prohibitions

Antitrust prohibitions:

45. The OFT is responsible for investigating and enforcing the Chapter I and Chapter II prohibitions in the Competition Act 1998. These prohibitions are modelled on similar prohibitions in the Treaty on the Functioning of the European Union (TFEU). Chapter I prohibits agreements, decisions and concerted practices between two or more undertakings (i.e. entities conducting economic activities), which may affect trade within the UK and whose object or effect is to prevent, restrict or distort competition within the UK.
46. Chapter II prohibits the abuse of a dominant position in a market by one or more undertakings that may affect trade within the UK. Undertakings generally means businesses but it is also capable of including e.g. public sector bodies when they operate in economic markets.

¹⁷⁷ If the public interest consideration mentioned in the intervention notice is not one that is already specified in section 58 of the Enterprise Act 2002, it will cease to be an admissible public interest consideration if it has not been laid before and approved by both Houses of Parliament before the CC's report to the Secretary of State.

¹⁷⁸ Section 56 of the Enterprise Act 2002.

47. The OFT also investigates and enforces, where appropriate, the EU prohibitions imposed by Articles 101 (anticompetitive agreements etc between undertakings) and 102 (abuse of a dominant position) of the TFEU. The EU prohibitions are engaged whenever agreements or abusive conduct may substantially affect trade between Member States. The European Commission also enforces Articles 101 and 102, and there are working rules to establish whether the OFT or the European Commission will act in each case.
48. The OFT is tasked with investigating and enforcing the EU prohibitions because it is designated to do so under the EU regulation that introduced the concept of enforcement action being taken by the member states. This is Regulation 1/2003 (“the Modernisation Regulation”). The CC is not designated to investigate and enforce the EU prohibitions. This means it currently cannot do so.¹⁷⁹
49. In relation to the prohibitions in Article 101 TFEU and Chapter I, horizontal cartel agreements between competitors (commonly agreements to fix prices, share markets, rig bids for contracts, or restrict output) are typically categorised as 'object' infringements. In 'object' based cases there is no need also to prove that an agreement has an anticompetitive effect – so these cases typically involve less economic analysis. 'Effects' based cases are those where the question of whether the prohibition has been infringed depends on the economic effect of the relevant agreement.
50. Agreements that are caught by the Article 101 TFEU and/or Chapter I prohibition may nevertheless be exempt if they:
 - a. contribute to improving production or distribution, or to promoting technical or economic progress; and
 - b. allow consumers a fair share of the resulting benefit; and
 - c. do not impose restrictions that are not indispensable to achieving these objectives; and
 - d. do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.
51. In effects based cases, and in cases in which parties argue their agreement is exempt, applying the criteria above, deciding on whether or not the Article 101 and/or Chapter 1 prohibition has been infringed can involve significant economic analysis.

¹⁷⁹ The Market Investigation Regime requires the OFT and CC to consider whether there are features of relevant markets that prevent, restrict or distort competition. Features include the structure of the market, conduct of suppliers in the relevant market or in related markets, and the conduct of customers in the relevant market. This broad definition is capable of encompassing conduct that would be caught by Article 101 and/or Article 102, which can in some cases limit the ability of the CC to take action to address identified competition concerns.

52. In relation to the prohibitions in Article 102 TFEU and Chapter II, in making any assessment of dominance, it is necessary to carry out a detailed analysis of market power. In addition, some of the types of conduct that may, in principle, amount to abusive conduct on the part of parties involve significant economic or financial analysis. Accordingly Article 102 TFEU and Chapter II cases also typically involve significant economic and perhaps also financial analysis.
53. When it is enforcing the UK and the EU prohibitions, the OFT uses the investigation powers in Competition Act 1998. These include the powers to request documents and information in writing, to enter premises having given the parties notice and to enter premises under a warrant. The OFT has to prove infringement cases on the civil standard of evidence – i.e. on the balance of probabilities, but case law provides that the evidence must be 'carefully considered'¹⁸⁰ bearing in mind the nature of the issues involved and the high penalties that can be imposed. Accordingly, significant effort goes into working up the necessary evidence to prove an infringement.
54. Before making an infringement decision, the OFT must give the investigated person(s) notice of the proposed decision and an opportunity to make representations.¹⁸¹ If the OFT decides that an antitrust prohibition has been infringed, it may give directions requiring the person concerned to bring the infringement to an end.
55. The main penalty for infringement is the imposition of a fine. Fines can be substantial: up to 10% of an undertaking's turnover (there is OFT guidance on how it sets fines).
56. The OFT's infringement decisions, non-infringement decisions, interim measures and other directions and decisions as to the imposition of penalties can be appealed to the CAT by parties under investigation and (with some exceptions) by third parties with sufficient interest. On all appeals of infringement decisions and decisions imposing fines, the CAT has to determine the appeal 'on the merits'. This means that it can (according to the matters raised in the appeal) reopen all of the OFT's assessments of the facts and evidence, and can reach a different view and substitute its own view for that of the OFT.

Background on criminal cartel offence

57. The cartel offence is a criminal offence under section 188 of the Enterprise Act 2002. It is separate from the Chapter I prohibition and the Article 101 TFEU prohibition, but the same set of facts may give rise to parallel civil proceedings brought under Chapter I/Article 101 and criminal proceedings brought against an individual under section 188 Enterprise Act 2002. The OFT can investigate alleged cartels where it

¹⁸⁰ *Re Doherty* [2008] UKHL 33 (11 June 2008).

¹⁸¹ See section 31 of the Competition 1998 Act. More detail on the procedural requirements is set out in enclosure (e) the OFT's Rules.

has reasonable grounds for suspecting that the offence has been committed. Proceedings are brought in criminal courts by the OFT, or in cases of serious or complex fraud, by the Serious Fraud Office.

Concurrency

58. Concurrency is the power for certain sectoral regulators to exercise powers within the industries that they regulate, that are also exercisable by the OFT. The sectoral regulators with concurrent competition powers are Ofcom, Ofgem, Ofwat, ORR, the Northern Ireland Authority for Utility Regulation and the CAA (currently for air traffic services only). Neither the FSA nor Postcomm has concurrent competition powers nor does the CAA as far as airport regulation is concerned. The Postal Services Bill will extend Ofcom's concurrent competition powers to the postal sector when it absorbs Postcomm and other Departments are also planning or considering an expansion of the concurrency regime: the Government is planning to extend competition concurrency to the CAA in respect of airports management and to Monitor (the health services regulator), and is considering whether concurrent competition powers should be extended to the future Financial Conduct Authority (FCA).
59. The concurrent competition powers are:
- powers to make market investigation references under section 131 of the Enterprise Act 2002 where sectoral markets appear to be displaying anti-competitive features. These powers are contained in the relevant sectoral legislation. The OFT carries out market studies under its general functions (sections 5 to 8 of the Enterprise Act 2002) and the sector regulators have similar powers under their general regulatory functions;
 - powers to investigate possible infringements of the prohibitions in Chapters I and II of the Competition Act 1998 and Articles 101 and 102 TFEU in the UK (against anti-competitive agreements and abuse of a dominant position).
60. Concurrency arrangements do not relate to merger investigations, which are the responsibility of the OFT and the CC, subject to any intervention by the Secretary of State on public interest grounds—currently national security, media plurality and financial stability. Water company mergers meeting certain jurisdictional thresholds are required to be referred to the CC. The OFT makes the reference, although the substantive test in these cases is whether the merger would prejudice the ability of Ofwat to make comparisons between water enterprises.
61. The Concurrency Regulations and the OFT's guidance 'Concurrent application to regulated industries' (OFT 405) set out concurrency working arrangements that operate in relation to infringements of Chapter I and/or II and Article 101 and/or 102. The OFT's guidance 'Market investigation references' (OFT 511) describes the considerations

62. According to the current arrangements, the OFT and the sector regulators consult with each other before acting on a Competition Act 1998 case, where it appears that they may have concurrent jurisdiction. The general principle is that a case will be dealt with by whichever of the OFT or the relevant regulators is best placed to do so, taking into account factors which include:
- the sectoral knowledge of a regulator;
 - whether the case affects more than one regulated sector;
 - any previous contact between the parties or complainants and a regulator or with the OFT;
 - any recent experience in dealing with any of the undertakings or similar issues that may be involved in the proceedings.
63. In circumstances where an agreement cannot be reached between the relevant authorities as to which of them is better placed in relation to a case, the matter is referred to the Secretary of State who will decide which authority should deal with it.
64. Where they may have concurrent jurisdiction, neither the OFT nor the sector regulators will formally investigate a case or make a decision in use of their Competition Act 1998 powers until the case has been allocated to one of them through the existing mechanisms.

Ancillary competition functions of the OFT and CC

Competition Act 1980

65. The Secretary of State may at any time refer to the CC any question relating to: the efficiency and costs of, the service provided by, or a possible abuse of a monopoly situation by various public bodies and corporations (including the marketing boards, Transport for London etc.) The CC's information gathering powers under the Enterprise Act 2002 apply in relation to these investigations, and it is an offence to supply false or misleading information.
66. The Secretary of State has the power to direct that a plan for remedying or preventing the adverse effects set out in the report is produced, and may ask for a report on prices.

Financial Service and Markets Act 2000 (FSMA)

67. The Financial Services Authority (FSA) is a sector regulator but differs from other sector regulators as there is no price regulation in the financial services sector. However, the OFT must keep the regulating provisions and practices of the FSA, and of recognised clearing houses and recognised investment exchanges, under review. If the OFT considers that a regulating provision or practice has a significantly adverse effect on competition, it must make a report to that effect. The OFT has investigatory powers.
68. If the OFT makes a report under the FSMA then the CC must¹⁸², in certain cases, investigate the matter and must issue its own report on whether there is a significantly adverse effect on competition, and if there is, whether it is justified. If the CC reports that an identified adverse affect is not justified, then the Treasury must¹⁸³ give a direction to the FSA requiring it to take action.

Legal Services Act 2007

69. If the OFT is of the opinion that the regulatory arrangements of an approved legal services regulator prevent, restrict or distort competition within the market for reserved legal services to any significant extent, or are likely to do so, the OFT may prepare a report to the Legal Services Board to that effect. The OFT may use a number of investigatory powers under the Enterprise Act 2002 in preparing its report.
70. If the OFT is satisfied that the Legal Services Board has failed properly to consider its report, it must report to the Lord Chancellor, who must seek the CC's advice. The CC must then prepare its own report, unless it considers it would serve no useful purpose. The CC may use investigatory powers under the Enterprise Act 2002 in preparing its report.
71. The Lord Chancellor may direct the Legal Services Board to take such action as the Lord Chancellor considers appropriate in connection with any matter raised in the OFT report. The Lord Chancellor must take the CC report into consideration.

Local Bus Schemes

72. The Transport Act 2000 (as amended by the Local Transport Act 2008) and the Transport (Scotland) Act 2001 both create competition tests that apply when local transport authorities form schemes or make agreements with bus operators.

¹⁸² Unless it considers that, as a result of a change in circumstances, this would serve no useful purpose.

¹⁸³ Unless the FSA has already taken action or the exceptional circumstances of the case mean that it is inappropriate or unnecessary to do so.

73. The first test, which applies in England, Wales and Scotland, applies only when an authority makes or varies a Quality Partnership Scheme, makes or varies a ticketing scheme, or invites and accepts tenders for subsidised services under section 89 to 91 of the Transport Act 1985. The test is whether one of these schemes would have a significantly adverse effect on competition. If it does, the scheme can still pass the test if it:

- secures improvements in the quality of vehicles or facilities used, or
- secures other improvements in local services of substantial benefit to users of local services, or it reduces or limits traffic congestion, noise or air pollution,

and the effect on competition must be proportionate to the achievement of one of these objectives. If the test is not passed the OFT can make any direction it considers appropriate, including the termination of the scheme.

74. The second test, which applies in England and Wales, applies to voluntary passenger agreements and certain other agreements between operators, including qualifying agreements between operators that have been certified by the local transport authority. The test is whether:

- the agreement has as its object or effect the prevention, restriction or distortion of competition;
- does the agreement contribute to the attainment of the bus improvement objectives;
- does the agreement impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and,
- does the agreement afford the undertakings involved the possibility of eliminating competition in respect of a substantial part of the services in question.

75. If the test is not passed the OFT may give directions to bring an infringement to an end or accept binding commitments offered to it. The OFT's powers to impose financial penalties under the Competition Act 1998 do not apply to agreements which fail the test, provided the arrangement does not involve price fixing and is not in breach of Article 101 of the TFEU.

*The Payment Services Regulations 2009*¹⁸⁴

76. The OFT was given responsibility for enforcing Part 8 of the Payment Services Regulations 2009 (PSR). Part 8 concerns non-discriminatory access to payment systems in the UK. Payment systems that have been designated as systematically important, intra-group payment systems and so called three party propriety payment systems are exempt from Part 8, but other systems, such as MasterCard, Visa, and the ATM network are subject to it.
77. Rules on access to payment systems must be objective, non-discriminatory and proportionate, and must not inhibit access more than is necessary to protect the system against specific risks, or to protect the financial and operational stability of the system. There is a series of 'black-listed' requirements that cannot be imposed by payment systems on payment system providers, service users or other payment systems.
78. If the OFT has reasonable grounds for suspecting that a rule breaches the Part 8 access requirements, it can carry out an investigation, including requiring documents and information to be provided to it. If the OFT finds a breach of the rules, it can impose a fine or give directions. Appeals against directions made by the OFT or fines are heard by the CAT.

Judicial Review versus Full Merits

79. Judicial review is an administrative law process that enables public law decisions to be examined – generally by the Administrative Court (but other courts and tribunals also exercise judicial review jurisdiction in some cases) Challenges by way of judicial review can only be brought on the basis of a limited range of public law failures in the original decision-maker's decision. These include that the decision was made illegally, that the decision was irrational and/or that the process for taking the decision involved some procedural impropriety. In addition decisions can be challenged by way of judicial review on the basis that they breach EU law and/or rights established under the European Convention on Human Rights.
80. Importantly, a court or tribunal applying judicial review principles can only look at the facts underlying the original decision-maker's decision in limited circumstances. And the range of remedies is limited. The court can quash the decision and refer it back to be retaken by the original decision-maker. It cannot itself retake the decision.
81. By contrast, in a full merits review of an antitrust decision, the CAT can review all the facts and evidence underlying the decision that is challenged afresh (subject to the limits of the grounds of the appeal),

¹⁸⁴ The Payment Services Regulations 2009 SI 2009/209

reach its own view on those facts and if it wishes substitute its view for that of the decision-taker.

Considerations on Article 6 of the European Convention on Human Rights

82. Under the Human Rights Act 1998, it is unlawful for public authorities to breach the rights under the European Convention on Human Rights (ECHR) and claims for breach of ECHR rights can be brought before the UK courts and tribunals (including the CAT). Article 6 of the European Convention on Human Rights (ECHR) essentially provides that in any decision that determines civil rights and obligations or criminal charges, a person (including a business entity) is entitled to a fair hearing within a reasonable time before an independent and impartial tribunal established by law. This right is commonly referred to as the 'right to a fair trial'.
83. Where the decision involves determination of a criminal charge, there are a number of additional rights.¹⁸⁵
84. It is fairly well accepted that decisions establishing that there has been an infringement of the two competition prohibitions (either the Chapter I and/or II UK competition prohibitions in the Competition Act 1998 or the EU prohibitions under Article 101 and/or 102 TFEU on which they are modelled) are 'criminal' in nature for the purposes of Article 6 ECHR. This is primarily due to the nature and severity of the penalties that can be imposed on a party to an infringement; these are essentially punitive in nature and designed to deter infringement.¹⁸⁶ By contrast, decisions at phase 2 of the merger and markets regimes are unlikely to engage 'criminal' rights under Article 6 as their aim is to restore a market to a competitive state (or prevent a planned merger that would create an uncompetitive state), rather than to deter and punish transgressions. Phase 2 mergers and markets decisions may engage the Article 6 ECHR 'civil' protections insofar as they 'determine civil rights and obligations'.
85. The requirements for a 'fair trial' should be met in relation to the first instance decision. By way of example, criminal offences are normally prosecuted in criminal courts, and this satisfies the need for an 'independent and impartial' tribunal. But in civil and in some non-core criminal cases, where the requirements for an 'independent and impartial' tribunal are not fully met by the first instance decision-taker,

¹⁸⁵ These include the right to be presumed innocent until proven guilty under Article 6(2) of the ECHR. They also include (under Article 6(3) of the ECHR) the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

¹⁸⁶ *Napp Pharmaceuticals Holdings Limited v Director general of Fair Trading* [2002] CAT 1, paras 98-99.

Article 6 can be satisfied if there is an appeal from the first instance decision before an independent and impartial tribunal that has what the case law calls ‘full jurisdiction’.¹⁸⁷

86. The Article 6 case law demonstrates that in the order to meet the requirements for ‘independence’ and ‘impartiality’ at first instance, it is not always necessary for the decision-making body to be totally separate from the body that investigates and prosecutes: it is possible to create a form of ‘internal tribunal’ that will meet the Article 6 requirements.¹⁸⁸ But there must be sufficient safeguards in place so that the decision-maker’s independence and impartiality – in particular their separation from the investigation and prosecution function – are not in doubt.¹⁸⁹
87. Measures that may help to safeguard independence and impartiality in the context of an internal decision-making tribunal include:
- ensuring one or more permanent members is suitably legally qualified and appointed by the head of the judiciary;¹⁹⁰
 - appointment of one or more members of the decision-making tribunal by an external person or panel on a permanent (rather than ad hoc) basis for a period that is long enough to avoid concern that they might be influenced to achieve particular policy goals;¹⁹¹
 - security of tenure for one or more tribunal members for the period of appointment,¹⁹² and ensuring that their performance is not subject to appraisal by the executive of the investigating and prosecuting body;¹⁹³
 - a clear and comprehensive policy on conflicts and bias;¹⁹⁴
 - ensuring that members of the tribunal are not involved in the investigation and prosecution of cases (or at least the cases on which they are called on to adjudicate)¹⁹⁵, and that they are sufficiently distanced from the day-to-day governance of the

¹⁸⁷ *Bryan v UK* (1996) 21 E.H.R.R. 342, *R (on the application of Bewry) v Norwich City Council* [2002] H.R.L.R. 2, *Kingsley v UK* (2002) 35 E.H.R.R. 10, and *Tsfayo v UK* (2009) 48 E.H.R.R. 18.

¹⁸⁸ This has been possible, for example, in the case of certain courts martial (see *Engel and Others v Netherlands* (1979-80) E.H.R.R. 647, *R v Spear and Others* [2003] 1 A.C. 734, and *Cooper v UK* (2004) 39 E.H.R.R. 8) and certain prison boards (see *Campbell and Fell v UK* (1984) 7 E.H.R.R. 165, and *R (on the application of Haase) v Independent Adjudicator* [2008] EWCA Civ 1089).

¹⁸⁹ See, for example, the following court martial and prison board cases where the protections were not sufficient to satisfy the Article 6 requirements as to independence and impartiality: *Findley v UK* (1997) 24 E.H.R.R. 221; *Morris v UK* (2002) 34 E.H.R.R. 52; *R v Dundon* [2004] EWCA Crim 621; *Grievés v UK* (2004) 39 E.H.R.R. 2; *R v Stow* [2005] EWCA Crim 1157; *Martin v UK* (2007) 44 E.H.R.R. 31; and *Brooke et al v Parole Board* [2007] EWHC 2036.

¹⁹⁰ *Engel* (1979-80), *Findley* (1997), *Morris* (2002), *Spear* [2003], *Cooper* (2004), *Grievés* (2004), and *Dundon* [2004] (all referenced more fully in preceding footnotes).

¹⁹¹ *Grievés* (2004), and *Brooke* [2007] (referenced more fully in preceding footnotes).

¹⁹² *Campbell and Fell* (1984), and *Brooke* [2007] (referenced more fully in preceding footnotes).

¹⁹³ *Spear* [2003], and *Cooper* (2004) (referenced more fully in preceding footnotes).

¹⁹⁴ *Morris* (2002), *Spear* [2003], *Cooper* (2004), *Dundon* [2004], and *Grievés* (2004) (all referenced more fully in preceding footnotes).

¹⁹⁵ *Morris* (2002) and *Spear* [2003] (referenced more fully in preceding footnotes).

investigation and prosecution function so that there is no appearance of lack of objective impartiality.¹⁹⁶

¹⁹⁶ *Campbell and Fell* (1984), *Whitfield v UK* (2005) 41 E.H.R.R. 44, and *Brooke* [2007] (some cases referenced more fully in preceding footnotes).

Statistics on Competition Cases

The following tables list cases split into the various competition tools (anti trust, markets and mergers) to illustrate the average length of time it has taken for cases to get through the whole system under the current regime. The data comes from actual cases completed as at end December 2010, sourced from the competition authorities, including sector regulators.

Summary of Data

Table 1

	Average end to end timescales excluding appeals (months)	Average end to end timescales including appeals (months)
Antitrust chapter I	30.7	38.2
Antitrust chapter II	31.8	45.0
Market Investigation References	31.1	36.8
Market Studies	12.6	12.6
Merger References	9.4	10.6

Sources: OFT, CC and CAT

Notes: The figures represent an average end to end timescale it takes for cases to get through the system. End to end means from the moment the OFT formally opens an investigation until a formal completion such as a final decision or publication of a report, or a final judgment in an appeal. In market investigation and merger reference cases the figure does not include the period taken to arrive at remedies. Market Investigation References includes the nine market study cases that were referred as detailed in Table 4. The mergers figure includes those mergers referred from July 2006 to December 2010 (i.e. not including mergers cleared at phase 1) and are listed in Table 6. More detailed notes on the figures are given under each table.

Antitrust

Chapter 1 Antitrust Cases

Table 2

Case Name	Formal Opening	Infringement Decision	Conclusion of any Appeals	Time taken including Appeals (Months)
Arriva/First Group	Jul 00	Jan 02		18
John Bruce Truck Components	Jul 01	May 02		10
Hasbro I ^a	Mar 01	Nov 02	Mar 03	24
Northern Ireland Livestock	Feb 01	Feb 03		24
Lladro Commercial SA	Feb 01	Mar 03		26
MasterCard UK Members Forum ^b	May 04	Nov 04	Jul 06	26
Flat Roof and Car Park Surfacing	Jul 03	Feb 06	Feb 07	43
Replica Football Kits ^c	Jun 01	Aug 03	Feb 07	68
Hasbro II ^d	Aug 01	Dec 03	Oct 06	62
West Midland Roofing	Jun 02	Mar 04	Feb 05	32
At The Races (ATR)	Nov 01	Apr 04	Aug 05	45
UOP Ltd/UKAe ^e	Feb 03	Nov 04	May 05	25
Felt and single Ply North East	Jul 02	Mar 05		32
Mastic Asphalt Flat Roofing in Scotland	Oct 02	Mar 05		29
Felt and Single ply – Western Central Scotland	Sep 03	Jul 05		22
Stock Check Pads	Feb 04	Mar 06	Oct 06	32
Aluminium Spacer Bars	Apr 02	Jun 06	Mar 07	59
Private School Tuition Fees	Jun 03	Nov 06		41
Construction ^f	Nov 04	Sep 09		58
Construction Recruitment Forum ^g	May 06	Sep 09		40
Retail Pricing of Tobacco ^h	Mar 03	Apr 10		85
Average Time spent on cases				38.2

Source: OFT and CAT published material

Notes: Includes only those cases that resulted in an infringement decision. Those cases that were closed or resolved other than by a published infringement decision, or where no infringement was found are not included. The start of a case represents an OFT announcement that it had enough evidence to begin a formal investigation and an infringement decision represents the end, or in those cases of appeal its final judgment of the highest court of appeal. Initial periods where the OFT may have received initial complaints, or was gathering evidence are not included. Criminal cartel investigations are not included.

- a Hasbro 1 – Includes appeal, which was withdrawn by permission of the CAT
- b The case began as a notification on 1 March 2000 but the notification lapsed on 1 May 2004 with the coming into force of the EU Modernisation Regulation (EC Regulation 1/ 2003), at which point the OFT's investigation continued as a standard Competition Act investigation
- c Replica Football Kits – includes all appeals including Court of Appeal judgment and House of Lords rejection of further appeal
- d Hasbro II – Includes all appeals including Court of Appeal judgment
- e UOP/UKAe – includes appeal, which was withdrawn by agreement
- f Construction – 25 companies are appealing to CAT – no time added as case remains live
- g Construction Recruitment Forum – 3 companies appealing to CAT – time not included as case remains live
- h Retail Pricing of Tobacco – In appeal before CAT for which time is not included as case remains live

Chapter II Antitrust Cases

Table 3

Case Name	Formal Opening	Infringement Decision	Conclusion of any Appeals	Time Taken including Appeals (Months)
Napp	Mar 00	Mar 01	May 02	26
Aberdeen Journals ^a	Jan 00	Jul 01	Jun 03	41
Genzyme	Jun 01	Mar 03	Mar 04	33
EWS ltd	May 01	Nov 06		66
National Grid ^b	Jun 05	Feb 08	Aug 10	62
Cardiff Bus	May 05	Nov 08		42
Average Time Spent on Cases				45

Source: OFT, Ofgem, ORR and CAT

a Aberdeen Journal – includes time for appeal and OFT remittal decision

b National Grid (Ofgem case) – includes appeals before CAT and Court of Appeal and refusal of permission to appeal to the Supreme Court

Markets

Market Investigation References

Table 4

Case Name	Time Taken for Market Study/pre MIR work	MIR Decision	CC Report Published	Time Taken including appeals (Months)	Time taken from CC report to making of remedies*
Store Credit Card Services	6	Mar 04	Mar 06	31	4
Domestic Bulk Liquefied Petroleum Gas	5	Jul 04	Jun 06	28	35
Home Credit	7	Dec 04	Nov 06	29	9
Classified Directory Advertising Services	8	Apr 05	Dec 06	25	4
Northern Irish Personal Banking	7	May 05	May 07	31	9
Groceries Market ^a	6	May 06	Apr 08	47	10
Payment Protection Insurance ^b	10	Feb 07	Jan 09	54	
BAA Airports ^c	9	Mar 07	Mar 09	52	-
Rolling Stock Leasing	N/A	Apr 07	Apr 09	34	8
Average Time Spent on cases				36.8	

Source: OFT, CC and CAT

* Figure illustrates time taken to implement remedies, which is not included in summary data in Table 1

a Groceries Market – includes appeal to CAT and CC remittal decision

b Payment Protection Insurance – includes appeal to CAT and CC remittal decision. Remedies pending.

c BBA Airports – Includes appeals to CAT and Court of Appeal.

d Remedies figure does not include recommendations to Government which are still to be fully implemented.

Market Studies

Table 5

Case Name	Formal Opening	OFT Report Published	Time Taken (Months)
Consumer IT Services	Oct 01	Dec 02	14
Private Dentistry	Jan 02	Mar 03	14
Pharmacies	Dec 01	Jan 03	13
Estate Agents in England and Wales	Jun 02	Mar 04	21
Taxis	Aug 02	Nov 03	15
Doorstep Selling	Nov 02	May 04	18
Liability Insurance	Jan 03	Jun 03	5
Payment Systems	Feb 03	May 03	3
Debt Consolidation	Jun 03	Mar 04	9
New Car Warranties	Jun 03	Dec 03	6
FSMA	Nov 03	Nov 04	12
Public Sector Procurement	Mar 04	Sep 04	6
Public Subsidies	Apr 04	Nov 04	7
Ticket Agents	Jun 04	Feb 05	7
Care Homes	Jun 04	May 05	11
Property Searches	Dec 04	Sep 05	10
Commercial Use of Public Information	Jul 05	Dec 06	17
Pharmaceutical PRS	Sep 05	Feb 07	17
Internet Shopping	Apr 06	Jun 07	14
School Uniforms	Jul 06	Sep 06	2
Personal Current Accounts	Mar 07	Jul 08	17
Medicine Distribution in the UK	Apr 07	Dec 07	8
Home Building in the UK	Jun 07	Sep 08	15
Sale and Rent Back	May 08	Oct 08	5
Scottish Property Managers	Jun 08	Feb 09	8
Home Buying and Selling	Feb 09	Feb 10	12
Isle of Wight Ferry Services	Feb 09	Jun 09	4
Second Hand Cars	May 09	Mar 10	10
Northern Rock	Aug 08	Mar 09	7
Online Targeting of Advertising and Prices	Oct 09	May 10	7
Advertising of Prices	Oct 09	Dec 10	14
Corporate Insolvency	Nov 09	Jun 10	7
Consumer Contracts	Feb 10	Feb 11	12
Outdoor Advertising	May 10	Feb 11	9
Equity Underwriting	Jun 10	Jan 11	7
Average Time Spent on Cases			10.4

Source: OFT

Notes – Includes only those Market Studies undertaken by the OFT. Does not include those market studies referred to the CC.

Merger References

Table 6

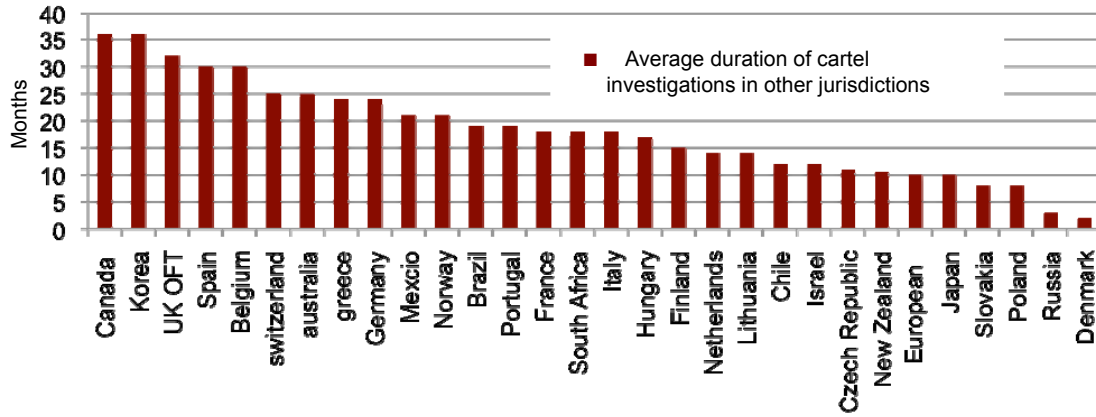
Case Name	Reference Decision	CC Report Published	Time Taken (Months)
Pan Fish ASA/Marine Harvest NV	Jul 06	Dec 06	7
Christine Brockbank/Hampden Agencies	Jul 06	Dec 06	7
Stericycle/Sterile Technologies Group ^a	Jun 06	Dec 06	8
Academy Music/Hamsard/Live Nation	Aug 06	Jan 07	7
Svitzer/Wijsmuller/Adsteam marine	Aug 06	Feb 07	8
Stonegate Farmers/Deans Food Group	Sep 06	Apr 07	9
HDF(UK) Holdings/ Hastings/MacQuarie	Nov 06	May 07	7
Wienerberger/Baggeridge Brick	Dec 06	May 07	9
Thermo Electron/GV Instruments	Dec 06	May 07	7
Kemira GrowHow/Terra Industries	Jan 07	Jul 07	9
Grief/Blagden Packaging	Feb 07	Aug 07	9
Woolworths/Bertram	Apr 07	Sep 07	7
Tesco/Coop store in Slough ^b	Apr 07	Dec 09	35
BSkyB/ITV ^c	Apr 07	Jan 08	35
Sportech/Vernons/Ladbroke	May 07	Oct 07	9
MacQuarie UK Broadcast/National Grid	Aug 07	Mar 08	9
Game Group/Game Station	Aug 07	Jan 08	6
BOC/Ineos Chlor	May 08	Dec 08	9
Project kangaroo	Jun 08	Feb 09	10
Nufarm Crop/AH Marks	Aug 08	Feb 09	10
Long Clawson/Millway of Dairy Crest	Oct 08	Jan 09	9
Capita Group/IBSOpen Systems	Nov 08	Jun 09	10
Julian Graves/NBTY Europe	Mar 09	Aug 09	9
Stagecoach/Eastbourne/Cavendish	May 09	Oct 09	7
Stagecoach/Preston Bus ^d	May 09	Nov 09	14
Live Nation/Ticket Master ^e	Jun 09	May 10	13
Sports Direct/JJB Sports stores	Aug 09	Mar 10	10
Friends Reunited/Brightsolid	Nov 09	Mar 10	7
Zipcar/Street Car	Aug 10	Dec 10	7
Average Time Spent on Cases			10.6

Source: OFT, CC and CAT

Notes: only those mergers that were referred from July 2006 to December 2010 have been included (i.e. it does not include those mergers cleared at Phase 1 during that time period). Those mergers referred, but abandoned soon after a reference decision or during the CC's investigation have not been included. Start of a merger case is when the OFT received a satisfactory submission. Remedy periods post decision and most stop the clock phases have not been accounted for which affects some cases (such as Project Kangaroo and Sports Direct/JJB Stores), and time for recommendations to the Secretary of State (which affected the BSKyB/ITV case).

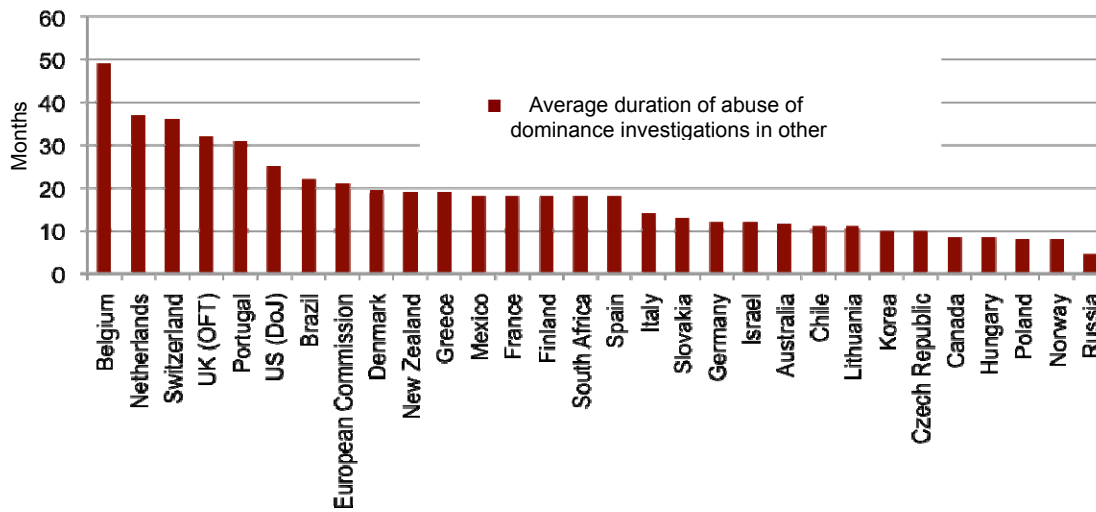
- a Stericycle/STG – Appeal withdrawn March 2007
- b Tesco/Co-op – Includes judgment for interim relief on remedy
- c BSKyB/ITV – includes appeals to CAT and Court of Appeal
- d Stagecoach/Preston Bus – Includes appeal to CAT
- e Live Nation/Ticket Master – Includes appeal to CAT and CC remittal

Figure 1 Average duration of antitrust investigations in other jurisdictions



Source: Global Competition Review

Figure 2 Average duration of abuse of dominance investigations



Source: Global Competition Review

Simplified comparative table of EU and international merger control regimes

Jurisdiction	Nature of regime	Administrative / judicial model for intervention	Summary of jurisdictional thresholds	Phase 1 review period	Phase 2 review period
EU ¹⁹⁷	Mandatory, with suspensory obligation	Administrative	<p>The combined aggregate worldwide turnover of all the undertakings concerned is more than €5,000 million and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State</p> <p>or</p> <p>The combined aggregate worldwide turnover of all the undertakings concerned is more than €2,500 million and in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than €100 million and in each of at least those three Member States the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million; and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State</p>	25 – 35 working days	90 – 125 working days
France ¹⁹⁸	Mandatory with suspensory obligation	Administrative, with certain Governmental powers	<p>Combined worldwide turnover of the parties is over €150 million and at least two of the parties involved each has turnover in France of over €50 million</p> <p>Retail mergers: Combined worldwide turnover of the parties is over €75 million and at least two of the parties involved each has turnover in the retail business in France of over €15 million</p>	30 – 60 working days	90 – 130 days

¹⁹⁷ Source: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT>.

¹⁹⁸ Source: http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=319.

Jurisdiction	Nature of regime	Administrative / judicial model for intervention	Summary of jurisdictional thresholds	Phase 1 review period	Phase 2 review period
Germany ¹⁹⁹	Mandatory with suspensory obligation	Administrative	<p>The combined aggregate worldwide turnover of all participating undertakings was more than € 500 million and the domestic turnover of at least one participating undertaking was more than € 25 million and the domestic turnover of at least one other participating undertaking was more than € 5 million</p> <p>Unless either one of the parties to the merger has worldwide turnover of less than €10 million or the market concerned (which has existed for at least five years) has a total sales volume in Germany of less than €15 million</p>	One month	Four months (including Phase 1)
New Zealand ²⁰⁰	Voluntary – no suspensory obligation	Judicial	No jurisdictional thresholds	Target timetable of 40 – 60 working days	-
Singapore ²⁰¹	Voluntary – no suspensory obligation	Administrative	No jurisdictional thresholds	30 working days	120 working days
Spain ²⁰²	Mandatory with suspensory obligation	Administrative	<p>Combined turnover in Spain for all participants in the merger exceeds €240 million provided that at least two participants each has turnover in Spain exceeding €60 million</p> <p>or</p> <p>Combined economic market share (or market share in Spain) is at least 30 per cent and is created or increased by the merger</p>	One month – one month and 10 working days	Two months – two months and 15 working days

¹⁹⁹ Source:

http://www.bundeskartellamt.de/wEnglisch/Fusionskontrolle_e/Information_leaflets_FusW3DnavidW2638.php.

²⁰⁰ Source: <http://www.comcom.govt.nz/assets/Business-Competition/Mergers-and-Acquisitions/Mergers-and-Acquisitions-Clearance-Process-Guidelines-14-July-2010.pdf>.

²⁰¹ Source: http://app.ccs.gov.sg/cms/user_documents/main/pdf/mergerprocedures_Jul07FINAL.pdf.

²⁰² Source:

http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=18425&Command=Core_DoWnload&Method=attachment.

Jurisdiction	Nature of regime	Administrative / judicial model for intervention	Summary of jurisdictional thresholds	Phase 1 review period	Phase 2 review period
USA ²⁰³	Mandatory, with suspensory obligation (but also ability to review transactions falling below thresholds)	Judicial	<p>The acquirer will have post-transaction voting shares or assets in the target worth in excess of \$200 million (as adjusted, currently \$263.8 million) (the 'size of transaction' test)</p> <p>or</p> <p>The acquirer will have post-transaction voting shares or assets in the target worth in excess of \$50 million (as adjusted, currently \$66million) but not more than \$200 million (as adjusted, currently \$263.8 million); and one party has worldwide sales or assets of at least \$100 million (as adjusted, currently \$131.9 million) and the other person has worldwide sales or assets of at least \$10 million (as adjusted, currently \$13.2 million) (the 'size of person' test)</p> <p>Certain exemptions apply, including that the acquisition of foreign assets is exempt where the sales in or into the U.S. attributable to those assets were \$50 million (as adjusted, currently \$66 million) or less</p>	15 – 30 days	No fixed period

Note: this table has been prepared for the purposes of international comparison of merger regimes. The details in this table have been intentionally summarised and simplified in order to facilitate comparison. No regard should be had to this table for the purposes of legal assessment. Reference should always be had to the laws applicable in the relevant jurisdiction.

²⁰³ Source: <http://www.ftc.gov/bc/hsr/introguides/guide1.pdf> and <http://www.ftc.gov/bc/hsr/introguides/guide2.pdf> and <http://www.ftc.gov/os/fedreg/2010/january/1001218claytonact7a.pdf>.

List of individuals/organisations consulted

Addleshaw Goddard LLP
Administrative Justice & Tribunals Council
Advertising Standards Association
Allen & Overy LLP
Amazon
Ampersand Stable of Advocates
Asda
Ashurst
Attorney General's Office
Australian Competition & Consumer Commission
Baker & McKenzie LLP
Bar Council
Boots
Barclays Bank Plc
Black Stone Chambers
Brick Court Chambers
Bristows
British Bankers Association
British Chambers of Commerce
British Council of Shopping Centres
British Institute of Agricultural Consultants
British Institute of International and Comparative Law
British Petroleum
British Retail Consortium
Burgess Salmon LLP
Cabinet Office
Centrica
Charles River Associates International
Citizens Advice
Citizens Advice Scotland
City of London Corporation
Civil Aviation Authority
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance LLP
CMS Cameron McKenna LLP
Competition Appeal Tribunal
Competition Commission
Confederation of British Industry
Confederation of Passenger Transport
Consumer and Competition Commission New Zealand
Consumer Council for Northern Ireland
Consumer Focus
Consumer Focus, Scotland
Consumer Focus, Wales
Co-operation & Competition Panel for NHS Funded Services

Credit Suisse
Crown Office and Procurator Fiscal Service
Denton Wilde Sapte LLP
Department for Culture, Media & Sport
Department for Environment, Food and Rural Affairs
Department for Energy & Climate Change
Department of Enterprise, Trade and Investment NI
Department for Transport
Department of Health
Dundas & Wilson LLP
European Property Finance Limited
EU Commission
European Policy Forum
Eversheds
Faculty of Advocates
Federal Ministry of Food, Agriculture and Consumer Protection (DE)
Federation of Small Businesses
Field Fisher Waterhouse LLP
Financial Ombudsman Service
Financial Services Authority
FIPRA
Forum for Private Business
Freshfields Bruckhaus Deringer LLP
Frontier Economics Limited
French Ministry for Competition, Consumer Affairs and Anti-Corruption (DGCCRF)
FTI Consulting
GlaxoSmithKline
Goldman Sachs
Google
Hausfeld LLP
Herbert Smith LLP
Hill Dickinson LLP
HM Treasury
Hogan Lovells
Information Commissioner's Office
Institute of Directors
International Chambers of Commerce
Irish Competition Authority
Joint Working Party of the Bars and the Law Societies of the United Kingdom
Kings College London
Kirkland & Ellis LLP
KPMG
Land and Property Services
Land Registry
Law Society of Scotland
Law Society of Northern Ireland
LEGG Ltd
LEK Consulting LLP
Linklaters LLP
Lloyds Banking

Local Better Regulation Office
Local Government Association
London School of Economics
Macfarlanes LLP
Maclay Murray and Spens LLP
Matrix Chambers
Mayer Brown International LLP
McGrigors LLP
McGuire Woods LLP
Microsoft
Ministry of Justice
Monckton Chambers
Monitor
Nabarro LLP
National Audit Office
National Economic Research Associates
National Federation of Property Professionals
Northern Ireland Assembly
Northern Ireland Executive
Northern Ireland Utility Regulator
Norton Rose LLP
Ofcom
Office of Fair Trading
Office of Fair Trading Scottish Representative
Office of Rail Regulation
Ofgem
Ofwat
One Essex Court
Oxford University (All Souls)
Oxford University (Oriental College)
Oxford University (St John's College)
Osborne Clarke
Oxera
Oxford Law
PhonePayPlus
Postal Services Commission
Postwatch
PPL
Provident Financial
RBB Economics
Reed Smith LLP
Registers of Scotland
Regulatory Policy Institute
ResPublica
Rothschild
Royal Institute of Chartered Surveyors
Rio Tinto
Salans LLP
Scottish Assembly
Scottish Competition Law Forum

Serious Fraud Office
Shearman & Sterling LLP
Shell
Shepherd and Wedderburn LLP
Simmons & Simmons
SJ Berwin LLP
Slaughter and May
Speechly Bircham LLP
Squire Saunders Dempsey LLP
Symantec
Taylor Wessing LLP
Tesco
The City of London Law Society
The Law Society of England and Wales
The Law Society of Northern Ireland
The Law Society of Scotland
The Work Foundation
Trading Standards Institute
Travers Smith LLP
UK Cards Association
Unilever
Federal Trade Commission (USA)
University of East Anglia
University of Exeter
Visa Europe
Vodafone
Water Industry Commission for Scotland
Welsh Assembly
Which?
White & Case LLP
Wilmer Cutler Pickering Hale and Dorr LLP
39 Essex Street Chambers

The Code of Practice on Consultation

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Tunde Idowu,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Tunde on 020 7215 0412
or e-mail to: Babatunde.Idowu@BIS.gsi.gov.uk

Consultation responses

Name _____

Organisation (if applicable) _____

Address _____

Return completed forms to:

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

Telephone: **0207 215 5465**

Fax: **0207 215 0480**

email: cma@bis.gsi.gov.uk

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

<input type="checkbox"/>	Small to Medium Enterprise
<input type="checkbox"/>	Representative Organisation
<input type="checkbox"/>	Trade Union
<input type="checkbox"/>	Interest Group
<input type="checkbox"/>	Large Enterprise
<input type="checkbox"/>	Local Government
<input type="checkbox"/>	Central Government
<input type="checkbox"/>	Legal
<input type="checkbox"/>	Academic
<input type="checkbox"/>	Other (please describe):

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

Consultation Questions

1. Why reform the competition regime?

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

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

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

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

Comments:

2. The UK Competition regime and the European context

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

Comments:

3. A stronger markets regime

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

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

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

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

Comments:

4. A stronger mergers regime

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

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

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

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

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

Comments:

5. A stronger antitrust regime

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

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

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

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

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

Comments:

6. The criminal cartel offence

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

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

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

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

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

Comments:

7. Concurrency and sector regulators

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

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

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

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

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

Comments:

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

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

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

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

Comments:

9. Scope, objectives and governance

This chapter sets out that the CMA should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA and proposes that the CMA will: have clear, and potentially statutory, objectives to underpin prioritisation; be accountable to Parliament;

and, have an appropriate governance structure for a single decision making body. We ask:

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

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

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

Comments:

10. Decision making

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

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

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

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

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

Comments:

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:

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 antitrust 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:

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

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

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

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

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:

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:

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

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:

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

Comments:

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:

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

Comments:

13. Questions on the impact assessment

Mergers

In this section we outline, and quantify where possible, the costs and benefits of the proposed options regarding strengthening the current voluntary

notification regime, introducing mandatory notification, exempting small businesses from merger control, streamlining the merger process and adjusting merger fees.

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?*

Antitrust

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'.

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.

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

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

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

Comments:

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