

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

Impact assessment

MARCH 2011

Title: A Competition Regime For Growth: A Consultation on options for Reform Lead department or agency: Department of Business, Innovation and Skills Other departments or agencies:	Impact Assessment (IA)
	IA No: BIS0238
	Date: 16/03/2011
	Stage: Consultation
	Source of intervention: Domestic
	Type of measure: Primary legislation
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Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

The UK competition regime is highly regarded internationally and independently assessed as world class. There are, however, some aspects of the competition regime identified by research that might be improved to enhance the system. They include the length of time it takes to conduct cases, the cost for authorities and businesses in having two competition bodies, and in the case of antitrust cases, enhancing the through put of cases to strengthen the deterrent effect. In addition, completed mergers, can cause problems in both the investigation phase and the remedies stage, where damage may have already occurred and it may be difficult to implement an effective remedy. Moreover, the current regime has two competition bodies which means resources are not always efficiently allocated between them.

What are the policy objectives and the intended effects?

Three main policy objectives have been identified. These are:-

- 1) Improve the robustness of decisions and strengthen the regime;
- 2) Support the competition authorities in taking forward the right cases;
- 3) Improve speed and predictability for business.

The intended effects are to strengthen the existing competition regime to support growth in the economy.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Throughout the consultation document and again in this impact assessment, a number of options have been considered. The Evidence Base sets out all these options in detail. However, in the summary sheets we present three illustrative options against the Do Nothing. These are:

- 1) Limited change model - OFT and CC merge but their functions only change to allow for being in 1 body.
- 2) Full mandatory merger notification under the limited change model where the OFT and CC are merged.
- 3) Hybrid merger notification under the limited change model where the OFT and CC are merged.

Mandatory notification of mergers is the significant regulation consideration in this consultation. The current voluntary approach is being considered alongside mandatory notification. On merger notification there is no preferred option for Government at this stage. The preferred option will be confirmed at the final stage IA. However, merging the OFT and the CC is a preferred option.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 1/2018

What is the basis for this review? PIR. **If applicable, set sunset clause date:** Month/Year

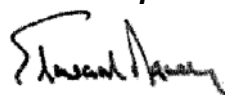
Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?

Yes

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



Date: 16/03/11

Description:

Create CMA by merging the competition functions of the OFT and the CC under a limited change model

Price Base Year 2011	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £24m	High: £54m	Best Estimate: £37m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£4.5m	1	Optional	£4.5m
High	£6.8m		Optional	£6.8m
Best Estimate	£6.8m		0	£6.8m

Description and scale of key monetised costs by ‘main affected groups’

Creating the single CMA would involve significant transition costs, incurred by the Government including accommodation, information technology, staffing, branding and communication and financial and accounting costs. Past Government reorganisations have shown a tendency to underestimate the transition costs and we have therefore applied an optimism bias, giving our best estimate as equal to our higher figure.

Other key non-monetised costs by ‘main affected groups’

There may also be additional costs of equipping hearing rooms for phase 2 hearings if the CMA was located at Fleetbank House or any other location which was not already equipped with suitable equipment and rooms.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	0	£3.5m	£30.4m
High	Optional		£6.8m	£58.3m
Best Estimate	0		£5.1m	£43.7m

Description and scale of key monetised benefits by ‘main affected groups’

Creating the CMA results in annual benefits arising mainly from accommodation savings, staffing savings and back office savings. The estimates were developed following BIS's work and consultation with the Competition Authorities and the Treasury. The benefits are a saving to the Government as the annual costs of the CMA are borne by the Government.

Other key non-monetised benefits by ‘main affected groups’

By merging the two bodies, we would anticipate more efficient resource allocation by the CMA, as it would be able to better balance the portfolio of work across the regime as a whole and reduce some duplication of activities. We would also anticipate that this could lead to savings to the Government, and shorter times to undertake some of the work, mainly on markets, which would reduce uncertainty on businesses and lead to gains for consumers being secured sooner.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

The main assumption in this model is that the CMA is located at Fleetbank House (the current location of the OFT) and Victoria House, the current location of the CC, is sublet. Hence, the profile of the savings depend critically on the state of the housing market and how quickly suitable tenants can be found. This is a working assumption but the final decision may locate the CMA at Victoria House or another location. Further work will be undertaken to decide the most appropriate location if the bodies are merged. It is assumed that the current competition functions of the competition authorities continue but in a single authority. There are also risks around any staff disruption costs associated with the merger during transition, and a need to minimise any initial uncertainty amongst stakeholders about the operation of the competition regime.

Direct impact on business (Equivalent Annual) £m):			In scope of OIOO?	Measure qualifies as
Costs: 0	Benefits: 0	Net: 0	No	NA

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?	United Kingdom				
From what date will the policy be implemented?	2013Q3				
Which organisation(s) will enforce the policy?	N/A				
What is the annual change in enforcement cost (£m)?	N/A				
Does enforcement comply with Hampton principles?	Yes				
Does implementation go beyond minimum EU requirements?	No				
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)	Traded: 0		Non-traded: 0		
Does the proposal have an impact on competition?	No				
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?	Costs: 100		Benefits: 100		
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	Micro N/A	< 20 N/A	Small N/A	Medium N/A	Large N/A
Are any of these organisations exempt?	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
Statutory equality duties¹ Statutory Equality Duties Impact Test guidance	No	Annex 2
Economic impacts		
Competition Competition Assessment Impact Test guidance	No ²	Annex 2
Small firms Small Firms Impact Test guidance	No	Annex 2
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	Annex 2
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	Annex 2
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	Annex 2
Human rights Human Rights Impact Test guidance	No	Annex 2
Justice system Justice Impact Test guidance	No	Annex 2
Rural proofing Rural Proofing Impact Test guidance	No	Annex 2
Sustainable development Sustainable Development Impact Test guidance	No	Annex 2

¹ Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

² Although we would expect that reforms to the competition regime would ultimately affect competition, this would be based on the case work of the competition authorities and the associated deterrence effect. These proposals do not affect the competition in any particular market directly.

Summary: Analysis and Evidence

Illustrative Policy Option 2

Description: Create CMA by merging the competition functions of the OFT and the CC under the limited change approach model with full mandatory notification of mergers where mergers with a UK target turnover greater than £5m and acquirer turnover greater than £10m must notify the SCMA

Price Base Year 2011	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: -£2,412m	High: £459m	Best Estimate: -£682m

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£4.5m	£108m	£934m
High	£6.8m	£283m	£2,442m
Best Estimate	£6.8m	£161m	£1,393m

Description and scale of key monetised costs by 'main affected groups'

Creating the CMA entails significant transition costs including accommodation, information technology, staffing, branding and communication and financial and accounting, borne by the Government. Full mandatory merger notification introduces costs to businesses of having to notify the CMA (£78.3m), to the CMA of having to sift and possibly investigate an increased number of mergers (£5.2m) and to the economy with a risk that anti competitive mergers which are not under the CMA's jurisdiction proceed (£37.2m).

Other key non-monetised costs by 'main affected groups'

Mergers- the introduction of penalties for businesses failing to notify and / or failing to comply with hold separates is a cost to business. However, in line with impact assessment guidance these penalties have not been counted as they arise as a result of non-compliance.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	£3.5m	£30m
High	Optional	£161.8m	£1,393m
Best Estimate	0	£82.6m	£711m

Description and scale of key monetised benefits by 'main affected groups'

The additional benefit to the economy stems from more 'substantial lessening of competition' (SLC) findings as a result of the CMA considering more merger cases. The benefit is based on the average annual direct consumer saving from merger control given in the OFT's Positive Impact Report 09/10, which was independently assessed as providing conservative estimates of the direct benefits arising from merger control. Although the consumer saving from previous merger cases may not be a good predictor of the saving that may result from mergers caught under this regime.

Other key non-monetised benefits by 'main affected groups'

Merger – wider economic benefit from greater deterrent effect; opportunity to review more ant-competitive mergers. Businesses would benefit from reduced uncertainty of being investigated by the CMA once the merger process has begun, and should face fewer information requests and less distraction from business as usual. Constitution – more efficient resource allocation leading to better prioritisation of cases.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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We have made a number of assumptions to help give a range of the costs and benefits involve. These are: 1)The threshold for mandatory notification is based on the UK target turnover; 2) The direct cost of merger investigations in the CMA are the same as the current direct costs; 3) The decisions on merger cases currently made by the OFT follow the same distribution by UK target turnover as mergers in the whole economy; 4)The cost of legals fees ranges from £50k to £200k; 5) Mandatory notification would require an initial sift stage to assess which cases warrant a full phase I investigation; 6) The number of phase I and II cases expected based on discussions with the OFT; 7) The accomodation assumptions are the same as for illustrative policy option 1.

There is a risk more cases would be reviewed by the CMA but very few extra anti-competitive deals found.

Direct impact on business (Equivalent Annual) £m):			In scope of OIOO?	Measure qualifies as
Costs: £81.04m	Benefits: 0	Net: £81.04m	Yes	IN

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?		United Kingdom			
From what date will the policy be implemented?		2013Q3			
Which organisation(s) will enforce the policy?		SCMA			
What is the annual change in enforcement cost (£m)?		£5.2m			
Does enforcement comply with Hampton principles?		Yes			
Does implementation go beyond minimum EU requirements?		No			
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)		Traded: 0		Non-traded: 0	
Does the proposal have an impact on competition?		No			
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?		Costs: 100		Benefits: 100	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	Micro	< 20	Small 33	Medium 33	Large 33
Are any of these organisations exempt?	Yes	Yes	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
Statutory equality duties¹ Statutory Equality Duties Impact Test guidance	No	Annex 2
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	Annex 2
Small firms Small Firms Impact Test guidance	Yes	Annex 2
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	Annex 2
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	Annex 2
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	Annex 2
Human rights Human Rights Impact Test guidance	No	Annex 2
Justice system Justice Impact Test guidance	No	Annex 2
Rural proofing Rural Proofing Impact Test guidance	No	Annex 2
Sustainable development Sustainable Development Impact Test guidance	No	Annex 2

¹ Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Summary: Analysis and Evidence

Illustrative Policy Option 3

Description: Create CMA by merging the competition functions of the OFT and the CC under the limited change approach model with hybrid mandatory notification of mergers where mergers with a UK target turnover greater than £70m must notify the CMA and the CMA has the ability to investigate mergers qualifying on the share of supply test

Price Base Year 2011	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: -£528m	High: £159m	Best Estimate: -£18m

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£4.5m	£18.8m	£166m
High	£6.8m	£64.1m	£558m
Best Estimate	£6.8m	£21.9m	£195m

Description and scale of key monetised costs by 'main affected groups'

Creating the CMA entails significant transition costs including accommodation, information technology, staffing, branding and communication and financial and accounting, borne by the Government. Hybrid mandatory merger notification introduces costs to businesses of having to notify the CMA (£20.1m) and to the CMA of having to investigate an increased number of mergers (£1.8m).

Other key non-monetised costs by 'main affected groups'

Mergers - the introduction of penalties for businesses failing to notify and / or failing to comply with hold separates is a cost to business. However, in line with Impact Assessment guidance these penalties have not been counted as they arise as a result of non-compliance.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	£3.5m	£30m
High	Optional	£37.8m	£325m
Best Estimate	0	£20.6m	£177m

Description and scale of key monetised benefits by 'main affected groups'

The additional benefit to the economy stems from more 'substantial lessening of competition' (SLC) findings as a result of the CMA considering more merger cases. The benefit is based on the average annual direct consumer saving from merger control given in the OFT's Positive Impact Report 09/10, which was independently assessed as providing conservative estimates of the direct benefits arising from merger control. Although the consumer saving from previous merger cases may not be a good predictor of the saving that may result from mergers caught under this regime.

Other key non-monetised benefits by 'main affected groups'

Mergers - wider economic benefit from a greater deterrent effect. Businesses would benefit from reduced uncertainty of being investigated by the CMA once the merger process has begun, and should face fewer information requests and less distraction from business as usual.
Constitution – better allocation of resources leading to better prioritisation of cases.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5%

We have made a number of assumptions to help give a range of the costs and benefits involve. These are: 1)The threshold for mandatory notification is based on the UK target turnover ; 2) The direct cost of merger investigations in the CMA are the same as the current direct costs; 3) The decisions on merger cases currently made by the OFT follow the same distribution by UK target turnover as mergers in the whole economy; 4)The cost of legals fees ranges from £50k to £200k; 5) Mandatory notification would require an initial sift stage to assess which cases warrant a full phase I investigation; 6) The number of phase I and II discussions based on discussion with the OFT; 7) The accomodation assumptions are the same as for policy option 1.

There is a risk more cases would be reviewed by the CMA but very few extra anti-competitive deals found.

Direct impact on business (Equivalent Annual) £m):			In scope of OIOO?	Measure qualifies as
Costs: £21.3m	Benefits: 0	Net: £21.3m	Yes	IN

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?	United Kingdom				
From what date will the policy be implemented?	2013Q3				
Which organisation(s) will enforce the policy?	OFT				
What is the annual change in enforcement cost (£m)?	£1.8m				
Does enforcement comply with Hampton principles?	Yes				
Does implementation go beyond minimum EU requirements?	No				
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)	Traded: 0		Non-traded: 0		
Does the proposal have an impact on competition?	No				
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?	Costs: 100		Benefits: 100		
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	Micro < 20	Small 10	Medium 40	Large 50	
Are any of these organisations exempt?	Yes	Yes	No	No	No

Specific Impact Tests: Checklist

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Economic impacts		
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Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	Annex 2
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	Annex 2
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	Annex 2
Human rights Human Rights Impact Test guidance	No	Annex 2
Justice system Justice Impact Test guidance	No	Annex 2
Rural proofing Rural Proofing Impact Test guidance	No	Annex 2
Sustainable development Sustainable Development Impact Test guidance	No	Annex 2

¹ Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Evidence Base

Illustrative Policy Option 1 - Annual profile of monetised costs and benefits* - (£m) constant prices

	Y ₀	Y ₁	Y ₂	Y ₃	Y ₄	Y ₅	Y ₆	Y ₇	Y ₈	Y ₉
Transition costs	6.8	0	0	0	0	0	0	0	0	0
Annual recurring cost	0	0	0	0	0	0	0	0	0	0
Total annual costs	6.8	0	0	0	0	0	0	0	0	0
Transition benefits	0	0	0	0	0	0	0	0	0	0
Annual recurring benefits	5.1	5.1	5.1	5.1	5.1	5.1	5.1	5.1	5.1	5.1
Total annual benefits	5.1	5.1	5.1	5.1	5.1	5.1	5.1	5.1	5.1	5.1

* For non-monetised benefits please see summary pages and main evidence base section

Illustrative Policy Option 2 - Annual profile of monetised costs and benefits* - (£m) constant prices

	Y ₀	Y ₁	Y ₂	Y ₃	Y ₄	Y ₅	Y ₆	Y ₇	Y ₈	Y ₉
Transition costs	6.8	0	0	0	0	0	0	0	0	0
Annual recurring cost	161	161	161	161	161	161	161	161	161	161
Total annual costs	167.8	161	161	161	161	161	161	161	161	161
Transition benefits	0	0	0	0	0	0	0	0	0	0
Annual recurring benefits	82.6	82.6	82.6	82.6	82.6	82.6	82.6	82.6	82.6	82.6
Total annual benefits	82.6	82.6	82.6	82.6	82.6	82.6	82.6	82.6	82.6	82.6

* For non-monetised benefits please see summary pages and main evidence base section

Illustrative Policy Option 3 - Annual profile of monetised costs and benefits* - (£m) constant prices

	Y ₀	Y ₁	Y ₂	Y ₃	Y ₄	Y ₅	Y ₆	Y ₇	Y ₈	Y ₉
Transition costs	6.8	0	0	0	0	0	0	0	0	0
Annual recurring cost	21.9	21.9	21.9	21.9	21.9	21.9	21.9	21.9	21.9	21.9
Total annual costs	28.7	21.9	21.9	21.9	21.9	21.9	21.9	21.9	21.9	21.9
Transition benefits	0	0	0	0	0	0	0	0	0	0
Annual recurring benefits	20.6	20.6	20.6	20.6	20.6	20.6	20.6	20.6	20.6	20.6
Total annual benefits	20.6	20.6	20.6	20.6	20.6	20.6	20.6	20.6	20.6	20.6

* For non-monetised benefits please see summary pages and main evidence base section

Evidence Base (for summary sheets)

Background

1. The recent state of the UK economy has been well documented, having entered a recession in 2008, and now returning to growth, the economy is in a state of recovery. The Government's economic policy objective is to achieve strong, sustainable and balanced growth that is more evenly shared across the country and between industries¹.
2. Competition is a key driver of productivity growth both within and across firms. Competition forces firms to improve management techniques and innovate, and it also encourages improvements in the resource allocation between firms. It ultimately benefits consumers through greater choice, better quality and lower prices.
3. In the short term competition generates efficiency gains within firms by forcing firms to allocate resources more efficiently and putting downward pressure on costs. In the long term, competition generates dynamic benefits as the best performing firms expand, the worst performers exit and new firms enter the market, leading to increased aggregate productivity. The static benefits from increased allocative efficiency have been shown empirically to be substantial, but it is widely believed that the dynamic benefits exceed the static benefits. Harris and Li (2007) used data from 1996 to 2004 to examine the factors affecting productivity growth. They found that 42% of UK total factor productivity growth comes from reallocation between firms, 37% from exit and entry of firms and 22% from intra-firm productivity growth.
4. Competition also encourages innovation of new products and production processes and R&D investment as firms need to remain competitive in order to retain customers and survive. Griffiths et al. (2006)² analysed the impact of the EU single market programme. They found that competition increased innovation by incumbents, but if anything decreased the incentive for new firms to innovate. In addition, competition creates pressure for management efficiency. Bloom and Van Reenen (2006)³ found that competition increases management quality but does not reduce work-life balance, a trade off that has been argued.
5. Market forces can sometimes fail to deliver effective competition, if for example, mergers lead to a high degree of concentration or if high barriers to entry prevent new and innovative companies from accessing markets. By setting the market frameworks, the Government can therefore help to ensure markets are conducive to productivity growth. Competition law facilitates open and competitive markets and restricts and deters anti-competitive behaviour⁴. Evidence on the impact of competition policy on productivity is limited, as no OECD country has operated without competition laws so the appropriate counterfactual is not available. Nevertheless the suggestion is that competition policy has a significant positive impact on total factor productivity. Empirical work suggests that there is a negative relationship between market power and productivity, with a 10% increase in price mark-ups resulting on average in a 1.3 to 1.6% loss in total factor productivity growth (Disney et. al, 2003⁵ and Nickell, 1996)⁶.

¹ http://www.hm-treasury.gov.uk/d/growth_291110.pdf

² Griffiths, R., Harrison, R. and Simpson, H. (2006), 'The Link Between Product market Reform, Innovation and EU Macroeconomic Performance', *European Economy Economic Papers* No. 243.

³ Bloom, Nick and van Reenen, John (2006), 'Management practices, work-life balance and productivity: A review of some recent evidence', *Oxford review of economic policy*, Vol. 22.

⁴ Whilst acknowledging some markets are subject to natural monopolies, competition law prevents these firms from abusing a dominant position

⁵ Disney, R., Haskel, J. and Heden, Y. (2003), 'Restructuring and Productivity Growth in UK Manufacturing', *Economic Journal*, Vol. 113.

⁶ Nickell, S.J. (1996), 'Competition and Corporate Performance', *Journal of Political Economy*, Vol. 104.

6. In common with all modern economies, and consistently with the European Union's competition rules, which are themselves directly effective here, the UK maintains a system of competition law which governs the economic behaviour of businesses. Competition laws have become increasingly prevalent internationally as their value has been recognised: today some 112 jurisdictions have competition laws, with more proposing to adopt them in the next few years⁷.
7. The aim of the competition regime is to benefit consumers and the rest of the economy by supporting and enhancing the process of competition. Its main elements are:
 - *Antitrust*: enforcing legal prohibitions against anti-competitive business agreements (including cartels) and the abuse of a dominant market position. There is also a specific cartel offence against individuals who engage in certain forms of price-fixing and other 'hard core' cartel activity.
 - *Merger control*: protecting competition in markets by regulating mergers between businesses.
 - *Market studies and market investigations*: examining markets which may not be working well, with powers to impose remedies where an adverse effect on competition is found.
 - *Competition advocacy*: promoting the virtues of competition and challenging barriers to competition, for example Government regulations.

These elements can be found in competition regimes around the world, although with some variation; in the UK system of market investigations is particularly developed and is regarded as an exemplar. A detailed note on the various legal powers and how they are exercised is at Annex C. This includes the European Union's arrangements on competition and the details of the various statutory bodies which are responsible for enforcing the competition regime: principally the Office of Fair Trading (OFT) and the Competition Commission (CC), but also the sector regulators which exercise certain competition powers in their sectors.

8. The promotion and enforcement of these competition laws facilitates open and competitive markets and restricts and deters anti-competitive abuses. The presence and abuse of market power means that consumers consume less of the affected products or services and pay more than the competitive price. This results in a transfer from consumers to producers and also in a deadweight loss from the inefficient allocation of resources. However, it is likely that these are greatly exceeded by the dynamic benefits flowing from competition law enforcement.
9. The competition regime is therefore clearly of vital importance, particularly in view of stress now being placed on the role of competitive markets in driving growth, and the Government is concerned to ensure that the regime operates as optimally as possible.

Assessment of the UK Competition Regime

10. The UK competition regime is highly regarded internationally. In 2010 the Global Competition Review (GCR)⁸ awarded the CC its highest rating of 5 stars and the Office OFT 4.5 stars, both appearing in the top 5 agencies in the world. In addition, an

⁷ Kovacic W., 'Dominance, duopoly and oligopoly: the United States and the development of global competition policy', *Global Competition Review*, December 2010 (Vol. 13 ISS 11)

⁸ <http://www.globalcompetitionreview.com/features/article/28599/>.

independent review of competition regimes, by KPMG (2007)⁹, ranked the UK's competition regime third, behind the US and Germany. Although the UK was also ranked third in the 2001 and 2004 reviews, the UK had narrowed the gap by 2007 and was by then almost level with Germany. The National 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 internationally¹⁰.

11. The Government acknowledges that it has inherited a competition regime which has been independently assessed as world class. The UK 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, with other elements of the competition regime ranked third, behind Germany as well as the USA.
12. The Government has no intention of undermining these solid foundations. In particular, the Government supports the basic principles that underpinned the previous administration's reforms to the regime: that competition issues should be decided by independent, expert competition authorities, equipped with effective powers to investigate and remedy problems, and taking decisions on the basis of rigorous economic analysis. Rather, the Government intends to build upon these foundations, and to address the weaknesses in the regime that have become apparent.

Rationale for consultation on reform of the UK competition regime

13. The recent McKinsey report on growth and productivity¹¹ once again identified competitive intensity within sectors as one of the key conditions needed for a productive, broad-based and resilient economy. At a time of deficit reduction, when the UK faces growing challenges from emerging economies, getting right the regulatory framework within which business operates is a key action the Government can take enhance the UK's international competitiveness and grow the economy. Ensuring the UK has the most effective regime possible for identifying and remedying failures, weaknesses and distortions in competition is the primary objective of this reform exercise.
14. Reviews of the regime have highlighted the following among others as areas for improvement: the time taken over market studies and investigations, antitrust enforcement and merger cases; the complexity of the regime; the effectiveness and efficiency with which resources are used; the relevance and importance of subject matter; the management of caseloads generally; and the number of decisions on significant cases aside from mergers.
15. The Government has specific concerns about various elements of the regime. There are difficulties in successfully prosecuting antitrust cases at reasonable cost and in reasonable time, including by the sector regulators with concurrent powers, which means that the decisional case law is too thin and precedents too few, and the deterrent effect of the prohibitions is reduced. The voluntary nature of notification requirements in the merger regime gives rise to problems in dealing with the anti-competitive effects of a completed merger. In relation to the market regime there are questions over the split between market studies and market investigations, and this is an area which poses in an acute form whether the best use is made of the resources and powers available to the competition authorities. There are also questions around whether all of the sector regulators have

⁹ <http://www.berr.gov.uk/files/file39863.pdf>

¹⁰ http://www.nao.org.uk/publications/0910/competition_landscape.aspx

¹¹ http://www.mckinsey.com/mgi/publications/uk_report/index.asp

access to a critical mass of competition expertise, and whether the operation of powers concurrently by the OFT and the sector regulators can be improved. More generally, there may be scope for delivering more streamlined and consistent processes, and better and more flexible allocation of resources, across the competition regime. These are discussed in more detail in the main body of the text

16. In addition, the Government is committed to reduce the number and cost of public bodies, and to reduce the burden that such bodies impose on the businesses with which they deal. The OFT and the CC have worked hard both individually and collectively to maximise the efficiency of their processes. However, the need for two wholly separate competition bodies – with two boards, offices, support systems, sets of powers and internal processes etc – should come under scrutiny. Currently, the OFT and the CC can not fully take into account the impact of their prioritisation on each other, especially with regards to Markets work, because they operate as two separate bodies and are seeking to maximise the effectiveness of their own work, while taking some, but not the whole, account of their decisions on the other body.
17. A further objective of the consultation is, therefore, to consider the potential operational benefits of a single competition and markets authority and the opportunities this presents to pool and share expertise and knowledge, deploy resources more flexibly depending on priorities, eliminate duplication and develop a powerful, integrated culture of competition investigation, advocacy and enforcement.
18. The consultation exercise is also an opportunity to look at the relationship between a single Competition and Markets Authority(CMA) and bodies including the sectoral regulators, the new Financial Conduct Authority (FCA) in the financial services sector and the key consumer bodies, and the scope for improving co-operation between them¹².
19. Government intervention is being considered to deal with the issues outlined in the above section, given the separation of the two bodies. It is the government which sets the legal framework under which the bodies operate so if any changes are required, it would be necessary for the Government to intervene. In addition, options which change legislation that make it easier for the bodies to conduct their work and reduce burdens to business and increase growth should increase both the efficiency and impact of the competition regime.

Policy objectives

20. In more detail, the policy objectives for proposed reform are:
 - 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.
21. There are some supplementary objectives which support the overall objectives. These are:-
 - the decision-making of a CMA is demonstrably independent of the Government and accountable to Parliament;
 - competition decisions are high quality, transparent and robust;

¹² The Government will also be consulting in parallel on changes to the consumer landscape, which will be published in due course.

- 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 CMA should have the right legal powers and tools to address competition problems in the interests of consumers and the economy.
22. Under each policy area below (Mergers, Markets, Antitrust and Concurrency), there are more specific policy objectives which refer to the particular problems and nuances with the current regime and more tightly define the intentions of each policy area.

Background on length, throughput and cost of cases

23. *Length of process.* Although difficult to measure accurately, an indication of the average time taken for different types of case from start to completion is shown in table 1. The time taken to deliver cases has been criticised by some commentators – for example, it was flagged by some respondents in the 2007 KPMG report¹³, and the length adds cost to the public purse and to those parties subject to the investigations. Some aspects of the process, particularly antitrust cases, are lengthy by international standards as indicated in fig 2 and 3. The factors affecting the length of time differ for the different tools, and these are explained more fully in those relevant sections.

Table 1: Average duration of Competition casework

Tool	Average end to end ¹⁴ timescales excluding appeals (months) ¹⁵	Average end to end ¹⁶ timescales including appeals (months) ¹⁷
Market Investigations ¹⁸	31.1	36.8
Market Studies ¹⁹	10.4	10.4
Mergers ²⁰	9.4	10.6
Antitrust chapter I ²¹	30.7	38.2
Antitrust chapter II	31.8	45.0

Source: OFT and CC case data

¹³ Although, as noted later, the OFT and the CC have done some work to address this since KPMG report.

¹⁴ Measured from the month the case was formally opened by the OFT till the final report/decision by the OFT or the CC. This does not include remedies.

¹⁵ Calculated from when the OFT opens a case till the time a decision is made by the OFT or the CC (depending on relevance of tool.)

¹⁶ Measured from the month the case was formally opened by the OFT till the final outcome of appeal or remittal decision by the CAT, the OFT or the CC. This does not include remedies.

¹⁷ This includes remittal decisions by the OFT and the CC.

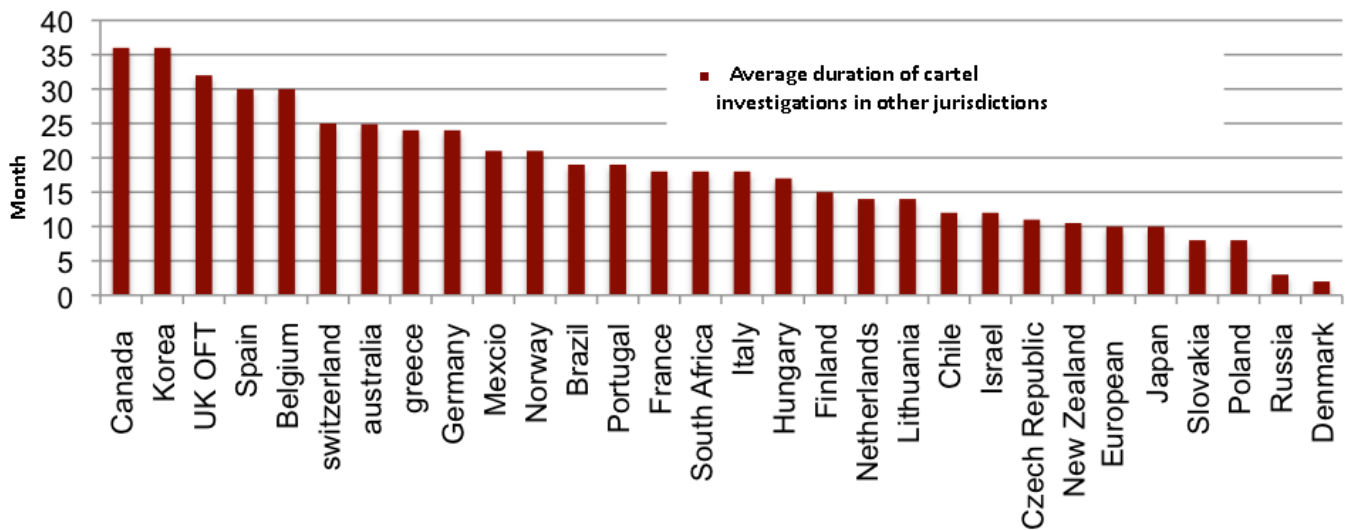
¹⁸ This includes the 9 cases referred to the CC, 2003 – 2010.

¹⁹ For 33 Market Studies not leading to a phase 2 reference.

²⁰ For mergers this only includes 28 cases where phase 2 is completed by the CC, 2006 – May 2010. The OFT deals with 90% of mergers in phase 1, a much shorter process, which are not recorded here. Abandoned mergers in Phase 2 are not considered.

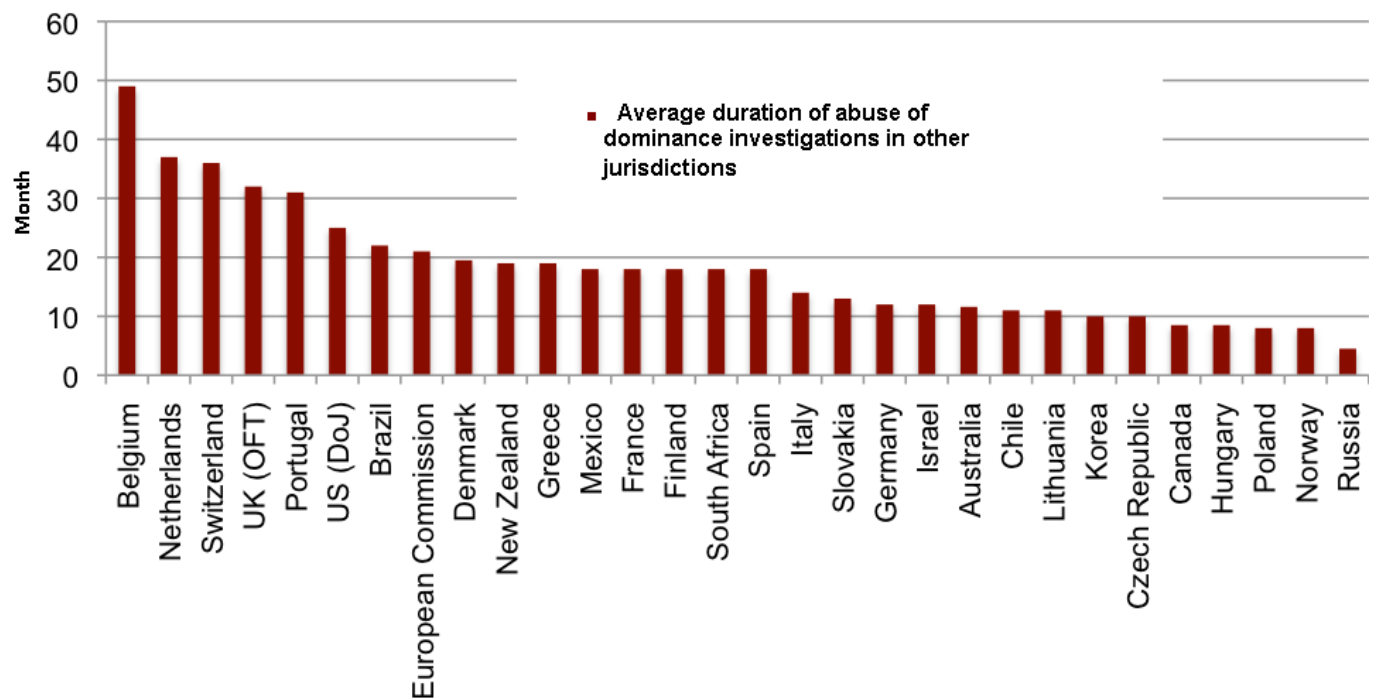
²¹ For antitrust all cases where an infringement decision was made either by the OFT or a regulator, 2000-2009.

Figure 2: Average duration of cartel investigations



Source: Global Competition Review

Figure 3: Average duration of abuse of dominance investigations



Source: Global Competition Review

24. *Throughput of cases.* Although the outcome of interventions should be the central focus of the regime, absolute numbers of cases also play a vital role. The throughput of cases contributes to the deterrence effect^{22,23}, along with the clarity of decision making for business, which is globally recognised as a crucial plank of an effective competition regime. Some commentators²⁴ have suggested that antitrust policy would be more effective if there were a greater number of Competition Act 1998 (CA98) cases, and Deloitte’s report noted that throughput is one of a few factors that affect deterrence.

²² Deterrence is a relevant factor in Mergers CA98, Article 101/ 102 and criminal cartels

²³ ‘Deterrence effect of Competition Enforcement by the OFT’, Deloitte on behalf of OFT, 2007, available at: http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of962.pdf

²⁴ ‘There have been significantly fewer Competition Act decisions by the OFT and the sector regulators than expected... Infringement decisions have also taken longer than expected’. ‘The Competition Act at 10 years old: Enforcement by the OFT and the sector regulators’, Margaret Bloom, 2010 Competition Law.

25. Cost of the regime to business. A number of businesses have also commented on the costs of the regime. There is a perception of a duplication of information requests when cases are looked at by both bodies, and concerns have been raised about unnecessary complexity of the system and occasional lack of cooperation between the two authorities.
26. Costs to the authorities. The costs of the regime of competition enforcement action by the OFT and the CC amounted to around £55m in 2009/10. To put this in perspective, the GCR gives estimates of spend on competition enforcement for the agencies that it rates. These estimates are provided by and limited to the agencies themselves ie they are not all-inclusive costs of the individual country regimes. The UK estimate appears to exclude the OFT's markets function (although the CC's is included), the costs of the CAT and the costs of the regulators in enforcing competition law. Table 4 shows spend in Euros and ranks the countries by spend per million of population.
27. The figures suggest the UK is mid-ranking on spend per head of population, and given the world class rating of the regime, would suggest reasonable value for money by international standards. There are countries such as Italy and Japan that spend more than the UK on competition enforcement but whose regimes are rated less highly; whilst the German regime is less costly but considered to be on a par with the UK²⁵. Typically, given the significant fixed costs in running a competition regime, we would expect larger countries to achieve better ratings, as generally shown in table 4.

Table 4: Spend by country and spend per million population

Country	Population (Millions)	Budget (€m)	Budget per person (€)
Ireland	4.2	6.7	1.6
Australia	21.3	32.5	1.5
Denmark	5.5	7.9	1.4
Netherlands	16.7	15.8	0.9
Italy	58.1	52.8	0.9
New Zealand	4.2	3.8	0.9
United Kingdom	61.6	45.6	0.7
United States	307.2	193.8	0.6
Japan	127.0	55.3	0.4
France	64.0	19.4	0.3
Spain	40.5	12.0	0.3
Germany	82.0	18.3	0.2

Source: Global Competition Review

Presentation of Illustrative options in Summary Sheets

28. The flow diagrams (figures 5b-5e) illustrate the range of options being consulted on under the various competition tools; mergers, markets, antitrust and concurrency and the sector regulators. In addition, figure 5a shows the options under constitution; do nothing or create the CMA, and the governance and decision making options which are available if the creation of the CMA is chosen. Under each of these options the various competition tool options are also available.
29. The purpose of the flow diagram is to show the range of options under each competition tool. Further, it illustrates the numerous options which are available in aggregate²⁶, since different combinations of the individual competition tool options are available. Given the

²⁵ See, for example, KPMG's 2006/07 peer review of the competition regime.

²⁶ Well in excess of 10,000

number of options, the summary sheets of this Impact Assessment illustrate just three of the possible aggregate options. The options chosen in the summary sheets are those which are likely to have the greatest impact and therefore are most helpful to the reader²⁷. The costs and benefits of the various options are outlined further in the sections below.

Figure 5a: Options under Constitution and Governance

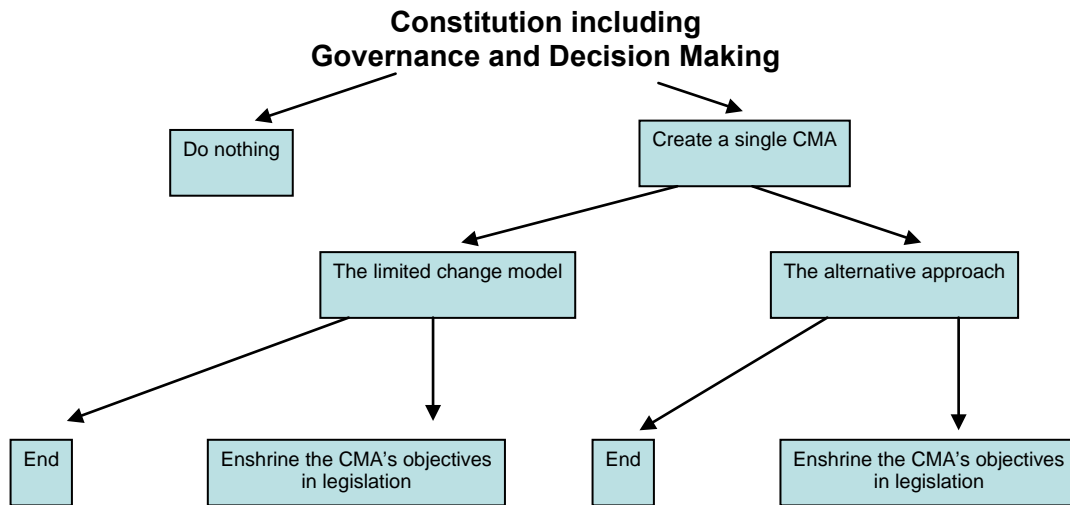
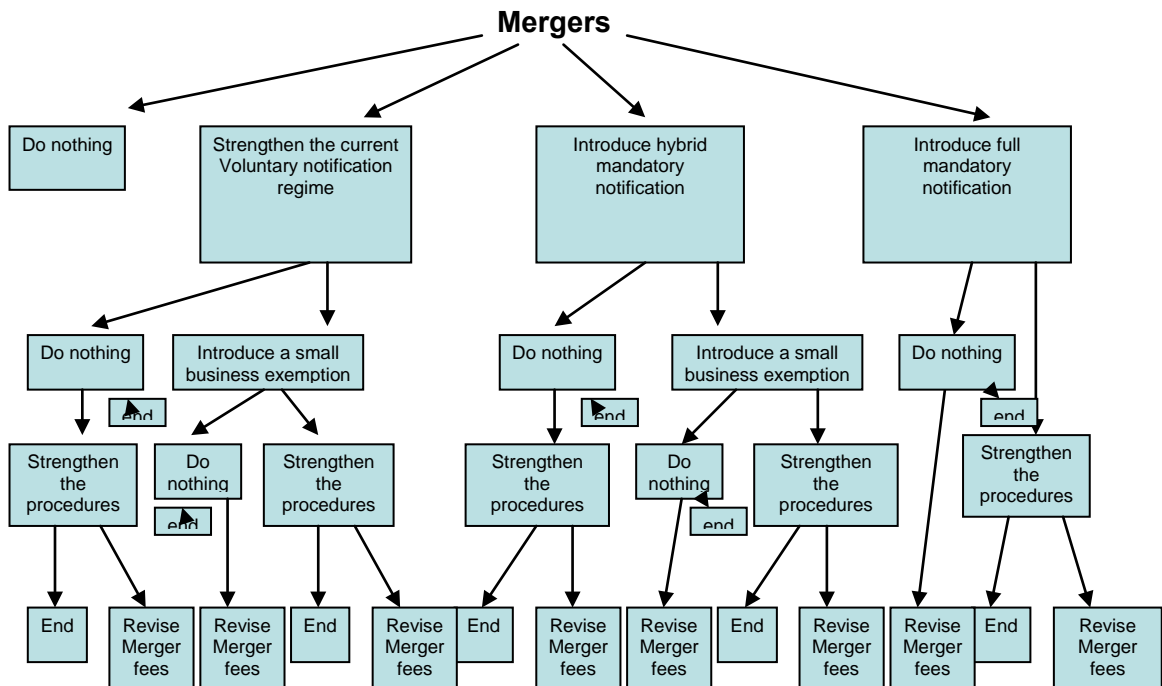


Figure 5b: Options under Mergers



²⁷ The relevant sections for the summary sheets are the Constitution and Mergers Notification sections.

Figure 5c: Options under Markets

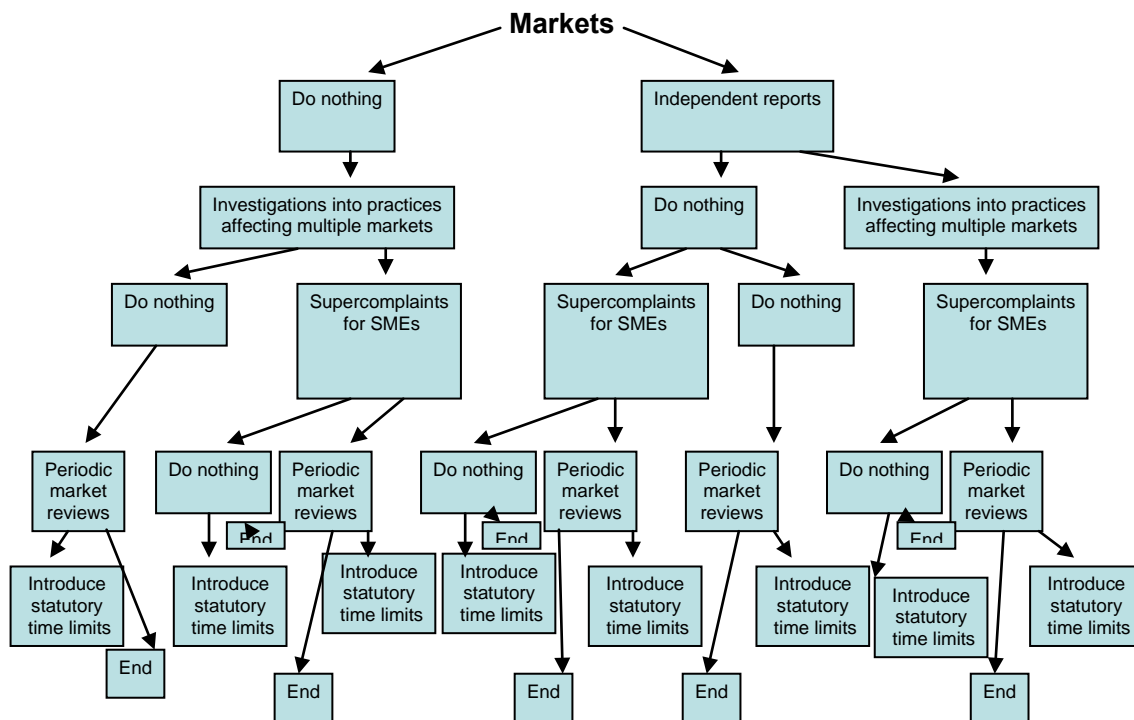


Figure 5d: Options under Antitrust

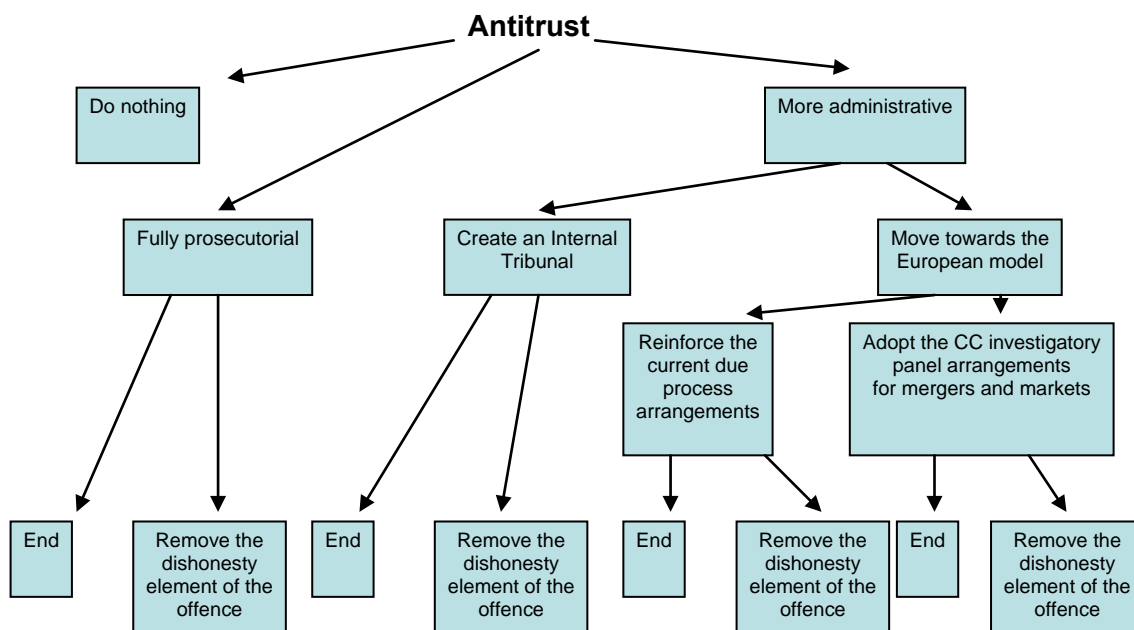
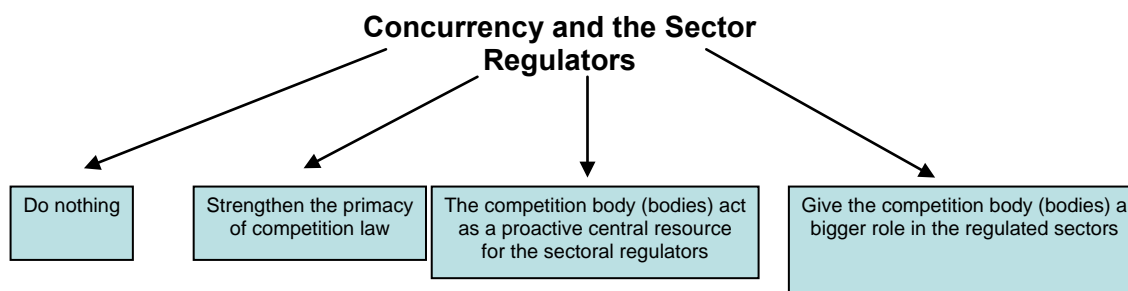


Figure 5e: Options under Concurrency



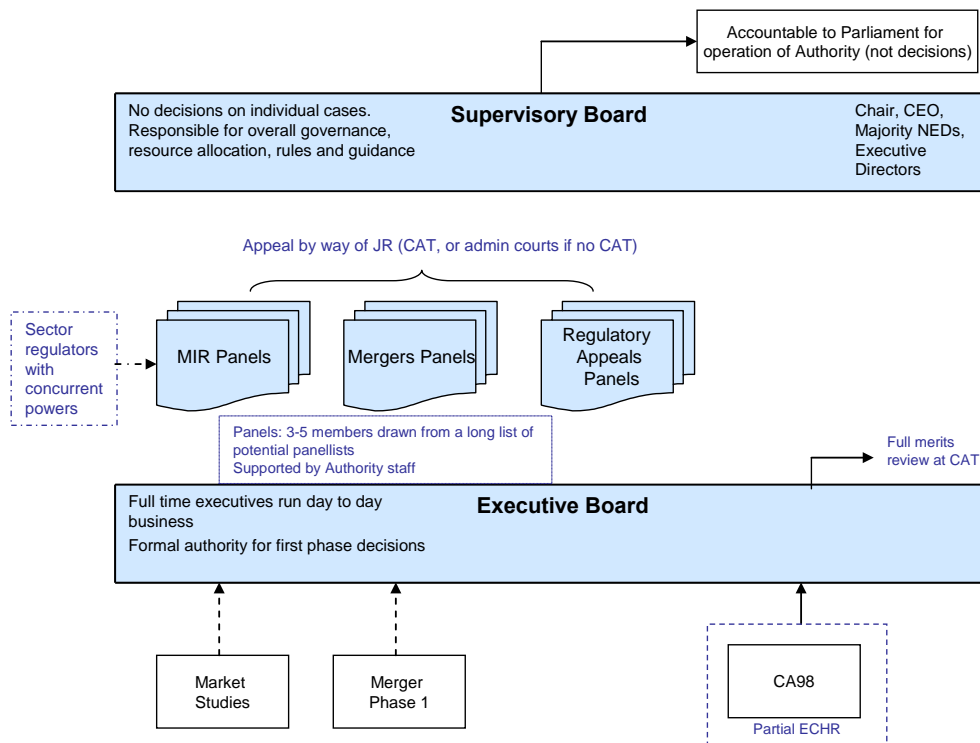
Constitution and Governance including models for the CMA and Decision making

Description of options considered

Decision Making

30. In terms of decision making two main options have been identified.
31. **Option 1** – Do nothing. Under this option the responsibilities and decision making powers of the OFT and the CC would not change. The principal bodies responsible for enforcing competition law are the OFT and the CC, although sectoral regulators such as the Office of Communications (OFCOM) and the Gas and Electricity Markets Authority (OFGEM) have particular responsibilities in relation to their sectors and have powers that are concurrent with those of the OFT in respect of civil antitrust enforcements and making market investigation references to the CC.
32. **Option 2** – Create a Competition and Market Authority (CMA). There are a number of different approaches which could be adopted, but the following core elements remain true regardless of the specific model. At the macro level the CMA will have:
- The Supervisory Board would have overall responsibility for the CMA, including overall governance, resourcing, strategy and policy, including the development of rules and guidance. 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.
 - 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 decision-making model adopted.
 - **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 options for this are considered in chapter 5 of the consultation document, and the antitrust section of this document.
33. **Option 2a** – The Base Case model. Figure 6 shows the type of structure that might be put in place as a result of a merger of the OFT and CC to create the CMA, but with limited other changes to the overall framework. If the 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 6: Base Case decision-making model for the CMA model



- Markets** – 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).
- 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 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.
- Mergers** – 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 role²⁸.
- 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.

²⁸ 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.

- **Antitrust** – Under this model, the decision-making processes for civil antitrust cases remain as they are now, with the 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.
34. **Option 2b** – The alternative approach. Beyond the base case option outlined above, the Government is seeking views on the full range of deeper and broader changes to decision-making. An illustration of potential further changes that could be made to the decision-making structure for the different competition tools is described briefly below. However, a wider set of options are considered in chapter 10 of the consultation document.
- In relation to the markets tool the alternative approach involves changes in the nature of the panel, including who should make up the panel and the role of panel. Specifically, how much the panel is involved in the investigation, and the degree of separation between phase I and phase II at an executive level. The design of decision making for markets will ultimately be decided by the approach taken in the markets section above
 - In relation to mergers the alternative approach involves changes to the applicability of the panel.
 - In relation to antitrust there are broadly two approaches – prosecutorial or administrative in nature, but there are degrees between these extremes which could be adopted.

Governance

35. With regard to the CMA's objectives two options have been identified.
36. **Option 1:** Do nothing. Currently neither the OFT nor the CC's objectives are enshrined in the legislation as a set of duties. Under the do nothing option the current status of the OFT and CC's objectives would continue.
37. **Option 3:** Enshrine the CMA's objectives in the legislation.

Benefits and costs of each option

Decision Making

Option 1: Do nothing

38. Table 7 details the annual costs of the OFT and CC.

Table 7

Annual Costs of OFT and CC	OFT (2009-10)	CC (2010-11)
Total staff cost	£37.3m	£10.1m
Total accommodation cost	£7.6m	£4.7m
Total IT cost	£3.1m	£0.9m
Total corporate support services cost	£8.4m	£2.1m
Total cost	£56.4m²⁹	£17.8m

Staff information source: CC Annual Report and Account 2009-10 and OFT Annual Report and Resource Accounts 2009-10

Other information sources: CC, Public Value Programme: review of the competition regime.

39. The OFT and the CC are already pursuing efficiency programmes. These have been driven by recent grant in aid and Spending Review settlements. Specifically, the OFT received a 25% programme budget cut in real terms phased over 4 years. Within this overall figure the OFT aim to reduce the administration budget by at least a third³⁰. The CC has received an overall reduction in budget of 3.3%³¹ giving the CC an annual budget of £17.814 for 2011/12, following on from an 18% reduction in budget from 2008/09 to 2010/11. Both the OFT and the CC have implemented changes to bring their key performance measures for overhead costs in line with comparable OEP benchmarks, the CC has achieved this for the majority of benchmarks in 2009/10.

Option 2 – Create a single CMA

40. The creation of a single CMA generates benefits including:

- Potential annual cost savings³² – resulting from pooling competition experts, a reduction in staffing, obtaining contracts at more favourable terms as a result of economies of scale and accommodation savings from co-locating, providing vacant accommodation can be let at the current headline rents and not at current market rents³³. Accommodation savings could also be delivered through participating in BIS commercial strategy and working with the ERG and London Property Vehicle.
- Dynamic benefits vis-à-vis two separate bodies, including better allocation of resources through consistent prioritisation.
- A strengthened competition regime may also deliver wider benefits to the economy. Improvements in restricting and deterring anti-competitive behaviour may lead to improved quality, greater choice and more innovation in goods and services, and ultimately lead to economic growth.

41. However, the creation of a single CMA poses significant risks, as detailed in the risks section below.

²⁹ These figures do not take into account the OFT settlement following the 2010 Spending Review. They also include spending on consumer projects, which may be changed and are subject to a separate consultation and Impact Assessment.

³⁰ The OFT budget discussion with BIS, 16th November 2010, at Fleetbank House.

³¹ The CC's budget was not split by programme and admin in 2009/10.

³² Modelling has yet to be done to precisely estimate annual cost savings as the detail necessary to do this has not been decided.

³³ The PVP process demonstrated that savings from accommodation could only be realised once the rental market improved. At the time of the PVP, Fleetbank House or Victoria House would have to be let at a deficit.

Option 2a – The base case model

42. The limited change model seeks to accommodate improvements to the delivery of each tool, as detailed in the specific tool sections above. Improvements to the delivery of each tool may result in benefits to the businesses subject to investigations, in the form of earlier certainty and therefore the ability to pursue transactions and business as usual earlier. This also means that the economy may benefit sooner from transactions and activities which are pro competitive.
43. The limited change model incorporates the use of panels in decision making. Drawing panel members from a 'long list' of members allows sufficient flexibility in the composition of panels to suit specific circumstances, including the most appropriate mix of skills and the most appropriate sized panel depending on the case.
44. Governance and senior staffing. The limited change model assumes the continuation of the majority of the current decision making structures, but with changes to the role of the Executive Board and small changes to the composition of the Panels. BIS discussed the possible saving that these changes may yield with the OFT and the CC as part of the PVP in May 2010. BIS's best estimate based on information provided by the CC and the OFT was that savings of £0.5m to £0.8m may arise as a result of changes to the composition of the Board and Panel and some changes to senior staffing levels leading to reductions in staff numbers.
45. Back office staffing. Based on discussions with the OFT and the CC as part of the PVP exercise, BIS estimated that savings of £0.65m to £0.93m were possible from back office roles, such as HR, Finance and corporate services, which may be duplicated in a merged competition authority.
46. Other staffing. Based on discussions with the OFT and CC as part of the PVP exercise, BIS estimated that other staff savings could be between £1m and £3.5m, as some roles in both case work and at policy level, may be duplicated in a merged competition authority. However, it was noted that these savings may be realised through a cost saving exercise.
47. Back office non-staff savings. Discussions during the PVP process also noted savings of around £0.5m as a result of the OFT ceasing to employ an outsourced IT helpdesk. .
48. Other savings. It was also noted during the PVP process that marginal efficiency improvements, such as staff sharing information, sharing support services and further efficiencies in Press office and Communications³⁴ may lead to savings of between £0.1m and £0.3m.

³⁴ The CC does not currently have a Communications function.

Table 8: Potential cost saving from merging OFT and CC

Potential Savings	Lower Estimated Saving	Higher Estimated Saving	Best Estimate
Governance and senior staffing	£0.5m	£0.8m	£0.8m
Back office staffing	£0.65m	£0.9m	£0.65m
Other staffing	£1m	£3.5m	£2.25m
Back office non-staff	£0.5m	£0.5m	£0.5m
Other	£0.1m	£0.3m	£0.1m
Total	£2.75m	£6m	£4.3m

Source: Best estimates based on discussions with OFT and CC during the PVP process.

49. It is important to recognise that conditions have changed since these savings were estimated as there has been a spending review that has affected the budgets for both organisations and a review of the consumer landscape which may affect some of the savings achievable. These are the best estimates currently available but further consideration will be made during consultation to estimate these savings more accurately, as the detail of the governance structure of the CMA emerges.

Option 2b – The alternative approach

50. In relation to the markets tool the information at phase I would flow into phase 2, as happens currently, in the alternative approach model. This helps minimise the cost to business as it reduces the burden on business of any duplicate information requests. In addition, the phase I market study team would continue to work on the case in phase 2, but join a larger team, therefore balancing out the potential for confirmatory bias.
51. Further, in relation to the markets tool there is the possibility for the panel to have a purely decision making role and being less involved in the investigation itself, therefore strengthening its independence. However, at present the CC members play a steering role in the inquiry, ensuring the right evidence is being gathered for the decision to be made. Therefore, having a panel with a purely decision making role means there is a risk that the panel may perceive that the evidence that has been gathered is not the most appropriate to enable a robust decision to be made. The panel would be drawn from a pool of panellists and would be required to commit more time to the competition authority, than the current time commitments of members over the course of the year. This, alongside flexibility in the composition of panels, is more likely to deliver predictability of outcomes. A pool of panellists will also enable the selection of a panel with the most appropriate skills mix and of the most appropriate size. The cost of such an approach has not yet been quantified as the detail of the model is yet to be decided.
52. In relation to mergers, both phase 1 and phase 2 would be undertaken by the executive, and there would be no involvement of a panel, in the alternative approach model. The phase I decision would be made by a senior member of the executive and the phase 2 decision could be made by a different member of the executive- someone not previously involved in the case, alongside a non executive director from the Supervisory Board. This may result in greater throughput of cases and therefore deliver the associated efficiencies by acting as a deterrent effect. The cost of such an approach has not yet been quantified as the detail of the model is yet to be decided. There may be some savings in direct costs from having just two decision makers instead of a panel, but these details have not yet been decided.

53. In relation to antitrust, the various models between the prosecutorial and administrative extremes each have costs and benefits as detailed in the antitrust section. The final approach will depend on the net benefits, along with the fit with the CMA as a whole.
54. It has not been possible to quantify the staff savings of this model as sufficient detail is yet to be decided. The consultation period will be used to quantify the expected savings as the detail of the model is decided. However, the starting assumption is that the savings would be similar to those under the limited change model but some of the savings are outlined for option 2a in paragraphs 42 to 49.

Governance

Option 3: Enshrine the CMA's objectives in the legislation

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

Transition Costs

56. It is anticipated that the creation of the CMA will involve significant transition costs. Past machinery of Government changes indicate there are five broad categories of costs; accommodation, information technology, staffing, branding and communication and financial and accounting.
57. An NAO report³⁵ notes the gross cost of the 51 reorganisations covered by their survey to be £780m, equivalent to about £15m for each reorganisation. However, the costs of reorganisations vary greatly depending on the complexity of the case. This figure does not take into account any financial savings and benefits delivered by the reorganisations.
58. In addition, the NAO report proposes that the reorganisation cost may be an underestimate for a variety of reasons, including the fact that other bodies, particularly parent departments of arm's length bodies incurred additional costs and some reorganisation costs were assigned to normal business costs. Further, the cost does not include underperformance caused by the time it takes a new organisation to get up to speed, costs stemming from a loss of expertise, institutional memory and strategic focus and the impact on third parties which may be negative.
59. The costs involved in the 51 reorganisations considered by the NAO survey are summarised in table 9. The main cost relates to staff and in particular to redundancy costs.

³⁵ Reorganising Central Government, National Audit Office, March 2010.

Table 9

Costs involved in reorganisations		
	Cost for 51 reorganisations (£m)	Average Cost per reorganisation (£m)
Staff	320	6
Information technology	153	3
Property	116	2
Corporate functions	106	2
Indirect costs	52	1
Branding and communications	33	1
Total	780	15

Source: Reorganising Central Government, NAO, March 2010.

60. As part of the PVP exercise the transition costs of moving to a single competition authority were estimated, including accommodation and IT costs. The costs estimated were for two of the six categories of costs highlighted in the NAO report, which also accounted for approximately a third of costs. Therefore we have multiplied the estimated costs by three as an estimate of the total costs. In addition, given that these costs may be an underestimate for the reasons highlighted by the NAO report, an optimism bias adjustment of 50% is applied to the costs, a practice recommended in the Green Book, which may be a more realistic estimate of the costs. These costs are summarised in table 10.

Table 10

Transition costs estimated in the PVP ³⁶		
	Estimated Cost	Estimated Cost applying optimism bias adjustment of 50%
Cost of Moving Staff / Equipment	£0.31m	£0.46m
Cost of Internal Reorganisation	£0.02m	£0.03m
Cost of Configuring Hearing Rooms	£0.5m	£0.75m
Survey & Space Planning Costs	£0.02m,	£0.02m
Business continuity	£0.02m	£0.03m
Cost of IT server room	£0.18m	£0.26m
Merger of IT systems	£0.3m	£0.45m
Project Management Cost	£0.13m	£0.19m
Staff Cost of Move +-1 Day Lost	£0.05m	£0.07m
Total	£1.5m	£2.3m
Estimated total transition costs³⁷	£4.5m	£6.8m

Source: PVP, 2010. The costs above are based on the CC moving to Fleetbank House as an independent body. The OFT estimated the costs of an OFT move to be in excess of £2.2m excluding staff costs, corporate functions, indirect costs and branding and communication costs

61. However, it is important to recognise that conditions have changed since these costs were calculated as noted in paragraph 49, but these are the best estimates currently available.
62. Accommodation. The largest cost item for both the OFT and the CC is accommodation, and they both occupy buildings with spare space, indicating the possibility of achieving efficiencies by co-locating. Although the CC sublets space to other organisations and its accommodation is currently fully occupied. The CC lets its accommodation primarily under

³⁶ Numbers may not add up due to rounding

³⁷ Includes estimate of other staff costs, corporate functions, indirect costs, branding and communication costs

MOTOs (Memorandum of terms of Occupation) to other government departments. Its one commercial sublet is scheduled to end on the 29 September 2013. Early work has shown that Victoria House could accommodate both the CC and the OFT if all other tenants excluding the CAT were asked to vacate (current MOTO breaks/ terminations are between July 2010 and December 2013).

63. BIS is a pilot department within the Government Property Unit's London Property Vehicle, which will have a shell PV from April 2011, to undertake occupancy management across all of the Government estate within five central London postcodes (excludes Fleetbank house). BIS estates optimisation strategy will concentrate on all BIS family (including ALBs) properties with lease expiry up to January 2015. Fleetbank House and Victoria House are BIS family preferred sites due to their long lease break (September 2023) and therefore BIS will look to maintain occupancy levels by co-locating / subletting to other BIS organisations. There is not currently an obvious other BIS site for a new CMA to move to. The BIS estates team will seek to align estate and operational strategies for the CMA.
64. The PVP exercise completed in March 2010 detailed that with the OFT located at Fleetbank House and the CC at Victoria House, accommodation costs per annum were £6.4m and £6.8m respectively. In addition, both the OFT and the CC sublet some space generating £60k and £3.2m in sublet income per annum respectively. In the PVP exercise the transition costs were estimated at £1.51m.
65. For the purposes of this Impact Assessment, we consider co-locating the CC with the OFT at Fleetbank House to illustrate the costs involved. However, if the decision to merge the bodies was taken, further work would be needed to decide the best location for the new body.
66. Compared to the current location arrangements, the CC moving to Fleetbank House sub-letting space from the OFT and the formation of a single competition authority, is estimated to generate an average annual benefit of approximately £0.79m at constant prices over 10 years, but a net cost in year 1 due to the transition cost. Discounting by the recommended 3.5%³⁸ gives a net present value of £6.7m³⁹.
67. The savings given above are based on the best information available. More detailed financial work will be undertaken during the consultation time period to compare different accommodation options and for more accurate estimates of the costs and benefits of changing the current accommodation arrangements to be calculated.
68. During the PVP, the possible advantages identified by moving the CC into Fleetbank House, and sub-letting space from the OFT include⁴⁰:
 - Eliminates the travel time between the two bodies.
 - Solves the problem of the OFT having to find tenants for its vacant space⁴¹.
69. Possible disadvantages of the CC moving into Fleetbank House include:

³⁸ http://www.hm-treasury.gov.uk/d/green_book_complete.pdf

³⁹ The cost escalation over period for rent for Victoria House is 2.5% every 5 years. The cost escalation over period for rent for Fleetbank House is 2.25% every year per lease agreement.

⁴⁰ However, these considerations are not so relevant if there is a single CMA

⁴¹ Although it is possible that the CMA may not need all the accommodation at Fleetbank House so tenants would still have to be sought.

- Current or future tenants in Victoria House may choose to move because the support services the CC offers to its sub-lets would no longer be available, which would mean a loss of income to the CMA;
 - Potentially not all space in Fleetbank House will be occupied by the CMA meaning that the CMA will have to be a 'landlord and service provider to tenants;'
 - BIS might not be able to lease out the additional vacant space in Victoria House or only at rents below the current headline rents. Further, income may be less as shared services are unlikely to be available on the site; and
 - Additional cost of configuring hearing rooms in Fleetbank House, which would not be incurred if the bodies were located in Victoria House.
70. However, co-locating the OFT and the CC is complicated by their lease arrangements. The CC's lease at Victoria House runs until 2023, but there is a break clause in 2019, and the OFT's lease at Fleetbank House also runs until 2023.
71. In addition, the opportunity for the CC and the OFT to co-locate exists, to some extent, independently of whether the bodies merge to form a CMA.
72. Information Technology. Transition IT costs will include the cost of purchasing new equipment, integrating the OFT and CC's current systems including disaster recovery arrangements and purchasing sufficient new user licenses for all staff in the CMA, terminating current IT contracts and integrating current record management systems.
73. Staffing. Both the OFT and the CC staff would need to transfer to the CMA. This process would include harmonising pay for all staff and terms and conditions of employment, which would need to be negotiated with Staff Council (CC) and Trade Union (OFT). The OFT's staff are civil servants with different terms and conditions, grading structures and salary scales to the CC. Although both organisations are members of the Civil Service Pension Scheme.
74. Other staffing costs include:
- Redundancy costs which will depend on the number of staff who find alternative positions within the public sector, whether staff leave on voluntary or compulsory terms and under what civil service redundancy scheme terms staff leave.
 - Recruitment costs which will depend on the amount of recruitment required.
 - Distraction from business as usual during the process of creating the CMA.
75. Branding and Communication. Transition branding and communication costs will include website rebranding.
76. Financial and Accounting. Transition financial and accounting costs will include adjustments to budgets, performance management, risk management, pay and workforce management and general accounts. As noted in Machinery of Government Changes Best Practice Handbook produced by the Cabinet Office, "the processes concerning these changes are complex and can be time-consuming"⁴².

⁴² 'Machinery of Government Changes, Best Practice Handbook', Cabinet Office.

Summary

77. Presented above are the different options being considered and the current costs of the regime have also been outlined to provide a benchmark against which future work should be assessed. The Secretary of State said he was ‘minded to merge’ the competition and markets investigation functions of the OFT and the CC on 14th October 2010. However, there is no preferred option over which model should be chosen and the options are considered in the light of the objectives set out at the beginning of this section in Table 11.

Table 11: Assessment of Constitution options against objectives

	To strengthen the UK’s competition regime	To reduce the burdens to business and government	Maintain independence and objectivity of decision making
The base case model		1) Transition costs from bringing bodies together 2) Potential annual cost savings 3) Dynamic benefits vis-à-vis two separate bodies	
The alternative approach	1)Accommodates improvements to the delivery of each tool so the economy may benefit sooner from transactions and activities which are pro competitive	1) Transition costs from bringing bodies together Potential annual cost savings 2) Potential annual cost savings 3) Dynamic benefits vis-à-vis two separate bodies	1) Panels on Markets having a purely decision making role strengthening independence 2) Mergers tool decision making mirroring international authorities with regimes regarded as being on par with or better than the UK
Enshrine the CMA’s objectives in the legislation	1) Provides a strong, clear mandate and purpose for the organisation 2) Difficult to ensure suitable flexibility to allow the CMA to be future proofed		

Mergers

Issues under consideration

78. A merger regime is necessary to prevent companies achieving a dominant position, thus leading to anti-competitive outcomes. The direct benefits of the UK merger regime were estimated to be £310m on average per year during 2007 to 2010⁴³. An independent review of the methodology by Davies (2010)⁴⁴ considered this estimate to be conservative; it also does not take into account the very significant dynamic effects associated with the regime.
79. The UK merger regime is highly regarded internationally and was ranked second behind the US out of nine merger regimes (KPMG, 2007)⁴⁵. The strengths noted include technical competence, independence from the political process, transparency and access to decision makers, accountability and robustness of decisions. There are, however, areas where the current regime could be improved:
- *Risk that some anti-competitive mergers escape review.* The UK is one of the very few OECD countries which operate on the basis of voluntary notification, which carries a risk that some anti-competitive mergers escape review by the competition authority. The majority of OECD countries operate mandatory pre-notification merger regimes and there has been a running debate about whether the UK should move to such a regime.
 - *Investigating completed mergers.* The current voluntary notification regime results in the competition authorities looking at some cases which have already been completed. This can be burdensome in terms of case handling – both for the competition authorities and for the companies concerned – and can give rise to problems in designing appropriate remedies where a merger is found to result in a substantial lessening of competition since it can be difficult to undo the effects of a completed merger, and it is costly both for the authority and the merging parties. Since 2004/05 of the 125 cases at phase 1, where the duty to refer arose, 60 were already completed. At phase 2, 14 of the 25 cases resulting in a substantial lessening of competition (SLC) were completed at the time of reference.
 - *Businesses argue that the merger process could be speedier and more streamlined.* The Peer Review of Competition Policy by KPMG in 2007 found that the UK regime was considered slow compared to other countries and ranked 7th out of nine merger regimes on speed of decision making.
 - *The current system does not yield full cost recovery.* It is government policy to charge for many publicly provided goods and services and the UK norm is to charge at full cost⁴⁶. Merger fees were raised in October 2009, but the revenue generated is still far from achieving full cost recovery. It has been argued that the public purse should not bear the cost and risks of investigating mergers which have completed without notification.

⁴³ See OFT Positive Impact Report 2009-10

⁴⁴ http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1164.pdf

⁴⁵ Peer Review of Competition Policy, KPMG, June 2007.

⁴⁶ Managing Public Money, HM Treasury, October 2007.

Policy objectives

80. Along with the overall objectives, there are some specific objectives for the mergers regime which are linked to the overarching objectives including:-
- **Create a strengthened merger regime which supports growth and productivity** by ensuring that mergers that weaken competition are correctly identified and remedied, thus bringing benefits to consumers and the economy as a whole.
 - **Create a more efficient, speedier and streamlined merger regime** through amending the investigatory process and reducing the duplication of work between phase 1 and phase 2 to benefit businesses.
 - **Reduce the burden on the public purse** through a review of fees aiming to recover the cost of merger control. The aim of charging fees for mergers that qualify for regulatory consideration has always been to achieve full cost recovery.

Description of options considered

81. To meet the objectives and to address the issues set out above, a number of options for the mergers regime have been identified in the consultation document. These options fall into three categories; notification and thresholds, process and fees.

Notification and thresholds

82. Three options have been identified concerning notification and thresholds.
83. **Option 1** – Do nothing: The current voluntary notification system and the threshold which dictates over which mergers the competition authority have jurisdiction would not change.
- Most other OECD country regimes, including the US and EU have mandatory pre-notification regimes. The UK, however, operates a voluntary notification regime along with Australia, Singapore and New Zealand.
 - UK competition authorities currently have jurisdiction over mergers where the value of the UK turnover of the enterprise being acquired exceeds £70 million or where the merger would result in the combined share of supply of the parties in any description of goods or services of at least 25% in the UK or a substantial part of the UK⁴⁷. A merger arises where one enterprise obtains control over another. This may be the case where it acquires the whole or a majority of the shareholding, where it acquires a sufficiently large interest to be able to control the policy of that enterprise or where it acquires 'material influence' over the target which can occur at relatively low ownership shares.
84. **Option 2** – Strengthen the voluntary notification regime by introducing a statutory restriction on further integration that could take place between the merging parties that would apply automatically as soon as the CMA commences an inquiry into a completed merger or by making clearer the range of measures the CMA could take in order to prevent pre-emptive action.
- 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

⁴⁷ If certain higher thresholds are breached the EC may have jurisdiction.

such financial penalties should be 10% of aggregate turnover of the enterprises concerned.

85. **Option 3** – Adopt a mandatory notification regime with penalties for merging parties who fail to notify and / or who do not adhere to the suspensory obligation.
- The Government would be minded to introduce similar penalties to those operated by the EU where the penalty is 10% of aggregate turnover⁴⁸.
86. **Option 3a** – Hybrid mandatory notification of mergers where the value of the UK target turnover exceeds £70 million would be required to be notified. In addition, the 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 threshold.
- This turnover threshold has been chosen as this is the turnover threshold used in the current voluntary notification regime. As an alternative to retaining the share of supply test, the CMA could have jurisdiction over all mergers, except those qualifying under the proposed small merger exemption.
87. **Option 3b** – Full mandatory notification of 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 turnover threshold has been chosen from a consideration of the turnover data of recent mergers, suggesting it would reduce the risk of missing small mergers which may raise competition concerns. Data shows that for 8 merger cases since 2006 where a ‘realistic prospect’ of a substantial lessening of competition (SLC) was found⁴⁹ where the UK target turnover was less than £5m, all had an acquirer worldwide was greater than £10m.
 - In addition, opinion is being sought through consultation on the nature of the turnover test, in particular whether it should be based on the target’s turnover only or the target and acquirer’s turnover combined. In addition, the possibility of having a short and long form notification is being consulted on.
 - In a mandatory notification regime the Government intends to retain the ability to look at mergers which give the acquirer the ability to exercise ‘control’ over the target, including where one enterprise acquires material influence over another. The OFT and CC are currently able to investigate transactions where the acquirer may obtain the ability materially to influence the policy of the target (material 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)⁵⁰. Under a mandatory notification regime mergers that result in an acquisition of control of policy of the target or an acquisition of a controlling interest in the target to be notified. In addition, the CMA would continue to have jurisdiction over, and the ability to initiate investigations into, transactions that give rise to material influence of one enterprise over another and such mergers could be notified voluntarily.
88. **Option 4** – Small business exemption under both the hybrid mandatory and voluntary regimes where the UK target turnover does not exceed £5m and the acquirer worldwide turnover does not exceed £10m.

⁴⁸ A penalty which should be sufficient to deter failures to notify.

⁴⁹ Not including De Minimis clearances

⁵⁰ Mergers: Jurisdictional and procedural guidance, OFT, June 2009, paragraph 3.14.
http://www.offt.gov.uk/shared_offt/mergers_ea02/oft527.pdf

- This small business exemption would replace the current de minimis exception to the duty to refer.

Process

89. On process two options have been identified.
90. **Option 1** – Do nothing: The current process for merger investigations and the associated time limits and extension powers would not change but would function in a single CMA.
- The OFT carries out phase 1 of merger investigations and has a 40 day administrative time limit. The OFT decides whether the merger will lead to a ‘realistic prospect’ of a substantial lessening of competition (SLC), and if it does the OFT will refer the merger to the CC, accept undertakings in lieu or clear on the basis that the market(s) concerned is / are of insufficient importance (de minimis). An informal discretionary ‘stop the clock’ of up to 3 weeks can be used before phase 2 begins, to give merging parties an opportunity to reassess the situation and provide better undertakings, or when information has not been provided. The OFT has a 20-30 day statutory deadline if the merger notice route is used, although in practice it rarely is. The OFT may refer completed mergers to the CC up to four months after completion, or the date on which details of the merger were made public, whichever is later. Otherwise there are no statutory deadlines in the phase 1 part of the process.
 - The CC carries out phase 2 of merger investigations and decides if an SLC exists ‘on the balance of probabilities’. If an SLC is found, the CC can require structural undertakings to either prevent the merger (or part thereof) or to ‘unscramble’ a completed merger, and/or impose behavioural undertakings. The CC has 24 weeks to publish its phase 2 decision in the form of a report, which can be extended by 8 weeks for exceptional reasons. The report includes, where relevant, a description of the remedies and the reasons for those remedies. The time limit does not include the time taken for remedies implementation (in particular the detailed negotiation of undertakings or drafting of an Order to implement the remedies).
91. **Option 5** – Design a streamlined system. The consultation explores options such as reducing timescales and introducing statutory time limits for phase 1 and the undertakings in lieu and remedies implementation stage of both phase 1 and 2. It also considers the merits of introducing a fast track process for certain cases, amending the stop the clock powers and changing information gathering powers.
- The design and speed of the merger process depends on whether a voluntary or mandatory notification regime is adopted.
 - Information gathering powers – Give the CMA information gathering powers in phase 1. Currently the OFT does not have compulsory information gathering powers for phase 1, but it can use discretionary stop the clock powers if parties fail to provide the information requested.
 - In addition, award the CMA stop the clock powers in phase 2 to enable the CMA to suspend or extend its statutory review timetable for a period of three weeks when the CMA believes the merger may be abandoned. Currently, the CC must start to investigate all cases referred to it even if it suspects that the merger may not proceed, as otherwise if the parties do decide to proceed with the merger, the CC will have lost a considerable amount of time from its investigative process.

- **Statutory time limits** – Introduce a statutory time limit to phase 1 and introduce a statutory time limit to the undertakings in lieu and remedies implementation stage of phase 2. The specific time limit for different aspects of phase 1 is likely to vary depending on whether a mandatory or voluntary notification regime is adopted.
- A mandatory regime is likely to require tighter timescales (for example 30 working days) to keep the suspensory period to a minimum and to minimise interference in the market for corporate control, as businesses would only be able to complete mergers once they obtained clearance from the competition authority. Further, since mandatory notification requires a formal submission which is often discussed in advance with the competition authority, it is more likely that the competition authority will have the information it needs when it starts the investigation.
- In a voluntary notification regime an appropriate time period might be 40 working days. 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 CMA making either an Order or accepting undertakings. If a statutory time limit to the remedies implementation stage of phase 2 is introduced, it is likely that the CMA’s information gathering powers would need to be extended to enable it to compel information to be provided up until the remedies undertakings have been agreed, or an order has been put in place.
- **Remedies** – Allow the CMA to consider remedies in phase 2 without having to decide whether the merger has or will result in an SLC.

Fees

92. On fees three options have been identified.
93. Option 1 – Do nothing: The current merger fees would not change. Merger fees are currently charged to qualifying mergers, based on the UK turnover of the target company. The merger fees that currently apply are set out in table 12.

Table 12

Value of the UK turnover of the enterprise being acquired	Fee on or after 1/10/09
< £20m	£30k
£20m - £70m	£60k
> £70m	£90k

Source: BIS

94. The total cost, including overheads, of merger control work in 2009/10 was approximately £10.4m. This includes a £6m cost to the CC and a £4.4m cost to the OFT. However, income from fees has been less than £2m per year recently resulting in a substantial deficit. Over recent years the total number of cases considered by the competition authorities has fallen significantly, to 71 in 2009-10. This largely reflects greater familiarity with the regime and developing case law which has made it easier for all parties to determine whether or not a merger is liable to raise competition concerns and therefore needs to be subjected to competition review. It also reflects a decline in the total number of mergers taking place across the whole economy.
95. The reduction in the number of cases being considered may represent an improvement in efficiency but it has resulted in fewer merger fees being collected and therefore in spite of

a substantial increase in the levels of the fees, a failure to achieve full recovery of costs. Merger fees have increased six fold over the past four years and they are now high by international standards; many regimes do not charge a fee at all. The aim of full cost recovery is to recover the total cost of merger control including overheads. The percentage of overheads the CC attributes to merger control is equivalent to the percentage of the time they devote to merger control rather than other activity. Therefore the overheads the CC attributes to merger control will depend on the amount of merger control work undertaken and will hence vary considerably between years.

Table 13

Costs of merger control	
	2009-10
Cost to the OFT	£4.4m
Cost to the CC	£6m
Total cost (including overheads)	£10.4m
Income from fees	c. £2m
Deficit	£8.4m

96. **Option 6** – Revise merger fees: To achieve full cost recovery, either the level of fees charged must increase significantly and / or the number of fees being collected must increase. The objective of amending merger fees is to ensure the level of fees benefit the economy as a whole, properly balancing the interests of the taxpayer and all of the businesses concerned. The options available for merger fees were last examined in 2005, and following public consultation the Government concluded that the existing three fee bands remained appropriate, providing an appropriate level of differentiation between smaller and larger mergers. Therefore the turnover bands are not being consulted on again.
97. **Option 6a** – Under voluntary notification increase merger fees and / or add one further fee band applicable to mergers involving the acquisition of enterprises with a UK turnover above £120 million. This is thought to be the most straightforward way of achieving an increased income from fees under a voluntary regime. However, this still means that the costs of merger control are recovered from a small number of parties and full cost recovery is unlikely to be achieved.
- In a voluntary notification regime given that the number of mergers that qualify for a fee is determined by the number of mergers that are either voluntarily notified or are called in by the OFT’s mergers intelligence function, increasing fee levels seems the only practical way of achieving full cost recovery.
 - A single flat fee for all qualifying mergers considered by the competition authorities was considered during public consultation in 2005. A single flat fee would provide clarity to the acquirer of the costs involved, and a simple charging structure for the OFT to administer. However, the Government concluded that removing all differentiation between the fee payable when acquiring a smaller and when acquiring a larger enterprise could place disproportionate costs on smaller mergers and may discourage some smaller transactions. Therefore this option is not being considered again.
 - A separate fee that is applicable to those mergers that are referred to the CC for a phase 2 investigation was also considered during consultation in 2005. However, the Government concluded that this would introduce greater complexity and uncertainty about the costs to be incurred. Further, it might jeopardise the economic rationale of some mergers that are referred – with the possibility of more cases being abandoned at

reference stage. Further, it might also be deemed unfair – particularly in cases where a merger is subsequently cleared, as it penalises mergers simply because they appear capable of giving rise to competition concerns as they involve enterprises that operate in similar markets. Therefore this option is also not considered again.

98. **Option 6b** – Under mandatory notification, adjust fees and / or add further fee bands. This is likely to be the most straightforward way of achieving an increased income from fees. A separate fee applicable to all mergers referred to phase 2 investigation is also considered inappropriate under mandatory notification for the reasons given above.
99. The Government is interested in exploring whether scope exists to introduce a different type of charge that would apply to a much broader range of the mergers taking place in the economy than that relatively small number which are subject to regulatory consideration. However, a practical and cost effective mechanism is yet to be identified.

Benefits and costs of each option

Notification and thresholds

Option 1 – Do nothing: The current voluntary notification system and the threshold which dictates over which mergers the competition authority have jurisdiction over would not change.

100. The current merger regime enforced by the OFT and CC imposes costs to both bodies but creates significant benefits to the UK economy and to consumers, by preventing mergers which substantially lessen competition. These baseline costs and benefits are further outlined below.

Option 2 – Strengthen the voluntary notification system regime by introducing a statutory restriction on further integration that could take place between the merging parties that would apply automatically as soon as the CMA commences an inquiry into a completed merger or by making clearer the range of measures the CMA could take in order to prevent pre-emptive action.

101. The primary benefit of strengthening ‘hold separate’ requirements is that it would address the ‘unscrambling’ problems associated with investigating completed mergers. Strengthening hold separate requirements may lead to further benefits, in that, by making completing mergers without prior merger clearance less commercially attractive, it may reduce the number of investigations into completed mergers which are both more costly (to business and to the Authorities) and more complicated. Further, strengthening hold separates may increase the incentive for businesses to notify mergers, in order to gain certainty before completion.
102. The introduction of penalties for businesses failing to comply with ‘hold separates’ would incentivise cooperation with obligations. The introduction of penalties could increase single CMA costs because of the need to consider penalties and deal with possible challenges to penalties.

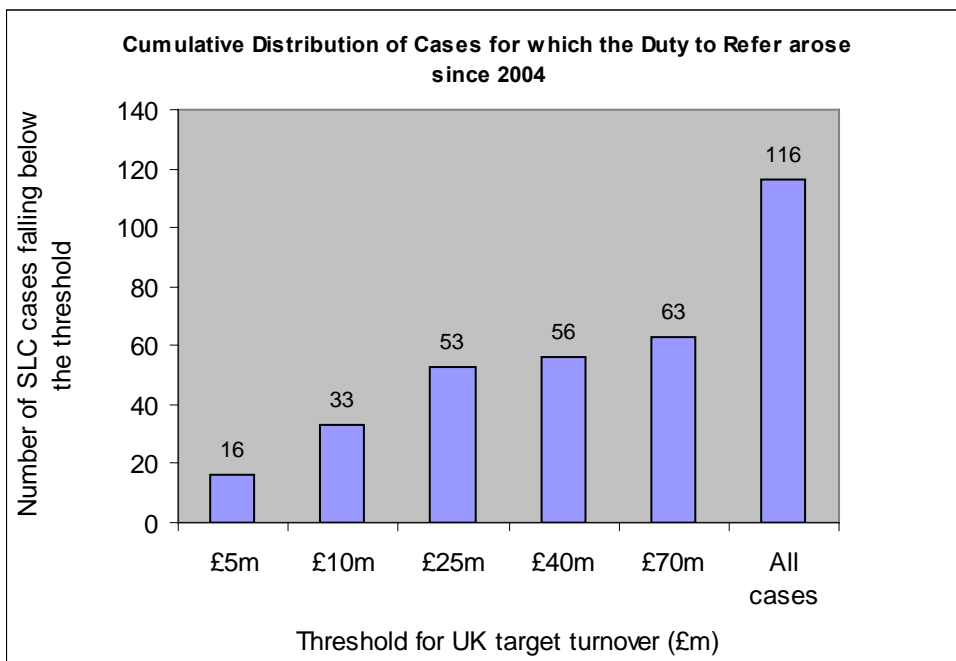
Option 3 – Adopt a mandatory notification regime with penalties for merging parties who fail to notify and / or who do not adhere to the suspensory obligation

103. Mandatory notification would reduce the problems associated with investigating completed mergers, by reducing the number of cases requiring ‘unscrambling’ which are generally complicated and costly to both business and the Authorities and may mean that the most appropriate remedy is not used. It would also reduce the costs to business and the competition authority of having to seek hold separates, which can be time consuming.

Since 2004-05, 60 (48%) of the 125 cases meeting the ‘realistic prospect of SLC’ test for reference at the OFT stage, were completed. Mandatory notification would enable these cases to be caught before the mergers were completed. However, the unscrambling problem has only affected a handful of the many SLC cases the OFT has investigated. Although around half of the cases referred to the CC are completed.

104. In addition, a mandatory notification regime could strengthen the existing regime by requiring all mergers above the specified turnover threshold to notify. This means that all mergers that are anti-competitive⁵¹ would be notified and considered by the competition authorities.
105. Currently 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. The percentage of cases at phase 1 that meet the ‘realistic prospect’ of an SLC test qualifying on share of supply has increased from 43% in 2004-05 to 68% in 2009-10, while the percentage of cases qualifying on turnover has fallen. The purpose of the turnover test is that it captures large vertical mergers, while the share of supply test captures horizontal mergers.
106. A mandatory notification regime would require a clear and objective threshold to provide businesses with clarity as to when notification is necessary. Such thresholds are recommended best practice by International Competition Network (ICN). Figure 14 shows the cumulative distribution of SLC outcomes (at the OFT stage) based on UK target turnover for 116 cases since 2004, for which the OFT has the relevant data. For example 63 SLC cases would have fallen below a turnover threshold set at £70m. Missing SLC cases would have a significant detrimental impact on consumer welfare and missing such a large number of cases would reduce the deterrent effect of the current regime. It highlights the need to set the target turnover threshold low, in order to reduce the risk of missing problematic cases in a fully mandatory notification regime.

Figure 14



Source: OFT

107. The ICN and the OECD advocate objectively quantifiable criteria for merger notification thresholds. In particular they favour sales and assets tests over market share based

⁵¹ Provided they are above the turnover threshold

threshold as market share thresholds would generate a number of unnecessary investigation and create uncertainty for business.

108. There is discussion about the nature of the turnover test and whether it should be based on the target's turnover only or the turnover of the target and acquirer. Empirical evidence shows that an increase in the target's turnover increases the probability of a merger being referred, more than an increase in the acquirer's turnover.^{52,53}
109. The appropriate nature of the turnover test also depends on whether mandatory notification is adopted or if the voluntary system continues. In particular, in a system of full mandatory notification, it is better for the turnover test to be based on the target and acquirer's turnovers, as this potentially allows for more anticompetitive mergers to be caught. This is because the share of supply test captures more horizontal mergers so in a full mandatory notification regime, basing the turnover threshold on the target and acquirer would help ensure that cases where there is an overlap in activities in the UK are subject to review (a target only turnover test may not capture cases where a large acquirer takes over a small competitor). Whereas in a system of mandatory notification, with voluntary notification based on a share of supply test below the mandatory turnover threshold, the turnover test based on the target's turnover only would be sufficient.
110. The OFT and the CC are currently able to investigate transactions where the acquirer may obtain the ability materially to influence the policy of the target (material 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).
111. The Government wishes to retain the ability to look at mergers which give the acquirer the ability to exercise 'control' over the target, including where one enterprise acquires material influence over another. Under a mandatory notification regime mergers that result in an acquisition of control of policy of the target or an acquisition of a controlling interest in the target to be notified. In addition, the CMA would continue to have jurisdiction over, and the ability to initiate investigations into, transactions that give rise to material influence of one enterprise over another and such mergers could be notified voluntarily. 'De facto' control and 'de jure' control may be considered to be broadly comparable to the level of control that applies under the EU Merger Regulation (known as decisive influence). This would provide reasonable certainty as to the type of transactions subject to the mandatory notification requirement whilst maintaining the 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. The inclusion of such cases in mandatory notification would result in costs both to the competition authority and affected businesses as outlined below and potentially benefits to the economy from additional cases meeting the 'realistic prospect' of a SLC test at Phase 1. However, in practice, very few cases have been investigated under 'de facto' control (one in 10 years), so principally the costs and benefits would be the same as assessment for controlling interest only.

⁵² To Refer or Not to Refer: An Empirical Analysis of UK Merger Policy, G. Fazio and P. Hutchinson, January 2009.

⁵³ Although there is not a significant correlation between the target turnover and the probability of an SLC

Option 3a – Hybrid mandatory notification- Mergers where the value of the UK target turnover exceeds £70 million would be required to be notified. In addition, the CMA would retain the ability for the CMA to initiate investigations and take action where appropriate for mergers that fall below the turnover threshold but are caught by the share of supply threshold.⁵⁴

Option 3b – 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.⁵⁵

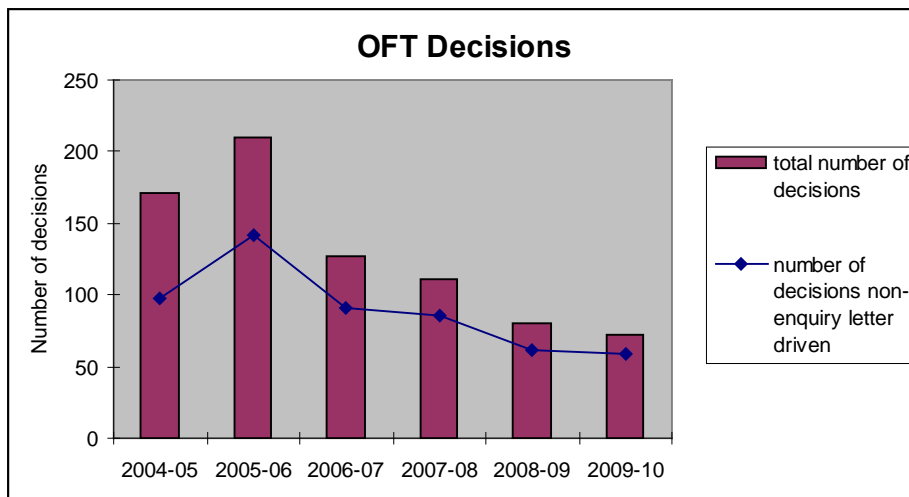
Cost to business

112. Mandatory notification introduces a cost to business of having to wait for merger clearance in order to implement transactions, which in turn delays the efficiencies that can come from deals which are pro competitive. In addition, mandatory notification introduces another cost to business as having to notify the competition authority is a burden on time and resource. The size of the burden on business as a whole depends on the number of businesses that would be required to notify, which depends on where the threshold for mandatory notification is set. The size of the burden also depends on the extent of the burden imposed by the notification. It is assumed for this analysis that the threshold will be based on the UK target turnover as it is currently, to enable a calculation of the cost to business.
113. To estimate the cost to business as a whole of introducing mandatory notification, the number of businesses that would be required to notify, depending on the turnover threshold set, is estimated from the Zephyr database, which is used by the OFT's merger intelligence function. The Zephyr database recorded 1,965 mergers in 2009 but only has the turnover of the target company recorded in 604 mergers. In order to estimate the number of businesses that would be required to notify mergers, it is assumed that the distribution of total number of mergers follows the same distribution by UK target turnover as the 604 sample. However, this number excludes cases involving overseas acquirers and therefore could be a significant underestimate.
114. An estimate of the number of businesses that currently engage with the OFT per year, by UK target turnover is used as the baseline, based on an average over the past 3 years. This includes those businesses that voluntarily notify the OFT and businesses targeted by enquiry letters sent by the OFT's mergers intelligence function. Data available details the number of decisions made per year, but not their turnover. In order to estimate the distribution of these decisions by UK target turnover, it is assumed that the decisions currently taken by the OFT follow the same distribution by UK target turnover as the distribution of mergers in the whole economy. Deducting the number of businesses that currently engage with the OFT from the total number of businesses that would be required to notify in a mandatory regime, depending on the turnover threshold set, gives the additional number of businesses that would face costs of engaging with the OFT.
115. The total number of decisions made per year by the OFT since 2004-05 and the number of which were non-enquiry letter driven are shown in figure 15.

⁵⁴ The costs and benefits of options 3a and 3b are considered in parallel in this section

⁵⁵ Please note that throughout the quantified costs and benefits the numbers have been rounded to avoid spurious accuracy.

Figure 15



Source: OFT

116. The costs to business of notifying the OFT vary significantly for a variety of reasons. Firstly, not all merging parties engage legal advisers with some businesses presenting their case directly to the OFT. In addition, fees charged by legal advisers are also likely to vary significantly. Thirdly, the costs to business of engaging with the competition authority at phase 1 depend on the complexity of the case. Generally, cases which go to a Case Review Meeting, for which more information is required, require more legal advice and sometimes economic advice as well, which increases the cost to business. Other factors that affect the costs to business include whether a customer survey is undertaken by the merging parties.
117. The OFT note that in some cases parties did only limited work before notifying a proposed merger, and in other cases parties undertook a substantial amount of analysis before requesting to have pre-notification discussions. Informal discussions with law firms, however, indicate that the legal cost businesses face of notifying mergers ranges from £50k to £200k for both parties. Legal fees of around £200k occur in complex cases involving a market which has not previously been considered, or has changed significantly since it was last considered. Although it is important to note that the average cost historically is very likely to be higher than that for a mandatory notification regime, given that the extra cases brought in should, on average, be simpler to the extent that self-selection works in the current voluntary regime.
118. In addition, notifying mergers requires considerable time of the managers, Directors and other executives of the businesses concerned. The amount of time involved is difficult to estimate but is likely to be around 150-250 hours. For the purpose of estimating the cost to business of mandatory notification, it is assumed that notifying may require around 200 hours⁵⁶ of corporate managers' and senior official's time who receive a median gross wage of approximately £37 per hour as reported in the Annual Survey of Hours and Earnings⁵⁷. This is uplifted by 24% to account for non-wage costs⁵⁸. Therefore the total cost of management time is estimated at approximately £9k per merger.

Q.1: Do you have any evidence about the costs to businesses of notifying mergers to the OFT, in terms of management time and legal fees?

⁵⁶Sensitivity was considered around 150-250 hours of management time. However, this does not significantly change the final numbers and to avoid spurious accuracy, we have used a mid-point estimate.

⁵⁷ http://www.statistics.gov.uk/downloads/theme_labour/ashe-2010/2010-occ4.pdf

⁵⁸ Eurostat: <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/>

119. The baseline cost to business is based on the average number of decisions made per year by the OFT in the last 3 years (i.e. since 2007-08). A 3 year average is chosen because the OFT has seen a steady decline in the number of decisions taken over time, due both to the maturity of the merger regime and the decline in the number of mergers taking place in the economy. Given an average of 88 decisions per year, and the cost of notifying per case estimated typically to be in the region of £50k to £200k in legal fees and £9k in management time, leads to a total cost to business as a whole of engaging with the OFT of £5.2m to £18.4m per year.
120. Under the hybrid option, setting the **UK target turnover threshold at £70m** (or £40m) would mean about 305 (460) businesses respectively per year engaging in mergers would be required to notify as their UK target turnover exceeds this threshold. In addition, about 75 (65) businesses per year whose UK target turnover falls under £70m (£40m) would be caught by the share of supply provision and would therefore also be required to bear the cost of engaging with the competition authority. This is the average number of decisions the OFT has made per year since 2007-08, where the target turnover is less than £70m (£40m), assuming that the distribution of decisions by UK target turnover follows the same distribution as the distribution of all mergers in the whole economy. Since approximately 88 (88) of these businesses currently notify the OFT, an additional 292 (437) businesses would be required to notify compared to under the current regime. This results in a total **additional cost to business as a whole of approximately £17m to £61m** (£25m to £91m), given the cost of notifying per case at £59k to £209k respectively including both the cost of legal fees and management time. However, please note that the high scenarios are likely to be overestimates as it is unlikely that the majority of businesses would face such high legal costs. It has not been possible to quantify the cost to business when a UK target turnover threshold of more than £70m is set due to data limitations.
121. Under the full mandatory notification option setting the **UK target turnover threshold at £5m** would mean about 1190 businesses per year would be required to notify mergers to the competition authority. Approximately 55 of these businesses currently notify the OFT and hence an additional 1135 businesses would be required to notify compared to the current regime. This generates a total **additional cost to business as a whole of approximately £67m to £237m**, given the cost of notifying per case of £59k to £209k respectively including both the cost of legal fees and management time. However, please note that the high scenarios are likely to be overestimates as it is unlikely that the majority of businesses would face such high legal costs.
122. In addition, the cost to business of penalties for merging parties failing to notify and / or who do not adhere to the suspensory obligation has not been quantified. This is likely to be similar to the penalties operated by the EU where the penalty is 10% of aggregate turnover. The cost to business as a whole of such penalties has not been quantified in line with Impact Assessment guidance since they arise as a result of non-compliance. In addition, the scale of such a penalty is yet to be decided and it is difficult to estimate how many businesses would face these penalties. However, under the EU Merger Regulation, there have been very few cases where penalties have been imposed, indicating that the scale of the penalty is sufficient to deter failures to notify.
123. The additional cost to business as a whole of introducing mandatory notification, depending on the threshold set is summarised in table 16. It is, however, important to note that a short form notification procedure, which is being consulted on, would reduce the cost to business. It has not been possible to quantify this cost precisely at this stage as the nature of the short form notification procedure has not been clarified. If this option is pursued, further consideration will be given to the costs of a short form notification procedure.

Table 16: Cost to Business of Mandatory and Hybrid Notification

COST TO BUSINESS							
Mandatory Notification Threshold	Cost of Legal Fees	Cost of Management Time	Number of Businesses Required to Notify per year	Number of Businesses Caught by the Share of Supply Test	Number of Businesses Currently Engaging with OFT per year	Additional Number of Businesses Required to Notify per year	Estimated Additional Cost to Business per year
5m	£50,000	£9,000	1190	0	55	1,135	£67m ⁵⁹
	£200,000	£9,000					£237m ⁶⁰
70m	£50,000	£9,000	305	75	88	292	£17m ⁶¹
	£200,000	£9,000					£61m ⁶²

Note: The table shows costs to business based on two scenarios for the cost of legal fees, for notification thresholds of £5m and £70m.

Benefit to business

124. A mandatory notification regime would also yield some benefits for businesses. In particular businesses would benefit from reduced uncertainty from pre notifying as they would not face the risk of being investigated by the competition authority once the merger process has begun or the risk that their merger would be prohibited, or made subject to conditions that erode the value of the transaction. A related point is the fact that businesses would have to spend fewer resources in the form of legal and economic consultancy fees investigating whether they should notify the competition authority, as this should be more readily apparent from their turnover. In addition, as it would be usual in mandatory notification regimes for the information to be provided in the notification to be relatively standardised and specified up front, there would be less need to request information to establish whether the jurisdictional thresholds are satisfied, businesses may face fewer information requests which are time and resource intensive to respond to, and hence less distraction from business as usual.

125. Mandatory notification and the associated reduction in the number of completed cases investigated by the competition authorities also reduces the cost to business since the investigation of completed mergers are more costly for the parties as negotiating hold separate undertakings takes up management time and incurs legal costs. Parties also have to pay the costs of a monitoring trustee to monitor and report on compliance with the undertakings and in some cases a hold separate manager to run the acquired business.

Cost to the competition authority

126. Introducing mandatory notification would result in an additional cost to the competition authority from having to consider an increased number of cases⁶³.

127. The baseline total direct cost of merger control to the competition authority is calculated based on the number of phase 1 (88) and phase 2 (7) cases per year on average over the last 3 years and the respective cost of each phase. The OFT reported that the incremental staff cost per case of phase 1 investigation is around £20k⁶⁴ on average, which is uplifted by 24% to account for non-wage costs. Data from the CC including members' costs, staff costs and external costs of 17 inquiries from 2007 to 2010, indicates an average cost of

⁵⁹ The cost to business under the high scenario under full mandatory notification.

⁶⁰ The cost to business under the low scenario under full mandatory notification.

⁶¹ The cost to business under the low scenario under hybrid mandatory notification.

⁶² The cost to business under the high scenario under hybrid mandatory notification.

⁶³ Some of the additional cases qualifying for review may be eligible for referral to the EU Merger Regulation and therefore require less work for the CMA.

⁶⁴ This is the incremental staff cost per phase I case on average over the last few years. It does not include overheads. It is not representative of the cost of current phase I investigations.

approximately £415,000⁶⁵ per phase 2 case. Although it is important to recognise that the cost of phase 2 investigations varies significantly between cases depending on their complexity. The baseline total direct cost therefore of phase 1 and 2 merger control to the competition authorities is £5.1m. The PVP exercise in March 2010 noted the cost of merger control for 2008-09 was £14.5m, comprising £5m from the OFT and £9m from the CC. However, this includes an allocation of overheads which can change significantly from year to year depending on the balance of casework. In addition, the CC faced particularly costly phase 2 merger investigation cases in that time and since then the CC has adjusted downwards their hourly rates between 20% and 25%. The cost of the merger intelligence function of the OFT is a fixed cost and is assumed to persist under a system of mandatory notification; tasked with having to identify businesses failing to notifying.

128. Mandatory notification may require an initial sift stage to sort through the volume of cases notified, to decide which mergers require further investigation. It is assumed that the sift process would require a Grade 5 decision maker for one day and a Grade 7 case officer for one week, for each notified merger. Their respective salaries of £58k to £118k,⁶⁶ and £48k⁶⁷ to £62k,⁶⁸ are used to estimate the range of the cost of the sift per case. These are uplifted by 24% to account for non-wage costs. The cost of the sift per case is therefore estimated to range from £1.4k to £2k. To avoid spurious accuracy the cost of the sift is estimated at £2k.
129. To estimate the cost to the authority a number of assumptions have been made regarding the number of cases expected to be investigated by the competition authority under mandatory notification. The estimated number of sift cases is estimated to equal the number of businesses that would be required to notify under a mandatory regime, plus the cases caught by the share of supply test under the hybrid option.
130. Under the hybrid mandatory notification option the number of phase 1 cases (i.e. cases that go beyond the initial sift) is estimated to range from a low scenario where 10% of the additional cases sifted will pass the initial sift such as to warrant a full phase 1 investigation, to a high scenario where 15% of the additional cases sifted warrant a full phase 1 investigation. Under the full mandatory notification option the number of phase 1 cases is estimated to range from a low scenario where 5% of the additional cases sifted pass the initial sift such as to warrant a full phase 1 investigation, to a high scenario where 10% of the additional cases sifted warrant a full phase 1 investigation. It is estimated that the absolute number of phase 1 cases will increase since type I errors (i.e. cases getting through the sift such as to warrant a full phase 1 investigation where they are then found to be benign) are inevitable and mandatory notification may encourage more parties to complain as they will no longer believe they are too late to complain because the merger is complete. However, it is not estimated that the number of phase 1 cases will be that much higher than currently, to the extent that the current regime is working well. Different assumptions have been made for the different options since although it is estimated that there would be a higher number of phase 1 cases under full mandatory notification than the hybrid option, it is expected that there would be a higher number of benign cases that would be cleared during the sift. In addition, it is anticipated that the number of phase 1 cases will decline over time in a new regime as the regime becomes better understood. This pattern was observed in the OFT's merger intelligence function where a decline in the number of enquiry letters from 73 in 2004-05 to 13 in 2009-10 reflects their more targeted use.

⁶⁵ Including the 24% non-wage uplift.

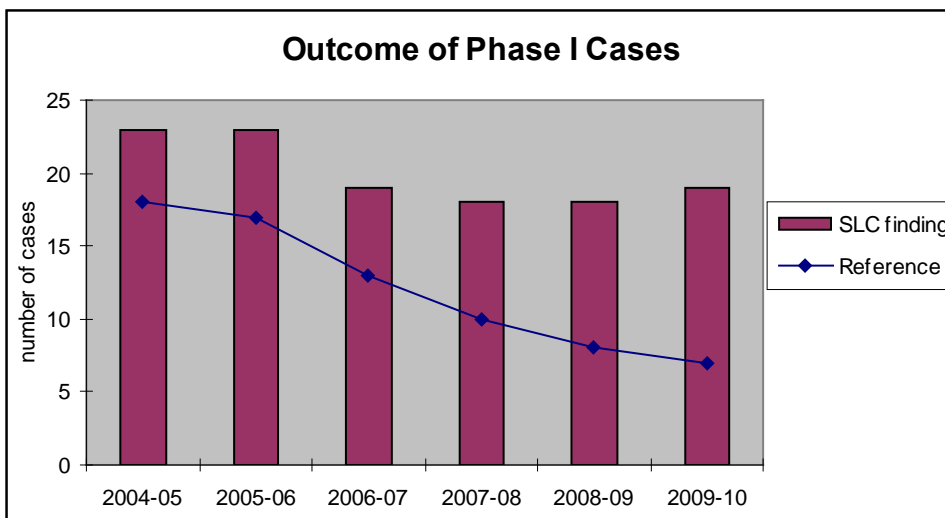
⁶⁶ <http://www.cabinetoffice.gov.uk/about-cabinet-office/plans-performance/scs-pay-ranges.aspx>

⁶⁷ <http://www.civilservice.gov.uk/my-civil-service/networks/professional/ges/what/about-bis.aspx>

⁶⁸ <http://www.hmrc.gov.uk/jobs/salaries.htm>

131. The number of merger cases referred to the CC for phase 2 investigation has fallen each year from 17 in 2004-05 to 5 in 2009-10, as shown in figure 17. This may be partially due to the maturity of the current regime. However, even if the number of SLC findings increased as a result of mandatory notification, it does not necessarily mean the number of cases referred to phase 2 will increase, since UILs or clearance on de minimis may be more appropriate. Therefore in the low scenario of both mandatory notification options, the number of phase 2 cases is estimated to remain the same as the baseline at 7 cases. For the high scenario of both mandatory notification options it is assumed that 7.5% of phase 1 cases will be referred to phase 2. Currently, the OFT refers approximately 10% per year of all case decisions to the CC⁶⁹. It is anticipated that type I errors (i.e. referring benign cases) would continue to occur under mandatory notification. However, given that phase 1 merger control is working well the absolute number of phase 2 is not expected to increase too much. A report by Deloitte in 2007 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 SLC or had UIL was approximately one to one.”⁷⁰

Figure 17



Source: OFT

132. It is assumed that the incremental staff cost of each phase in the new single CMA will be approximately the same as the current cost of phase 1 and 2 investigation. This generates a total direct cost of phase 1 and 2 merger control ranging from £6.7m to £8.2m under the hybrid mandatory notification option with the UK target turnover threshold set at £70m and £8.9m to £13.6m under the full mandatory notification low turnover option.

133. The resulting **additional direct cost to the competition authorities** from introducing mandatory notification **ranges from £1.6m to £3.1m**, under the **hybrid mandatory notification** option with a UK target turnover threshold of £70m. Under the **full mandatory notification** option with a UK target turnover threshold of £5m the **additional direct cost to the competition authority ranges from £3.8m to £8.5m**.

134. The additional cost to the competition authority of introducing mandatory notification, depending on the threshold set, is summarised in tables 18 and 19. However, it is important to note that mandatory notification would result in the competition authority investigating fewer completed cases. Therefore, the cost of investigation is likely to be lower in some instances as completed cases are generally more resource intensive.

⁶⁹ This is in a system where self selection (i.e. problematic cases are notified) works to some extent. Also the OFT do not aim to refer 10% of decisions, rather they refer cases which require further investigation.

⁷⁰ See Footnote 23

Table 18

COST TO THE AUTHORITY – Hybrid Mandatory Notification							
Estimated Direct Cost of Sift per case	Direct Cost of Phase 1 Investigation per case	Direct Cost of Phase 2 Investigation per case	Estimated Number of Sift Cases per year	Estimated Number of Phase 1 Cases per year	Estimated Number of Phase 2 Cases per year	Estimated Total Direct Cost to Authority per year	Additional Direct Cost to Authority per year
£2,000	£25,000	£415,000	380	120	7	£6.7m	£1.6m ⁷¹
£2,000	£25,000	£415,000	380	130	10	£8.2m	£3.1m ⁷²

Table 19

COST TO THE AUTHORITY – Full Mandatory Notification							
Estimated Direct Cost of Sift per case	Direct Cost of Phase 1 Investigation per case	Direct Cost of Phase 2 Investigation per case	Estimated Number of Sift Cases per year	Estimated Number of Phase 1 Cases per year	Estimated Number of Phase 2 Cases per year	Estimated Total Direct Cost to Authority per year	Additional Direct Cost to Authority per year
£2,000	£25,000	£415,000	1190	145	7	£8.9m	£3.8m ⁷³
£2,000	£25,000	£415,000	1190	200	15	£13.6m	£8.5m ⁷⁴

Benefit to the competition authority

135. The Competition Authority may also benefit from the introduction of mandatory notification. As a result of mandatory notification the number of mergers reviewed by the competition authority would increase, particularly under the full mandatory notification option. The Peer Review of Competition Policy by KPMG noted that the UK's competition authorities opportunity of reviewing interesting mergers partially led to its improved ranking. In addition, the Authority would benefit from a reduction in the number of completed cases it investigates. These cases are generally more costly to investigate and can be harder to remedy.

Benefit to the economy

136. The baseline benefit to the economy of merger control is based on the OFT's Positive Impact Report 09/10⁷⁵. It reports that the merger regime saved consumers £310m per year on average from 2007 to 2010. The average direct consumer saving per year from the OFT's merger control work ranges from £112m to £143m, when applying low, medium and high elasticity values. The consumer saving includes mergers amended by the OFT through UILs, mergers abandoned on referral to the CC and mergers amended or prohibited by the CC and come from the prevention of market power that can lead to higher prices or lower quality of goods and services.

137. To estimate the direct consumer saving per case the total consumer saving per year is divided by the average number per year of mergers amended by the OFT through UILs (5), plus mergers amended or blocked by the CC (3) and mergers abandoned on referral to the CC (2) from 2007 to 2010. This time period is used as it is the same period over which the consumer saving reported in the OFT's Positive Impact Report was calculated. Given a

⁷¹ The additional direct cost under the low scenario under hybrid mandatory notification.

⁷² The additional direct cost under the high scenario under hybrid mandatory notification.

⁷³ The additional direct cost under the low scenario under full mandatory notification.

⁷⁴ The additional direct cost under the high scenario under full mandatory notification.

⁷⁵ "Positive Impact 09/10, Consumer benefits from the OFT's work," OFT, July 2010.

Available at: http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1251.pdf

consumer saving of about £310m per year and 10 such merger cases per year, the consumer saving per case is approximately £31m. In addition, there is an indirect deterrent effect from SLC findings which is assumed to be five times the direct effect. This is based on the conclusion by Deloitte that for every merger blocked or modified by the OFT, five more were abandoned or modified⁷⁶.

138. The additional benefit to the economy in the form of additional consumer savings from introducing mandatory notification stems from more cases meeting the 'realistic prospect of SLC' test at phase 1. For the low scenario under both the hybrid mandatory notification option and the full mandatory notification option it is assumed the number of cases which deliver a benefit will remain the same since the number of SLC findings has been broadly constant over the years, at around 20 per year, and the current regime is believed to be working well. For the high scenario under the hybrid option it is estimated that a consumer saving will arise from 50% of the additional cases estimated to be referred to phase 2 compared to currently. For the high scenario under the full mandatory notification option the number of cases from which a consumer saving would arise is estimated to be 50% more than the baseline. A report by Deloitte in 2007 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 SLC or had UILs was approximately one to one."
139. The OFT, however, believes this figure may be an overestimate since it was based on anecdotal evidence from practitioners and corporate lawyers, and that if this number of genuinely anti-competitive mergers were taking place, then third parties would be likely to complain. In addition, since the report was written the OFT has improved its mergers intelligence function.
140. Under the full mandatory notification option where the **UK target turnover is set at £5m**, the total consumer saving ranges from £310m when assuming the number of cases that would generate a consumer saving does not change, to approximately £465m in the high scenario where 5 additional cases generating a consumer saving are caught. Therefore the **additional direct benefit to the economy ranges from zero to about £155m**. However, this assumes that the average saving from the 'missed' cases is the same as the ones previously caught, and therefore it is likely to be an overestimate of the additional consumer benefit. The high scenario is likely to be an overestimate given that the cases will on average be those with a lower turnover and therefore the consumer saving generated would be lower. The additional benefit to the economy including the deterrent effect has not been estimated since the size of the deterrent effect may change under a mandatory notification regime. This is summarised in table 20.

Table 20

BENEFIT TO THE ECONOMY – Full Mandatory Notification					
The number of SLCs per year ⁷⁷	Direct Consumer Saving per year	Direct Consumer Saving per case	Estimated number of SLCs per year ⁷⁸	Direct Consumer Saving per year	Additional Consumer Saving per year
10	£310m	£31m	10	£310m	£0 ⁷⁹
10	£310m	£31m	15	£465m	£155m ⁸⁰

⁷⁶ See footnote 23

⁷⁷ More precisely it is the number of mergers amended by OFT through UILs, plus mergers blocked or amended by CC and mergers abandoned on referral to CC per year.

⁷⁸ More precisely it is the estimated number of mergers amended by OFT through UILs, plus mergers blocked or amended by CC and mergers abandoned on referral to CC per year.

⁷⁹ Benefit to the economy under the low scenario under full mandatory notification.

⁸⁰ Benefit to the economy under the high scenario under full mandatory notification.

141. Under the hybrid mandatory notification option where the **UK target turnover is set at £70m**, the total consumer saving ranges from £310m when assuming the number of cases that would generate a consumer saving does not change, to £341m in the high scenario where 1 additional case generating a consumer saving is caught. Therefore the **additional direct benefit to the economy ranges from zero to about £31m**. Again, the deterrent effect has not been included since the size of the deterrent effect may change under a mandatory notification regime. This is summarised in table 21.

Table 21

BENEFIT TO ECONOMY – Hybrid Mandatory Notification					
The number of SLCs per year ⁸¹	Direct Consumer Saving per year	Direct Consumer Saving per case	Estimated number of SLCs per year ⁸²	Estimated Direct Consumer Saving per year	Additional Consumer Saving per year
10	£310m	£31m	10	£310m	£0 ⁸³
10	£310m	£31m	11	£341m	£31m ⁸⁴

Cost to the economy

142. Under the full mandatory notification option where the **UK target turnover is set at £5m**, there is a risk that problematic mergers with a turnover less than the mandatory notification threshold will not face investigation by the competition authority. Since 2004-05, 8 UILs and references had a UK target turnover of less than £5m, approximately 1.2 per year. Therefore assuming that 1.2 problematic mergers would not be caught by the competition authority per year under the full mandatory notification option and that the direct lost consumer saving per case is about £31m on average, yields a **cost to the economy of approximately £37.2m per year**.

143. The lost consumer saving from these cases is, however, likely to be smaller than the average consumer saving, reflecting the lower target turnover. This is likely even though there is no direct correlation between the target turnover size and the consumer detriment. In addition, exempting mergers where the UK target turnover is less than £5m from merger control is likely to lead to a number of additional mergers, due to the loss of the deterrence effect and therefore the cost to the economy may be greater.

Table 22

COST TO ECONOMY- Full Mandatory Notification		
Estimated Number of UILs and References Not Caught per year	Lost Direct Consumer Saving per case	Estimated Total Lost Direct Consumer Saving
1.2	£31m	£37.2m

144. Under the hybrid mandatory notification option with a high turnover threshold, this risk is minimised as problematic cases that do not have to notify can be called in by the competition authority using the share of supply provision.

⁸¹ See Footnote 78

⁸² See Footnote 79

⁸³ Benefit to the economy under the low scenario under hybrid mandatory notification.

⁸⁴ Benefit to the economy under the high scenario under hybrid mandatory notification.

145. It should be noted that the calculations above are sensitive to a number of assumptions, variations in which have a significant impact on the end figures. Further, there are some elements of the costs and benefits which it has not been possible to capture, such as the number of missed SLCs, the cost of delay to business in introducing mandatory notification and the costs of ‘unscrambling’ a completed merger. The low and high scenarios, presented throughout, give and illustrative impacts of the changes being consulted on

Best Estimates

146. Table 23 summarises the best estimates of the costs and benefits of mandatory notification. With regard to the cost to business the range of costs presented earlier comes from the variation in legal fees. As a best estimate it is estimated that legal fees would be nearer to the low scenario at £60k, given that on average the additional cases engaging with the OFT should be simpler to the extent that the current regime works well. Therefore, the best estimate of the cost to business under the hybrid high turnover option is approximately £20m and £78m under the full mandatory low turnover option. With regard to the cost to the authority, the best estimate of the number of phase 1 cases is estimated to be the high scenario estimate, since the zephyr database excludes cases involving an overseas acquirer and therefore may be an underestimate. For the number of phase 2 cases the best estimate is estimated to be the low scenario estimate, since it is likely that most anti-competitive mergers are being caught by the current system. This results in a best estimate of the cost to the authority under the hybrid high turnover option and the full mandatory notification option of approximately £1.8m and £5.2m respectively. The best estimate of the benefit to the economy is the average of the high and low scenarios presented earlier under each option. Finally, the best estimate of the cost to the economy is equal to the estimate presented earlier.

Table 23

BEST ESTIMATE SUMMARY		
	Hybrid Mandatory Notification	Full Mandatory Notification
Cost to Business	£20m	£78m
Benefit to Business	Not quantified	Not quantified
Cost to Authority	£1.8m	£5.2m
Benefit to Authority	Not quantified	Not quantified
Benefit to Economy	£15.5m	£77.5m
Cost to Economy	n.a	£37.2m

Option 4 – Small business exemption under both the hybrid mandatory and voluntary regimes where the UK target turnover does not exceed £5m and the acquirer worldwide turnover does not exceed £10m

147. The argument for having a small business exemption is that the costs to business and the competition authority of investigating such mergers, may actually exceed the benefits generated from preventing potentially anti-competitive small mergers. In addition, arguably the current regime has a chilling effect on small merger activity.

148. The CBI has argued that mergers where the target turnover is less than £5m should be exempt from merger control. However, data from the OFT shows that since 2004, 16 (14%) of the 116 cases that met the ‘realistic prospect of SLC’ test, had a target turnover of less than £5m. Hence, if a small business exemption had existed for mergers where the

target turnover was less than £5m, these cases would have been missed by the competition authority⁸⁵.

149. An exemption where the UK target turnover does not exceed £5m and the acquirer worldwide turnover does not exceed £10m may reduce the risk of missing potentially anti-competitive mergers. The OFT data for 8 cases since 2006 where the UK target turnover was less than £5m, all had acquirer worldwide turnovers greater than £10m. Therefore, the small business exemption described would enable the competition authority to investigate these mergers.
150. A small business exemption would create benefits for business and the competition authority. Businesses would face certainty over not being investigated by the competition authority and therefore would not face the cost of engaging with them. In addition, the competition authority would not face the cost of investigating small mergers. The Zephyr database notes that 239 mergers in 2009 had a target turnover of less than £5m. The database only recorded the target turnover for 604 of the 1965 mergers in 2009 and therefore the absolute number of mergers with a target turnover of less than £5m is likely to be much higher than this. However, having a small business exemption creates a risk that some anti-competitive mergers would take place, which are ultimately detrimental to consumer welfare. In addition, the competition authority having jurisdiction over small mergers deters potentially anti-competitive mergers in that turnover range.
151. Currently, the de minimis exemption exercised by the OFT is based on market size and the decision is taken at the end of a phase 1 investigation. Specifically, if the total value of the market, where an SLC has been identified, is less than £10m the OFT can choose not to refer the case to the CC. The benefit of the small business exemption outlined is that it creates clarity for business and means the exemption is exercised before a phase 1 investigation occurs, hence reducing the burden on both business and the competition authority.

Process

Option 5 – Strengthen the procedures

152. The consultation is exploring the following options to strengthen the process in a single competition body.
153. Information Gathering Powers. The advantage of giving the CMA compulsory information gathering powers in phase 1 is that it should prevent delays in the phase 1 process as the authority will have less need to use its stop the clock powers. This should enable decisions to be made earlier and hence benefit businesses. Giving the CMA additional stop the clock powers at phase 2, in cases where it is likely that an anticipated merger will not proceed as a result of the reference, may prevent valuable resources being spent on mergers which are then abandoned. However, if these mergers proceed, it may lead to some delays.
154. Giving the CMA stop the clock powers to enable the 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 would enable the CMA to stop issuing requests to merging parties and third parties and thus reduce the investigatory burdens for all parties, including the CMA where referred mergers were subsequently abandoned.
155. Statutory Time limits. The advantage of introducing a statutory time limit at phase 1 is that it would give certainty to business about when they will receive a decision. Businesses

⁸⁵ Although 8 of these cases were cleared on de minimis.

would benefit from earlier certainty as a result of a reduction in the process time from when a merger is called in to when a decision is made. It also creates an enhanced incentive for business to co-operate with the CMA in phase 1 to avoid the risk of a phase 2 reference. However, in some circumstances business may prefer to give the competition authority more time to make a phase 1 decision and gather more evidence if this reduced its chance of being referred to phase 2 which is a more intensive and costly investigation.

156. Introducing a statutory time limit to the undertakings in lieu and remedies implementation stage of phase 2 would also benefit businesses by increasing the speed of the merger investigation process.
157. Remedies. Allowing the CMA to consider remedies without reaching an independent decision on the SLC finding at phase 2 should reduce the time of the phase 2 investigation in some cases, and therefore benefit businesses in those cases. However there are significant risks. It could lead to a remedy being designed without an adequate understanding of the competition problem, and without adequate transparency for third parties. And it may increase the time taken for some inquiries: it could change the incentives of main parties to seek to agree undertakings in lieu of a process, and phase 2 may need to be longer overall in order to incorporate the possibility of having an attempt to agree remedies early on, while still allowing time to have a full investigation if that attempt fails.
158. The costs and benefits of revising the procedures have not been quantified, because it is difficult to quantify the benefit to business of a reduction in the time of an investigation and is likely to vary greatly depending on the type of business.

Fees

Option 1 – Do nothing

159. Under this option, current merger fees would not change. Therefore the current gap between the costs incurred and the income obtained from fees would continue. However, this may narrow if costs are reduced or the total number of cases considered increases, without any corresponding increase in operating costs. Any remaining funding deficit would represent a cost to public expenditure.

Option 6 – Revise merger fees

160. Any increase in fees will incur additional cost to businesses. This has implications for one in one out, which requires that if a policy introduces a cost to business, an equal cost to business must be removed through a corresponding policy. However, fees are a transfer from businesses to the Government, with business bearing a greater proportion of the burden of the cost of merger control.
161. In considering these options, we will also need to ensure that the efficient cost of the merger regime are being recouped so that fees reflect no more than the full cost of the regime.
162. 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 £9m⁸⁶ 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

⁸⁶ £3m from the OFT and £6m from the CC. This is believed to be a robust basis on which to calculate merger fees.

are referred for a Phase 2 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, the target income to be achieved is around £9 million annually.

Option 6a – Under voluntary notification increase merger fees and / or add one further fee band

163. To estimate the appropriate fee levels needed to recover the full, approximately £9million 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. The baseline cost to business of merger fees is based on current merger fees.
164. Table 24 illustrates a range of options for merger fees under voluntary notification. This is for illustrative purposes only. As shown in the table, proposed fee 1 shows full costs may be recovered if fees were increased to £65,000, £130,000 and £195,000 within each of the three fee bands. However, the OFT have raised concerns about a possible chilling effect on some of the smaller mergers from such a significant further rise in fees.
165. Proposed fee 2 illustrates that an additional higher fee band could be introduced for mergers involving acquisitions of enterprises with an annual UK turnover that exceeds £120 million. 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. Greater differentiation between fees charged based on turnover levels means a greater degree of the cost burden is borne by those acquiring enterprises with higher turnovers.
166. The fees illustrated show how the approximately £9m anticipated cost of merger control work could be recovered. However, it is important to note that the cost of merger control work vary between years and particularly depend on the proportion of overheads the CC attributes to its merger control work, which in turn depends on the amount of merger work it undertakes relative to its other work.

Table 24

UK Target Turnover	Number of Cases	Current Fee	Proposed Fee 1- increase fees	Proposed Fee 2- increase fees with an additional fee band
<£20m	30	£30k	£65k	£60k
£20-70m	15	£60k	£130k	£120k
£70-120m	9	£90k	£195k	£180k
>£120m	17	£90k	£195k	£220k
Revenue		£4.1m	£8.97m	£8.96m
Additional Cost to Business			£4.8m	£4.8m
Deficit to Government		£4.86m	£30k	£40k

Option 6b – Under mandatory notification adjust fees and add further fee bands

167. 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 CMA would increase as a result of reviewing more cases under a mandatory notification regime. The estimated revenue from different fees under mandatory notification is calculated based on the predicted number of cases falling in the UK target turnover threshold bands, under the different mandatory notification thresholds being considered. The baseline cost to business of merger fees is based on current merger fees.
168. Merger fees are considered under both the full mandatory notification option and the hybrid mandatory notification option as the estimated number of cases seen by the competition authority varies and therefore the appropriate fees vary.
169. Table 25 illustrates a range of options for merger fees under full mandatory notification with a UK target turnover threshold of £5m. Fees of approximately £4,000, £8,000 and £12,000 within the current fee bands respectively would be sufficient to recover the full cost of merger control. Alternatively a flat fee of approximately £7,500 would be sufficient to achieve the full, approximately £9m cost of the merger regime. A flat fee is feasible under a mandatory notification regime as the number of mergers notifying will be considerably higher than under a voluntary notification regime so a relatively lower fee can be charged. This allows the cost of merger control work to be recovered from a greater number of businesses, rather than the relatively few cases currently considered by the competition authorities.
170. It is, however, important to note that these fees are the amount necessary to cover the anticipated £9m cost of merger control. Since under mandatory notification it is expected that the cost of merger control to the competition authority will be higher, given the increase in the number of cases the competition authority will have to review and possibly fully investigate, the fees may need to be adjusted upwards to cover this additional cost.

Table 25

UK Target Turnover	Number of Mergers	Current Fee	Proposed Fee 1- fee bands	Proposed Fee 2- flat fee
£5-20m	498	£30k	£4k	
£20-70m	384	£60k	£8k	
>£70m	306	£90k	£12k	
Total	1187			£7.5k
Revenue		£65m	£8.7m	£8.9m
Additional cost to business			£4.6m	£4.8m
Deficit to Government		-£60m	£270k	£90k

171. Table 26 illustrates the options for merger fees under the hybrid mandatory notification option with a UK target turnover threshold of £70m. Proposed fee 1 shows how 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 test⁸⁷ and approximately £13,000 charged to mergers qualifying on the share of supply test would be sufficient to achieve full cost recovery. Proposed fee 2 shows that charging a flat fee to all

⁸⁷ Mergers with a UK target turnover greater than £70m.

qualifying mergers of around £23,000 would achieve approximately full cost recovery. Proposed fee 3 shows how the differentiation of fees by turnover could be retained. Fees of approximately £9,000, £18,000 and £27,000 charged to mergers with a UK target turnover of less than £25m, £25m to £70m and more than £70m⁸⁸ respectively would be adequate to recover the full cost of merger control.

172. Again it is important to note that these fees are the amount necessary to cover the approximate £9m cost of merger control. Since under mandatory notification it is expected that the cost of merger control to the competition authority may be higher, given the increase in the number of cases the OFT will have to review and possibly investigate fully, the fees may need to be adjusted upwards to cover this additional cost.

Table 26

Threshold	Number of Mergers	Proposed Fee 1- separate flat fee	Proposed Fee 2- flat fee	Proposed Fee 3- turnover bands
Turnover test	306	£26k		£27k
Share of supply test	74	£13k		
£0-25m UK target turnover	60			£9k
£25-70m UK target turnover	14			£18k
Total	380		£23k	
Revenue		£8.9m	£8.7m	£9.1m
Deficit to the Government		£90k	£260k	-£50k

Summary

173. Presented above are the options being considered. However, there are no preferred options presented and table 27 outlines the different options set against the objectives at the beginning of this section.

Table 27: Assessment of Mergers options against objectives

	Efficient, speedier and streamlined merger regime	Strengthened merger regime	Reduce the burden on the public purse
Strengthen the voluntary notification regime	Improving hold separates reduces the number of completed case investigated		Fewer completed mergers which means less costly investigation

⁸⁸ These turnover bands have been used as due to data limitations these are the bands by which we have been able to estimate the expected number of mergers.

	Efficient, speedier and streamlined merger regime	Strengthened merger regime	Reduce the burden on the public purse
Hybrid mandatory notification	Reduces the problems associated with investigating completed cases but does not eliminate it	1) Reduces the risk of missing large anti competitive mergers 2) Enhances the deterrent effect	1) Fewer completed mergers which means less costly investigation 2) More merger cases to review
Full mandatory notification	Reduces the problems associated with investigating completed cases	1) Reduces the risk of missing anti competitive mergers 2) Enhances deterrent effect	1) Fewer completed mergers which means less costly investigation 2) More merger cases to review
Small business exemption			Fewer small merger cases to review
Streamline the system	Reduces delays		
Revise merger fees			Transfers the cost to business

Markets

Issues under consideration

174. The Markets Regime is an important tool in the UK competition regime. The combined OFT – CC regime has acquired world class status with a reputation for excellent analysis, expertise, flexibility and transparency. It has attracted considerable international admiration⁸⁹. Some of the transparency features have been adopted by the European Commission’s Competition Directorate General (DG Comp); and the UK regime has been recently replicated in Israel. Both OFT and CC work closely with interested parties to ensure an effective and proportionate response. There are, however, some aspects of the regime which might be refined in order to improve its overall effectiveness, including:

- *Realising the full potential of the regime for proactive competition:* There have been some questions about whether the current regime always selects the right sectors for market investigations⁹⁰ and more generally, whether more Market Investigations References could be made to the CC. To date, 11 references have been made since 2003 of which two have been from sector regulators⁹¹. There are also issues around the incentives for sector regulators to make references to the CC, compared with using their licensing tools to regulate competition issues and/or market outcomes.
- *Speed of the markets regime.* There are no time limits on OFT in conducting Market Studies – and the time can be in excess of 6 months even when a market investigation

⁸⁹ See 2007 peer Review and GCR

⁹⁰ See 2007 peer Review

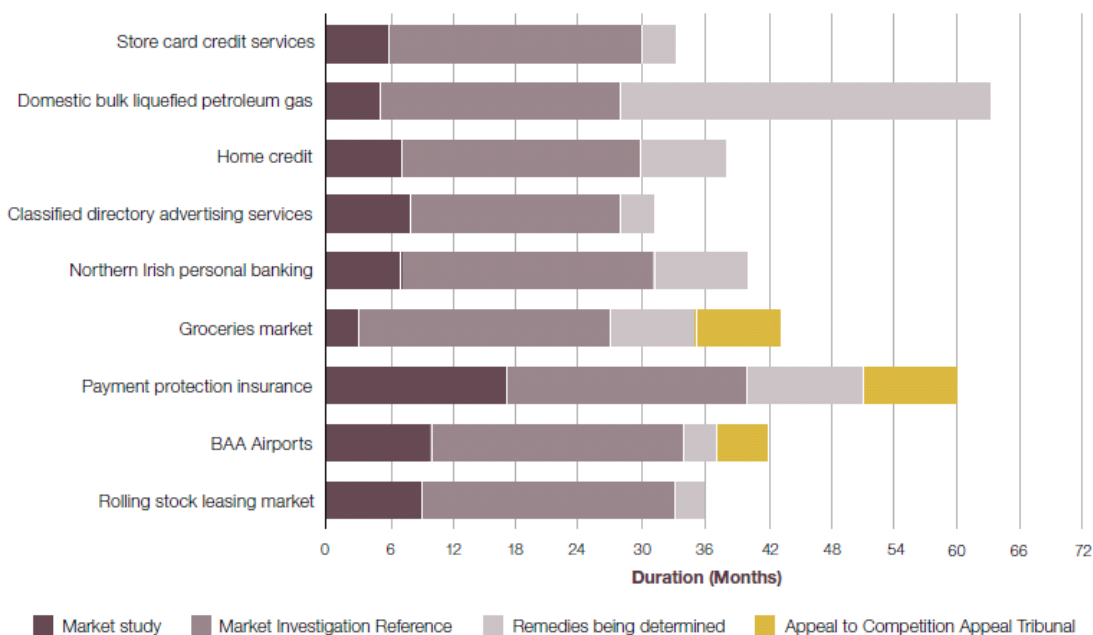
⁹¹ See footnote 10

at CC follows⁹². Whilst the CC has 24 months to complete an investigation (not including remedies implementation), and has taken most of this time for the majority of the market investigation references that it has completed to date, in the CCs original planning assumptions, they were expected only to last between 11-14 months⁹³. Looking at the end-to-end process, Market Investigations (including stage 1 market studies and remedies implementation) have lasted between 33-63 months (see Figure 28 from NAO report). The length of time can cause uncertainty in the markets investigated and costs to the businesses in engaging extensively with the competition authorities. OFT and CC have sought to address these issues and are already piloting processes to reduce these timescales. For example, the CC announced in 2009 that it would aim to complete a standard market investigation in 18 months and may complete less complex investigations in 12 months.

Figure 28

Figure 8

Timescales of market studies/market investigations



Source: National Audit Office analysis of Competition Commission website data

NOTE

The cases are ordered chronologically based on the date of referral, with store card credit services being the earliest which was referred to the Competition Commission in March 2004.

- **Costs of the regime:** Some businesses have raised concerns that CC can duplicate requests for data and information already provided by the OFT. At the same time businesses may seek to delay the process. Market investigations can be costly to business. The CBI estimates that the Groceries investigation cost businesses £20m, though the benefits are expected to be much higher than this⁹⁴. The average cost of market investigations conducted by the CC has generally been higher than the

⁹² Although the legal test for making and MIR is relatively low, OFT has a discretion to refer, and takes into account (among other criteria) whether the use of other powers would be more appropriate in deciding whether to exercise its discretion to refer. The OFT has a developed programme of competition advocacy and may decide to continue with a market study where the likely outcome is only the making of recommendations to Government to change its laws or policy.

⁹³ These original assumptions may not have been realistic but the 24 months was clearly intended to be an upper limit on the duration of the CC's work, appropriate for the very largest cases.

⁹⁴ A lower bound for the estimated net present value (NPV) of benefits to consumers over a period of 25 years as a result of the CC's Groceries market investigation decision was estimated at £800 million.

http://www.competition-commission.org.uk/our_role/analysis/100928_uantification_report_black_line.pdf

expected level of £1.2m estimated in 2002 planning documents, with a range of actual costs from £1.2m (Domestic bulk petroleum gas) to £5.1m (Groceries)⁹⁵.

- Equally the review of stage two remedies is a considerably complex process that can lead to obsolete remedies remaining in place for longer than necessary. This dual structure is a complex process, where the OFT decides whether to initiate a review and, having carried out a review on whether there has been a change of circumstances that would require change or removal of the remedy, the Competition Commission then decides what change to make. Many of these have taken over two years.
- *Use of resources*: There can be a mismatch between caseloads and staffing. The OFT and CC can be overstretched at different times so expertise is not always fully utilised⁹⁶. Here, the existence of two institutions helps embed a robustness into the regime but may lead to some inefficient use of resources by each organisation not being able to fully consider its impact on the other.

Policy objectives

175. Along with the overall objectives, there are some specific objectives for the markets regime which are linked to our overarching objectives including:-

- **Strengthen the UK competition regime in support of growth and productivity** by proactively look at markets where competition is not functioning well; and
- **Streamline the end to end competition process to deliver more efficient, speedier but no less robust competition decisions** by having an emphasis on looking at competition ‘in the round’ rather than focusing on individual events of behaviours.

Description of options considered

176. To meet the objectives above, a number of options, not all mutually exclusive, have been put forward in the consultation document. A number of these relate to making the regime more effective, whilst a second category, which are more measurable, relate to the streamlining of processes.

- The CMA could be given powers to conduct in-depth investigations into ‘practices’ that affect multiple markets. At present, the Competition Commission can only look into practices ‘vertically’ in the market referred to them by either the OFT or a sector regulator⁹⁷. However, some practices may be apparent in more than one market, such as switching costs, below cost selling, and point of sale and extended warranties. These could be investigated by the CMA without multiple markets having to be referred for examination in their entirety.
- The CMA could be given powers to provide independent reports to Government on public interest issues alongside competition issues. The purpose would be to enable the CMA to take a core competition role in inquiries, such as the Banking Commission, in the future
- The super-complaint system could be extended to allow SME representative bodies to make a complaint to the CMA if features in a market(s) are having an impact on

⁹⁵ See footnote 10

⁹⁶ See footnote 10

⁹⁷ This includes examining the conduct in related markets of suppliers that are active in the reference market, provided such conduct is capable of impacting competition on the reference market

competition that significantly harm the interests of SMEs. Smaller businesses are increasing voicing concerns about anti-competitive measures adopted by large firms, but they do not have a formal mechanism to raise these concerns.

- Whether the CMA Markets Regime should be widened to cover ‘pure consumer’ cases that are currently undertaken by the OFT or passed to the relevant consumer bodies, such as CitA. Approximately 20% of OFT market studies have been ‘consumer cases’ – where consumer detriment has been found not to be caused by 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. This option is intended to seek views about the best place for this role to be taken forward, whether this be the CMA or an enhanced consumer focused body, and not whether this role should exist.

177. The second group of options relate to the processing of cases through the system. However, in terms of how the markets regime processes cases, three options have been identified:-

- **Option 1: Do nothing.** The current regime has no time limits on market studies and 24 months allowed for market investigations in phase 2. More detail on the current markets regime is provided in Annex 3.
- **Option 2: Introduce statutory timescales.** Statutory timescales could be introduced to stage one inquiries (market studies) and stage two remedies; and timescales in stage two investigations be reduced from 24 to 18 months. Timescales could also be introduced to remedy making and the review of remedies. Further details and safeguards for this option are included in the consultation document.

Costs and Benefits

178. The impacts associated with the options presented above are likely to be highly case dependant. Both OFT and CC have, however, done a great deal of evaluation on their existing work which allows a strong qualitative evidence base. The overall objectives of the review of the competition landscape are to enhance the competition regime. Therefore we need to assess the baseline of how the current regime is performing.

Option 1: Do Nothing (Baseline)

179. In Frontier Economics’ evaluation of the markets regime, they identified that the markets regime can lead to both static benefits, and dynamic benefits associated with increased innovation and other productivity improvements over time. They noted, however, that the scale of benefits of the MS/MI regime are often uncertain and highly variable.

180. Both OFT and CC commission evaluation of their work and the OFT, in its most recent evaluation, estimated that the total annual average consumer benefit from the work on markets is £345m^{98,99}. Moreover, these figures do not take into account any of the dynamic benefits which can be hugely significant. To give an accurate picture of how the regime is performing, we need to take into account the costs imposed by the regime on business, and the costs to the authorities.

⁹⁸ CC found that this figure was £317m, but this is based on a slightly different portfolio of work, including cases from sector regulators. To be consistent, we will consider regulated sectors under the options on concurrency.

⁹⁹ http://www.ofg.gov.uk/shared_ofg/reports/Evaluating-OFTs-work/oft1251.pdf

181. In work conducted as part of the Public Value Programme (PVP)¹⁰⁰ on the competition regime, in 2008/09, the markets regime was estimated to have cost £16m¹⁰¹. In addition, as indicated above, the costs of any individual Market Investigation to the CC can be between £1.2m and £5m, depending on the complexity of the case, and the cost of an OFT market study is on average £380k¹⁰².
182. In addition, there are costs to businesses of conducting investigations, including the costs of providing information and the uncertainty introduced while investigations are taking place. These may be significant costs although businesses are often reluctant to say what has been spent participating in competition enforcement actions and investigations. In other cases, there are issues about how to check the reliability of estimates from the business or legal community about the costs of investigations, as there may be incentives to overstate these. In the recent ruling by the Competition Appeals Tribunal (CAT) on Tesco's costs in its appeal against the CC's planning remedy relating to the groceries market study, Tesco were awarded £312k.
183. Work carried out by Oxera attempted to estimate the business costs of participating in market investigations. Their best estimate is that business cost is around twice the CC's costs¹⁰³. Using the Oxera estimate, and applying it to Market Studies as well as Market Investigations, we would calculate the overall cost of the current regime to be approximately £48m¹⁰⁴ set against the benefits of £345m. However benefits will depend greatly on case selection.

Option 2: Streamline the current system with statutory timescales

184. The desire to streamline the current system and introduce statutory time scales into the system should reduce delays and the associated uncertainty, reduce duplication of information requests and potentially reduce the cost to the competition bodies. Reducing uncertainty in a market is extremely difficult to quantify. The costs stemming from uncertainty may be things such as a lack of investment in physical capital and R&D or difficulty in obtaining capital for investment.
185. Initial discussions with the competition authorities suggest that introducing statutory timescales could reduce the average time taken per study by around 25%. We know the annual cost of market studies/investigations to the competition authorities is around £16m. Costs to the competition authorities are unlikely to fall in proportion with shorter timelines because some resources may be used more intensely for the period of investigation. Taking these factors into account our judgment is that costs are likely to fall by 10 to 20% which implies a saving of the order of £2m per annum. On this final point however, discussions with the competition authorities revealed that it may impact on their prioritisation of work as the same, to ensure the same quality of decisions
186. In addition, if the CMA were to be created, then this may also enable reduced duplication of requests for information and better resource management than the current system. It would be hoped that a single CMA would be able to then identify better which cases it takes on, considering the balance of resources in the two phases of investigation, leading to both a better selection of cases and quicker processing of each case.

¹⁰⁰ PVP was a joint project between HM Treasury and BIS, that was agreed by Treasury officials.

¹⁰¹ £6m for Market studies and £10m for Market Investigations.

¹⁰² Page 12, Frontier Economics evaluation of market regime. <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/10-921-evaluation-impact-of-enterprise-act.pdf>

¹⁰³ The Oxera study put the cost to business of the NI banking investigation at around £8-9m. The 2007 CBI report on the competition system reported that the investigation of Northern Irish banking was estimated to have cost the participants £20m relative to a market size of only £170m a year.

¹⁰⁴ £16m cost of regime, £32m cost to parties.

Supplementary option: Enhancing the proactiveness of the competition regime

187. In consultation with stakeholders we have developed a range of proposals, described below, to make the markets regime more effective. The benefits of doing this would be that the competition bodies could be tackling markets and practices that are of greater significance than the ones that are currently being considered.
188. We would envisage the range of measure below as leading to approximately two additional market studies per annum and one extra market investigation and we know the average market study and market investigation costs £380k and £2.5m respectively. This therefore implies additional costs to the authorities of around £3.3m.
189. The PVP exercise concluded that whilst there was significant variability amongst the markets work, the markets regime as a whole delivers benefits significantly in excess of its costs. The latest evaluation of the market studies regime suggests that the direct consumer benefits alone, ignoring the substantial longer-term dynamic effects, amount to nearly 15 times the authorities costs, or 5 times the total costs including business costs¹⁰⁵.
190. The precise benefits of our proposals will depend on the types of study undertaken in the future. In some cases reviews may recommend no changes in which case there would be a net cost. More generally, however, it is clear that the benefits are likely to significantly outweigh the costs in most cases and in some cases, such as the utilities sector or networks sectors, and financial sectors the potential benefit from enhanced competition is clearly huge and in the order of hundreds of million pounds.
191. The impacts of these proposals will be highly case-specific. Clearly any new studies/investigations would need to be weighed by the competition bodies, including considerations of the potential costs and benefits against its prioritisation principles and we would expect that the regime would continue to provide benefits far in excess of the costs of conducting the markets work. Indeed, we note that the OFT have a target to deliver direct benefits in excess of 5 times their costs, and would take this criteria into account in prioritising markets for further study. Against this general background, we provide specific points on the impacts of each proposal below.
192. **Practices** – Giving the competition authorities powers to look at practices across markets would reduce the need for the bodies to look at multiple markets as a whole. This could save considerable time and resource for CC/CMA and produce a more targeted approach for affected parties and encourage sector regulators to use their competition tools to refer parts of the overall sector to the CC/CMA. However, there is a risk that while investigating certain practices, the authorities would uncover other related practices in some markets that are of concern but would be unable to act quickly as this would require a new investigation. Therefore safeguards would need to be put in place to ensure that this risk is minimised.
193. **SME Super complaints** – Super-complaints were introduced with the Enterprise Act 2002 to enable consumer bodies to give consumers a stronger voice in the competition regime and to help identify problematic areas for consumers. However, SMEs do not have a strong voice and can suffer from a lack of representation and ability to highlight problematic areas.
194. By granting SME representative bodies super complaint status, this could raise the number of cases and improve the efficiency of the supply chain, leading to growth in the economy.

¹⁰⁵ http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1251.pdf

In addition, SMEs are often less able to fund private actions and by granting this status, government can partially correct for their lack of ability. However, granting super-complainant status to SME representative bodies may lead to some inappropriate super complaints that prevent the competition authorities dealing with other competition problems in the economy. Again, safeguards would be required to ensure that only competition matters were brought to the CMA's attention.

195. **Public interest cases** – Competition authorities are often well placed to investigate public interest cases alongside competition cases as they already have the requisite investigatory expertise and will be in contact with parties and third parties in their investigations. They also have the experience of investigating public interest issues in mergers, such as Lloyds/HBOS and BSkyB/ITV. However the final decision on public interest issues would be with the Secretary of State, whilst the competition authorities would remain the final decision maker on competition issues.
196. The benefits of giving the authorities the ability to investigate public interest issues as well means that the investigation can be conducted independently and evidence gathered efficiently. It could also save the costs of setting up a body such as the Independent Commission on Banking as the competition authorities would already be well placed to conduct the investigation. However, this may also distract the authorities from their main focus of work.
197. **Consumer cases** – In carrying out market inquiries a competition authority may need to consider both supply-side (market structure) and demand-side (consumer behaviour) factors in assessing competition failures in markets in order to effectively identify a particular problem and the action that should be taken. This will necessarily include examining a wide range of markets, services and practices that are important to consumers and impacts on choice and price, including, on the basis of past studies, public sector transport; advertising practices and consumer financial services, such as warranties, insurance and store cards.
198. Currently, approximately 20% of OFT market studies have focussed almost solely on consumer issues (where consumer detriment has been investigated for reasons other than a lack of competition). Consumer studies 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 to achieve effective prioritisation and execution of the relevant functions, without duplication of effort.
199. Consumer bodies already undertake some element of initial 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 may not be 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 whether consumer advocacy and welfare would be strengthened by placing responsibility for consumer studies and appropriate remedies more clearly with these bodies, as opposed to the CMA. This is an issue which will be explored during the consultation.

Summary

200. We have presented the different options being considered and also outlined the current costs and benefits of the regime to provide a benchmark of how future work should be

assessed. There is, however, no preferred option presented as many of the options are not mutually exclusive. Table 29 seeks to consider the options outlined in the light of the objectives set out at the beginning of this section.

Table 29: Assessment of Markets options against objectives

	To strengthen the UK competition regime	To streamline the end to end competition process to deliver more efficient, speedier but no less robust competition decisions
Independent reports	Competition authority take a core competition role in inquiries	
Investigations into 'practices' that affect multiple markets.	Prevents multiple markets having to be referred for examination in their entirety	
Extend the super-complaint system to SMEs	Gives SMEs a formal mechanism to raise their concerns	
Widen the markets regime to cover 'pure consumer' cases	To find the best place for this role to be taken forward	
Introduce statutory timescales	Quicker outcomes for consumers means they could enjoy the benefits of greater competition in the markets identified as being problematic	1)Reduces delays and the associated uncertainty 2)Reduces duplication of information requests and reduce the cost to the competition bodies

Antitrust

Issues under consideration

201. An effective competition regime needs to root out anti-competitive activity and provide a significant deterrent effect; for the latter to occur, the regime needs to deliver a stream of cases concluded within a reasonable time. The identification and sanctioning of breaches of the antitrust prohibitions, needs to take place sufficiently swiftly that businesses and their executives can expect that sanctions for such behaviour will have an effect on them, and their business, in the foreseeable future.
202. The primary law imposing the antitrust prohibitions in the UK derives from the Treaty on the Functioning of the European Union [TFEU] and European caselaw, applies across the Union and is enforced by national competition authorities in the member states and by the European Commission, but the procedural arrangements for enforcing it varies. For example, and looking from a high level perspective, the European Commission acts, as in our system, as investigator, prosecutor and adjudicator but in contrast to our provision permitting appeal on the merits, the courts of the European union have full jurisdiction to hear appeals only over the amount of a penalty; they have a more limited, JR-like jurisdiction over the actual infringement decision¹⁰⁶. In practice, the ECJ gives a significant *margin of appreciation* to the European Commission in making economic assessments¹⁰⁷.

¹⁰⁶ Article 263 TFEU.

¹⁰⁷ The Commission's procedures have been criticised by lawyers and businesses including on the grounds that they are not ECHR-compliant although those arguments are strongly rebutted by the Commission. There is a current ECJ case (Bolloré v Commission (Case T-372/10) (2010/C 301/60)) which may clarify some of these

203. There is evidence that the UK typically brings a lower number of antitrust cases than many other regimes as shown in table 30.

Table 30: Aggregate figures on antitrust cases for selected member states 1 May 2004 - 30 September 2010

Member state	New case investigations	Decisions notified to the European Commission
France	189	70
Germany	128	58
Italy	81	58
Netherlands	76	32
Denmark	62	32
Spain	75	30
Greece	31	22
Hungary	79	20
Sweden	36	16
Slovenia	24	12
UK	52	11
(European Commission)	195	N/A

Source: European Commission

204. There can be arguments over the comparability of these figures as between member states, and the relevance of differences in market structure, but the general picture of fewer UK cases has been raised by others, including in the 2007 KPMG report¹⁰⁸.
205. There are some reasons why there is a difference in the number of cases. It may be that the UK has more open markets than other European countries and therefore we would expect fewer cases. Also the UK's competition authorities may be targeting particularly serious and complex cases more than those in other member states. It is, anyway, impossible to say what proportion of anticompetitive behaviour is being tackled in any particular jurisdiction since the number of potential cases is unknown and unknowable.
206. There is evidence, however, that the lower number of cases is down to the burden on the competition authorities in establishing and upholding a case¹⁰⁹. As the National Audit Office has noted, "[a] perception persists amongst Regulators and the Office of Fair Trading that the UK enforcement system, including the likelihood of appeal, is an onerous process compared with the use of other powers."¹¹⁰ Ofcom has made trenchant criticisms of the lengths it has to go first to make a decision finding an infringement and second to defend the decision before the CAT¹¹¹. These difficulties seem to be an important factor in explaining not just the number of cases but also why they can be so protracted; the tobacco price-fixing case is (for some parties) still at the appeal stage nearly eight years after the OFT opened its investigation.
207. Expediting antitrust cases is therefore a vital aim of the review of the competition regime. It is, however, also important to ensure that the decision making process is fair and the

issues. But it should be noted that the proposal for the Internal Tribunal option would aim to provide much greater protections and rights than the current Commission model, including access to the decision-makers.

¹⁰⁸ See footnote 9

¹⁰⁹ The CAT's take on this, so far as we understand, is however that the authorities should simply bring cases before it at an earlier stage, and legislative changes that encourage this are to be welcomed; the underlying belief that there are too few cases is the same

¹¹⁰ *National Audit Office Review of the UK's Competition Landscape*, March 2010, paragraph 3.8.

¹¹¹ See for example Ed Richards' speech at <http://media.ofcom.org.uk/2010/07/13/competition-law-and-the-communications-sector/>

quality of decisions high, so that decisions are robust against legal challenge. Moreover, businesses rightly expect to receive due process over allegations that they have broken the law, especially when the potential penalties - fines of up to 10% of turnover¹¹², voiding of agreements, liability in damages and disqualification of directors - are high. They are also protected by the ECHR and in particular the Article 6 (the right to a fair trial), so procedural fairness must be built in to any system we devise. Moreover, antitrust cases often involve complex issues of law and analysis, and require the careful identification of relevant facts and the weighing of evidence. They will only rarely be straightforward or easy cases to resolve.

208. Concerns have been expressed by business¹¹³ and practitioners¹¹⁴ regarding the existing OFT/sector regulator system for investigating infringements with particular concerns arising from the length of the process and the lack of separation of powers between investigators and decision makers.
209. In addition, it is important to review the arrangements relating to the criminal cartel offence, which provides for custodial sentences (in addition to criminal fines) for individuals who engage in cartel agreements. This radically alters the incentives against cartel activity. Executives take the threat of personal imprisonment much more seriously than the threat of civil fines, which they can view simply as a cost of doing business.
210. Deloitte's report¹¹⁵ demonstrates that, from the point of view of executives, the threat of imprisonment and a criminal record is the biggest deterrent to engaging in cartel activity. But the deterrent effect may be weakened by the low number of successful cases to date. This is despite the fact that a number of civil cases for price-fixing have successfully been brought under the antitrust prohibitions. Only one successful prosecution (concerning marine hoses) has been brought since the offence in the Enterprise Act 2002 was commenced. Although a successful case that addressed a seriously damaging, worldwide cartel, the case did not provide much opportunity to consider the offence in action because the defendants agreed to plead guilty to the UK offence, as part of a plea bargain in parallel criminal proceedings in the US.
211. The consultation document considers the evidence and experience in applying the dishonesty requirement and looks at whether there are better ways of framing the offence that will retain existing benefits but make it easier to prosecute.
212. There is some evidence (see fig. 2 and 3) that civil infringement cases in the UK take more time to investigate and conclude than other countries that are considered on a par or better than the UK regime.
213. In considering the antitrust procedures it is helpful to bear in mind two common but contrasting approaches to enforcing the law which can be found in many legal regimes including ones for the enforcement of competition law.
214. In a *prosecutorial model* the competition authority investigates suspected misconduct, builds a case and then in effect presses charges. This is the model used in the United Kingdom for criminal offences and indeed is how the OFT (or the Serious Fraud Office) enforces the cartel offence (against individuals) in section 188 of the Enterprise Act 2002. This model can be used in a criminal or a civil enforcement context, but here it is intended

¹¹² Although fines at this level have, so far, not been levied

¹¹³ CBI: see *UK Competition Regime: CBI "Clean Sheet" Approach*.

¹¹⁴ The City of London Law Society: see *Discussion Paper on UK Competition Reforms*.

¹¹⁵ See footnote 23

only to describe a means of enforcing civil prohibitions¹¹⁶. 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.

215. In an *administrative model*, the competition authority has a more balanced role. It seeks to establish the truth itself. It gives a full and fair hearing to the alleged infringer, states its case formally, gives access to the file and gives 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.
216. Looked at in this light, the UK model appears to be double-banked in providing the protections of both a prosecutorial and an administrative model. The OFT and the sector regulators with concurrent powers:
- carry out investigations, which can include dawn raids and statutory demands for information;
 - prosecute alleged infringements by way of a formal Statement of Objections (SO) – in effect a draft detailed and reasoned decision;
 - then adjudicate as to whether an infringement has in fact occurred by reviewing the parties' submissions in response to the SO and conducting an oral hearing, and then taking a decision on whether there has been an infringement; and
 - Finally they decide on the level of fine if any that should be imposed.
217. Clearly there are tensions in this approach given the multiple roles that are adopted and therefore built into the detailed processes on case handling are protections to guard against, for example, so-called institutional "confirmation bias". 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, to decide the issue and to impose that decision; in the many cases which go to appeal, the CAT may be said to be the real decision-maker at least over the matters appealed (which may be very wide). Arguably the combination of these successive processes can mean that the case is in effect run twice (although the CAT has generally sought to try to focus appeals on the relevant and substantive disputes).
218. Concerns have been expressed by business¹¹⁷ and practitioners¹¹⁸ about the OFT/sector regulator system for investigating infringements with particular emphasis given to there being no separation of powers and that the procedures are too protracted. It has been suggested¹¹⁹ that the CC model of bringing a case before members of an inquiry group who did not initiate the investigation and can hear representation from the parties would provide appropriate safeguards and enable cases to be speeded up.
219. The analysis above suggests that there may be benefits from lightening the overall process, which may reduce the burden on the competition authorities (and the opportunities for businesses to challenge or otherwise delay or obstruct the process) and allow a swifter throughput of more cases. Conceptually, this could be done at either the front or back end of the process; or to put it another way, we could move either to a more administrative or a more prosecutorial approach. Provided that is that we continue to

¹¹⁶ 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.

¹¹⁷ CBI: see *UK Competition Regime: CBI "Clean Sheet" Approach*.

¹¹⁸ The City of London Law Society: see *Discussion Paper on UK Competition Reforms*.

¹¹⁹ *Ibid.*, pages 18-19.

provide due process and in particular comply with the 'right to a fair trial' requirements of Article 6 of the ECHR, an issue which is addressed at length in the consultation document.

Policy objectives

220. The policy objectives for a new regime are:

- Deliver a stream of cases concluded within a reasonable time
- Making it easier and quicker to bring antitrust cases
- Ensure that cartels and anti-competitive behaviour is appropriately deterred
- Maintain a regime that is ECHR compliant, but does not give excessive rights of appeal which could lead to unnecessary delays and costs and even allow the system to be abused.

Description of options considered

Antitrust

221. The options available are as follows:

Incremental

222. **Option 1** – Retain and enhance the OFT's existing procedures, building on the streamlining and other procedural improvements which the OFT has in hand, whilst retaining full merits appeal to the CAT.

More administrative:

223. **Option 2** – Develop a new administrative approach: either

- Create an Internal Tribunal in the CMA, building upon and modifying the CC's group system to create decision-making adjudicatory panels; the first-phase decision-makers within the CMA and the sector regulators would bring cases before these panels with appeal being by some form of judicial review.
- A variant of this option would tie the UK regime even more closely to the European model for antitrust enforcement, by providing that appeal rights are to be similar to those which apply in Europe¹²⁰, and meanwhile strengthen the procedural safeguards at the investigatory/decision-making phase. This might be done by either:
 - Reinforcing the current due process arrangements e.g. by providing for "Hearing Officers" (as the Commission has) to safeguard parties' rights; or
 - Providing for the second-phase of cases to be conducted by investigatory panels of the kind that consider mergers and markets cases at the CC.

¹²⁰ A form of enhanced judicial review in which the court nevertheless gives a significant "margin of appreciation" to the European Commission in making economic assessments

More prosecutorial:

224. **Option 3** – Make the regime prosecutorial: the CMA/sector regulators prosecute the case before the CAT which decides on infringement and penalty.

Criminal Cartels

225. The options under this section are:

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

Benefits and costs of each option

226. In the sections below we will outline the impacts of each option. We do not seek to quantify all the costs and benefits as it is difficult to predict how the systems will operate against the current regime. The intention of the consultation is to seek the views of stakeholders and help establish how best to meet the policy objectives. Rather, in general terms, we will outline at the end the intended benefits of any changes.

227. As a backdrop however, many of the measures are designed to increase the number of cases and the speed of decision taking. We provided evidence earlier in Figure 2 that the average duration of a cartel investigation is relatively high in the UK by international standards. A realistic target might be that the measures could bring the average duration of investigation down to that of, say, Germany; such an effect would imply a duration saving of around 6 months (roughly 20%) in the average duration of investigation. Not all of the reduced duration would represent a cost saving as there may be some greater intensity in investigation, but it would imply a saving to the authorities of up to £3m per annum.

228. The proposals are also designed to make it easier for the authorities to bring cases. The UK currently brings around 8 new cases per year, less than half the number in France and Germany. A 25% increase in the number of new cases, which we would consider a conservative impact of the proposals below, would imply 2 additional new cases each year and additional costs to the authority. The benefits would be highly case-specific, but evaluation of the cartel enforcement regime suggests that the direct benefit might be an average of £20m per annum¹²¹, excluding the beneficial effects from increased deterrence and any longer run dynamic benefits.

Option 1: Baseline case

229. The current antitrust regime, enforced by OFT creates significant benefits to UK economy and particularly consumers. As outlined above, the benefits from reduced anti-competitive behaviour contributes towards economic growth¹²².

¹²¹ Taken as 25% of the current estimated benefit of cartel enforcement from OFT’s Positive Impact evaluation.

¹²² See paragraphs 4 and 5

230. In its most recent evaluation report, OFT estimated that between the financial years 2007 and 2010 competition enforcement work resulted in an annual average consumer savings of £84m^{123,124}. This is considered to be a lower bound estimate as it is based on case-specific conservative assumptions about price overcharge and expected future duration and does not include the significant deterrent effect of OFT's competition enforcement actions¹²⁵.
231. In addition, OFT has imposed fines on companies which are significantly in excess of the enforcement costs of the regime. Although these figures could be considered a transfer from business to government, they are also seeking to extract the harm caused to consumers by prohibited anti-competitive activity. OFT have made decisions on 13 cases over the last 5 years and PVP estimates that the current regime cost £19m in 2008/9. Leaving the regime as it is, however, would mean that cases would continue to be difficult and costly for the authority to prosecute cases and the full potential of this important power would not be realised.
232. Options that speed up the process and make it easier to prosecute cases would strengthen the regime and increase deterrence. As noted in the consultation document, a number of such changes are in train or already being anticipated.

Administrative Approaches

Option 2a: Create an Internal Tribunal

233. Under this option, cases at the second stage would be heard by an adjudicatory panel of suitably qualified impartial experts that would be independent of the executive arm of the authority that initially decided to investigate the case and appointed with sufficient tenure to secure their independence. In all cases, there would remain provision for appeal to but this would be by way of judicial review. However, an anticipated substantial advantage of an Internal Tribunal system would be that it would enable a more transparent and robust decision making process at an early stage, thereby reducing grounds for and the likelihood of successful appeals, and hence the incentive to appeal.
234. The benefits of this option is that it will enable the bringing of the case before an adjudicatory body that can impose a discipline on the investigatory and decision taking processes much sooner so that there is a shorter and more efficient investigation resulting in higher throughput of cases. The internal tribunal could also ensure procedural fairness as well as allowing parties' access to the decision makers. In addition, this option may allow for the removal of appeal on the merits in antitrust cases¹²⁶ which could lead to fewer cases and shorter cases in the appeals stage as hearing rights will have been guaranteed earlier in the process. There ought therefore to be judicial savings.
235. Balanced against this, however, costs may just be transferred with limited savings at the end of the investigation process, and a more labour intensive process at the beginning when collecting evidence. In addition there is no firm evidence that the gain in speed at the first phase of bringing cases would not be lost at the second judicial phase. Finally,

¹²³ http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1251.pdf

¹²⁴ The OFT methodology has been independently assessed and results are published, here:

http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1164.pdf

¹²⁵ See footnote 23. The research, based on surveys of competition lawyers and businesses, indicated the **ratio** of anti-competitive actions abandoned or modified because of the risk of an investigation to those resulting in a CA98 decision. According to the survey of Competition Lawyers the ratio was: five to one for cartels, seven to one for commercial agreements, and four to one for abuses of dominance. Corresponding ratios from the business survey were higher.

¹²⁶ Provided that the internal tribunal is sufficiently independent

there is a risk that the degree of legal challenge might intensify meaning that the process is no quicker than at present.

Option 2b: Tie UK regime to EU model

236. A variant of this option would see the appeal rights in the UK being aligned with those in respect of a decision made by the European Commission. This would mean that appeals would be under a form of JR, and as the European system develops, so would the UK system. To have consistency between the two processes, and improve procedures at the administrative stage, further protections could be introduced, for example a hearing officer could be required to protect parties' rights throughout the process.
237. The main cost of this approach would be the introduction of such protections, although this would have to be set against the current costs for considering representations throughout the process.
238. The main benefit of this option would be that appeals would be under JR rather than appeal on the merits; the benefits of this were discussed above. There is, however, a risk that the EU regime may be found not to be ECHR compliant and so further protections would have to be introduced at the administrative or appeal stage or both.
239. Alternatively, appeal rights could similarly be aligned with Europe but cases could be conducted within the CMA by investigatory panels, as it is anticipated they would be for second-phase merger and markets cases. This variant is different from the central option 2 as it would involve a panel exercising a greater investigatory role, akin to the approach adopted currently by CC merger and market panels rather than simply adjudicating on a case before it. This might cost the authorities slightly more than an adjudicatory panel only but this should be offset by the overall efficiency savings from the speed and direction investigatory panels could give a case and reduced appeals resulting from improved decision taking.
240. Management of an investigation by such panels could produce quicker and better results than purely executive management, as the publicity and terms of their appointment means they could be more effectively incentivised to manage and conclude cases efficiently. Involving such panels would, however, also offer scope for improving the fairness of the process by reducing the risk of confirmation bias within the authority and providing a mechanism for parties to gain access to the decision taker. They would seem particularly suited to case requiring specialist assessment of the economic effects of the behaviour of businesses.

Prosecutorial Approach

Option 3: CMA/Sector regulators prosecute the case before the CAT

241. Under this option, the CMA or sector regulator would not decide on infringement or penalty but would instead prosecute cases before the CAT which decides both matters. This would be relatively easy to provide but it would be a big change from the current system. It is assumed that costs may be transferred from one body in the system to another. On the other hand, a prosecutorial approach would lead to an entirely different approach by the OFT and sector regulators, such that the body (or the relevant part of it) could take a more robust approach to dispensing with less vital procedural steps. Some commentators think that this approach could save up to 2 years.

Q.2: Under a prosecutorial system, are there likely to be changes to the overall costs of the system?

242. The costs that could be anticipated from this approach are an increase in court costs for parties having their cases heard in court. However, as with costs for the authorities, it may be that rather than larger numbers of representations to the competition authorities, most of these representations will now be made before the Court and there will be no extra cost. In addition, as a number of cases have been appealed on the merits to the CAT, for these parties, we could expect a saving as they are unlikely to face as lengthy process before arriving in court, and the regulator would be subjected to the disciplines of time limited case management by the court, although the rights to appeal on at least points of law (and possibly on grounds of sentencing policy) to an appellant body would remain.
243. However, this option may have an effect on the CMA as a driver of competition policy. It has been suggested that there might be less overall coherence and consistency in policy and decision making, thus creating tensions and uncertainty about which institution is *driving* competition cases and the regime. This may also reduce business certainty. On the other hand, one observer¹²⁷ has seen this view as creating a false dichotomy between administrative and judicial systems: whichever system is selected, legal development will effectively be a dialogue between the administrative and judicial branches. But this does not necessarily answer the question whether one approach or the other would tend to lead the system in particular directions, for example whether one would encourage the grounding of the system in cutting edge economic analysis as Commissioner Almunia has suggested¹²⁸.

Criminal Cases

244. On the basis of a finely balanced assessment the consultation document concludes in favour of Option 4, but invites comments and views. Analytically, it is difficult to differentiate between these options, so we briefly consider option 4 below.

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

245. This option is distinctly different from and would be supplementary to all the other options presented in so far as it relates only to criminal cartels.
246. The main benefit of the recommended change would be to make it easier to bring such cases and therefore increase the deterrence against engaging in the most damaging forms of anti-competitive behaviour.

Summary

247. Above we have presented a variety of options mainly focused on designing a better civil competition enforcement regime. At the present time, it is difficult to assess the costs and benefits of the options and some of the options may not be feasible. It is, however, hoped the consultation will help identify the feasibility of the options and the size of the costs and benefits. Table 31 sets out the options against the objectives outlined above.

¹²⁷ W. Allan, *Redesign of the UK's competition system: the case for an efficient separation of powers*, (2010), Competition Law

¹²⁸ Joaquín Almunia, *Due process and competition enforcement*, IBA 14th Annual Competition Conference, Florence, 17 September 2010.

Table 31: Assessment of Antitrust options against objectives

	Stream of cases	Easier and quicker to bring antitrust cases	Cartels and anti-competitive behaviour deterred	Maintain appropriate rights of appeal
Make the regime fully prosecutorial	More robust approach to dispensing with less vital procedural steps	1) Should enable evidence to be heard once, thus streamlining. 2) Involvement of the CAT as decision-maker, lead to greater consistency	1) More cases should increase deterrence. 2) Possible that a court would be less inclined to impose high fines, thus reducing the deterrent effect.	Full rights: decision on infringement and fine made by a court
Create an Internal Tribunal in the CMA	Shorter investigations resulting in higher throughput of cases			1) Appeal to the CAT (and beyond) by way of JR 2) More transparent decision making process reducing the likelihood of successful appeal
Reinforcing current due process				1) Appeals would be under a form of JR 2) Risk that the EU regime may be found not to be ECHR compliant
Providing for the second-phase of cases to be conducted by investigatory panels	Efficiency savings from the speed and direction			1) Reduces the risk of confirmation bias within the authority 2) Providing a mechanism for parties to gain access to the decision taker
Removing the 'dishonesty' element from the offence and defining the offence so that it does not include agreements made openly.			Easier to bring cases and therefore increases deterrence effect	Maintains appropriate safeguards about its compatibility with EU law

Concurrency and the Sector Regulators

Issues under consideration

248. General competition law provides a framework that can be used by companies to guide their compliance even in the absence of detailed rules. Competition regimes require a rich body of case law to maximise their effectiveness - cases establish the bounds of competition law and help explain the rules of the market.
249. In addition to general competition law, regulated sectors (energy, telecommunications, water etc.) are subject to sectoral regulation which prescribes in subtly different ways the framework within which the market participants may operate.
250. Most sector regulators have a primary duty to further the interests of consumers through the promotion of competition, and most (but not all of them) have concurrent powers to use the Competition Act 1998 and make Market Investigation References (MIRs) in pursuit of this duty.
251. There may be particular disincentives for regulators to make MIRs to the CC. The regulator may be concerned about: the length of time taken by the CC in conducting market investigations, especially if regulatory action can produce a swifter 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.
252. The concurrent competition powers are generally regarded as being very resource intensive to use, and the relative paucity of Competition Act infringement decisions and MIRs in concurrent sectors is regarded by many commentators as a weakness in the regime.
253. The concurrent competition powers are generally regarded as being difficult and expensive to use, and the relative paucity of Competition Act infringement decisions and MIRs in concurrent sectors is regarded by many commentators as a weakness in the regime.
254. The relatively few cases may result partly from, and further lead to, a subsidiary problem of a lack of critical mass of competition expertise within some sector regulators. Competition Act 1998 cases often require large teams of lawyers, economists, accountants and investigators, not in the least given the adversarial nature of the enforcement process, which often involves large and well-resourced investigatees.
255. In addition, regulatory action is faster and likely to bring benefits to consumers more quickly than enforcing competition law, even if over the long run competition may be a more powerful tool to changing the behaviour of suppliers.
256. 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 their antitrust cases and the CC has introduced new procedures to speed up their market investigations.
257. Further changes set out in the sections on markets and antitrust powers should make their use less burdensome and relatively more attractive for the sector regulators.

Policy objectives

258. The policy objectives for concurrency is to strengthen the UK competition regime in support of growth and productivity, by making greater use of competition powers by the sector regulators.

Description of options considered

259. A number of options for strengthening the regime by improving the effectiveness of concurrency arrangements have been considered. With the exception of Option 1 (Do Nothing) these options are not mutually exclusive. They are outlined below:-

260. **Option 1: Do nothing** - continuing the current concurrency powers and arrangements between the sector regulators and competition bodies.

261. **Option 2: Strengthening the primacy of competition law** over sectoral regulation.

- Each of the regulated sectors has its own structural features, and the sector regulators have to balance their duties to promote competition with their other duties. A number of regulators have duties to consider whether they should use competition powers before using their sectoral powers as a way of ensuring they do not resort to the latter where the conduct that is of concern is sanctioned under competition law.
- One possible reform would be to encourage the Sector Regulators to identify a common approach (subject to EU requirements) for deciding which of their powers to use. This would help increase consistency; and increase understanding of the suitability of competition powers for resolving issues.
- Alternatively, the Sector Regulators could be given a consistently strong obligation, as matter of policy or statutory duty, that they will use their competition powers in preference to their sectoral powers wherever legal and appropriate.

262. **Option 3: Single CMA to act as a proactive central resource** for the Sector Regulators by:-

- The CMA developing a central core of expertise so that it can work with and for the Sector Regulators. 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;
- Changing the legislation to permit joint sector regulator/CMA antitrust investigations. Where responsibility for decision-making lay would have to be carefully considered and could be flexible to accommodate different situations; and,
- 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.

263. **Option 4: Giving the CMA a bigger role in the regulated sectors.** Included within this option is for the CMA to have a case allocation and oversight role.

- The regulators would notify the CMA before they open or close a competition case, but unlike under the 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 in the case, such as in terms of consistency with the wider regime.
- The sector regulators could be required to inform the CMA of cases where competition powers would be applicable concurrently with sectoral powers, even if the sector regulator considers that regulatory powers are more appropriate. The sector regulators and single 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 has occurred or making a MIR. The sector regulators, in particular, would be required to consult the CMA before taking a decision on whether to proceed on a case by making use of their sectoral or competition powers.

Benefits and costs of each option

Option 1: Baseline

264. Concurrency is desirable for several reasons – first, the regulator has detailed knowledge of the sector, and may be best placed to understand complaints being made under competition legislation and to come up with appropriate remedies. Second, sectoral regulators are also better placed to spot competition problems in the markets they regulate, even in the absence of specific complaints. Third, and perhaps most importantly, having concurrent powers means that the regulator is able to judge whether conduct will be more appropriately regulated by sector-specific regulation or the use of general competition powers. Regulators can co-ordinate their use of sector-specific regulation and expertise with the exercise of general competition law.
265. There is also considerable benefit in continuing to perform the current functions of the CC in regulatory cases in the CMA - it has the expertise, resources and procedures in place to handle a highly variable appeal caseload. There could be a variety of ways in which such regulatory appeals could be handled by the CMA, depending upon the ultimate structure of that body.
266. To this point, there have been 2 CA98 infringement decisions made by sector regulators (compared with 24 by the OFT) and only 2 Market Investigation References. In addition, we can see the number of competition staff across the competition bodies and regulators in table 32.

Table 32: Number of Competition staff in bodies

OFT	Competition Commission	Ofcom	Ofgem	ORR	Ofwat	Total
265	78	21	Unknown ¹²⁹	4	4	372

Source: *Review of the UK's Competition Landscape, NAO, 2010.*

267. There are small numbers of competition staff in some of the regulators, although they may have a larger number of staff with wider knowledge and responsibilities for the sector whose expertise is drawn on for antitrust/MIR issues as well as for the promotion of competition under their sectoral powers.

¹²⁹ Ofgem handles enforcement cases on a project basis drawing in staff from across the organisation. A typical investigation would involve two members of the relevant division, a lawyer, and two members of the Enforcement and Competition Policy Team.

268. With regard to regulatory appeals, the costs of these vary hugely, dependant on both the size of the case and the type of appeal. For example, in the last 3 years, the costs of water appeals to the CC have ranged from £0.3m - £0.5m but the Stanstead price control review cost over £1m.

Option 2: Strengthening the primacy of competition law

269. Under this option, we would not expect a significant impact in resources or costs to business but we would expect there to be some change in emphasis away from using sectoral powers and towards using competition powers.

270. In the short term, this may mean that there is a slower movement towards a competitive outcome than under current regulatory requirements (as competition cases typically take longer than sectoral regulatory enforcement actions). However in the long term, it would be hoped that solving competition problems using competition tools will lead to more dynamic markets, greater deterrence of anti-competitive behaviour and ultimately reduced burdens on the sector regulators and businesses with less regulatory intervention.

Option 3: CMA to act as a proactive central resource

271. Under this option, we would not expect any changes in total costs, other than the costs of seconding staff and the competition bodies hiring out their expertise to the sector regulators. The peaks and troughs of the workloads of the competition bodies and sector regulators could be somewhat smoothed out – leading to greater administrative efficiency – but this impact would be mitigated by a greater overall caseload. We would also expect there to be greater expertise developed and shared between the different bodies and as a result an increase in the quality of decision making and a greater use of competition tools by sector regulators.

Option 4: Giving the CMA a bigger role in the regulated sectors

272. A European Competition Network (ECN) type model would give the CMA a case allocation and oversight role. 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.

273. The advantages of this approach would be that the CMA would have greater control and oversight of the competition regime, building on its existing expertise. It could improve the quality of the case investigation and management process, ensure greater consistency of decision making and help create a greater body of case law to both increase deterrence, increase certainty and support future case work. In cases where the sector regulators do not have the capacity or expertise to undertake competition cases speedily, it could also improve administrative efficiency by providing an alternative approach to bringing the case – i.e. having the CMA take it forward.

274. This option would also make the competition authorities more independent by taking the Secretary of State out of the case allocation process.

Summary

275. The changes proposed may change the landscape of sector regulation significantly, although at this stage it is difficult to know how effective the various options would be. However, if successful, we would expect an increase in the number of competition cases and less licensing regulation over the long term. In addition, we would expect a decrease in total cases over time as competition rules become more embedded in business

practices. Sector regulators are currently funded largely by license fees so a shift from sectoral regulation to competition cases may shift costs to the public sector, although this may be offset by an increase in proceeds from fines. Table 33 set out the options against the objective for concurrency.

Table 33: Assessment of Concurrency options against objectives

	To strengthen the UK competition regime in support of growth and productivity, by the sector regulators making greater use of competition powers
Strengthening the primacy of competition law	<p>1) In the short term, this may mean slower movement towards a competitive outcome</p> <p>2) In the long term, it should lead to more dynamic markets, greater deterrence of anti-competitive behaviour and ultimately reduced burdens on the sector regulators and businesses</p>
For the CMA / competition bodies to act as a proactive central resource for the sector regulators	<p>1) Greater administrative efficiency – but this impact would be mitigated by a greater overall caseload</p> <p>2) Greater expertise developed and shared between the different bodies and as a result an increase in the quality of decision making</p> <p>3) Greater use of competition tools by sector regulators</p>
Giving the CMA / competition bodies a bigger role in the regulated sectors	Improves the quality of the case investigation and management process, ensure greater consistency of decision making and help create a greater body of case law to both increase deterrence, increase certainty and support future case work

One-in, One-out

276. As the options considered above are not preferred options, it is difficult and possibly too early to identify the total costs to business for the changes in the competition regime. However, for mergers, if full mandatory notification was introduced, the Government would need to find a “one out” of the order of £81m. Alternatively for mergers, if hybrid mandatory notification was introduced, the Government would need to find a “one out” of around £21m.

277. In addition, depending on what fees are charged for recovery of the costs of merger control, this may also increase the costs to business. This will need to be calculated more fully to account for the amount of regulation that would need to be removed if these options are pursued.

Risks

Description of the risks associated with moving to a single CMA

278. A number of principle risks that would need to be addressed in integrating the competition functions of the OFT with the Competition Commission are outlined below.
279. Competition authorities underperform in short term if detailed transition strategies and plans, and adequate transition funding, are not in place to address impact on senior management time of implementing institutional change while continuing to deliver competition functions to a high standard.
280. Failure effectively to integrate cultures and competition tools of OFT and CC leads to low morale and difficulties in retaining expert staff. Mitigating action would include communicating opportunities for a wider range of competition roles and experience as functions are brought together in a single, more powerful body.
281. Chilling effect on growth if business uncertain about the impact of and requirements of changes to competition powers and functions, for example, the requirements of any introduction of mandatory pre-notification of mergers. Mitigating action would include careful preparation of policies, guidance and information, in consultation with business and their advisers.
282. Increase in appeals in the short term, as business test independence and objectivity of decision making in a single organisation, potentially leading to higher costs in short term and a greater than anticipated role for courts over time. In the event of challenge, there is a risk that the Courts consider that the decision-making structure is not fit for purpose and would require further change. Mitigating action would be to ensure design of decision making structure can demonstrate independence, objectivity, transparency, fairness and appropriate access to decision makers. In addition, ensuring measure of flexibility in the regime to enable the CMA to respond to any adverse judicial ruling without the need for further primary legislation.
283. Integration does not deliver significant net cost savings over and above spending review reductions (noting that this is not the primary objective of this reform exercise).
284. Conversely, deciding not to integrate the competition functions of the OFT with the CC would mean foregoing the opportunity to:
- Maximise the flexible use of competition tools and, in particular, efficient allocation of resource and expertise to particular competition issues. For example, there is much commonality in the skills, analysis and evidence base required for OFT and CC to conduct, respectively, Competition Act Chapter 2 (abuse of dominance) cases and phase 2 market investigations.
 - Improve evaluation of competition outcomes.
 - Improve stakeholder and information management. For example, enabling more efficient information requests from business and in the handling of information passing from phase 1 to phase 2 of a merger or market case.

Q.3: Are there likely to be any unintended consequences of the policy proposals outlined?

Wider Impacts

285. Merger of the OFT and CC with changes to the operation of the competition tools could lead to potentially better and integrated advice to business on the requirements of the competition framework and once competition advocacy voice; better co-ordination between a single competition and markets authority and other authorities with competition powers, leading to more effective enforcement; leading to greater competition in the economy, more innovation and economic growth.

Summary

286. There are a great number of options presented in this impact assessment and during the consultation and we will use the views of stakeholders to help decide which options best assist the government to achieve the objectives of the competition regime.

287. The Secretary of State for Business Innovation and Skills announced on 14th October 2010 that he is minded to merge the OFT and CC. Although this is a preferred option, there are no preferred options on the model outlined in the decision making section nor preferred options on how the different tools will operate in the new regime. Further analysis will consider the options which are developed as the options are refined.

288. In order to estimate the costs and benefits of the options it is necessary to understand the costs and benefits of the current system and to make assumptions.

Q.4: Do you have better information about the costs and benefits of the current competition regime?

Q.5: Do you have evidence that indicates better assumptions could be made to estimate the costs and benefits of the proposed options?

Annexes

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. If the policy is subject to a sunset clause, the review should be carried out sufficiently early that any renewal or amendment to legislation can be enacted before the expiry date. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences.

Basis of the review:

Political commitment to review the impact of competition framework reform. In addition, elements of enabling legislation may be subject to sunseting.

Review objective:

To review delivery against policy objectives of greater pro-activity, streamlining and throughput of competition cases. Will remain for competition authority to evaluate impact of competition interventions on markets.

Review approach and rationale:

Review will assess impact of change on speed and throughput of cases, on the business experience of the regime, on efficient allocation of public resources and on use of competition powers by sector regulators. Will include examination of number and quality of competition cases, compared to current baseline, and review of business, academic and legal views on the impact of change.

Baseline:

Existing data on number and speed of merger, markets and antitrust cases, on application of competition law by sector regulators with concurrent powers, current costs of competition functions of OFT/CC and international reputation of the authorities.

Success criteria:

International peer reviews continue to accord world class status to UK competition regime and judge UK to have delivered on areas for improvement in previous reviews; the business and legal community agree system more efficient; data demonstrates more high impact competition cases.

Monitoring information arrangements:

As now, case data will be collected and analysed with and through the competition authority.

Reasons for not planning a review:

N/A

Annex 2: Specific Impact tests

Statutory equalities impact test

1. As with any organisational re-design, there is always a risk that different groups will disproportionately be affected.
2. In terms of accommodation, the group most likely to be affected by this change would be those with disabilities where the access to the various buildings may be different. In this Impact Assessment, we have assumed that Fleetbank House will be used. However this is not the final decision and further work will be undertaken to ascertain the most suitable location for the CMA. Included in the assessment will be consideration of the accessibility of the building alongside the cost of bringing the building up to a suitable standard if that is required.
3. The other potential area where equalities considerations need to be taken into account is in the staff in the new body and how roles are allocated. It has not been decided precisely how many staff would be transferred and whether staff numbers would remain the same. However, it is not anticipated that any group would be disproportionately affected by the changes, although this will be reviewed throughout the implementation phase.

Small firms impact test

4. The changes in the competition framework will affect all businesses. On particular proposals, such as introducing super complainant status for SME representative organisations, this will give small firms a greater voice to raise concerns about anti-competitive practices affecting them.
5. On Mandatory Notification of mergers, depending where the turnover threshold is set, this will both remove the possibility of all firms below that turnover threshold being investigated if they merge. Other proposals suggested on mergers are safe-harbours for small mergers, which are being considered alongside other proposals, in response to claims that the merger regime may have a chilling effect on small mergers. However, anti-competitive mergers, even small ones, could affect other small firms and consumers so that options will need to balance both these costs and benefits to small firms.

Competition test

6. As described by OFT in its guidance, this proposal will not directly or indirectly impact on the number or range of suppliers in any particular market, although action by the competition authorities on individual cases might. Neither will the policy proposals reduce the ability or incentives of competitors in any particular market's to compete.

Justice Impact test

7. The proposals to remove the dishonesty element of criminal cartel cases would make it easier to prosecute cases of this nature and therefore may lead to a greater use of courts. However, it may also may reduce the amount of time cases would be considered in court and therefore lead to reduced cost per case. A separate justice impact assessment has been filed with MOJ. This estimates that any change is only likely to increase the maximum number of criminal prosecutions launched in any one year from the current level of one per year to up to three per year.

Other tests

8. We do not believe that there will be any impacts in the areas of greenhouse gas, wider environmental issues, health and well being, human rights, rural proofing and sustainable development.

Annex 3: Background to current competition framework in the United Kingdom

1. The principal bodies charged with enforcing competition law are the OFT and the CC, although sectoral regulators such as the Office of Communications and the Gas and Electricity Markets Authority 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 (“EA02”). 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 EA02.
3. The CC is established under section 45 of the Competition Act 1998 (“CA98”) 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 market is taken by the OFT. The decision as to the appropriate remedial measures for any competition issues identified is taken by the CC.
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 cases¹³⁰. In practice, successive 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 gave 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 were 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.

¹³⁰ 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 complex monopoly provisions were retained in a modified form through the current market investigation regime.

Background on antitrust prohibitions

Antitrust prohibitions

6. The OFT is responsible for investigating and enforcing the Chapter 1 and Chapter 2 prohibitions in the CA98. These prohibitions are modelled on similar prohibitions in the Treaty on the Functioning of the European Union (TFEU). Chapter 1 prohibits agreements, decisions and concerted practices between two or more undertakings (i.e. entities conducting economic activities) whose object or effect is to prevent, restrict or distort competition.
7. Chapter 2 prohibits the abuse of a dominant position by one or more undertakings. Undertakings generally means businesses but it is also capable of including e.g. public sector bodies when they operate in economic markets.
8. The OFT also investigates and enforces 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.
9. 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 Competition Commission is not designated to investigate and enforce the EU prohibitions. This means it currently cannot do so¹³¹.
10. In relation to the prohibitions in Article 101 TFEU and Chapter 1, 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.
11. Agreements that are caught by the Article 101 TFEU and/or Chapter 1 prohibition may nevertheless be exempt if they:
 - a. contribute to improving production or distribution, or to promoting technical or economic progress; and

¹³¹ 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.

- 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
12. 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.
 13. In relation to the prohibitions in Article 102 TFEU and Chapter 2, 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 2 cases also typically involve significant economic and perhaps also financial analysis.
 14. When it is enforcing the UK and the EU prohibitions, the OFT uses the investigation powers in CA98. 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'¹³² 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.
 15. Before making an infringement decision, the OFT must give the investigated person(s) notice of the proposed decision and an opportunity to make representations¹³³. 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.
 16. 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).
 17. 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 Competition Appeal Tribunal ("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 reopen all of

¹³² *Re Doherty* [2008] UKHL 33 (11 **June 2008**)

¹³³ See section 31 of the 1998 Act. More detail on the procedural requirements is set out in enclosure (e) the OFT's Rules.

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

18. The cartel offence is a criminal offence under section 188 EA02. It is separate from the Chapter 1 prohibition and the Article 101 TFEU prohibition, but the same set of facts may give rise to parallel civil proceedings brought under Chapter 1/Article 101 and criminal proceedings brought against an individual under section 188 EA02. The OFT can investigate alleged cartels where it 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.

Background on EA02

Mergers:

19. 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 cases¹³⁴. The sectoral regulators have no concurrent powers.
20. Where a merger is a concentration with a Community dimension as defined in the EU Merger Regulation,¹³⁵ assessing the effect on competition of the merger ordinarily falls to the European Commission.
21. 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)¹³⁶ 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 might lead to a substantial lessening of competition¹³⁷. 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

¹³⁴ 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).

¹³⁵ Council Regulation 139/2004/EC on the control of concentrations between undertakings.

¹³⁶ Under section 23 of the 2002 Act, 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.

¹³⁷ 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.

from the merging parties in lieu of a reference to the CC¹³⁸. Undertakings in lieu of a reference may be appropriate where there is a clearly identifiable competition problem with a clearly identifiable solution.

22. The CC, when cases are referred to it, conducts the “second phase” of the investigation. The CC conducts its investigations through panels which are created for the purposes of the particular investigation¹³⁹. The CC members are appointed by the Secretary of State. 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 Chairs). Subject to following published CC Rules and guidance, Inquiry Groups are free to establish their own procedures for inquiries. They direct the investigation and analysis to be carried out by the CC staff and are the ultimate decision makers on the competition issues arising from the merger and remedies required to address any such issues. 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 to take specified action or making enforcement orders¹⁴⁰ (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).
23. Merger remedies, once put in place by way of undertakings or orders, are monitored by the OFT¹⁴¹, and can be enforced in civil proceedings by both the OFT and the CC or by third parties in private law action for breach of statutory duty¹⁴². 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 circumstances¹⁴³. In addition, persons who have given undertakings to the CC may seek variation of, or release from

¹³⁸ Section 73 of the 2002 Act.

¹³⁹ Competition Act 1998, schedule 7 sets out the requirements for the appointment of members to Inquiry Groups.

¹⁴⁰ 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 2002 Act. This means that remedies imposed by way of order are less flexible than undertakings. CC remedies are usually implemented by means of undertakings.

¹⁴¹ Section 92 of the 2002 Act.

¹⁴² Section 94 of the 2002 Act.

¹⁴³ There is a Memorandum of Understanding between the OFT and the CC concerning remedy reviews.

the undertakings at any time. These provisions prevent undertakings remaining in place when there is no longer a need for them.

24. 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 under section 120¹⁴⁴. 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.

Market investigations:

25. Market investigations are also a two stage process involving the OFT and CC. In the first stage, the OFT considers under section 131 EA02 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 refer¹⁴⁵.
26. 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 EA02. 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 Competition Commission 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.
27. The Secretary of State can also make a market investigation reference (under section 132 EA02) 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. The Secretary of State also has a discrete role in relation to market investigations involving specified public interest considerations¹⁴⁶.
28. Where the statutory test for reference is met, the OFT can accept undertakings in lieu of making a reference (UIL) from the parties that would be the subject of the reference¹⁴⁷. In doing so, the OFT must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect

¹⁴⁴ Decisions on penalties imposed as a result of a failure to comply with the requirements of a notice issued under section 109 of the 2002 Act, are subject to a full appeal on the merits (see sections 109 to 114 of that Act).

¹⁴⁵ 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").

¹⁴⁶ 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).

¹⁴⁷ Under section 154 EA02.

on competition concerned, and any detrimental effects on consumers resulting from that adverse effect.

29. In practice the OFT has only accepted UIL once, in relation to postal franking machines. The OFT's experience of the statutory provisions around accepting UIL is that it is likely to be difficult to get satisfactory UIL 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 UIL 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 referring, 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 judgement on whether a proposed solution is sufficiently comprehensive to address any problems.
30. The CC conducts its investigations through Inquiry Groups which are created for the purposes of the particular investigation¹⁴⁸. CC members are appointed by the Secretary of State. 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 Chairs). Subject to following published CC Rules and guidance, Inquiry Groups are free to establish their own procedures for inquiries. They direct the investigation and analysis to be carried out by CC staff and are the ultimate decision makers on the competition issues in the relevant market and remedies required to address any such issues. Upon referral under section 131 or 132 EA02, 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)¹⁴⁹. 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 undertakings¹⁵⁰.
31. Market investigation remedies, once put in place by way of undertakings or orders, are monitored by the OFT¹⁵¹ and can be enforced in civil proceedings by both the OFT and the CC or in private law action for breach of statutory duty¹⁵². The OFT has an ongoing duty to keep market investigation remedies under

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

¹⁴⁹ See sections 159 and 161 and Schedule 8.

¹⁵⁰ 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 2002 Act. This can limit the scope of remedies that the CC is able to impose.

¹⁵¹ The OFT has a duty to monitor under section 162.

¹⁵² See section 167.

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 circumstances¹⁵³. In addition, persons who have given undertakings to the CC, or who are subject to 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.

32. 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 CAT¹⁵⁴. As with merger decisions the CAT is required to apply judicial review principles when reviewing these decisions and the CAT may wholly or partially quash the decision and direct the decision-taker to reconsider.

Judicial Review versus Full Merits

33. 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.
34. 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.
35. 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, reach its own view on those facts and if it wishes substitute its view for that of the decision-taker.
36. Because full merits review is more intensive than judicial review, it may be that appeals by way of a full merits review take longer than appeals by way of judicial review. We consider they may also involve greater resource.

¹⁵³ There is a Memorandum of Understanding between the OFT and the CC concerning remedy reviews.

¹⁵⁴ Decisions on penalties imposed as a result of a failure to comply with the requirements of a notice issued under section 109 of the 2002 Act (which applies to market investigations by virtue of section 176 of that Act), are subject to a full appeal on the merits (see sections 109 to 114 of that Act).

37. If appeals of antitrust decisions can be changed to being by way of judicial review, this may both a) reduce the frequency of appeals and b) reduce the length and resource intensiveness of any appeals that are brought.
38. Whether or not it will be possible to move to appeal by way of judicial review depends in part on considerations in relation to the right to a fair trial under Article 6 of the European Convention on Human Rights.

Considerations on Article 6 of the European Convention on Human Rights

39. 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'.
40. Where the decision involves determination of a criminal charge, there are a number of additional rights¹⁵⁵.
41. It is fairly well accepted that decisions establishing that there has been an infringement of the two competition prohibitions (either the Chapter 1 and/or 2 UK competition prohibitions 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.
42. By contrast, we consider that determinations at stage 2 of the merger and markets regimes are 'civil' in nature for the purposes of Article 6 ECHR. This view is based on the nature of the regimes, and in particular the fact that 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.
43. The ECHR case law confirms that the right of access to a determination by an independent and impartial tribunal doesn't have to be provided in all cases at first instance (i.e. by the person taking the final decision). In civil cases and in some

¹⁵⁵ These include the right to be presumed innocent until proven guilty under Article 6(2) ECHR. They also include (under Article 6(3) 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.'*

criminal cases, the requirements of Article 6 ECHR will be met if there is an appeal from the decision to an independent and impartial tribunal that has 'full jurisdiction'.

44. What is meant by 'full jurisdiction' depends on the subject matter of the decision appealed against, the way in which the decision was reached, and the content of the dispute. There are some inconsistencies in the case law that explains the concept of 'full jurisdiction' and there may be different approaches taken in relation to decisions that engage civil rights and obligations and those that engage criminal charges.
45. However, taking into account EU case law as well as cases under Article 6 ECHR, it appears that:
 - appeal by way of judicial review will be sufficient to cure any Article 6(1) shortcomings at first instance for decisions on the competition prohibitions that depend on the application of specialised knowledge and/or complex economic or technical appraisals (such as in 'rule of reason'¹⁵⁶ CA98 and Article 101 and 102 TFEU infringement decisions) as long as the facts have been established by a first instance process that is quasi-judicial and that incorporates some safeguards in terms of independence of decision-making;
 - appeal to a tribunal that can conduct a full review on the merits would be needed in order to cure Article 6(1) failings in a first instance decision taker in relation to decisions on the competition prohibitions that depend on an assessment of primary facts (such as CA98 and Article 101 and 102 decisions in relation to fines, and CA98 and Article 101 decisions as to whether or not undertakings have been engaged in 'hard core' cartel activity);
 - in relation to stage 2 merger and market investigation decisions and remedies, we consider these types of decision involve the application of complex economic or technical appraisals, and appeal by way of judicial review should be sufficient to meet the Article 6(1) requirement for a tribunal that has 'full jurisdiction' as long as the facts are established by a first instance process that is quasi-judicial and that incorporates some safeguards in terms of independence of decision-making.
46. However, if the full requirements of Article 6(1) ECHR can be met by ensuring that there are sufficient protections for the independence and impartiality of the first instance decision-taker (i.e. it is sufficiently independent of the executive and establishes and analyses facts by a sufficiently impartial process), there will be no need for those decisions to go on appeal to a tribunal that also has 'full jurisdiction'. The case law suggests that a tribunal does not have to be totally independent to meet the requirements of Article 6(1) but there do need to be significant protections in terms of separation between the investigation and

¹⁵⁶ 'Rule of reason' is a US antitrust expression that does not strictly apply in EU law, and in regimes modelled on the EU prohibitions. However, broadly speaking it denotes those cases that involve assessment of the economic effects of agreements or conduct, including cases that require an assessment of whether the exemption criteria under Chapter 1 and Article 101 TFEU are met, instead of being able to rely for infringement on agreements having a clear anticompetitive object.

prosecution function, on the one hand, and the decision-making function on the other.

47. So, if it is possible to establish a fully Article 6 ECHR compliant tribunal *within the CMA* to take first instance decisions, we think it may be possible to reduce the intensity of the court's scrutiny on appeal of antitrust decisions to judicial review only. We also think that if some or all of the same protections are built into decision-making by the merged single CMA in stage 2 mergers and market investigations, it ought to be possible to retain appeal by way of judicial review for these regimes.
48. Conversely, if we roll together the OFT and CC stage 1 and 2 processes on markets and mergers without incorporating sufficient protections, there is a risk that the decision-making at stage 2 will not provide sufficient procedural protections to enable appeal to be by way of judicial review only. There is a risk that appeals would need to provide a full merits review of the decision.

Separation of decision-making

49. In the current regime, there is separation of decision-making as between stage one and stage two on mergers and on market investigation references. The OFT takes the decision that there is something that merits further in depth investigation in mergers and or markets cases, by applying the relevant statutory test. The CC conducts an in depth investigation – starting afresh as fact finder and decision maker. It decides whether there is an adverse effect on competition (or in merger cases a substantial lessening of competition). If it reaches an adverse competition finding it must decide on appropriate remedies to the problems it has found. Appeals from second stage decisions go to the CAT for review, applying judicial review principles only.
50. The two-stage decision-making process helps to guard against the risk of 'confirmatory bias' – i.e. the initial set of decision-makers having an interest in having their original concerns about mergers and markets confirmed in the eventual decision. Non-executive Phase 2 decision makers (as are currently used in market and merger investigations) also ensure that decision makers are independent of bias or perceived bias stemming from any apparent desire to drive forward a broader organisational policy agenda in coming to decisions on specific cases.
51. In legal terms, the two-stage decision-making process helps to ensure that, in combination with an appeal mechanism where judicial review principles are applied, the overall process for deciding whether there are problems and if so what should be done about it, satisfies the requirements in Article 6 of the European Convention on Human Rights as regard the right to a fair trial.

52. In a merged body, where one and the same organisation conducts both stage 1 and stage 2 inquiries¹⁵⁷, there may be a need to build in extra procedural protections in the decision making during stage 2 of the mergers and markets regime in order to preserve appeals being by way of judicial review.

¹⁵⁷ This is the format that applies in cases brought by the European Commission and which has been subject to significant criticism on the basis that the same case teams handle the phase 1 and phase 2 inquiry (and are seen as been subject to confirmatory bias). In addition, the EU regime has been criticised as not providing the parties to an investigation with access to the ultimate decision maker during the investigatory process.

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