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

Pickering, Prof John F

PROFESSOR J F PICKERING

10th June 2011

Mr Duncan Lawson
Department for Business, Innovation & Skills
1 Victoria Street
London SW1H 0ET

Dear Mr Lawson

A Competition Regime for Growth: Options for Reform

Having read the consultation document dated March 2011, I am taking the liberty of writing to offer some comments. My credentials for commenting are that for nearly 50 years as researcher, consultant and office holder I have been involved in different aspects of UK competition law and policy. From 1990-99 I served on the MMC/CC and from 2000-11 I was a member of the CAT, being involved *inter alia* in the two cases where, as BIS notes, the Tribunal substituted its own infringement decision rather than remit a case.

I note that the CAT was one of the bodies consulted by BIS. You should know that I was not involved in any discussions about a response nor, I believe, were the majority (if any) of the "ordinary" members. This seems an unfortunate omission since the view of the ordinary members may not have been the same as any "official" submission from the CAT.

I. The case for action.

An analysis of the strengths and weaknesses of the present regime ought to be a starting point for this discussion, coupled with a consideration of the way in which priorities and challenges are likely to develop in the medium term. A sense of the history of British competition policy and systematic review of best practice in other competition regimes would be important. The consultation document only partially achieves those desiderata. As a consequence, there is a risk that some important considerations and evidence may have been overlooked.

My own analysis of the different agencies currently involved is as follows:

OFT. The OFT is a well regarded body which, over the years, has had many able staff and produced some good work. It seems to be generously funded. However the "flow" of investigations, decisions and actions has become slow. This has been criticised by NAO and the PAC in the fairly recent past. Maybe there has been inadequate massing of resources in terms of teams of people working together on an investigation. This is more valuable than the same total resource spread out more thinly through time.

In my personal experience, the quality of some of its work has been well below an acceptable standard. This applies to past merger briefings, decision-making and collection of forensic evidence. The consumer arm of OFT has been of benefit and the

cross-fertilisation of consumer and industrial economics in the analysis and improvement of the working of markets is important, at least in principle.

The Competition Commission. The CC is a direct successor to the first UK competition agency – the Monopolies Commission. As such, it has had a continuous existence for over 60 years. Powers to work in sub groups speeded up investigations. The public impact of its reports has often been substantial. Despite quite generous resourcing, the length of time taken on some investigations seems to have increased. Some cases are now being lost on JR, which possibly suggests some slip in standards. However, it may also be a consequence of the greater number of "hurdles" through which the Commission has to pass and be seen to have passed, in justifying its findings, including the need to produce interim reports. Such demands can be expensive and, in the end, not beneficial to any party, except the litigious!

CAT. This is the newest of the UK's competition agencies. It was initially the appeal arm of the CC, but was quickly and necessarily, separated from the CC. It is legally dominated in its leadership and the Tribunal support staff (referendaires). More lawyers are amongst its ordinary members and some others may not have had relevant experience to make an effective contribution. There has been an evident reluctance by some Tribunal Chairmen to use the merits jurisdiction available to the Tribunal or to encourage the Tribunal to take its own decisions. Some Chairmen have also been reluctant to recognise the importance of business/economic analysis alongside the law in decision taking on competition matters and the production of judgments explaining those findings.

Sector Regulators. The concurrent competition powers of the sector regulators have not been used as effectively as might have been hoped. However, they have been defendants in several appeals in the CAT. Initially they, as OFT, appeared to endeavour to circumvent the CAT by arguing that they had not taken an appealable decision! Given the importance of the actual regulatory role, it seems that the competition responsibility has taken a distant second place in the regulators' work and may even be in opposition to the regulatory emphasis where the regulator is likely to have a more common interest with supplier organisations. The lack of pro-competition emphasis may therefore be a sign of "regulatory capture". It may also reflect a lack of expert resources committed to the competition enforcement role.

II. Overview of the present situation

The consultation paper confirms that the British competition regime is highly regarded. Currently, it is suffering from low throughput from OFT and some decisions that, even so, cannot be considered to have been of the highest quality.

Equally, it seems the decisions of individual agencies do not appear to be viewed as creating a binding precedent which would cause businesses and their advisers to recognise that there are certain practices or situations that should be avoided. This is disappointing, given that the regime has moved from one based solely on investigation, through registration and investigation, to limited prohibitions with scope for exemption, to one based more directly on prohibitions of anti-competitive behaviour.

Reading the consultation document, leads me to conclude that, in some respects the system has lost some of its earlier "edge". Thus it seems we no longer:

- Use injunctions to require businesses to desist in future from practices found to be anti-competitive and from other practices to a like effect.
- Have provision for cross-market general reports such as those produced by the MC/MMC on Collective Discrimination, Recommended Retail Prices, Discounts to Retailers, and even Brown and White Goods.

- The loss of the complex monopoly provisions for investigations may have weakened the ability to address tacit collusion and markets that are not working well for consumers. They may have been more effective than the current market investigation/market studies regime.
- The time allowed and taken for some types of investigation under the regime seems to have been extended, perhaps to meet the implications of the additional requirements placed on the agencies in preparing their findings. This can become excessive and all agencies should remember the adage that "justice delayed is justice denied".
- We seem to have lost the confidential guidance provisions in relation to mergers and the exclusion of small mergers from merger controls.

Before addressing the Proposals as such, may I just offer some comment on a few *obiter* that appear in the consultation document. First, I do not think BIS should accept that an investigation imposes a gross cost on the firm or group of firms. On balance there may be a net cost but that is different. Smart businesses learn, often much, that they did not previously realise about themselves and their markets. This can be efficiency-improving and may enhance competition. The danger is that the grossly excessive use of excisions from reports now weakens the wider benefit. Following on from that, I do not understand why a market can share test in mergers (and presumably dominance investigations and market studies too) is inherently "subjective" more than some supposedly "objective" accounting data! As Sir Douglas Hague remarked, profit is a discretionary item! Further, the consultation document seems to overlook the fact that all strands of a competition regime, especially dominance, mergers, market studies, necessarily have regard to industry-wide features, including concentration levels, entry barriers etc.

III. The BIS Proposals

The greater part of the discussion in this document seems to be primarily about changing organisation structures, and secondly about procedural detail. As such, it does not really address some of the important ways in which the regime ought to be strengthened. Indeed, given the apparent approval for the current regime and its agencies, it is surprising there is such a desire to change the organisation structures!

The main proposal is to merge the OFT and CC to create a Competition and Markets Authority (CMA). This gives rise to several concerns, some of which are recognised but dismissed by BIS. It also constrains much of the discussion in the consultation document. In particular, the single CMA with its proposed two phases will be likely to:

- Suffer from the need to maintain "Chinese walls".
- Generate what BIS describes as "confirmation bias".
- Create too many layers of bureaucracy and decision making.

Indeed, it seems to be contrary to the requirements of A6 ECHR which requires the separation of decision makers from the investigation and prosecution process. The early action to separate off the CAT from the CC should serve as a warning against putting different "arms" under one organisational control. It is also important that the CMA should have a responsibility to prosecute cases at a higher level and this would be readily compatible with its overall ownership of a two-phase process.

There does not seem to be a need to rename OFT, but if there is to be a CMA, whatever that first tier is called, above it should be a Competition and Market Court, the case for which is argued in the next section.

Since effective consumer information and choice are recognised as important elements in making markets work well, it is difficult to understand the rationale for taking this area away from OFT. We ought to be looking for more, effective interaction between the competition and consumer arms, not a separation. Indeed, there seems to be a strong case for making the national Trading Standards service an arm of OFT or at least giving it super-complainant status.

The key elements of an effective competition regime are normally agreed to be the prohibition of cartels and abuse of dominance, together with controls on mergers judged likely to be anti-competitive. In this consultation, the impression is gained that the key drivers of the proposals are the market investigation regime, followed by mergers. Issues of the CA 98 Chapter II provisions are hardly touched upon. It is important that BIS and the regulatory agencies establish the key priorities and address first and foremost the need to increase the effectiveness of enforcement of those policies.

On the proposals regarding cartels, a problem seems likely to arise in deciding what "made openly" actually means and how to prove or deny it in an individual case. The primary aim of policy in this area must remain to prevent cartels, not to separate out the few agreements that may be beneficial (but on what criteria?). Why not require any firms seeking approval for a cartel to obtain *ex ante* clearance, without which any agreement would be declared void?

The regulatory agency should make greater (and better) use of its forensic powers, including the inference of tacit collusion from empirical evidence of parallelism/common practices.

In dealing with mergers, it is surely necessary that material degrees of control falling short of 100% ownership should still be classed as merger situations. Equally, attention should be paid to the implications of interlocking directorates for all forms of anti-competitive conduct.

The discussion of cost recovery is understandable in the current economic environment. However, it should be recognised that the competition regime is about delivering public benefit. The arrangements should not be such that they add to the cost burden or risk such that it might discourage legitimate actions by those that do not have the advantage of deep pockets.

IV. Some alternative suggestions

From what has been said above, the proposed structural change does not seem persuasive. An alternative approach is suggested in this section.

One of the current weaknesses is the slow progress OFT makes with its investigations, the relatively few decisions that flow from it and, sometimes, the poor quality of those decisions. These are matters that must be addressed. Greater massing of internal resources and a willingness to refer at an earlier stage would help. Stronger enforcement and more effort to identify practices that would normally be prohibited in order that there should be the creation of a clearer precedents base would be desirable.

Priorities for particular attention should be not only those sectors of general economic importance but also those that are of importance to vulnerable consumers and market segments with particular needs but limited demand-side market power. While super complainants may have a useful role to play, it is arguable that the more actions they are forced to take, the less effective has been OFT's monitoring and enforcement.

It is understood that much of business prefers a judicial to an administrative procedure for resolving major cases. The greater formality of the court proceedings

may be helpful, but this may be offset by the lack of an investigatory role for the decision maker, something which has, typically, been well discharged by the MMC/CC. Care would need to be taken in the appointment of Chairmen in order to ensure the procedure did not become too legalistic and that attention to the economic etc. evidence and analysis was given due weight.

Rather than put all these activities into the OFT/CMA, it is proposed that OFT/CMA should have monitoring, investigatory enforcement powers with authority to settle, including the use of fines up to a specified level. Where there are more serious cases or where the situation and findings are disputed by another party, this should be taken to a separate body – the Competition and Market Court, which would incorporate the CC and CAT, for resolution on the merits. Presumably a senior lawyer would need to chair the group hearing each case, other members should be those with relevant economic/business expertise so that they can play a full part in the proceedings and lend credibility to the process and outcome.

Appeals would be through JR and on points of law only, to the Court of Appeal. The OFT/CMA would remain responsible for all matters covered in the CA 98 and the Enterprise Act 2002, including mergers.

The approach to merger control should give due regard to indicative "safe harbours", within which only exceptionally would a merger be challenged, and above which only exceptionally would a merger be cleared without a full investigation. However, "creeping concentration" should be monitored and challenged as necessary. In the light of Lloyds/HBOS, the competition authorities should not be willing to allow a merger to be "pushed through" on "imminent failing company" grounds.

The approach to cartels should, as indicated above and as accepted by the European Commission, be prepared to use empirical evidence of parallelism in claiming a cartel or tacit collusion. What is required to show the absence of a cartel is clear evidence of independence of action. Consideration should be given to restoring the complex monopoly provisions to competition law as a more targeted approach to market studies and the investigation of oligopolistic conduct.

While the consultation document assumes that the concurrent competition powers of the sector regulators should be retained, and their competition role re-emphasised, there are grounds for suggesting that this should be withdrawn, to give OFT/CMA responsibility for competition issues in the regulated sectors. If that happened, it would not preclude a sector regulator bringing an action in the CMC or acting as a super-complainant. If that is too draconian, at the very least, sector regulators should be left in no doubt they are now in a "use it or lose it" situation. Indeed, with "sunset" expectations concerning the role of regulators, competition enforcement will, sooner or later, need to revert to OFT/CMA.

I hope these suggestions may still be considered, though I have the impression that BIS is committed to the solution it promotes in the consultation document! If I have made factual mistakes at any point in the above comments, I apologise. Should you wish me to amplify or explain any of the points in this letter, please do not hesitate to contact me.

Yours sincerely

John Pickering

Pinsent Masons LLP

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BY POST

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13 June 2011

Dear Sir,

On behalf of Pinsent Masons LLP we have the following comments on the consultation document issued by the Department for Business Innovation & Skills ("BIS") on 16 March entitled, "A Competition Regime for Growth: A consultation on Options for Reform". For ease of reference, we refer to that document as "the Consultation", and references to paragraphs are to paragraphs of that document.

In this letter we have addressed only certain of the proposals considered in the Consultation rather than seeking to comment on every issue of potential importance.

1. **INSTITUTIONAL REFORM**

1.1 We consider that there are potentially significant synergies and working efficiencies that could be achieved within the current institutional structure with the Office of Fair Trading ("OFT") and Competition Commission ("CC") continuing to function as separate bodies. For example, we consider that there are material opportunities to improve further the focus of, and to reduce the data-gathering burdens imposed by, market investigation references before the CC that are not dependent on merging the CC and OFT. Likewise, we consider that the speed of decision-taking by the OFT and the deterrent impact of its Competition Act 1998 ("CA98") actions could be improved further by changes to administrative approach and information requests, and by continuing the recent shift towards bringing narrower and more focused CA98 cases.

1.2 Equally, we perceive that there are opportunities which are more dependent on institutional changes to achieve material improvements in working practices, for example in respect of avoiding duplication between the work undertaken currently during OFT market studies and CC market investigations.

1.3 Even if there are to be institutional changes we would urge caution to ensure that those features currently working well are not needlessly abandoned. In this category, we would specifically identify the current Panel system of the CC, including for the in-depth review of mergers, and the speed and effectiveness of the judicial scrutiny currently exercised by the Competition Appeal Tribunal ("CAT"), especially in relation to its judicial review of merger decisions and its "On the Merits" reviews of competition

enforcement decisions.

2. MERGER CONTROL

2.1 Mandatory vs voluntary notifications: We consider that the current voluntary system of merger notification in the UK works effectively in ensuring that potentially problematic mergers are reviewed appropriately by the OFT. We see little evidence for the proposition that there are significant numbers of materially problematic mergers that are not reviewed effectively by the OFT.

2.2 Moving to a system of mandatory pre-notification (or even the hybrid system considered in the Consultation) would involve additional delay and cost for the parties concerned. We would point, in particular, towards the additional management time that would be incurred and to the additional costs in the form of advisers' fees, merger filing fees and to the potential opportunity costs for business resulting from the delay on completing transactions.

2.3 We would also be very concerned if a move was made towards a mandatory or hybrid notification system but adequate and experienced resources were not then made available to the Competition and Markets Authority ("CMA") to handle the volume of pre-notified transactions in a prompt and efficient manner.

2.4 Proposed thresholds for mandatory notifications: The proposal considered at paragraph 4.27 of the Consultation – i.e. mandatory pre-notification of mergers where the target's UK turnover exceeds £5m and the world-wide turnover of the acquirer exceeds £10m – would very significantly expand the remit of the UK's merger control regime. We would urge BIS to reflect on whether such a move would be appropriate or proportionate.

2.5 Proposed "hybrid system": BIS is also consulting on an alternative proposal that there should be mandatory pre-notification of mergers where the target's UK turnover exceeds £70m but the CMA would retain the ability to investigate mergers satisfying the share of supply test. We consider that this would not be a positive development, would continue the uncertainty about when the share of supply test might apply in any situation and may in practice result in uncontroversial transactions being needlessly pre-notified for merger clearance.

2.6 Retain voluntary system but strengthen interim measures: We consider that retaining, but improving, the current voluntary merger control system would be a preferable course of action. We consider that clients value the flexibility of the current system and understand when potentially problematic transactions should be pre-notified for merger clearance. In this context, we would support granting the CMA the power to require the production of information and documents from the merging parties and interested parties, which should improve the speed and robustness of the merger review process. We would also question whether the share of supply test remains fit for purpose and whether it should be replaced by a turnover or market share test, either of which would be much more predictable.

2.7 Proposed exemptions for small mergers: We consider that the proposed "small mergers" exemption is a welcome idea but is unlikely to be of any practical use because the turnover thresholds are currently envisaged to be set at an extremely low level (paragraph 4.41).

3. COMPETITION ENFORCEMENT

3.1 We consider that the steps taken recently by the OFT to improve the speed of decision-taking and to bring more narrowly focused and targeted investigations are strongly to be welcomed. The recent signs are encouraging, but it is currently difficult to assess with any certainty the scale of improvements that can be sustainably achieved by the OFT adapting and improving its working practices within the confines of the current administrative system.

3.2 We do however consider that further incremental improvements can be made, especially during the investigation phase by, for example, improved transparency, greater early access to decision-takers and by issuing at the initial stages of an investigation narrowly focused (rather than broadly drafted) requests under s.26 CA98, and by then widening the focus of an investigation if that should prove necessary.

3.3 We do not consider that the creation of an internal tribunal of the type envisaged in the Consultation would represent an improvement to the current administrative approach. We are unconvinced that this change would necessarily improve the quality of decision-making or the speed of decision-taking. We would also have material concerns about the compatibility of such an approach with ECHR Article 6.

3.4 We note the suggested variant that the phase 2 process would be handled by panels of administrative office holders. We agree that the current Panel system has worked well in the CC for mergers and market investigations, but remain unconvinced that it would be appropriate for quasi-criminal cases of the type that arise under CA98.

3.5 The prosecutorial system would represent a significant change from the current arrangement, which could lead to faster decision-taking and more narrowly focused cases being pursued by the CMA. It is however uncertain how a prosecutorial system would cope with cases involving very complex economic analysis, especially abuse of dominance cases.

3.6 On balance, we would at this stage be in favour of allowing the current administrative system more time to see if it can evolve in an appropriate and effective manner, before making potentially fundamental and irreversible changes to the system that may not necessarily lead to improvements in the quality or speed of decision-taking and/or which may not safeguard adequately the rights of defence.

4. THE CRIMINAL CARTEL OFFENCE

4.1 We consider it inappropriate and wholly premature at this stage to make any changes to the definition of the criminal cartel offence. In particular, we consider that the failure so far to pursue a contested prosecution to the point of a jury decision precludes a possible conclusion at this stage that the criminal cartel offence as currently drafted is unworkable and in need of a radical overhaul.

4.2 We consider all of the options considered in the Consultation to be flawed because of their uncertainty and/or impracticality. In particular, we consider the suggestion that a "White List" could be created as an exception to falling within a criminal offence to be especially unacceptable and unworkable.

5. MARKET STUDIES AND INVESTIGATIONS

5.1 We would strongly support changes to the way in which market studies and market investigation references are currently conducted by the OFT and CC respectively in order to reduce the demands and burden that they place upon business. As currently implemented, the system appears to involve considerable duplication between the

OFT and CC stages. The CC stage in particular places extremely onerous obligations on participants to gather data and we would suggest that greater emphasis be put on reflecting upfront whether the data being sought are likely to be necessary to the outcome of the investigation.

6. **USER FEES**

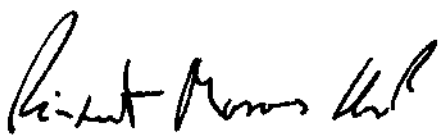
6.1 We note the intention to set merger fees at a level sufficient to recover the full costs of the merger control regime (paragraph 11.9). In certain cases this would appear likely to involve very significant increases in merger fees, to levels that on their face appear to be unreasonably high, especially when compared to most international jurisdictions. Although the envisaged fees are materially lower under a mandatory or hybrid notification system, they would of course be in addition to the actual costs to business in terms of management time and advisers fees (which would be incurred even in relation to unproblematic mergers).

6.2 We also note the proposal that fees be charged where an entity is the subject of a CA98 infringement decision, in order to recover the CMA's own costs of investigation. We consider this proposal concerning from the perspective of the principle and also on the detail.

6.2.1 On the principle, we do not understand why entities that are subject to competition enforcement proceedings should be singled out for the additional sanction of paying the administrative costs of the enforcement body. It is also unclear whether (and to what extent) any account would be taken of those additional costs when the amount of any financial penalty would be calculated. We consider that similar considerations would apply to the separate suggestion that the CAT should charge parties in order to recover its own costs of dealing with appeals in respect of CA98 matters.

6.2.2 On the detail, we consider that even if the principle was implemented, that there should be some test of the reasonableness of the charges that the CMA sought to recover. For example, the CMA could misguidedly initiate a burdensome investigation but then fundamentally change the direction of that administrative proceeding, albeit to the point of an ultimate infringement decision being taken. In that situation, why should the undertaking concerned (which would already have incurred costs of defence and potentially a financial penalty) be required to pay for the costs of the initial misguided investigation? If the CAT is to be the decision-taker under a prosecutorial system for CA98 infringement decisions, then (leaving aside the principle, for one moment) we would hope that the CMA's costs would be the subject of judicial scrutiny (by the CAT or the Costs Office).

Yours faithfully,



Pinsent Masons LLP

Prof Stephen Wilks of Exeter University

INSTITUTIONAL REFORM AND THE ENFORCEMENT OF COMPETITION POLICY IN THE UK

STEPHEN WILKS

A. The Consultation on Reform

On 14 October 2010 the Secretary of State for Business, Innovation and Skills in the new Coalition Government, Vince Cable, announced that "I am minded to merge the Competition Commission and the competition and markets investigation function of the Office of Fair Trading (OFT) to create a single, streamlined expert competition and markets authority".[1] This rationalisation of the enforcement agencies comprises the first major reform of the UK competition regime since the 2002 Enterprise Act and, while it is a shock (there was no mention of this in the Coalition's Programme for Government), it is hardly a surprise. It gives substance to a submerged debate which has been rumbling on for about five years and is of fundamental importance. This is no simple organisational rearrangement. Competition enforcement agencies are prominent, independent and potentially highly intrusive bodies entrusted with some of the most powerful economic laws in a modern market economy. The design of the agencies, including their processes, their inter-relationships with other agencies, their leadership and their enforcement culture, is of paramount importance. It will determine the effectiveness of the UK competition regime for the next decade.

This article is speculative and intended to contribute to the debate about reform. It is written at a relatively high level of generalisation to coincide with the publication of the detailed options for consultation. The article does not attempt to engage in detail with the content of the Consultation Paper that was published by the Department for Business Innovation and Skills (BIS) on 16 March 2011[2] with a closing date for responses of 13 June 2011. It seeks to contribute to a consultation debate which should be well grounded, critical,

* Stephen Wilks is Professor of Politics at the University of Exeter. He was a Member of the Competition Commission 2001–09 and was appointed as an Ordinary Member of the Competition Appeal Tribunal in January 2011. The views expressed in this article are the author's alone.

1 V Cable, "Changes to the UK Consumer and Competition Bodies", statement by Vince Cable, Secretary of State for Business, Innovation and Skills, BIS, 14 October 2010.

2 Department for Business, Innovation and Skills, "A Competition Regime for Growth: A Consultation on the Options for Reform" (London, March 2011).

ambitious and not too bogged down in detail. It is important not to lose sight of some of the fundamental principles of agency design since, as discussed below, the legislative process is capable of producing some quick fixes and pragmatic compromises. This article picks up four sets of key principles, in the form of independence, leadership, processes and relationships, which provide a context for the more detailed debate that is to come.

The BIS consultation paper is substantial. It goes well beyond the organisational questions of how best to combine the OFT and the Competition Commission (CC). It includes examination of all the important processes of the UK regime and offers many opportunities for incremental improvement in addition to the various options for agency design. Some incremental changes will be controversial, such as the possibility of introducing mandatory merger notifications and the possible removal of the dishonesty test from the criminal cartel offence. Other canvassed reforms are more fundamental, especially the possibility of moving from an administrative to a prosecutorial model of enforcement. The consultation appears to be genuinely open and exploratory, and we can anticipate vigorous debates over the next two years before a new regime comes into effect during 2013. It appears that there will also be consultations on the shape of the new regime of consumer protection and on private enforcement of competition law.[3] These are interesting times for competition practitioners.

The main parties involved have been meeting and debating the options quite intensively. For each of them there is much to play for. The CC will wish to preserve the proven qualities of decision making by expert groups of independent members. The Competition Appeal Tribunal (CAT) will be concerned about the possibility of introducing a fully prosecutorial system and the possible move away from a full appeal on the merits. The utility regulators will be alert to the possibility that they will have to use their concurrent competition powers more actively or, alternatively, that they might lose them entirely. Meanwhile, the OFT is facing a future of extremely radical change brought about by the likely combination with the CC and by the second and more genuinely surprising element in Cable's announcement, the comprehensive redesign of the British system of consumer protection. Simply rehearsing the implications for the various agencies underlines the desirability of a rapid move to firming up the options and moving to legislation. Each agency will be destabilised until a new regime is in place and there may be a chilling effect on enforcement. The present timetable is becoming elongated, with legislation unlikely to be enacted before 2012 and the introduction of new legislated processes as late as September 2013.[4] Before examining the competition options in more detail, it is worth

[3] *Ibid*, 4.
[4] *Ibid*, 110.

emphasising the importance of the consumer changes and their implications for the enforcement of competition policy.

The OFT is a combined competition and consumer protection agency in which the consumer side has come to dominate its activities. Of its 640 staff, only 30% work on competition enforcement and only 24% of its gross expenditure is devoted to competition.[5] It has always maintained that the two activities are complementary and in recent years that argument has moulded mission statements and the organisation of the Office. The mission is "to make markets work well for consumers", and the Office has been reorganised on thematic lines so that integrated competition and consumer analysis is undertaken. The Coalition proposals will demolish that integrated structure, taking the consumer protection functions away from the OFT and distributing them between local Trading Standards Offices, the Citizen's Advice Service and a new Consumer Protection and Markets Authority (for consumer credit).[6] These proposals give added impetus to the competition reorganisation and are likely to be welcomed by those consumer bodies that will acquire new powers. The consumer sector is already being encouraged to support the proposals for transfer of functions.[7] Of course, the OFT has been here before. In 2005 it successfully fought off recommendations from the Hampton Review to move its consumer functions into a proposed new Consumer and Trading Standards Agency.[8] This time the proposal is for decentralisation, but again the prospect is that of the OFT being dismembered. To that extent, it is the great loser from the proposed reforms, and its rump of competition responsibilities would actually have a slightly smaller budget than that of the CC.

It can be argued that this divorce of competition and consumer protection is wholly to be welcomed. The allocation of the two responsibilities to the same office in the 1973 Fair Trading Act was a product of legislative opportunism and was never systematically planned or based on a coherent design of policy. A monopolies bill and a consumer protection bill were combined simply to fit them into a very tight legislative timetable. The rationale for consumer protection was in part as a measure to reassure consumers about price levels as part of a wider statutory incomes policy involving control of wages.[9] Competition policy and consumer protection were administered separately within the OFT, but from 1973 the consumer obligations have distracted the senior man-

5 Global Competition Review, "Rating Enforcement: The Annual Ranking of the World's Leading Competition Authorities" (2010 June) 13(6) *Global Competition Review* 189; and OFT, "Annual Report, 2009–10", 65.

6 Cable, *supra* n 1.

7 Ed Davey, speech to Citizen Advice: Consumer Eempowerment Debate, 7 March 2011, available on the BIS website.

8 See OFT, "Companion Document to the DTI Hampton Review Consultation" (London, 2005).

9 S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester University Press, 1999), 182–84.

agement of the OFT from concentrating on competition enforcement. Both competition and consumer protection are important, but they are very different regulatory operations, with different tools, different legal bases, and essentially different clients and targets. The rationale behind the reformed UK competition regime was a concern to increase efficiency, productivity and growth. That priority is not served by a preoccupation with protecting consumers from fraudulent behaviour. Internationally some regimes incorporate the two functions, but across Europe neither France nor Germany, or the EU, combine the two activities. A focus on competition within a dedicated agency provides the potential to return to the primary mission of enhancing competitiveness.

B. The Rationale for Change

The proposed merger of the competition agencies was announced as part of the "bonfire of the quangos" exercise with the implication that it would cut costs. This was seen as largely presentational and there was little expectation of significant cost savings. The possible merger of the CC and the OFT has a deeper seated rationale, and Robert Peston has suggested that Labour were on the verge of announcing a combination in Autumn 2009.[10] All the same, the costs of the regime are worth bearing in mind. The National Audit Office (NAO) put the direct costs of competition enforcement at £27m[11] but the Consultation Paper gives a higher estimate of £55.5m.[12] The combined competition enforcement resources devoted to the three core agencies appear to be:[13]

	Costs (£m)	Staff
OFT	18.9	189
CC	20.6	113
CAT	3.8	16
Total	43.3	318

In fact, the savings element is important and the government clearly expects savings through streamlining, but also through fees and cost recovery. Remarkably a quarter of the questions for consultation deal with cost recovery which is an unwelcome emphasis when the really serious costs of operating the regime are, of course, the direct costs to the parties and the wider costs of compli-

[10] See Robert Peston's blog on the BBC, *Peston's Picks*, 16 September 2010.
[11] NAO, "Review of the UK's Competition Landscape" (London, 2010), 36.
[12] BIS, *supra* n 2, 112.
[13] Sources: GCR, *supra* n 6, 10; Competition Appeal Tribunal, "Annual Review and Accounts 2009–10" (London, 2010), 9.

ance and risk aversion. The fees and cost recovery element of the savings would not necessitate a combination of the agencies, neither could they be presented as failing organisations. As ministers have conceded, and as the agencies themselves repeatedly stress, government peer reviews and independent surveys indicate the high standing of the UK authorities. The Global Competition Review's (GCR) ratings famously place the CC in the 5 star "elite" category and the OFT in the 4.5 star "Very Good" category, making them among the global top five agencies (along with the US Antitrust Division of the Department of Justice and Federal Trade Commission, and the EU Directorate-General (DG) Competition).[14]

Against this background, and drawing on a deep-seated and almost instinctive reflex of self-justification, the leaders of the agencies have affirmed the virtues of their enforcement profiles. In fact, there are substantial weaknesses in the UK regime which have become evident since the launch of the modernised system in the 1998 Competition Act, weaknesses which have become substantially more important with the delegation of European competition enforcement to the UK agencies from 2003. Every analyst will have their own list of weaknesses, from delays in the processes to the lack of a mandatory merger notification. This article touches on four shortcomings which have reinforced the pressures for reform.

First, the system has become organisationally over-complex. A large merger such as the 2010–11 News Corporation proposed purchase of the outstanding 60.9% shareholding in BSkyB has had to engage with DG Comp; BIS; OfCom; the OFT; the CC; potentially the CAT (and, less predictably, the Department for Culture, Media and Sport). These are all independent bodies entrusted with specific legal powers and jealous of their autonomy and status. Not surprisingly, relations between the bodies have sometimes become tense, as in the case of the OFT and the CC, where senior staff have barely concealed their irritations about the level of references, alleged duplication and the substance of decisions. This inter-agency tension and jurisdictional overlap increases costs, creates delay, reduces clarity and limits deterrent effects. Simplification would be welcome. A second weakness concerns the utility regulators. Their reluctance to use their concurrent competition powers has been apparent for some years,[15] but it has been emphasised by the House of Lords and by the NAO,[16] which noted that from 2000 to 2009 the regulators had taken only two antitrust infringement decisions and made only one market investigation reference. The tension between direct sectoral regulation and competition

[14] GCR, *supra* n 6, 4.

[15] See C Bellamy, "The Competition Appeal Tribunal – Five Years On" in C Robinson (ed), *Regulating Utilities and Promoting Competition* (Cheltenham, Edward Elgar, 2006).

[16] House of Lords Select Committee on Regulators, "UK Economic Regulators", HL Paper 189-I (2007); NAO, *supra* n 11, 16, 27.

regulation creates ambiguity for the companies, for the sectoral regulators and for frustrated consumers.

The third set of weaknesses concerns the level of OFT enforcement activity. For antitrust the NAO presented a scathing report in 2005 emphasising a whole raft of flaws and stressing the low level of enforcement decisions.[17] Although the OFT reacted positively to many of the recommendations, the position on enforcement decisions has hardly improved. In the 10 years from 2000 to 2010 the OFT took 43 antitrust decisions, only 24 of which were infringement decisions.[18] The Office has advanced many ingenious reasons for this pattern but in comparative European terms it has become an embarrassment. Of the 1308 cases investigated and the 478 decisions taken by competition agencies across the EU from 2004 to 2011, only 54 cases and 12 decisions emerged from the UK, a mere 3% of the European total, with the UK registering fewer decisions than Hungary or Slovenia and the same number as Portugal.[19] Part of the problem is that the OFT has become appeal averse. The majority of infringement decisions have been appealed to the CAT, which also reduced the level of fine in most of the cases up to 2005.[20] This factor was spectacularly confirmed with the substantial 90% reduction of fines in the first six of the bid rigging cases announced in March 2011.[21] The whole process of fighting an appeal on the merits in the CAT is extraordinarily time consuming for the OFT and one important element in the new regime will be the opportunity to create a more robust decision-making process on antitrust cases which can deter and win appeals. Whatever the reason for a low level of decisions, the NAO has emphasised the challenge of "building a richer body of case law"[22] to provide innovation, certainty and deterrence, while Vince Cable emphasised the time delays and the "difficulties in successfully prosecuting anti-trust cases".[23] A consensus has formed around the need for more antitrust decisions and more and less time-consuming market inquiries.

A fourth area of weakness concerns the CC. In many ways merger control is the most successful aspect of the UK regime, but the Commission's role illustrates some of the dangers of incremental change and path dependence. When it was created in 1948, the Commission was the sole competition agency and was operating in an environment of extreme uncertainty about the desirability of competition policy, the economics that underpinned it and the public interest that it pursued. In this setting, a Commission of Inquiry

[17] NAO, "The Office of Fair Trading: Enforcing Competition in Markets", HC 593 2005–06 (London, 2005).
[18] NAO, *supra* n 11, 13.
[19] See DG Comp statistics at, http://ec.europa.eu/competition/ecn/statistics.html
[20] See R Whish, *Competition Law* (Oxford University Press, 6th edn, 2009), 367.
[21] *The Times*, 12 March 2011; judgment, *Keir Group et al v OFT*, CAT 3, 11 March 2011.
[22] NAO, *supra* n 11, 6.
[23] V Cable, speech to the CBI, 25 October 2010, available on the BIS website.

was sensible and productive.[24] The Commission has been a great survivor and its mode of decision making, with independent members sitting as a group to investigate a case, has been sustained for over 60 years. The independent member model involves groups of three or four part-time members sitting with a Commission Chairman to investigate cases. The method is not strictly a second-stage evaluation because the case is considered from first principles, with minimal material transferred from the OFT. Further, there has been very little reference to precedent. The CC is not bound by earlier cases and gives only tangential consideration to UK and even less to European case law. In this setting, members investigate and decide cases employing expertise, experience and judgement.

This decision-making model operates within increasingly narrow parameters. The massive shift came with the 2002 Enterprise Act, where the traditional public interest test was replaced by the legally binding competition tests of SLC (substantial lessening of competition) for mergers and AEC (adverse effect on competition) for market inquiries. These tests are far more technical and subject to standard economic evaluation working through a series of accepted stages and outlined in the soft law of the Commission's published guidelines. By the time the new regime had bedded down, it was becoming clear that there was relatively little room for the exercise of judgement and discretion. Case investigation became standardised, with economic theories of harm and routine staff working papers, with the case closely managed by the Chairman working in partnership with the inquiry director. The members provide challenge, rigour and openness. They adapt standard procedures to the specifics of the case, but the assertion that groups independently investigate and decide cases from first principles has become implausible, as also illustrated in their semi-detachment from appeals and the negotiation of remedies. The members do provide the huge procedural reassurance of complete independence, and minority reports are still made, but by now the devotion of such extensive resources to *de novo* examination of cases is becoming difficult to justify.

The case for an independent Commission with a full first principles examination of mergers and market investigations was fatally weakened by the creation and growing importance of the CAT, which provides the ultimate safeguard of appeals against OFT decisions and increasingly against the CC itself. The essential question now is therefore how the undoubted merits and safeguards of the CC model could be reproduced within a new Competition and Markets Authority (CMA). As argued below, it should be possible to migrate a version of the member system into the CMA, but there will have to be significant adaptations. In particular, if the member system were to be applied to antitrust decisions the whole question of legal consistency and precedent

[24] Wilks, *supra* n 9, 12.

would come into play. This would require more legally aware and systematically trained members.

This rehearsal of some of the weaknesses in the present regime serves to underline the importance of the consultation and ensuing reform. It should be understood that the proposed merger of the agencies is not simply a tidying up of enforcement; it also has the potential to secure some substantial benefits. As part of that understanding, it would be a mistake to see the exercise as a "takeover" either of the CC by the OFT or vice versa. The outcome should be a new agency distinctively different from either of the pre-existing bodies and therefore with a new leadership and organisational culture. This is the "once in a decade" opportunity to improve the UK system, to make it work more smoothly within the European competition rules, indeed to build upon the progress of the first 10 years of the modernised UK regime but also to transcend that regime.

C. The Processes of Consultation and Legislation

The consultation process will be tendentious, unpredictable and broad ranging. A perverse by-product of consultation is that the independence of the agencies will be temporarily reduced. The dependence of the agencies and the careers of their staff on ministerial choices mean that it could be expected that decisions would be attuned to the political preferences of the moment. Indeed, we have already seen the Culture Secretary, Jeremy Hunt, intervening to encourage News Corporation and the OFT to negotiate structural remedies to avoid a referral to the CC.[25] There is clearly a potential for ministers to widen the current competition tests and to increase the possibility for public interest interventions, especially in relation to market investigations.[26] It is particularly difficult to read the runes when negotiations will also be taking place within the Coalition trading off the more interventionist instincts of the BIS Secretary, Vince Cable, and of his competition minister Ed Davey, against those of the Treasury and George Osborne.

Experience indicates that the consultation process will be highly skewed with strong views expressed by those with an interest in the system. We can expect vigorous expressions of views from lawyers, the CBI and consumer organisations. It would be beneficial to secure input from the public, from SMEs and from those knowledgeable about best overseas practice. The consultation views will feed in to the deliberations of the team preparing to draft the legislation and to take it through the House. The Competition Minister, the Liberal Democrat Edward Davey, appears an able leader of the Bill Team. He took a first

[25] *Financial Times*, 25 February 2011.
[26] On this see BIS, *supra* n 2, 23.

in PPE at Oxford and went on to become an economic adviser and shadow economics minister with the Liberal Democrats. His Bill Team will be crafting the legislation, negotiating with lobbyists, striking compromises with other parts of government and introducing a pragmatic element into the legislation. Bill Teams operate in a legislative hothouse where pragmatism and compromise can trump rational debate and research. There is plenty of room for unpredictable elements to enter the legislation. For instance, the Vickers Review of Banking will be reporting in September and consultation will throw up less predictable elements.

D. Characteristics of Successful Competition Agencies

A remarkable global consensus has developed over the past 15 years about the desirability of independent regulatory agencies[27] and, in particular, that competition enforcement should be undertaken by such agencies.[28] The rationale is not simply the pressure from business to eliminate crude political intervention from opportunistic politicians, it is a more sophisticated objective of creating agencies which undertake credible application of impartial rules in order to sustain a stable market system. The analogy is the design of independent central banks whose objective of inflation control becomes self-sustaining thanks to the universal expectation that they will apply rigorous discipline. In the case of competition agencies, their independent commitment to market disciplines within a legal framework provides a credible assurance that blatant market distortions will be prosecuted and hence serves to provide deterrence and to create an economic constitution enshrining free market principles.

There are a range of alternative models of how such an agency should be designed, empowered and resourced. In the case of the UK reforms, questions of powers and resources will be subject to only minor variation, the big question being that of agency design, on which there has been very little focused research.[29] One particularly useful insight into good practice in agency design and operation is provided by Bill Kovacic's remarkable review of "The Federal Trade Commission at 100".[30] He considers the "institutional foundations of success", which include mission, structure, leadership and relationships.

[27] See F Gilardi, *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe* (Cheltenham, Edward Elgar, 2008).

[28] See S Wilks, "The Unanticipated Consequences of Creating Independent Competition Agencies" (2002) 25(1) *West European Politics* 148.

[29] For a rare exception see A Mateus, "Ensuring a More Level Playing Field in Competition Enforcement Throughout the European Union" (2010) 31(12) *European Competition Law Review* 514.

[30] W Kovacic, "The Federal Trade Commission at 100: Into Our Second Century" (Washington DC, FTC, 2009).

Together with analysis of the operation of the UK regime over the past decade, and drawing also on insights from other competition regimes, we can fasten on some of the key issues which need to be addressed and resolved in the consultation. This article picks out four collections of issues, centring on: independence; leadership; structure and process; and relationships with other agencies.

1. Independence

Independence has become the defining feature of successful enforcement agencies. Independence from political intervention, from capture by business interests but also arguably independence from populism and from an excessive commitment to legal or economic doctrines. This is a tall order, and we can visualise a spectrum defined by the level of political independence, ranging from an agency that is controlled by elected politicians to an agency that is entirely independent of elected politicians. The specialist literature terms these polar opposites as "majoritarian" (ie subject to control by majority focussed politicians) and non-majoritarian (subject to control by law and professional standards).[31] The spectrum can be presented as a series of contrasting characteristics as follows:

	Majoritarian agency	Non-majoritarian agency
Political intervention mission	Direct political guidance, clear rules and objectives	No political influence, delegated authority and rule making
Level of initiative	Consensual, reactive and complaint-led	Proactive, own initiative
Accountability	To ministerial bodies	To public, Parliament and wider stakeholders
Leadership	Short-term ministerial appointments	Long-term authoritative public figures

Placing the main agencies along this spectrum is a subjective business, but it can be suggested that DG Comp is towards the non-majoritarian end of the spectrum, as is the US Federal Trade Commission (FTC). In fact, the FTC is the classic model of an independent regulatory agency as part of the "fourth arm of government", with its five independent commissioners from different political parties. In contrast, the US Antitrust Division is more majoritarian and so, it could be argued, are the OFT and the CC, which is in an odd position. The OFT and the CC are perhaps midway across the spectrum. They exhibit strong operational independence but are subject to political influence through

[31] See M Thatcher and A Stone-Sweet, "Theory and Practice of Delegation to Non-majoritarian Institutions" (2002) 25(1) *West European Politics* 1.

Treasury targets, leadership appointments and the sort of periodic reorganisation in which we are currently engaged.

What does this imply for the design of the new CMA? A combined OFT and CC would measure up quite well on the spectrum of independence. Complete independence is unrealistic, political appointment of leaders in inescapable, and there is a danger that agencies can move too far away from politically acceptable enforcement.[32] Within these limitations the post Enterprise Act regime has seen politicians keep their distance and the OFT's independence in criticising the Lloyds/HBOS merger was refreshing. Improvements could be made in the relationship with the Treasury with a reduction in performance targets and the elimination of measures such as the rather bizarre consumer benefit calculations. The OFT and the CC have good records of transparent development of their own rules and procedures, and the OFT is capable of taking initiatives and prioritising its activities. Perhaps the two key issues here are the change in mission to remove the consumer protection goal and the question of leadership, which is examined in the next section. The change of mission should have a side effect of recalibrating the economic principles on which the OFT bases its enforcement, and particularly re-examining the commitment to consumer welfare. In the wake of the financial crash, the tendency of the OFT to model economic behaviour in idealised market settings would bear reconsideration.[33] Structural issues and behavioural economics might receive more attention, and it is worth bearing in mind that the driving principle behind the Enterprise Act was a desire to increase productivity (and hence growth) rather than to deliver price benefits to consumers.[34] This emphasis on growth has re-emerged in the current consultation.

2. Leadership

Effective leadership is an indispensible and often underemphasised foundation for a successful agency. Externally leaders articulate the mission of the agency, and should project its competence and achievements and act as advocates for competition. The internal role is crucial in building morale and creating the aggressive enforcement culture which marks out a proactive agency. Leadership is affected by personality, standing and experience, but it is also structural. It is bolstered by a secure term of office, respectable rewards and a high-profile appointment process, such as hearings before legislative committees. Here the

[32] See S Wilks, "Competition Policy" in D Coen, W Grant and G Wilson (eds), *The Oxford Handbook of Business and Politics* (Oxford University Press, 2010), 730.

[33] For a review of approaches see O Budzinski, "Monoculture versus Diversity in Competition Economics", (2008) 32 *Cambridge Journal of Economics* 295; and S Wilks, "The Impact of the Recession on Competition Policy: Amending the Economic Constitution?" (2009) 16(3) *International Journal of the Economics of Business* 269.

[34] See Department of Trade and Industry (DTI), "Productivity and Enterprise: A World Class Competition Regime", Cm 5233 (London, 2001), 1.

example of the Governor of the Bank of England provides a yardstick. The Governor is a renewable Crown appointment made for five years and the Parliamentary Treasury Committee has held hearings to confirm his professional competence and personal independence. International experience varies with the composition of the agency leadership. If we take the nine elite or very good agencies in the GCR rankings, the arrangements are as follows:

Leadership Arrangements in the Outstanding Competition Agencies[35]

Australia	Chairman, Deputy Chairman and additional five full-time Commissioners appointed by the Governor-General for five year terms.
EU DG Competition	One Commissioner appointed by the Commission President subject to Parliamentary hearings. Formal decisions taken by the full European Commission
France	Chairman and four Vice Chairmen appointed by the President of the Republic and additional 12 Council members. Head of investigation branch appointed by the Minister of the Economy. Five year terms of office.
Germany	President appointed by Federal Economics Minister for indefinite term (until retirement).
South Korea	Nine commissioners; Chairman and Vice Chairman appointed by the President for three year renewable terms, other seven commissioners appointed on recommendation of the Chairman
UK Competition Commission	Full time Chairman appointed by the Business Secretary of State for up to eight years. Three Deputy Commission Chairmen and 32 Commission members appointed by ministers
UK OFT	Part-time Chairman appointed by Business Secretary of State for four years, renewable. Chief Executive and Board appointed by ministers.
US Antitrust Division	An Assistant Attorney General appointed by the President after confirmation by the Senate
US FTC	Five Commissioners, appointed by the President for seven year terms. Subject to confirmation by the Senate. One Commissioner nominated as Chairman.

[35] Table compiled from a variety of sources including agency websites and annual reports.

The pattern is of seven agencies operating with between one and 36 commissioners, two with a single full-time head and the OFT with a part-time head and a Board. The newly merged and modernised French Competition Authority, which began operating in March 2009, is especially interesting. It has a Board of 17 members, but the decision-making powers are concentrated in the group of the five Chairman and Deputy Chairmen who sit with the additional expert members. To ensure a robust two-stage procedure, the Chief Case Handler is independent and appointed by the Minister of the Economy, who also appoints a Hearing Officer. The Chairman, Bruno Lasserre, is a judge, and the early activities of the Authority have been reported as "a resounding success".[36]

How should leadership be structured within a new CMA? The consultation paper specifies a Supervisory Board chaired by a part-time Chairman and an Executive Board chaired by the Chief Executive.[37] This is the model currently employed by the OFT. It is argued here that this would be a mistake and that the Board model is singularly ill suited to creating the sort of leadership essential to the new body. The OFT Board at present comprises the part-time Chairman, the Chief Executive, two executive directors and a majority of eight non-executive directors (NEDs). It is a model for the management of non-departmental public bodies that has become increasingly fashionable within British government since about 2003 and it is a tepid imitation of the board of a plc.[38] Even in its own terms, the UK plc board model is contentious, and the usual (although voluntary) device of the part-time Chairman is internationally exceptional and carries the risk of divided leadership. There has been very little examination of why this model should be appropriate for public bodies that operate in a radically different context and it can be argued that this model confuses internal leadership, inhibits external leadership and impedes clear decision making, responsibility and accountability.[39] The little research undertaken on boards in central government outlines more problems than successes.[40]

The position of the NEDs is particularly ill judged. This is not to criticise the individuals who have served as NEDs and have been leading specialists and conscientious board members, but they have been put into an unproductive role. The NEDs are part time, they have relatively little opportunity to engage with the professional staff and they have some residual decision-making

[36] See, eg Cleary Gottlieb Steen and Hamilton LLP, "The New French Competition Authority and Competition Policy Regime" (2009); and GCR, *supra* n 6, 54.

[37] BIS, *supra* n 2, 89.

[38] S Wilks, "Boardization and Corporate Governance in the UK as a Response to Depoliticization and Failing Accountability" (2007) 22(4) *Public Policy and Administration* 443

[39] S Wilks, "Board Management of Performance in British Central; Government" in KPMG Canada LLP, "Holy Grail or Achievable Quest? International Perspectives on Public Sector Management", 125.

[40] Institute for Government, "Shaping Up; A Whitehall for the Future" (London, 2009), ch 2.

functions in relation to market inquiries, but they suffer from the limitations on the role of NEDs in the public sector, including lack of information, lack of legitimacy and confusion about the role. In particular, "it is not clear exactly whom Whitehall non-executives represent"[41] which makes it difficult for them to contribute expertise or to "lead". The conventional understanding is that NEDs are not public figures but rather undertake an internal role of "challenge" within the Board, as they would be expected to do in a plc. In reality, of course, the OFT bears little resemblance to a plc: it is not a commercial organisation, there are no shareholders to protect, it operates in a complex public environment and it does not lack challenges. It is challenged by the Minister and his officials in BIS; by the Treasury; by the Public Accounts Committee; by the National Audit Office; by the other competition agencies; by competition lawyers; and by the CAT. Why it should also be subject to internal NED challenge is far from clear. The board arrangements generate potential paradoxes, including the possibility that the Chief Executive's clarity of responsibility might be concealed by the pre-eminence of the Chairman and by the supervision by the board, and that his articulation of the agency's mission will be handicapped. In a large private sector corporation board arrangements are designed to curb the power and hubris of an all-powerful chief executive; in the public sector they risk creating a weak, divided and opaque leadership.

The conclusion is clear. If government is serious about creating an independent and effective CMA, it should abandon the OFT Board model and appoint full-time and part-time Commissioners. There are some excellent international models, such as those found in Australia or France. Retention of the Board model would need a justification which is not to be found in the history of the UK regime. The Competition Commission has a fine 60 year old history of using Commissioners whilst the OFT operated perfectly well with a Director-General up to 2005 (when Sir John Vickers stepped down). Neither is justification to be found in the context of overseas practice in the leading competition agencies, in comparison to which the UK arrangements appear eccentric, exceptional and inconsistent with European best practice.[42] Competition Commissioners would be leading public figures with competition expertise. They could be confirmed through parliamentary hearings, they could lead with confidence, engage in public debate and develop an enforcement culture that would live up to the expectations of ministers and the public.

3. Structure and Processes

A third set of issues concerns the structure and processes of the new CMA, and especially the processes by which legally binding decisions are reached.

[41] *Ibid*, 61.
[42] See Mateus, *supra* n 29, 256.

This promises to be the dominant set of issues during the consultation exercise, stressing the questions of rigour and fairness. At present, the two-stage process means that the CC can deliver exceptional levels of objectivity, expertise, transparency and access to produce a decision-making process for mergers and market investigations that is regarded as scrupulous and fair. Fair procedures are the magic ingredient that encourages compliance and cooperation and discourages evasion and appeals; the commitment to a fair hearing has been the great strength of the CC, and before it the Monopolies and Mergers Commission.[43] It is vital to protect elements of that exemplary process within the new authority in order to maintain the quality of the decisions, but also to pre-empt as far as possible appeals based on inadequate process. A key question is whether an exemplary two-stage process should also apply to antitrust cases. At present, the UK practice of antitrust decision made by a single-stage process in the OFT shares some of the drawbacks of DG Comp practices, where the Commission is rightly regarded with suspicion as prosecutor, judge, jury and policeman.

One possibility canvassed in the Consultation Paper is to make a radical shift in the system and for the OFT to prosecute cases in front of the CAT. The prosecutorial system is used successfully in other common law jurisdictions, especially in the US, Canada and Australia. The CBI has had a major change of heart and has put its weight behind this model, which has also received reasoned support from leading lawyers.[44] Economists could be expected to be far less sympathetic since economic arguments would become less prominent and the opportunities for the impartial application of orthodox economic doctrine would be reduced. Despite real interest in this possibility, there are three further arguments against such a radical change. First is the inconsistency with the administrative method employed by DG Comp and enshrined in precedent and procedural rules. Companies operating in the UK would be subject to an administrative process in Brussels for those large cases which DG Comp chose to investigate, and a judicial process in the UK for cases prosecuted by the CMA. The parallel application of the EU antitrust competition rules is managed by the coordination mechanisms incorporated in Regulation 1/2003. It is not clear whether antitrust prosecutions could be made compatible with the residual control by DG Comp within the European Competition Network (ECN). Neither is it clear how leniency applications and negotiated settlements could be coordinated across such different enforcement models. It bears repeating that the EU rules are the most important for most large businesses operating in the UK, and the domestic enforcement regime must operate

[43] See Wilks, *supra* n 9, 333.

[44] See CBI, "UK Competition Regime, CBI 'Clean Sheet' Approach" (London, October 2010); and B Allan, "Redesign of the UK's Competition System: The Case for an Efficient Separation of Powers" (2010) 9(4) *Competition Law Journal* 389.

those rules sympathetically. Secondly, in prosecutorial jurisdictions most cases are settled by plea bargaining and settlement. Equivalent processes would have to be established with appropriate mechanisms available to the CAT to validate consent decrees, in something like the US Tunney Act process, to provide public scrutiny and legal certainty for fines and remedies. Nonetheless, the transparency of enforcement provided by court judgments would be limited, with many cases settled behind closed doors. Moreover, there will be criticism of uncertain time lines and access to justice for poorly resourced defendants. The third argument is more manageable and is simply that the resources available to the CAT would need to be increased substantially.

If an administrative system is maintained, then we come back to the design of the two-stage process. It has been argued that the new authority could reproduce the CC's system of groups and a part-time membership as a second stage within the organisation and extend that system to antitrust cases.[45] But there are a range of possible options which are laid out rather opaquely in the Consultation Paper[46] and which have already been rehearsed by Allan.[47] It appears imperative that there should be a two-stage process and that the second stage decision makers should be sufficiently authoritative and independent to provide clear evidence of impartiality, due process and natural justice. The logic of the argument in this article is that the second stage decision makers should be the Commissioners, who should undertake, supervise or ratify decisions of infringement or non-infringement, mergers and market remedies, with the integrity and authority at their disposal as public figures with responsibility for enforcement.

Commissioners taking decisions at a second stage would be insulated from the triage and investigatory process at the first stage, at least in respect of those cases which they are likely to hear. The French expedient of ministerial appointment of the head of the investigatory division is an interesting way of ensuring first stage independence and avoiding "confirmation bias" between the two stages. Commissioners might sit with groups of expert part-time members, especially for market inquiries, where there is no presumption of individual wrongdoing and a higher risk of organisational bias. This would perpetuate the strengths of the CC model and would avoid the risk of marginalising the second-stage decision makers. The Consultation Paper envisages "panels made up of independent members",[48] but there is an unacceptable risk that they would be marginalised within the new agency since they would be at

[45] European Policy Forum, "Streamlining the UK's Competition Authorities" (London, October 2010); L Carstensen, keynote speech to the Association of Corporate Counsel Europe Seminar, 9 March 2011.

[46] BIS, *supra* n 2, Fig 10.1.

[47] Allan, *supra* n 44, 397–99.

[48] BIS, *supra* n 2, 101.

least three stages down the hierarchy of authority (below the Supervisory and Executive Boards).

Commissioners who take direct responsibility for decisions, and therefore for delivering the core mission of the competition authority, would provide, it is argued, a far more robust and effective model. They and their full-time Chairman would articulate the mission of the CMA and act as a committed advocate for competition, especially since the new agency will not be distracted by the need to manage a range of consumer protection functions. We know this decision-making model works. It is the independent regulatory commission model that has worked for 100 years at the FTC; the chairman and ordinary members model that has worked for 65 years at the CC and for 12 years at the CAT. Less robust models might involve separate divisions within the CMA; use senior officials as decision makers; draw on NEDs to chair panels; or merely use panels of part-time members to make decisions. However, none of these weaker alternatives would deliver the authority and independence that would persuade complainants, companies, lawyers, the CAT and the ECHR that complex competition cases were being evaluated with the fairness that must be the key to successful reform.

The question of appeal to the CAT provides a temptation to limit the grounds of appeal which should be resisted. The appeal on antitrust decisions is an appeal on the merits, whilst the appeals against mergers and market inquiries are judicial review (JR) appeals. If a more rigorous second-stage procedure were established for antitrust decisions in the new authority, the Consultation Paper proposes a reduced appeal on grounds of JR only. This would be a false simplification. In practice, the distinction between a full merits appeal and a JR appeal is quite blurred and depends on the complexities of the case. The key factor is that a full appeal allows the CAT to substitute its own decisions for those of the OFT, thus expediting the process, whilst a JR appeal can only refer the case back to the original decision maker, setting up a prolonged ping-pong process of successive and time-consuming re-examinations.

4. Relationships with Other Stakeholders

Regulatory agencies succeed or fail on the basis of their relations with clients and other agencies within the regulatory community. They may be operationally independent, but effective enforcement depends on good working relations, trust and a framework of cooperation. In terms of agency design, it is therefore useful to review how the relations between a new CMA and other regulatory participants can be facilitated. This section examines three central sets of relationships—between the CMA and the utility regulators, business and Europe.

Initially, there is the sharing of competition enforcement powers with five of the utility regulators under the concurrency arrangements. Ofgem, Ofwat, Ofcom, the ORR and the Civil Aviation Authority all have actual or proposed

powers to regulate their sectors using competition policy or by regulatory rule making. Ofgem and Ofwat have barely used their competition powers, and this has caused increasing dissatisfaction ever since the DTI's 2006 concurrency review.[49] The recent NAO report stressed the lack of market investigation references,[50] and there has been discussion about requiring the regulators to prioritise their competition powers, to make mandatory references or, at the extreme, for the powers to be transferred to the new authority.

In this area, the government should move with caution. It was originally expected that the regulatory instruments would fall into disuse as competition became the main regulator of the utility natural monopolies, a Littlechild heavenly vision famously captured in the phrase that regulators should "hold the fort" until competition arrives.[51] In fact, regulation has continued to be necessary, and the essential question is surely about whether the utilities are being regulated effectively, not whether one particular instrument is being employed. Assessing effective regulation is difficult since the regulated markets are both economically and politically complex. The energy, water and transport industries are key elements of national and social infrastructure. It is doubtful that they should be regulated mainly by reference to price levels paid by consumers in retail markets. In energy, for instance, there are major policy concerns to do with energy conservation, security, infrastructure, fuel type, fuel poverty and, above all, climate change. In water, the natural monopoly elements are so dominant that it appears genuinely doctrinaire to insist on measures to create competition.

If, therefore, there is no compelling reason to privilege competition in the regulation of the utilities, it may be better to create incremental improvements in the existing concurrency arrangements rather than seeking to give the CMA competition powers to be exercised independently of the regulators. In this area, options along the lines of building up cross-sectoral expertise, perhaps through a centralised multi-utility investigatory capacity, or even allowing the CMA to take the initiative on investigations, would seem to be a more constructive way forward. An incremental approach along these lines is flagged in the Consultation Paper[52] and appears sensible. That does, however, leave the question of the appeals that the CC currently handles, and it is proposed that they should go to the CMA, which can deploy expert resources to make a determination appealable to the CAT. This will require careful design of processes within the CMA to ensure that appeals are handled independently from

[49] DTI, "Concurrent Competition Powers in Sectoral Regulation" (London, 2006).
[50] NAO, *supra* n 11, 27.
[51] SC Littlechild, "Regulation of British Telecommunication's Profitability: Report to the Secretary of State" (London, DTI, 1983), 7.
[52] BIS, *supra* n 2, 79.

concurrency discussions and underlines again the need to create good working relations.

A second key set of relationships is with business and business representatives such as the Confederation of British Industry (CBI) and trade associations. Companies are the main targets of competition enforcement, but it is worth considering for a moment how a competition agency should engage with this diverse community of exploiters and the exploited, of culprits and complainants. The approach to competition regulation, as with much economic regulation, is built upon education, persuasion, and emphasis on self-interest and deterrence. The philosophy of regulation is more negotiated than adversarial, and there is much to be said for encouraging voluntary compliance and a calibrated use of enforcement tools. The infringements decisions and fines which attract so much attention are at the extreme end of a scale of enforcement. Regulation that depends predominately on intervention has failed, and the key is to secure compliance through peer pressure, reputational anxiety, assessment of risk, and trust in the fairness and legitimacy of the competition agencies.[53]

This commonsense approach to reasonable regulation is one reason why the Minister and his Bill Team will listen carefully to the responses to consultation from corporations and the CBI. There is an opportunity here to make incremental changes to improve the operation of aspects of enforcement. For instance, a major improvement would be the introduction of mandatory merger notifications above a suitable threshold. Completed mergers referred to the CC have consumed an inordinate amount of time and trouble for the agencies and also for the parties. Mandatory notification will be unpopular for business, but it is basically in the interest of firms. The complaint will be of excessive regulatory burdens, but this criticism could be compensated for by a reduction in burdens that promises also to enhance the effectiveness of CMA enforcement, namely the abolition of the criminal cartel offence.

The cartel offence was inserted into the Enterprise Act in a rather dramatic gesture by Gordon Brown's Treasury. The Enterprise Act was heavily influenced by US experience and the criminal cartel offence was seen as rounding out the portfolio of powers available to the OFT to make it "world class". The experience of employing the criminal cartel offence has not been a happy one and the Consultation Paper devotes a chapter to possible ways of making it more effective. Far better to abandon it altogether. As has been argued elsewhere,[54] the cartel offence would be useful if it could be incorporated into a pyramid of enforcement and used as a threat of last resort. However, the practicalities of pursuing a criminal cartel investigation do not allow it to be used flexibly;

[53] S Wilks, "Cartel Criminalisation as Juridification: Political and Regulatory Dangers" in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Oxford, Hart Publishing, 2011, 341.

[54] *Ibid.*

indeed, it inhibits investigation. The criminal offence demands more rigorous standards of criminal evidence, which have to be set in place at the beginning of an investigation. As a recent comprehensive study observes, arguments that detract from the attractions of criminal enforcement "arise from the character and constraints of the criminal justice system that are unfamiliar if not inimical to the approach taken traditionally to competition regulation".[55] The threat of criminal sanctions reduces cooperation and instead creates determined opposition from the parties involved. Furthermore it makes huge demands on resources. The OFT's published review of "Project Condor", the unsuccessful prosecution of four airline executives, abandoned in May 2010, makes interesting reading.[56] It reveals the great complexity, resource requirements and time delays surrounding this case, and the demands made on senior staff in this and even more so in future cases.

The criminal cartel offence is intensely unpopular within the business community, and rightly so. It creates economic crimes with extremely onerous penalties. These are crimes that are defined by reference to abstract economic theories of efficiency and welfare,[57] and are not ethical crimes of absolute dishonesty. Recognising this feature, the Consultation Paper proposes to facilitate prosecutions by removing dishonesty from the test. In fact, the 10 pages devoted to discussion of the options for making cartel prosecution easier[58] simply serve to underline the legal and economic ambiguities which, when combined with the low level of public and business support for criminalisation, and the necessity to define the offence as outside "national competition law" (to avoid invalidation if DG Comp investigate the case), further reinforce the argument for abolition. While cartels should be punished, criminal sanctions are widely regarded as excessive.[59] Why does this matter? The criminal cartel offence causes business to view the OFT with greater suspicion, produces defensive behaviour, reduces cooperation, and paints the OFT as unreasonable and unfair. In addition, the failures to prosecute successfully (the only success being the *Marine Hoses* case in 2008, in which three UK executives were imprisoned[60]—and that resulted from a US plea bargain) calls the OFT's competence into question. In addition to all these drawbacks, it should be remembered that there is no criminal offence in the European competition rules or in the great majority of other European systems. The criminal threat inhibits exchange of information across Europe and inhibits cross-national collaboration. It is an

[55] Beaton-Wells and Ezrachi, *ibid*, 21.
[56] See OFT, "Project Condor Board Review", December 2010, available at www.oft.gov.uk/shared_oft/board/2010/Project_Condor_Board_Review.pdf.
[57] Wilks, *supra* n 53.
[58] BIS, *supra* n 2, 61–71.
[59] A Stephan, "'The Battle for Hearts and Minds': The Role of the Media in Treating Cartels as Criminal" in Beaton-Wells and Ezrachi, *supra* n 53, 393.
[60] *R v Whittle, Allison and Brammar* (2008) EWCA Crim 2560.

interesting experiment, but one that has failed and can safely be abandoned. Moreover, it provides the government with the carrot of reducing the regulatory burden to match the stick of mandatory merger notifications.

The third set of important relationships is with DG Comp and the array of competition agencies across the EU. The UK is, of course, regulated by European competition law, and the administrative actions of the European Commission. As far as large companies and market sectors are concerned, the key role of the new CMA is to enforce the decentralised antitrust powers of the European treaties, including the aggressive enforcement of anti-cartel measures, and to negotiate over merger jurisdiction. This aspect of the CMA's effectiveness surely needs to be recognised in its mission and given due attention in the design of the new agency. At times, the debate over reform is alarmingly parochial. The very useful NAO paper on the agencies is entitled "Review of the UK's Competition Landscape"[61] and barely mentions collaborative enforcement with other European agencies. In this regard, the CAT is perhaps the most European of the competition bodies, with its utilisation of European jurisprudence, whilst the CC is oddly one of the least European, with little reference to European practice and without membership of the ECN.

The OFT is already influential internationally and within Europe. It is one of the largest and most well regarded of the European enforcement agencies, and could become even more influential. There is potential to "upload" UK priorities and practices into the European regime and every reason to do so. DG Comp has always been sympathetic to the free market regulatory approach associated with British governments and it is a powerful vehicle for projecting British competition culture across Europe. Its role, for instance, in holding the line on state aid during the financial crisis and restraining some of the more adventurous plans for corporate rescues was brave and quite extraordinarily successful. There are a number of areas of agency work where European cooperation is mission critical. Consider, for example, the open nature of the British economy and the fact that many companies operating in the UK have a pan-European presence. Companies like Santander, Shell and Nestle, and the big energy conglomerates like Eon and EDF, are key players in British markets but have bases and activities elsewhere in Europe, where they may enjoy anti-competitive advantages as virtual national champions or as local monopolists. The extra-UK dimensions of restraints on competition can only be addressed by effective collaboration with DG Comp and national regulators. Collaboration has developed very effectively through the ECN, although it is an open question as to whether the membership of the regulators in the ECN should be continued or whether the CMA should assume this role as part of its competition partnership with the regulators.

[61] NAO, *supra* n 11.

We can expect continuing rounds of reform in European enforcement. There have been suggestions that standard institutional arrangements should be introduced for all agencies across Europe, and there is intense dissatisfaction with the uneven levels of enforcement and the diverse and unsatisfactory nature of many national competition appeal systems.[62] In this respect, the CAT appears exemplary as the only specialised competition court in Europe with full merits appeal powers in antitrust cases. UK governments have encouraged private actions as a means of supplementing public enforcement. If that is still a preferred mode of enforcement, then should the reforms seek to enhance the possibility of the CAT becoming the leading hub for competition litigation? This will presumably feature as an element in the private actions consultation promised by Vince Cable.[63] The discussion of the role of the CMA in a European context does not lead to a concrete suggestion for agency design but it does return the discussion to the question of a strong, proactive, confident leadership which can engage and also lead at the European level.

E. Conclusion

A government that abolishes two of the best competition authorities in the world is playing for high stakes. And if it does so simply to save a few million pounds, it is engaging in organisational vandalism and taking the crime of false economy to new heights. Abolition and merger can only be justified if a significantly more effective agency can be created that builds on the wonderfully rich legacy. The OFT can draw on nearly 40 years of experience whilst the CC is the longest standing agency in Europe. These are legacies which command credibility, respect and legitimacy, and are not lightly to be squandered. We can therefore conclude this plea for creative agency reform with three final points.

Despite the fact that scores of new competition agencies have been created over the past 20 years, there is a very limited body of research that defines the features of successful enforcement agencies.[64] This is in contrast to the vast literatures on the enforcement of competition law and the content of competition economics. Yet agency design taken in the widest sense, to include leadership, morale and the culture of enforcement, is equally as important as rigorous legal tests and perceptive economic analysis. In the great reforms that brought a reinvention of UK competition policy through the 1998 and 2002 Acts, the legal principles and the economic tests were transformed, but not the agencies. The OFT and the CC were incrementally adapted, thus providing a stream of continuity that was probably productive at the time. Now is the

[62] See Mateus, *supra* n 29.
[63] BIS, *supra* n 2, 4.
[64] See Wilks, *supra* n 32.

opportunity to extend the reinvention of UK competition policy to the design of the agencies, to their structure, processes, leadership and relationships, and to their independence. The consultation process has a number of fundamental choices to consider, and it is necessary to transcend the models offered by both the OFT and the CC.

It was argued above that the consistent and enduring virtue of the CC has been its scrupulous fairness and irreproachable integrity, reinforced in recent years by exceptional transparency and access. These are the qualities that must above all be recreated in the new CMA and they centre on the nature of a separation of powers within the new body. There is, at the moment, relatively common ground on the retention of a two-stage model as part of an administrative process on merger and market investigation decisions, and a willingness to debate the creation of such a model for antitrust. This is absolutely the right question for debate during consultation and in the passage of the eventual legislation. If we can get this right, then the government's gamble will have paid off.

In contrast, the question of leadership has barely been addressed in early discussions and there is a risk that it will be pre-empted in an expectation that the OFT's Board model will be perpetuated. As noted above, the British civil service has adopted as a default option for the leadership of public sector bodies this imitation of private sector boards. As also argued above, this is based on a false analogy. It confuses responsibility, inhibits decisive leadership and creates misleading expectations of accountability. It is therefore argued that consultation should seek more creative approaches to leadership of the CMA, and should look abroad for leadership options and analyse with care the alternative model of a number of competition commissioners who, as public figures, could make the case for effective competition with the same standing and vigour with which the Governor of the Bank of England can make the case for economic stability.

Property Ombudsman

From: Christopher Hamer [mailto:christopher.hamer@tpos.co.uk]
Sent: 03 June 2011 13:40
To: Competition and Markets Authority
Subject: RE:BIS Consultation - Competition Regime

The following response to the consultation paper issued by BIS and entitled "A Competition Regime for Growth: A Consultation on Options for Reform" is from myself as The Property Ombudsman and includes the views of the independent Council of The Property Ombudsman scheme (TPOs) to which I am accountable.

TPOs provides a facility for the independent and impartial resolution of disputes between buyers, sellers, landlords, tenants, leaseholders or lessees and agents which are registered with the scheme. It has the status of an Approved Redress scheme under the Consumers, Estate Agents and Redress Act 2007. The scheme has established Codes of Practice, setting the standards for Residential Sales Agents and Letting agents.

As the subject matter of this consultation paper is the potential reform of the UK's competition regime and as such is concerned with high level business policy matters there is little by way of specific response this scheme can provide. The mandate of the TPOs means that we are unable to respond to the specific questions in the document. However as a general comment we would support the greater openness in the sharing of information (recognizing that there may data protection or security implications) and would view the alignment of particular government responsibilities into the single body of a Competition and Markets Authority as a positive step.

We note however that this Competition Consultation was due to be aligned with a further consultation about institutional changes for the provision of consumer information, advice , education, advocacy and enforcement (the 'landscape review'). Whilst there is, at the time of writing, no indication as to the publication of that document we believe that there will be synergies between the two consultations and certainly the 'landscape review' will hold more relevance to TPOs where we will have a close interest in how the current responsibilities of the OFT in relation to licensing/ fitness to practice of estate agents and the Consumer Codes Approval Scheme, will be allocated in any new structure. The current consultation does not refer to those aspects and it is important therefore that these consumer protection measures are addressed in the forthcoming consultation and the timescale for consideration of responses to both should be aligned.

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A Competition Regime for Growth

A Criminal Lawyer's reaction to the BIS Consultation

1 Introduction

1.1 The Enterprise Act 2002 ("EA 2002"), with its revolutionary introduction of a criminal cartel offence under s188, came into force in 2003. In the intervening eight years, three significant events have occurred: on 12 March 2008, the House of Lords provided a comprehensive over-view of the history of price fixing and the English law in **Norris v Government of the United States of America [2008] 1 AC 920.** Later the same year, the Office of Fair Trading ("OFT") conducted the first criminal cartel prosecution in the uncontested case of **R v Whittle [2008] EWCA Crim 2560;** and in August 2008, the OFT embarked on its prosecution in the BA Case, **Regina v Martin George and Others**. This began life as the first contested cartel case in front of a jury in April 2010 and shuddered to a halt on 10 May 2010 when the OFT offered no further evidence against the four accused.

1.2 As a basis for a considered review of the working of the EA 2002 and a springboard towards adapting or relinquishing 'A World Class Competition Regime' in favour of a 'Regime for Growth', these three events and the evidence gathered from just two attempted prosecutions of the cartel offence seem to me to provide somewhat shaky and inadequate experience.

1.3 In its elegantly succinct composite opinion, the Committee in **Norris** reviewed the authorities on agreements in restraint of trade and summarised their effect: the common law recognised that an agreement in restraint of trade might be unreasonable in the public interest – and thus be void and unenforceable – but in the absence of aggravating features such as fraud, misrepresentation, violence and the like, such agreements were not indictable.

1.4 In such circumstances, the enactment of s188 of the EA 2002 marked a legal revolution. For the first time, statutory criminalisation of cartels threatened individual defendants with a five year maximum sentence on conviction for entering into certain anti-competitive agreements identified in section 188.

1.5 The impetus for such an offence was clearly outlined by the DTI in its consultation exercise and by the emphasis it sought to draw from the paper commissioned from Sir Anthony Hammond and Professor Penrose. The major considerations were said to be:

(a) the need to provide strong deterrents to anti-competitive behaviour;

(b) that only the fear of a custodial sentence might serve as a sufficient deterrent;

(c) that companies should remain subject to existing civil law sanctions and criminal sanctions should be reserved for individuals; and

(d) that the offence should be grounded in the requirement for dishonesty.

1.6 The reasons for the inclusion of the ingredient of dishonesty were carefully stated and were a consequence of the consultation process and as such were in support of a considered policy objective. They were:

(a) the need to send out a strong message that this was to be "a free standing offence based on dishonesty…" (The Director of the Competition Authority, May 2002);

(b) to reinforce and distance the statutory offence from some of the economic considerations which may arise in Article 81 infringements;

(c) to signal to the individuals through whom activity corporate actions is directed that individual liberty was at stake; and

(d) to demarcate clearly between competition law and the criminal law.

1.7 The **Marine Hoses** case provides precisely no relevant contribution to the debate. The case arose from a sting operation by the Department of Justice in the US and a consequent plea bargain entered into by UK citizens detained in custody in the US and facing a US indictment which charged them with an intent based offence: action taken with knowledge of the probable consequences and having a requisite anti-competitive effect. There is no ingredient of dishonesty.

1.8 The plea bargain achieved on their behalf required a contractual undertaking to plead guilty to whatever indictment the OFT might subsequently prefer against them and an agreement not to seek from the Court in England a sentence of imprisonment that amounted to a reduction from the sentence imposed in the US.

1.9 This degree of orchestration by the United States' prosecutors received less than approval from the Court of Appeal: see the judgment of Hallett LJ at paragraph 28 of **R v Whittle and others.**

1.10 The **BA case** similarly provides little information about the efficacy of the deterrence of a dishonesty offence or the suggested problems of dishonesty as an ingredient. The case collapsed almost as it began before a jury. Although the dishonesty issue was considered by the Court of Appeal in the form of a judgment in an interlocutory appeal on 28 May 2010: **Regina v George and Others [2010] EWCA Crim 1148**, this was on the discrete point of unilateral dishonesty.

1.11 The judgment of the Court given by Maurice Kay LJ adopted the test of dishonesty in the statutory offence which had been articulated by the trial judge Owen J, namely that :

"...the language of the section is simple and straightforward. It provides that the offence is committed by an individual who, acting dishonestly, agrees with one or more others to make or implement one of the proscribed arrangements. The adverb 'dishonestly' may qualify the verb 'agrees' but the subject of the verb is 'an individual'.

We agree with this analysis. Indeed we regard it as self-evident ."

1.12 The Court of Appeal held that there was no burden on the prosecution to prove a mutuality of dishonesty between the parties agreeing to a proscribed price fixing arrangement.

1.13 Against this background, it is with some scepticism that I approach the rationale provided in the Consultation Paper for now re-examining the nature of the cartel offence and its efficacy as a penal measure.

1.14 The collapse of the **BA Case** had nothing at all to do with difficulties put in the way of effective prosecution by reason of the dishonesty ingredient in s188 and everything to do with failures of management of the prosecution process by the OFT in their preparation for and delivery of their obligations as a prosecuting authority.

1.15 If no case has yet tested this criminal offence, which was enacted after much deliberation, consultation and declaration of stated objectives, what basis is there for asserting, as the Consultation Paper roundly implies, that the removal of the dishonesty test or its replacement by some other test, is appropriate, necessary or that it may offer an improved 'Regime for Growth'?

2 What are the criticisms which the Consultation Paper identifies?

2.1 (a) *"there have only been two cases prosecuted since 2003 and this weakens the offence's deterrent effect……one of the reasons ...suggested ....is that the definition of the offence, and particularly the need to prove dishonesty……may artificially limit the scope of cases….and make those cases disproportionately difficult to prove."* Paragraph 6.6

2.2 The Consultation Paper does not identify who has suggested this and on what evidence. Nor does it explain how the prosecuting authority is 'artificially limited'. What does this mean? In a sweeping but wholly unparticularised assertion, in paragraph 6.11, BIS states:

"The evidence suggests that having a dishonesty element in the offence may no longer be the best way to meet the three aims of the criminal offence."

2.3 In support, BIS cites a survey conducted in 2007. What weight should criminal policy makers afford to a limited Norwich Law School survey that indicates that 'only' 6 out of 10 members of 'the public in Britain' believe that price fixing is dishonest? And since on the basis of this, the majority of the surveyed public does consider price fixing dishonest, why should not the offence be so defined?

2.4 (b) Criticism of the ***Ghosh*** test

The Ghosh test has survived as the test for dishonesty in every offence in which such an ingredient is required to be proved since it was established by the House of Lords in 1982. Whilst not universally popular, it is not regarded as an obstacle in proving theft, robbery, fraud and myriad other offences, nor are such offences, because of the test, falling by the wayside in cases tried over the past thirty years. The Consultation Paper however has found that 'criticism of the Ghosh test has persisted and *intensified'* (my emphasis) but I confess, despite Professor Ormerod and a 1999 Law Commission Paper, it is a controversy that is hardly the talk of café society.

2.5 (c) BIS asserts that proving dishonesty in cases which may not involve an individual who is motivated by personal gain may be particularly difficult. Paragraph 6.15.

However, the Consultation then disarmingly admits : *"this is yet to be properly tested."*
An analysis of the arguments presented in the consultation paper for the removal of the element of dishonesty reveals a total lack of evidence in support of the proposition that to do so would remove 'the problems associated with the dishonesty element.' It merely begs the question: what problems?

3 Why retain 'dishonesty'?

3.1 The Consultation Paper touches upon one reason at paragraph 6.31 and at foot-note (98). Is the cartel offence a species of criminal or competition law? If it is competition law, then a parallel EC investigation could render a prosecution impossible and the Court of Appeal in the **BA Case**, in its ruling on a preliminary question, stated that the dishonesty element was not unimportant in differentiating the offence from civil prohibitions.

3.2 If the cartel offence is a criminal offence which is to carry a deterrent maximum – five years' imprisonment – then the factors or ingredients which are present in the offence should consist of those elements which society recognises as calling for the criminal prosecution and punishment of the individual's wrongful conduct as opposed to civil regulation or sanction.

3.3 The Consultation Paper does, after all, list them: hard-core cartels damage society; competitor businesses agree to co-ordinate activity to drive up prices; consumers suffer damage; the efficient running of the economy is compromised.

3.4 Executives who engage in such activities should recognise that if the circumstances and facts surrounding their conduct are judged by the tribunal, judge or jury, to have been 'Ghosh dishonest', they can expect to receive significant sentences of imprisonment.

3.5 Given that 6 out of 10 responses to a theoretical survey found the mere concept of a price fixing cartel to be dishonest (without any evidence of the conspiratorial hall-marks of cartel activity to colour their opinion), what competent, experienced and properly resourced prosecuting authority should be deterred from taking up the challenge of proving dishonesty?

4 What is the alternative?

4.1 BIS favours the removal of the dishonesty ingredient and a definition of the offence that excludes agreements made openly or overtly. This is to avoid difficulties of proving 'active secrecy' as against 'passive secrecy.' In the field of price fixing cartels, to ask whether an agreement is secret or overt seems the equivalent of asking whether the Pope is a Catholic. If the aim is to remove a recognisable and familiar mental ingredient, namely dishonesty, with which the public and juries are very comfortable and to which the concept of punishment is easily applicable, and replace it with concepts of active or passive secrecy or overt action, this seems contrived in the extreme.

5 Why not adopt the US 'intent based approach'?

5.1 The Supreme Court test in **United States Gypsum Co 438 US 422** states that action undertaken with knowledge of its probable consequences and having requisite anticompetitive effects *can be a sufficient predicate* for a finding of guilt. The answer may be complex.

5.2 A good place to start is to look at the careful preparation made by the Government, before s188 was enacted, to consider the reasons for and the consequences of the inclusion of the dishonesty ingredient. The Report prepared for the OFT by Sir Anthony Hammond and Roy Penrose set out the considerations that argued for dishonesty:

> *"It signals that the offence is serious….it would go a long way to preclude a defence argument that the activity….is not reprehensible….might have economic benefits….might have attracted exemption. The possible disadvantage is that….an approach of 'dishonesty' may be difficult for juries to understand. However, given the context in which hard core cartels take place….the facts will demonstrate that the parties realised what they were doing was dishonest…."* Report paragraph 2.5

5.3 Hammond and Penrose also gave careful consideration as to who might be the appropriate body to conduct any cartel prosecution. They began by adopting the criteria set out in the (Phillips) Royal Commission on Criminal Procedure 1981 Report, namely that prosecutions should be fair, open, accountable and

5.4 The arguments are that expertise in criminal prosecution would have to be created; that recruitment for a small team where the cases will, by their nature, be complex becomes more difficult; that small prosecution teams are in danger of becoming isolated from general developments in criminal law and practice; AND, *'the most potent risk…that there may be a temptation for such lawyers to become too close to the policy demands of the organisation which they serve and to develop a solicitor /client relationship rather than a relationship of a prosecuting lawyer executing an independent judgement…objectives will be ill-served if cases collapse as a result of abuse of process arguments and the prosecution system.…falls into disrepute…..'*

"The arguments developed in this paragraph…were strongly supported by those whom we consulted who have responsibility for the enforcement of criminal law." Hammond Penrose Report : paragraphs 3.5 - 3.9

5.5 For these reasons, the Hammond Penrose Report recommended the option of vesting the responsibility for criminal prosecutions of the cartel offence in the Serious Fraud Office.

6 How did the Government and the OFT react ?

6.1 The recommendations of the Hammond Penrose Report were accepted. In October 2002 in the House of Lords, Lord McIntosh on behalf of the Government said: *"... the expectation of the Government, the SFO and the OFT is that the SFO will carry out all prosecutions initially…..the SFO has the necessary resources and experience for the criminal prosecution of this type of case…."* Hansard: 28 October 2002 Column 69.

6.2 In October 2003, the OFT published its Memorandum of Understanding between the Office of Fair Trading and the Director of the Serious Fraud Office (OFT 547). Paragraph 4 states: *"If, after any necessary initial enquiries (and informal discussions with the SFO), the OFT identifies a criminal cartel case as being likely to fall within the SFO acceptance criteria, the case will be referred to the Director of the SFO…..to enable the Director to make an informed decision as to whether or not the matter should be accepted for investigation….."*

6.3 The 'Background Note' at page 4 of OFT 547 reads: *"The key criterion that the SFO takes into account in deciding whether to investigate a suspected offence is that the suspected fraud appears to be so serious and complex that its investigation should be in the hands of those responsible for its prosecution. The SFO regards the criminal cartel offence as potentially falling within this criterion."*

So, perhaps, might any experienced criminal lawyer have a similar regard.

6.4 Again the relevant question must surely be: why has this referral process not taken place in those few prosecutions which have taken place or may now be under active investigation?

6.5 There is a further tension which inhibits or complicates the role of the OFT as criminal prosecutor, namely the conflicting imperatives of the civil enforcement regime and the 'fair trial' obligations of Article 6 of the ECHR when preparing for and prosecuting a criminal offence.

6.6 In responding to the exercise by the EC or the OFT of their role as Competition Authorities, corporate entities may have to strike a balance between the practical and commercial consequences of co-operation and non-co-operation. The civil enforcement process is rooted in the exercise of compulsory powers to secure evidence and information. The commercial organisation has a keen eye upon minimising penalties and other commercial losses that may be consequent upon a protracted investigation and what commercial life may hold after the Statement of Objections is published. In particular it will have regard to potential third party liability.

6.7 If compromise or reduction of penalty become the preferred objectives, a carefully managed programme of responding to the competition authority will be embarked upon.

6.8 An individual employee/director is confronted by a wholly different set of issues. The range of 'involvement' in allegedly anti-competitive activity is very wide. It can range from professional long term hard core cartelists whose personal financial rewards may be directly reflective of the success of the cartel (perhaps Marine Hoses) to middle managers who derive no direct financial reward from implementing what may be little more than concerted practices (perhaps BA) .

6.9 Such an individual faces a protracted investigation, trial by jury and, in the event of conviction, the potential loss of his liberty as well as his livelihood and reputation. The criminal process places the defence in a reactive position. The burden and standard of proof and the effects of Articles 6 and 7 place on the prosecuting authority the requirement: for the case against an accused to meet the tests contained in the Code for Crown Prosecutors; to give full and timely disclosure to the defence of all material that is relevant and which may assist the defence or have the effect of undermining the case for prosecution; to have regard on a continuing basis to their role as independent prosecutor, what Lord Justice Farquharson memorably termed the role of 'a minister of justice.'

6.10 The tension between the civil enforcement process and the rights of an accused person is recognised by the limitations in Article 12 of the Modernisation Regulation which prevent disclosure by the EC of material obtained under

6.11 To underline the public interest in criminalising anti-competitive conduct as a 'dishonesty offence' is appropriate and is suitably discriminating. Neither judges nor criminal practitioners should (nor in my experience do) flinch at the suggested 'problems' such a requirement presents. Juries are not incapable of dealing with allegedly complicated cases. 'Dishonesty', even by reference to the Ghosh test, is not a mystical notion that either juries or business people find difficult to understand. Honest conduct does not impose standards of behaviour that business people should find difficult to conform to or recognise. Nor does service on behalf of the employer evade the individual employee's responsibility. Even where the individual has no direct financial interest in the outcome of the unlawful conduct, juries have little difficulty in comparable cases – for example corruption – in determining that acting unlawfully to further the commercial or financial interests of the employer is capable of amounting to personal criminality.

6.12 Similarly, the question whether or not an agreement has 'an appreciable effect' on competition is not in itself a complex question, although in a given case the evidence might be complex. Price fixing or bid rigging are concepts well able to be understood by the man in the street. The effects on the end consumer of an agreement which deprives the commissioning or purchasing entity of access to competitive supplies is not an obscure concept. Nor will it always make admissible 'complex' economic arguments. However if the facts of a particular case call for it, then such evidence should rightly be admitted.

7 The Consultation Paper Options

Option 1: To remove the dishonesty requirement and rely upon prosecutorial discretion and guidance.

7.1 This is rightly described by the Consultation Paper as carrying 'the risk of making the offence too broad.' It would be likely to bring the offence into conflict with Article 7 of the ECHR and would also strengthen arguments that the revised offence was, in reality, 'national competition law' not criminal law. To enact a criminal offence, punishable by up to five years' imprisonment, which is prosecutable at the whim or in the discretion of the prosecutor is repugnant.

Option 2: To remove the 'dishonesty' element and exclude 'white listed' agreements.

7.2 This option also meets with criticism in the Consultation Paper as introducing the risk of arguments about the scope and interpretation of the excluded agreements and for its proximity to an anti-trust style approach which would be more likely to be characterised as 'national competition law.' It is unlikely to

Option 3: replacing the 'dishonesty' ingredient with a 'secrecy' element.

7.3 This option would require the prosecution to prove a prohibited 'secret agreement' where the persons agreeing 'take measures to prevent the agreement becoming known to customers or public authorities.'

7.4 Mere secrecy is a very unsatisfactory basis for criminalising conduct. This is recognised by the debate which BIS has initiated between the so called concepts of 'active' and 'passive' secrecy. In reality this is striving to arrive at a redefinition of 'dishonesty' in some calorie free way to avoid criminalising potentially benign agreements and assuage natural repugnance at the introduction of serious absolute criminal offences.

7.5 If the offence is to be targeted at specific behaviour then covert actions are offensive because they deceive, they mislead and induce the misled to act to their financial disadvantage – that is they are dishonest. The test in **Welham v DPP** achieves its fiftieth anniversary this year, it works, and dishonest agreements are proved to conviction by its application on a regular basis.

Option 4 : remove 'dishonesty' and exclude agreements made openly.

7.6 The over inclusive scope of the targeted agreements and the breadth of the mental element of such an offence make this option objectionable. It is the preferred option of BIS in the Consultation Paper and underlines the specious nature of Chapter 6 of the consultative process.

7.7 In circumstances in which the dishonesty element in s188 has never been tested in court, in which no jury has returned a verdict upon an indictment and by reason of supposed 'problems and difficulties' which have not yet materialised, BIS has proposed a number of options.

7.8 The first two options are rejected by the consultation paper itself. By this rejection, BIS assumes the cloak of reasonableness and balance in its 'objective' recommendation of either Option 3 or, for preference, Option 4.

7.9 The correct option is to leave s188 unaltered; to give effect to it in appropriately conducted prosecutions and to punish convicted offenders for their dishonesty.

7.10 The factors which led Hammond and Penrose to recommend conduct of such cases by the SFO and which led to the protocol between the OFT and the SFO have been ignored. The consequence has been an absence of effective criminal prosecution and a consultation paper which appears to lack the understanding of the appropriate role of the criminal prosecution process in England and Wales and of the sentencing significance of the changes proposed.

7.11 The original intention in criminalising cartel behaviour included the deterrent effect of imprisonment and a rejection of the alternative spectre of individual suspects balancing commercial considerations against potential financial penalties. If dishonesty as an ingredient is removed and the mental element is reduced to a deliberate knowing secret agreement to bring about an anti-competitive effect, what is the impact on sentence?

7.12 The Courts of England and Wales retain, thankfully, a natural repugnance at their engagement in sentencing to imprisonment 'co-conspirators' of those whose immunity from punishment has been purchased by their testimony against the convicted – see the remarks of Hallett LJ in **Marine Hose** and passing comments of Hughes V-P in the course of argument in **R v G, C, B and B** in the Court of Appeal. What would be the appropriate tariff for such a 'dishonesty free' offence ?

7.13 The suggestion that a convicted person, almost certainly of good character, who had derived no financial advantage and had not been shown to have acted dishonestly would be sent immediately to prison seems improbable. If this is wrong, then no likely sentence would be such as to deter a hard core cartelist from involvement in such commercially expedient conduct. Again, see Hallett LJ in **Whittle**.

8 Conclusion

8.1 In the exercise of its civil enforcement powers, the OFT is investigator, prosecutor, determining tribunal and sentencer. Such a combination and concentration of functions is inimical to the criminal process and contrary to the 'Phillips Principle.'.

8.2 The proposal that structural reform should combine the functions of the OFT with those of the Competition Commission with the right of appeal to CAT would serve only to reinforce that concentration.

8.3 The proposals contained in Chapter 6 of the BIS Consultation Paper are characteristically lacking in appreciation of the role of the criminal prosecutor and should be comprehensively rejected.

Nicholas Purnell QC,

Cloth Fair Chambers

20 May 2011

Rail Freight Group

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13 June 2011

Dear Duncan,

A Competition Regime For Growth

I am writing in response to the BIS consultation ' A Competition Regime for Growth'.

Rail Freight Group is the representative body for rail freight in the UK. We have a membership of around 150 companies active in all sectors of rail freight, including train operators, ports, terminal operators, customers and suppliers. We aim to ensure that railway and Government policy supports our members in growing the volume of goods conveyed by rail, where there are environmental and economic justifications for doing so.

The Office of Rail Regulation (ORR) is a key player in rail freight policy and plays an important role in both setting policy and regulating the key parties, particularly Network Rail. ORR have also used their competition powers – or the prospect of their competition powers to influence a number of cases in the rail freight sector.

Whilst we are not experts in matters of Competition policy, we would consider it appropriate that ORR, who have a specific and detailed knowledge of the rail sector, retain the flexibility to choose how to address particular market failings using the toolbox of techniques which they have available. To that extent we would strongly support the retention of concurrency with the sector regulators. We note that the proposals would in any event change the nature of concurrency, and urge you to ensure that the details of such changes act to support the sector regulators in becoming more effective, and do not add additional bureaucracy to the process.

We have some concerns regarding the proposal to give the CMA a statutory duty to keep sectors under review. The rail sector is already under a great deal of regulatory scrutiny, and we are unclear that additional work is necessary. It is also difficult to determine the 'boundaries' of any market – for example, issues in the rail freight sector can be masked if the market is defined too broadly as 'logistics' or 'railways'. Yet the rail freight market itself is likely to be too small for CMA consideration. The interplay between CMA and the sector regulators therefore needs careful thought.

Finally we are unconvinced by the proposals around decision making and appeals. Whilst we support measures to speed up and streamline, we consider it vital that the decision can be made by the organisation who most closely understands the market – and who have been most closely involved in the investigation. The proposals would appear to create significant potential for duplication.

We would be pleased to discuss any of these points with you in more detail,

Yours sincerely,

Maggie Simpson
Policy Manager

BIS | Department for Business Innovation & Skills

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

Response form

Organisation **Reed Smith LLP**

Address **The Broadgate Tower, 20 Primrose Street, London, EC2A 2RS**

Return completed forms to:

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

	Small to Medium Enterprise
	Representative Organisation
	Trade Union
	Interest Group
	Large Enterprise
	Local Government
	Central Government
✓	Legal
	Academic
	Other (please describe):

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

Consultation Questions

1. Why reform the competition regime?

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

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

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

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

Comments:

Reed Smith welcomes the publication of the consultation document by BIS, which represents the first thorough review of the UK's competition institutions and framework for over ten years - since before the Competition Act 1998. We also welcome the recognition implicit in the consultation document that the general framework of merger review, bans on anti-competitive practices, and the scope for market studies is not proposed to be changed but that there are issues both of substance and procedure that might be improved. It is also right in our view that these matters should in general be the preserve of the specialist competition authorities, rather than politicians.

We consider that the objectives set out above are the right ones for any changes to the UK's competition regime. The critical issue is whether the changes or any of them will assist the British economy by encouraging and facilitating growth. We support the Government's determination to route out anti-competitive behaviour especially cartels in the interests of the economy overall. In our view, introducing a mandatory merger notification system would unduly and unnecessarily delay the completion of harmless mergers; a hybrid system would introduce unnecessary uncertainty and delay. However, in relation to strengthening the anti trust regime, we are attracted to the introduction of a phase 1/phase 2 approach, considering the importance of improved case management, including both investigation and preparation. We

have also considered several issues with the criminal cartel offence which have come to light following the thorough analysis of this offence. Further, we commend the review of the concurrency arrangements with sector regulators, as we consider that they are in need of alternation to create more satisfactory results.

We trust that our responses to the consultation paper are both constructive and practical in order to advance the successful reform of the UK competition regime.

2. The UK Competition regime and the European context

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

Comments:

For businesses, a key consideration is not only the need to have a compliance culture but also (i) to be as confident as they are able that their agreements and commercial policies are enforceable – through courts if necessary, and (ii) to obtain compensation for losses incurred by a breach. The consultation paper mentions briefly only some of the relevant issues in section 5. In our view:

- **The ability to obtain an opinion or short form opinion as to the compatibility of agreements under CH 1/Art 101 from the OFT in relation to novel legal issues is good in principle but is not working well. One factor inhibiting parties from approaching the OFT is that there is no ability to withdraw an application. While clearly the system must not encourage unmeritorious applications, it would in our view be appropriate if the parties had a single opportunity to withdraw an application after the OFT's initial review. This is an important change that we hope would be adopted by the OFT and CMA;**
- **s16 Enterprise Act should be implemented to facilitate the transfer to the CAT of cases before any court involving the determination of any infringement;**
- **stand-alone damages actions should be capable of being brought in the CAT;**
- **s47A CA should be amended so that claims might be lodged as soon as an infringement decision has been made by the EC Commission, OFT or CMA or sectoral regulator with power to suspend further proceedings pending the outcome of the appeal**

process; this would preserve documents and enable witness statements to be made at an early stage;

- **in terms of collective actions for damages, our view is that the key tools exist already especially with group litigation orders, which have been used in at least one competition case. We support 'opt in' collective actions for damages actions.**

3. A stronger markets regime

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

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

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

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

Comments:

Reed Smith recognises that the market regime holds an important role in identifying practices which might distort competition even though not falling within the Ch I or II prohibitions. However, these investigations are time consuming and expensive for those involved. In our experience, the direct and indirect costs to a party of participating in an MIR are significant: leaving aside the diversion and costs of management time, any party is likely to incur external expert costs in excess of £1.5m. It is therefore right that such investigations are relatively few in number. Those that are undertaken should be targeted according to need and then pursued efficiently. To date the outcomes of many market investigations appear to have been public policy focussed rather than competition-based.

We are not convinced of the need for the competition authority to have the power to carry out in-depth investigations into practices across markets. Whilst we agree that in some circumstances, a market investigation in one sector, may uncover concerns in other sectors, we consider that an extension of investigatory powers to enable cross-market investigations would likely prove to be a further hindrance to efficiency. Given that results have so far been disappointing under the scope of the current regime (perhaps due to poor identification of the markets that could benefit from or that require investigation), we consider that extending the scope of investigatory powers in this area would on balance, be likely to lead to even greater inefficiency, cost and disruption to business. In our view, the competition authority should instead focus on ways of improving its initial assessment of which markets are causing consumer harm and which should therefore be investigated.

In our view it is not appropriate for the CMA to provide reports to Government on public interest issues: this would confuse the role of the CMA which is to be an independent competition authority, and undermine the key strength of the UK regime which, as the consultation document points out, is clearly focussed on competition.

In our view, the super-complaints system has not thus far, yielded sufficient results to justify its extension to incorporate SMEs. An alternative approach could be to impose a proactive obligation on the competition authority to consult business organisations in order to try to identify those markets where businesses are already advocating harm.

We would endorse the proposal to introduce a statutory timetable for Phase 1 and consider that a timeframe of 6 months would be appropriate. We agree that a timeframe of 18 months for Phase 2 investigations is appropriate. In our view, the competition authority should have the ability to resolve all competition issues during Phase 1, rather than prematurely advancing to a Phase 2 investigation.

We agree with the proposal to abandon the duty to consult if MIRs are not made which appears to us to be an unnecessary burden upon the competition authority.

We agree with the proposed amendments to Sch 8 on remedies and the proposed extension of information gathering powers at the remedies stage.

In our view we do not consider it would be appropriate enable the CMA to review remedies if they are found to be not working as intended. This risks remedy creep. In our view, the current 'change of circumstances' test should be retained but expanded to include manifest error to cover cases where there is a mistake in an Order arising from a misunderstanding of a relevant market fact.

4. A stronger mergers regime

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

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

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

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

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

Comments:

In general, Reed Smith agrees that the UK's merger regime works well; we have a high regard for the OFT's merger team.

We question whether the issues regarding undoing completed mergers outlined in paragraphs 4.3-4.5 really make a convincing case for a radical change to compulsory notification. BIS recognises that there are few third party complaints regarding completed mergers. BIS also does not specifically identify cases where difficulties were found in dealing with completed mergers resulting in an SLC.

We do not support an automatic stay on integration once the OFT has commenced an investigation. There does not seem to be a justification for applying a more restrictive regime where a merger has not been notified and no finding has been made regarding a referral, than would be the case if the merger had been notified.

Clarity regarding measures which the CMA could take to prevent pre-emptive action would however be welcome.

We do not support the introduction of mandatory notification, as we believe this would place an undue burden on business to notify benign cases. IF BIS nevertheless wished to introduce mandatory notification, thresholds should be higher than those discussed at paragraph 4.27, and mandatory notification (and jurisdiction to review) should not apply to material influence cases unless a new bright line test is also adopted to define material influence.

A hybrid system canvassed in paragraph 4.28 would be likely to be perceived by industry as the worst of all worlds by requiring mandatory notification and also reserving a power to call in cases below applicable thresholds.

We would encourage BIS to consider a revision to the referral test, which does not seem to have been considered. In our view the current test results in too many cases being referred to the CC and is also difficult for business to understand. A higher threshold should be required for referral to Phase II under a new CMA system.

5. A stronger antitrust regime

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

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

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

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

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

Comments:

Reed Smith notes that, as is well documented, the throughput of cases under the Competition Act achieved by the OFT and the sectoral regulators is low in absolute terms and compared with other jurisdictions. While some cases, especially cartel cases, by their nature are time consuming, the OFT's track record in bringing cases to a conclusion has been an issue almost from the very early days of CA enforcement. The OFT has over the years made a number of changes to its processes to improve the robustness of its decision making processes, including the introduction of peer reviews. While these have lead to some improvements, we continue to believe that such a piecemeal approach, wholly under the control of the OFT, has not been sufficient to dispel concerns about the manner and time frame in which the OFT concludes its investigations. The peer review itself is not transparent and the extent to which it is effective as a check is unknown. In our view, a wholly new approach is desirable.

In principle, we are attracted to the prosecutorial approach under which the OFT or CMA would 'prosecute' its case before the CAT. However, we fear that the public opprobrium attached to any dismissals of cases would lead the OFT/CMA to pursue even fewer cases. In our view, the focus needs to be on better case management including investigation and preparation; with the involvement of senior staff accustomed to forensic examination of evidence, and legal and economic analysis. For that reason, we are attracted by the proposal of introducing a phase 1/phase 2 approach as adopted in merger and markets cases, with the phase 2 process involving both investigation and decision making, as proposed in paragraph 5.38. As with the CAT, we consider that involvement of panels of independent members appointed, as now, for their expertise in competition issues, would substantially assist in achieving more thorough inquiries and more robust decision making. We do not support the concept of an internal tribunal: it does not necessarily lead to any improvement in case preparation – for example, if the tribunal were to consider that an element needed further examination, it could only dismiss the case. In the phase 2 model, the panel would act as an objective check on the investigation and would direct any further necessary inquiries, as well as take the decision. This would be more transparent that the current decision making practices of the OFT.

It this model was adopted, our view is that phase 2 should commence at some point before the issue of the Section 14 notice.

We support the introduction of binding time scales in phases 1 and 2 for the investigatory procedure, together with a stop the clock mechanism in appropriate cases.

In this context, we would note that the OFT is too cavalier in its use of s26 notices: they are not always prepared with sufficient vigour and too

frequently expose a lack of understanding of the market concerned; nor is sufficient time given to consultation over the draft.

We note that Government believes that the phase 2 model could be implemented in a way that was consistent with Art 6 ECHR and we have no reason to question that analysis.

We note the proposal to give the OFT or CMA power to fine companies for non-compliance with an investigation (subject to appropriate safeguards and an appeal mechanism) in addition to the power to prosecute. Although the consultation paper identifies a number of difficulties of bringing prosecutions (none of which would have been unknown at the time the legislation was adopted), no evidence has been presented of any need to make the change – in other words, there is no evidence that non-compliance is so widespread to warrant such a change.

6. The criminal cartel offence

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

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

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

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

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

Comments:

We commend the very thorough and objective analysis presented in the consultation document of the issues surrounding the introduction of the cartel offence, some of which had been anticipated.

Largely for the reasons given in the consultation document, we do not support Options 1 or 2. Nor do we consider that introducing an element of 'secrecy' as in Option 3 or 'not openly' would necessarily remove difficulties in prosecution. For example, price signalling through press announcements would neither be secret or not open but might be part of a price fixing agreement or concerted practice: would this be within the scope of the proposed redefined offence? As has been noted, even price fixing is not necessarily unlawful in all cases if the exemption criteria are satisfied. Of the options put forward, our preference would be for the second with a definition of secrecy as in para 6.41, though it is doubtful whether, say, the use of code names would be sufficient as these are routinely adopted for legitimate but confidential commercial projects. We note that the House of Lords in Norris held that secrecy was not sufficient for criminal conspiracy.

There are considerable difficulties in seeking to run a criminal regime alongside an administrative one. While we have no objection to the principle that economic crimes may justify imprisonment, we suggest that the Government considers more fully precedents in other jurisdictions as well as the US, such as Israel and Japan. It may be that a more fundamental reconsideration of the definition of the offence is required.

In the interim, the OFT/CMA might consider using more frequently the power to apply to the court for disqualification orders of directors whose companies have infringed competition law. This is a powerful deterrent.

7. Concurrency and sector regulators

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

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

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

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

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

Comments:

Reed Smith considers that the concurrency arrangements have not worked well. Different approaches have been adopted by the different sectoral regulators both in relation to substance and procedure which are not necessarily just the reflection of the different sectors concerned. While we recognise that sectoral specialist knowledge is highly important in understanding market context, we are concerned that such a high degree of sectoral specialisation can lead to inconsistency in outcomes as well as, possibly, a degree of regulatory capture.

We consider that sectoral market and antitrust cases should also come within the scope of the CMA using the two phase process described above: sectoral staff could be seconded to the CMA as appropriate to provide specialist knowledge in handling antitrust cases at phase 2. This secondment could also apply to market cases. The CMA should also consult sectoral regulators closely in merger cases.

Clearly there would need to be a system to ensure that the CMA was not pursuing a phase 2 competition case covering the same ground as the regulator was investigating using its regulatory powers. In such cases, the competition case should have priority.

We note the proposal to restructure the concurrency working party along the lines of the ECN, giving the CMA a case allocation and oversight role. We would be content to see this remodelled as proposed.

We have always considered that there was an undesirable lack of transparency in relation to the concurrency working party: this should be addressed in any case subject to appropriate safeguards for confidentiality.

We do not consider it worthwhile for the sector regulators to have an obligation to use their competition powers in preference to their sectoral regulatory powers.

An alternative is for sector regulators to have sole ex ante competition law powers in the regulated sectors and the CMA to hold sole ex post competition law powers.

The Government might also consider setting a bright line test for case allocation between sector regulators and the CMA.

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

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

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

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

Comments:

We agree that the CMA would be an appropriate body to take over the CC's current role in relation to appeals from the regulatory references/appeals. To replicate the existing model, the decision making should be vested in the second phase body using the panel system described above.

We welcome the proposal to create a model regulatory process: the existing different systems can only be explained by political issues.

9. Scope, objectives and governance

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

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

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

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

Comments:

We agree that the objectives of the CMA should be enshrined in legislation, albeit in broad terms such as the duty to promote competition. In contrast, the phraseology in the 'chapeau' to para 9.2 is too uncertain and vague. We also agree that the CMA have a duty to keep economically important markets under review.

We support the proposals for the overall institutional design for the CMA set out in paragraphs 9.16-20 subject to our view above that the phase 1 and 2 approach should also be applied to antitrust cases.

It will be important that the CMA continues to carry out MIRs in consumer focussed cases which raise competition issues, given that consumer welfare is at the heart of competition policy. There are likely to be some cases at the margin and the CMA should so liaise closely with those bodies having responsibility for the consumer tasks currently undertaken by the OFT to determine which of them should investigate those which are predominantly raise consumer policy issues.

10. Decision making

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

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

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

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

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

Comments:

Our comments on the proposed decision making models are:

(i) Markets: there is some merit in some of the phase 1 case team being involved in phase 2, though to underline the independence of phase 2 it is important that at least a proportion of staff should not have been involved in phase 1. The current arrangement is that phase 2 starts afresh though taking note of the phase 1 work: it is important that the Government is clear about whether it proposes that this approach will continue or whether phase 2 adopts and builds on the phase 1 work. In our view it is important that the panel continues, as it does now, to be responsible, with the assistance and guidance of staff, for the investigation as well as the adjudication. The current structure works well and should be continued;

(ii) Mergers: The UK mergers regime works well and is highly respected. A key element of this is the close involvement of CC panel members (one of whom being the Chairman or deputy CC chairman other than in exceptional cases) in the investigatory and decision making stages at phase 2. We are wholly opposed to any proposal to adjust or change the structure such that the phase 2 decision might be made by an executive decision maker, which would be untried in the UK system, and which would, as is noted in paragraph 10.37, involve less independence than the current system. As with markets, the current arrangement is that phase 2 starts afresh: it is not clear whether the Government proposes that this should continue. In this structure, and as noted above, we propose that the reference test post should be reconsidered as too many cases are being cleared at phase 2.

(iii) Antitrust: for the reasons given in section [5], we consider that there would be merit in adopting the same 2 phase approach for antitrust cases as well as for mergers and market investigations. Under this structure, the panel, would be responsible for the investigatory and decision making stages of phase 2.

11. Merger fees and cost recovery

Merger Fees

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

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

Recovering the cost of anti trust investigations

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

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

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

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

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

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

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

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

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

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

Recovery of CC costs in telecom price appeals

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

Recovery of CAT costs

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

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

Comments:

In relation to costs:

- **for mergers: the current UK banding system is clear and has come to be accepted. We do not consider it appropriate for the parties to bear the full costs of the merger regime: this would be out of step with jurisdictions around the world. The current rates, though much higher than in some jurisdictions such as Germany, strike an appropriate balance.**
- **markets: it is not appropriate for the parties investigated to bear the full costs of the markets regime. In these cases, the parties are not investigated for an infringement of any prohibition. Moreover, the work of the OFT/CMA would be outside the control of the party paying (even in litigation the losing party is free to apply to have the costs of the winning party taxed).**
- **antitrust: in our view it is not appropriate to recover costs even from a party found to have infringed one of the prohibitions. This**

would be unprecedented; there would be also a sense of unfairness as the OFT has a discretion as to which case(s) to pursue. The recovery of costs should not be confused with fines which have different motives of punishment and deterrence.

- **CAT: the approach should be the same as in the case of the High Court.**

12. Overseas information gateways

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

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

Comments:

We note the arguments for extending the gateways in relation to information obtained during a merger investigation to overseas authorities investigating the same merger. We do not see any case for extension in relation to markets as few other jurisdictions have similar regimes.

13. Questions on the impact assessment

Mergers

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

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

Anti-trust

In this section we outline the costs and benefits of the options for achieving a greater throughput of antitrust cases including enhancing the OFT's existing procedures, developing a new administrative approach and developing a

prosecutorial approach. In addition we review the costs and benefits of retaining the 'dishonesty' element in the criminal cartel offence but exclude the possibility for defendants to introduce economic evidence produced after the events that constitute the alleged dishonest 'agreement'.

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

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

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

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

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

Comments:

We note the estimates of costs for mergers, markets and some Ch I/II inquiries, and do not wish to add to them.

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URN 11/657RF

Retail Motor Industry Federation

RMI

9 June 2011

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

Dear Sir

Re: Consultation – A Competition Regime for Growth: A Consultation on options for reform

The RMI represents the interests of retail businesses within the automotive industry, one of the largest industrial sectors in the UK, employing 570,000 individuals in 70,000 businesses. The Retail Motor Industry sector alone has a turnover of £14billion. The RMI has 8,000 members representing the interest of New and Used Vehicle Dealers, Vehicle Repairers, Motorcycle Retailers, Petrol Forecourts and Vehicle Auction Houses.

The RMI welcomes the opportunity to respond to the Governments consultation – A Competition Regime for Growth: A Consultation on options for reform.

Overview

A strong and effective competition regime is important to ensure that markets work in a competitive and beneficial way for consumers and business alike.

We understand that there are benefits of merging the OFT's competition functions with the Competition Commission. This move would ensure that there is one body responsible for competition in the UK which should ensure that the regime is streamlined, focused and has a good overview of how markets function. A concentration of competition authorities in one place should lead to better and more focused use of resources at a time when budgets are under pressure.

That said the new CMA needs to ensure that it does not lose functionality and that it continues the good work that the current authorities have undertaken. We are concerned that many disputes that have previously been investigated by the OFT would not be in future, as they would be considered commercial rather than competition disputes. We are particularly concerned with this in an industry where trade partners are of unequal size and where vehicle manufacturers hold a dominant position. There is a risk that manufacturers will perceive the new authority to have no interest in their commercial relationships with trade partners and use this to control the market and stifle competition, in turn reducing consumer choice and increase prices.

Some years ago we had the 'Rip off Britain' Campaign when new car prices in the UK were some of the highest in Europe. A situation brought about by the dominance of car

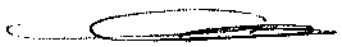
manufacturers and their ability to control the market and prices. This led to an enquiry in to the new car market by the Competition Commission which resulted in legislation to address the issue. We are not convinced that in future the new Competition Authority will have the means or the ability to act in a similar fashion. This is particularly concerning with the European Commission removing the vehicle specific Block Exemption for new vehicle sales in May 2013. This change is likely to result in manufacturers being more prescriptive in their relationship with dealers increasing dealer standards, as well as making restrictions on multi-branding, which in turn will raise investment costs for dealers. The likely result of this is to force prices up for consumers as dealers attempt to recover their investment. A situation that would only be compounded if manufacturers believed it was unlikely they would be challenged either by a weaker business partner or more pertinently the authorities.

Super-complaint

The option in the consultation to extend super-complaint powers to SME bodies would be a positive move. It would allow trade association such as ourselves to take action on behalf of our members in cases where their position has been prejudiced by potential anti-competitive conduct of a more dominant and powerful trading partner. It would also allow action on behalf of consumers where our members' market position has negatively impacted on them. In the new car retail sector this could be cases where manufacturers impose onerous requirements on dealers which in turn impact the price of vehicles as stated above.

If you require any further information please do not hesitate to contact me.

Yours faithfully



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Head of Business Development

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Royal Ins of British Architects

Royal Ins of British Architects

BIS | Department for Business Innovation & Skills

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

Response form

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

	Small to Medium Enterprise
✓	Representative Organisation
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	Interest Group
	Large Enterprise
	Local Government
	Central Government

	Legal
	Academic
	Other (please describe):

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

Response submitted on behalf of the RIBA following consultation with senior colleagues and members of the RIBA Practice Committee

Consultation Questions

1. Why reform the competition regime?

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

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

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

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

Comments:

We support the combination of the OFT and the CC to form the proposed CMA. It seems that such a simplification would reduce the number of incidences where the OFT (not currently having the responsibilities of the CC) appears to seek to intimidate the construction industry by imposing fines which are later quashed or greatly reduced after high court challenges.

2. The UK Competition regime and the European context

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

Comments:

3. A stronger markets regime

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

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

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

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

Comments:

We support the simplification of competition processes and the lowering of hurdles, particular in the public sector procurement of buildings. Standarised and simplified requirements and pre-qualification criteria should reduce waste, inconsistency and the exclusion of smaller firms. SMEs should be able to compete with larger businesses. Accredited systems, such as RIBA Chartered Practice and chartered membership should be recognised.

4. A stronger mergers regime

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

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

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

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

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

Comments:

5. A stronger antitrust regime

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

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

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

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

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

Comments:

6. The criminal cartel offence

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

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

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

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

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

Comments:

7. Concurrency and sector regulators

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

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

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

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

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

Comments:

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

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

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

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

Comments:

9. Scope, objectives and governance

This chapter sets out that the CMA should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA and proposes that the CMA will: have clear, and potentially

statutory, objectives to underpin prioritisation; be accountable to Parliament; and, have an appropriate governance structure for a single decision making body. We ask:

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

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

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

Comments:

10. Decision making

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

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

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

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

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

Comments:

11. Merger fees and cost recovery

Merger Fees

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

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

Recovering the cost of anti trust investigations

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

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

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

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

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

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Comments:

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URN 11/657RF

Scottish Power

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Duncan Lawson
Consumer and Competition Policy
Department of Business, Innovation and Skills
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SW1H 0ET

16 June 2011

Dear Mr Lawson

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

Thank you for the opportunity to respond to BIS's consultation on reforming the competition regime.

We agree that the UK competition regime is one of the best in the world, and we support the Government's objectives in seeking to improve its efficiency and effectiveness. Investors need to have confidence in the fairness and transparency of regulatory decision making processes and in the expertise of the bodies making the decisions. This is particularly important in the energy sector where the UK needs to attract unprecedented levels of investment in new infrastructure to meet energy security and carbon reduction objectives.

We wish to comment on the three aspects below.

1. Independence and impartiality of appeals bodies

To maintain confidence in the appeals process it is vital that the body hearing an appeal is entirely independent – and seen to be independent – of the body whose decision is being appealed. As noted in the consultation, this is a requirement of the Article 6 ECHR 'right to a fair trial'. It is also worth noting that appeals bodies have played an important role in the evolution of sectoral regulation, and in a number of cases their decisions have led to significant adjustments in the way that regulators conduct their business. It is vital that they retain their freedom to bring a fresh perspective and offer criticism where appropriate.

Under the proposed merger of the OFT and the Competition Commission into a new Competition and Markets Authority (CMA), the CMA would inherit the appeals role of the Competition Commission. If decisions previously made by the OFT are now appealable to the CMA, this could weaken the independence of the appeals process – at least in perception if not reality. There is no obvious solution to this problem, but it could perhaps be alleviated by ensuring that primary decisions are made where relevant by sectoral regulators rather than CMA (as is broadly the case at present), by maintaining the distinctive culture and staffing arrangements of the Competition Commission within

the appeals body, and by allowing for certain types of CMA decision (such as anti-trust cases) to be appealed to the Competition Appeals Tribunal on the merits.

In the energy sector, the majority of competition related decisions are made by Ofgem, and are appealable to the Competition Commission, notably energy code modifications, price determinations and licence modifications. The proposed merger of the OFT and the Competition Commission into a new Competition and Markets Authority (CMA) should not be a problem in principle, since it will remain independent from Ofgem. However, it is important that the appeals function of CMA retains the stature and freedom of thought of current appeals bodies, and that corporate governance and staffing arrangements continue to support this.

2. Anti-trust regime

The consultation document sets out three options to improve the speed and effectiveness of anti-trust enforcement: (i) retaining and enhancing OFT's existing procedures, retaining full merits appeal to CAT; (ii) a new administrative approach, in which an Internal Tribunal within the CMA decides on the case following the Statement of Objections, with appeal being by way of judicial review; and (iii) a 'prosecutorial' system in which the CMA or sectoral regulators prosecute cases before the CAT which decides on infringement and penalty.

Given the complexity and subjectivity of the economic arguments which underlie anti-trust cases, and the significant financial penalties that may result, we consider it is vital to retain the ability for appeals to be heard on the merits. We therefore favour option (i) as the only option which preserves merit based appeals to the CAT.

3. Criminal cartel offence

The criminal cartel offence - and the possibility of imprisonment on conviction – plays an important role in deterring the most damaging forms of anti-competitive agreement. However, as a matter of principle, such severe penalties must be balanced by stringent safeguards to ensure that business people can be convicted only if their conduct falls squarely within the type of hard core cartel behaviour that the offence is designed to deter. This means inter alia that there must be conscious intent (*mens rea*) to commit a criminal act.

Therefore, while we sympathise with the desire to make the offence easier to prosecute (and hence more effective as a deterrent) we are concerned that removing the 'dishonesty' test will seriously weaken the safeguards. As noted in the consultation document, the dishonesty test serves three purposes: (i) ensuring the offence applies only to harmful agreements that are unlikely to have countervailing benefits (ii) reducing the likelihood that conviction would depend on judgements taken on detailed economic evidence and (iii) signalling the seriousness of the offence in terms that juries would understand.

Notwithstanding the criticisms of the *Ghosh* test for dishonesty, it does not seem to us that any of the proposed alternatives offer the same level of safeguard. In particular, *mens rea* is implicit in the natural meaning of 'dishonest' and is made explicit in the second limb of the *Ghosh* test. Replacing the dishonesty test with prosecutorial guidance (Option 1) would not provide the appropriate signals to the jury, and we are not convinced that parallels with the English crime of conspiracy would provide sufficient comfort – at least in the Scottish courts. Furthermore, we agree that it would be inappropriate to include within the offence conduct that would not in practice be

prosecuted. Similar objections apply to replacing the dishonesty test with a white-list of exempt agreements (Option 2) or exempting agreements made openly (Option 4).

Replacing the dishonesty test with a secrecy test (Option 3) does at least provide a similar type of safeguard, but it is likely to be substantially weaker as a safeguard without significantly increasing the ease of prosecution. In most business contexts commercial exchanges are treated as confidential as a matter of default, so the presence of 'passive secrecy' would be dangerously wide as a test; we consider the prosecution should have to demonstrate 'active secrecy', as a minimum, but this may be no easier than demonstrating dishonesty.

In our view, therefore, the proposed alternatives to the 'dishonesty' test do not provide sufficient safeguards to allow the dishonesty test to be safely removed from the criminal cartel offence. However, we would be pleased to consider alternative proposals to address the issues identified in the consultation.

Yours sincerely,

Richard Sweet
Head of Regulatory Policy

Severn Trent Plc

BIS | Department for Business Innovation & Skills

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

Response form

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	Academic
	Other (please describe):

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

Consultation Questions – Severn Trent Water response

We have responded to the questions which specifically relate to the regulated sectors.

7. Concurrency and sector regulators

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

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

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

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

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

Comments:

We consider that competition powers could often be more effectively used by the CMA, rather than by the sectoral regulator. This is because a body with greater experience of applying competition law and experience across other sectors would have more appreciation of what issues are significant and the way in which powers can be used. This would contribute to meeting the Government objectives of improving the robustness of decisions and improving speed and predictability for business.

We recognise, however, that there are cases where it is valuable to have the sector experience which a sector regulator can provide. Retaining concurrency would maintain flexibility for a regulator to take cases where sector experience was important or in sectors where the regulator has significant experience in applying competition law. The balance between CMA and sector regulators could change over time as sector regulator experience develops.

In order to ensure that the potential use of competition powers is fully considered by sectoral regulators, we propose that the sector regulators

should be required to inform the CMA of cases where competition powers might be applicable alongside sectoral powers. This should apply even if the sector regulator considers that regulatory powers are more appropriate. The CMA could advise the sectoral regulator on which powers to use and ultimately have the final decision.

If competition powers were to be used by a sectoral regulator the role for the CMA would then be to:

1. Have a case allocation and oversight role, with sector regulators consulting the CMA before they open or close a competition case. The CMA could advise and ultimately decide on which powers should be used, and if competition powers are to be used whether the sectoral regulator or the CMA conducts the case. The CMA would have the right to conduct the case where it was felt by them, after discussion, that it was better equipped to do so.

   The CMA might be better placed to take a case where:

   - The case concerned an issue in respect of which the CMA had demonstrably greater expertise or experience (such as cartels).
   - The case had novel features or wider strategic implications.
   - There was a need to adopt a decision to develop competition policy

2. Act as a central resource, providing expertise on competition law and economics, where a case is retained by the sector regulator.

As set out above, we do not consider it necessary to place an obligation on sector regulators to use their competition powers in preference to their sectoral powers. If, however, such an obligation were to be created, we feel that criteria for assessing which powers to use should be defined, e.g. benefit to the customer, cost and effectiveness.

The consultation raises the possibility of the CMA having a high-level objective or being placed under a duty to review sectors subject to concurrent competition powers. We think it is valuable to review regulated sectors but this does not necessarily need to be carried out by the CMA. It could be achieved by external reviews such as the review of Ofwat by David Gray commissioned last year by Defra.

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

This chapter sets out the Government's view that the sectoral reference / appeal jurisdictions of the CC should be transferred to the CMA. We also

propose the development of model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

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

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

Comments:

It would not be desirable for the appeals process to become more legalistic and the Competition Commission, with its panel of people with the appropriate expertise, is an appropriate way to hear appeals. We agree, therefore, that the CMA is the most appropriate body to hear appeals.

We consider that it would be desirable to create model processes for procedural requirements for appeals, covering issues such as the initiation process and whether an appeal reviews all aspects of a decision.

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Shepherd & Wedderburg

SHEPHERD+WEDDERBURN

Comments on the BIS Consultation: A Competition Regime for Growth[1]

13 June 2011

1. Introduction

1.1 We are grateful for the opportunity to comment on the Department for Business Innovation & Skills consultation on reforming the UK competition regime.

1.2 As the consultation paper recognises, the UK competition system, whilst different in many respects from its counterparts in Europe and beyond, is widely recognised as a world class system. This view is held not just by UK practitioners but competition authorities across the globe and by independent commentators and analysts.

1.3 Whilst every system can benefit from optimisation, we believe that it would be counterproductive to introduce significant changes to the current system, unless (i) there is a very strong case for such change and (ii) a very high likelihood that the proposed change would address the perceived shortcomings.

1.4 We believe that the majority of areas identified do not require radical change but would rather benefit from system optimisation.

1.5 Lawyers of the firm have participated in and contributed to various *fora* that have developed detailed submissions. In this response we have therefore concentrated on certain key aspects of the consultation that we regard as particularly important. The remainder of this document mirrors the structure of the consultation document and deals with the following issues:

- Do we need a single CMA?
- Changes to the markets regime.
- Changes to the merger regime.
- Changes to the antitrust regime.
- Changes to the cartel offence.
- Concurrency.

[1] This response is submitted by Shepherd & Wedderburn LLP. It does not necessarily represent the views of any of our clients or of any particular lawyer representing any of our clients.

2. Do we need a single CMA?

2.1 We do not believe that the case is made for such a fundamental change to the institutional structure in the UK, given the high regard in which the UK authorities are held.

2.2 Under the current system the two-tier authority structure operates in the areas of merger control and the markets regime but not in antitrust where the OFT is the sole decision maker. The antitrust regime, however, provides for speedy and effective judicial control in the form of the CAT.

2.3 A single authority will no doubt bring with it some procedural synergies and some cost savings and will closer align the institutional framework of the UK with that in other member states of the European Union.

2.4 However, it will also entail a number of significant dis-synergies including, in particular, the increased danger of confirmation bias and the loss of different cultures that produces more rounded outcomes.

2.5 In the consultation document and from discussions with BIS representative it appears that the importance of independent decision making is understood and greatly valued. It therefore seems counterintuitive, if not contradictory, to create within a single authority a system of checks and balances that seeks to mirror the effect of having two authorities. Any such system will inherently be imperfect and we believe should only be considered if the synergies clearly outweigh the drawbacks for such imperfections. We do not believe that they do.

3. Changes to the markets regime

3.1 We believe that the markets regime has proved to be a useful tool within the overall competition regime and that both the OFT and the Competition Commission are already optimising the use and processes of this tool.

3.2 There are, however, three particular areas where further optimisation would be helpful: (i) reducing the overuse of market studies (ii) increasing the cooperation between the OFT and the CC and (iii) reducing the timeframe for market studies and MIRs.

3.3 ***Overuse of market studies.*** We believe that the number of market studies is significantly higher than was originally envisaged. Moreover, some of the studies have focussed on very small markets where the importance of gaining a better understanding of that market for the OFT's work (and ultimately for the consumer) was not always immediately obvious. (See 5.3

and 5.4 below on switching resources from the markets regime to deal with increased enforcement cases).

3.4 ***Increased cooperation between the OFT and the CC.*** It seems that the choice of markets and also the decision on whether to refer the matter for an MIR to the CC would benefit from increased coordination between the two authorities. This would deal with the perception that sometimes the 'wrong' markets (such as small markets or repeated referrals) are referred without endangering the benefits of the independent decision making of the two tier structure. The way the US Department of Justice and the Federal Trade Commission cooperate in an albeit different context is a useful example.

3.5 In this context we also believe that some of the Phase I knowledge gained by the OFT could be effectively transferred to the CC without losing the institutional independence and the consequential independence of the decision making.

3.6 ***Reduction in timing.*** A key issue of the current system is the timing of market cases, particularly if a full market study is followed by a lengthy MIR. For business this often leads to a large level of uncertainty and hence stasis in the market. A more focussed approach in selecting markets cases would address this issue somewhat.

3.7 Some of this can probably be achieved simply through optimising existing procedures and early indications from the most recent cases suggest that this is already taking place. In addition, increased cooperation between the OFT and the CC outlined above, would also contribute. A statutory timescale in Phase I would in our opinion be beneficial by ensuring that (i) the OFT selects only high priority cases and (ii) proceeds with such cases efficiently.

4. Changes to the merger regime

4.1 We believe that the current voluntary regime works well for businesses by providing a flexible system which allows the parties to allocate the antitrust risk freely between them.

4.2 ***Retaining the voluntary regime.*** The shortcomings outlined in the consultation paper appear to be limited to (i) anticompetitive mergers escaping review and (ii) lack of ability to unscramble some completed mergers.

4.3 As regards the first issue, we doubt that a significant number of welfare reducing mergers escape review given that customers, competitors and consumer organisations can and often

do bring such mergers to the OFT's attention and given that the OFT has an effective screening department.

4.4 As regards the unscrambling issue, it is important to bear in mind that not all completed mergers are difficult to unscramble and in only the most exception cases have the parties implemented a merger the mergers with the intention of frustrating a possible subsequent divestment.

4.5 One area of the current system that does give rise to issues of unnecessary complexity for business is the share of supply threshold. We believe that the issue of smaller mergers giving rise to significant issues could be more appropriately dealt with by reducing the turnover threshold.

4.6 We do not agree, however, with the very low thresholds which are set out in the consultation document. They appear to have been set by reference to the turnover of past mergers that have been referred. Instead, we believe that they ought to be set by articulating a level of consumer harm where the impact on UK (consumers) as a whole is significant.

4.7 In sections 4.8-4.12 below we have set out turnover thresholds that would in our view be workable and that would be consistent with international standards. By definition, any threshold will entail a certain level of imprecision as a result of various trade-offs such as certainty and practicability on the one hand and the level of regulatory burden and amount of public resources on the other hand.

4.8 ***A mandatory regime.*** The thresholds suggested in the consultation paper are set at such a low level that they would be by far the lowest and most stringent in Europe. Given that the German system is already regarded as having thresholds that are over-inclusive, the need for having even lower thresholds in the UK is unclear.

4.9 We believe that the consultation document does not adequately analyse when a welfare reducing (i.e. anticompetitive) merger is sufficiently significant in terms of consumer impact/ the UK economy to merit intervention. Moreover, assuming an average of £31m direct consumer saving for detecting an SLC in a merger where the target company achieves turnover of only £5m lacks credibility, despite the caveat in para 140 of the consultation paper.[2]

[2] See impact assessment Tables 20 and 21.

4.10 A comparison of merger regimes across Europe and beyond shows that the jurisdictional thresholds could be set at a much higher level without any suggestions of significant consumer detriment because of smaller mergers avoiding review. In any event Article 22 of the EUMR allows for a referral mechanism to the European Commission in cases where below threshold mergers do have a significant impact.

4.11 If BIS were minded to introduce a mandatory regime we believe that a notification threshold of £40-50m minimum turnover for at least two parties would strike the right balance. A £50m threshold would sit well with the £50 *de minimis* level set under section 40 Competition Act 1998[3] and would fall within the same turnover ballpark as set out in the European Commission's SME definition in Recommendation 2003/361/EC.[4]

4.12 By way of cross-check, France and Spain require €50m and €60m minimum turnover for at least two parties and smaller countries such as Belgium and the Netherlands €40m and €30m respectively. Italy requires only the target to achieve at least €47m. In addition, most of these countries also require a much higher combined worldwide or national turnover to ensure that only larger cases are caught.

4.13 ***The hybrid system.*** The hybrid option in our view combines the worst of both worlds: the rigidity of a mandatory notification system with a large degree of uncertainty for below threshold transactions.

4.14 In a fully mandatory system there is a clear trade off between the increased regulatory burden for above threshold transactions against the certainty for below threshold deals. In the hybrid system the overall regulatory burden would increase given that businesses would need to undertake the same risk analysis for below threshold deals as they currently undertake. Moreover, the hybrid system would only address the 'unscrambling' issue only for above threshold mergers.

4.15 The hybrid option, in our view, simply avoids the important question that needs to be answered (and that is not rigorously dealt with in the consultation document), namely: <u>At what level is a merger too small to merit regulatory intervention?</u>

4.16 We have set out in 4.9 and 4.10 above workable thresholds by comparison to other regimes of similar countries (in terms of size or economic output) and by reference to thresholds in

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[3] The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000, SI 2000/262 reg 4.

[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:en:PDF

other relevant legislation. We do not believe there is merit in a merger regime below those thresholds, voluntary of mandatory.

5. Changes to the antitrust regime

5.1 We agree with the two principal concerns in the consultation paper, namely that (i) there are too few cases and (ii) those cases that are taken on take too long to decide. In addition we believe that the current system of closing cases by administrative priority is overused. This can lead to a number of unsatisfactory outcomes from un-appealable *de facto* clearances at one end of the scale to a signal to business that the OFT is unlikely to pursue cases of a particular category (even if that is not the intention of the case closure).

5.2 However, in our view it is not the effectiveness of the CAT and the consequentially more elaborate internal processes of the OFT which has lead to low numbers of cases and long processes. The timing of current and more recent cases suggest that the OFT is much speedier and more efficient in proceeding with cases.

5.3 We believe that there has been too much focus on markets cases (see 3.2 above) at the expense of enforcement cases. The combined expenditure of both UK authorities in 2008/2009 on the markets regime amounted to £16m which is more than on merger control (£14.5m) and not significantly below that spent on enforcement (£19m).[5]

5.4 Given the more or less direct benefit to the economy of successful enforcement cases and the less immediate upside of many market cases, a relatively easy remedy would be to shift resource away from markets and towards enforcement. This could be achieved by allocating resource to a markets case only where robust likely outcomes can be demonstrated that lead to a significant upside for consumers/the economy.

5.5 The additional resource could be used by the OFT to take on not only large high impact cases but a range of cases that will provide it with a track record across industries, regions and markets that will enhance deterrence.

5.6 We do not believe that reducing the scope of appeals to the CAT would benefit the system. In addition to serious questions of human rights compliance, it seems counterintuitive to deal with judicial intervention in cases by curbing judicial power rather than facilitating systems and

[5] See para 11.4 of the consultation paper.

processes that allow the authority (CMA or OFT) to adopt more rigorous decisions that withstand such judicial scrutiny.

5.7 We believe that the prosecutorial system would be an innovative and dynamic way of balancing the various forces that pull into different directions: rigorous decisions, effective judicial control, speed and equality of arms. As this would require a comprehensive re-modelling of the entire competition enforcement regime, we question whether at this particular juncture this is the most cost-effective way of producing the desired outcome of more and quicker decisions.

6. Changes to the cartel offence

6.1 We do not believe that there is a need to change the current cartel offence. At the time the offence was introduced, it was done so on the basis that it ought to be applied cautiously and only in extreme cases. Therefore, the absence of a large number of cases is not in itself a cause for concern.

6.2 The 'dishonesty' concept is one that is well established in other areas or criminal law and we therefore believe that it would be more confusing for juries to introduce an entirely self-standing concept.

6.3 ***Option 1.*** Replacing 'dishonesty' with prosecutorial guidance gives rise to serious concerns of legal certainty and hence compatibility with fundamental human rights principles.

6.4 ***Option 2.*** Removing 'dishonesty' but carving out a 'white-list' from the offence would put form above substance. There is a long track record of issues encountered by the European Commission in designing 'white-lists' for its block exemptions. In a criminal law context, such issues would be aggravated by the criminal sanction.

6.5 ***Option 3.*** Replacing 'dishonesty' with 'secrecy' seems intuitively workable but it will give rise to new and significant issues such as defining the boundary between normal commercial confidentiality and secrecy. If, as is suggested in the consultation paper, the concept of 'active secrecy' were introduced one would faced with a new legal concept and the uncertainty that would entail. We therefore doubt that it would make the offence significantly more understandable to potential juries nor would it make it significantly easier to apply.

6.6 ***Option 4.*** Removing 'dishonesty' but carving out agreements 'made openly'. This would remove some but not all of the issues in the secrecy option. In particular, it might capture

commercially confidential but otherwise beneficial agreements and by contrast it might not catch otherwise harmful conduct where realistically customers have no alternative sources.

7. Concurrency

7.1 We agree that the current system of concurrency does not work well. In theory, concurrency should mean a higher level of intervention, as one authority can intervene when the other does not. This is not, unfortunately, how the system has evolved in practice. It seems to us that sectoral regulators are more comfortable using their ex-ante regulatory powers whilst the OFT is perhaps understandably reticent about initiating cases in an areas in which it has less industry knowledge.

7.2 In our view a clear separation of *ex ante* regulation power and *ex post* competition enforcement would address that issue. Given the absence of a significant number competition enforcement cases in the regulatory space, we believe that little is lost in disintegrating sectoral and competition law powers. Whilst there might be short term dis-synergies in terms of industry knowledge, it seems to us that a too narrowly focussed sectoral approach can lead to similar dis-synergies.

7.3 By contrast, being able to draw on competition law, public law and regulatory approaches from other areas can prove a more effective mechanism to achieve positive outcomes in terms of policy objectives.

Shepherd & Wedderburn LLP
13 July 2011

RESPONSE TO THE DEPARTMENT OF BUSINESS, INNOVATION & SKILLS' CONSULTATION

A COMPETITION REGIME FOR GROWTH:

OPTIONS FOR REFORM

10 JUNE 2011

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Simmons & Simmons

COMMENTS ON THE DEPARTMENT OF BUSINESS, INNOVATION & SKILLS' CONSULTATION

A COMPETITION REGIME FOR GROWTH: OPTIONS FOR REFORM

The Simmons & Simmons LLP EU, Competition & Regulatory Group welcomes the opportunity to respond to the Department of Business, Innovation & Skills' consultation document "A competition regime for growth: options for reform".

1. General comments

Given the breadth of the questions raised in the consultation, we have chosen to focus on the proposals relating to five major issues: the proposed single CMA, proposed changes to the markets and merger control regimes, strengthening the antitrust regime, and the proposed substantive changes to the definition of the cartel offence.

In brief,

- we do not believe that the case for a unified authority has been made out
- of more importance in our view is that the UK authority or authorities should be properly resourced with skilled and highly trained legal and economic experts able to manage cases, be they merger, market, or antitrust, in the context of well resourced companies supported by expert private practitioners
- we believe that neither a mandatory nor a hybrid mandatory approach to merger control is justified by the risk that the authorities may miss some anti-competitive mergers or by the relatively few cases where real difficulties are encountered in assessing a merger that has completed. We therefore support the retention of the voluntary system with strengthened interim measures
- we remain in favour of institutional separation of powers between investigators and decision makers and therefore support measures to do so within antitrust cases. However, if option two (changes to the administrative procedure) is chosen over option three (prosecutorial approach) we believe that there should be full merits review by the CAT
- we believe that the cartel offence should be restricted to the most serious of cartel activities and that a recognised criminal test should be applied to distinguish between criminal and civil liability. For that reason, we reject all of the proposals to dispense with the dishonesty test
- we do not support the suggestions in relation to fees for merger control and antitrust investigations.

2. Amalgamating the Competition Commission and Office of Fair Trading into a single Competition and Markets Authority

2.1 Should the Office of Fair Trading and the Competition Commission be merged?

The level of objective independence which the "fresh pair of eyes" are able to provide is in our view a real benefit of the current system, and we remain to be convinced that a merged entity will in practice be able to deliver benefits which outweigh its loss. We recognise that there is some duplication of effort when the Phase II merger (and market) investigation initially launches and every effort should be made to limit the degree of duplication. However, some duplication is inherent in any system which provides an independent review of initial conclusions. In order to maintain the distinction between initial review and in-depth analysis, and to avoid the allegations of a single entity being prosecutor and adjudicator at both stages levelled so often at the European Commission, the CMA would need to replicate the "independence" of its members or officials at the second stage. This in turn would lead to the very duplication of effort which is criticised.

Arguments that businesses find it difficult to understand the present two-tier structure seem unconvincing. It seems that significant cost savings would not be delivered by the merger. In particular, serious case work in all of the procedures under discussion requires substantial trained human resource to be devoted to it, with a need for substantial input of experienced senior officials and well trained and managed case workers with legal, economic and administrative expertise, and there are no shortcuts if high quality decision making is the goal. Nor is it clear to us that a single CMA is central to the government's vision of an improved competition regime. There may be some gains in terms of the speed of the merger review process, but these should be capable of being delivered through streamlining current procedures. For all of the above reasons, we are not convinced that the case for a single CMA has been adequately demonstrated, or that it would be capable of delivering the efficiencies on which the proposal is predicated.

It will be a considerable challenge to ensure independent Phase II decision-making in mergers and market cases in a single authority, and without preserving that strength of the present system we do not believe the merger should take place. In addition, merger would create the situation where under the market regime a single body would select a market for investigation, conduct a market study, then after a market investigation reference impose remedies including potentially the remedy of divestiture. Very strong checks and balances would need to be built in to the system if a single body exercising all of these functions were to be considered legitimate and immune from confirmation bias, in circumstances where these powers are unusual in world competition law. As discussed below, we would favour the introduction of merits appeal from market investigation reference decisions and the need for this is greater if there is a move to a single CMA.

3. The markets regime

3.1 General comments

Whilst we acknowledge the importance the Government attaches to the UK markets regime, we agree that there are areas where there is scope for improvement. We note in particular the proliferation of market studies and believe that there is a need to put the first phase of the markets regime onto a proper statutory footing, to codify its objectives, and to set out the criteria for launching a market study. Section 5 of the Enterprise Act 2002 seems to us to be over stretched as a basis for the first phase of the markets regime.

We are also in favour of streamlining the investigation process by reducing timescales where this is appropriate and feasible. Limiting the timescale for phase 1 investigations, for example, is one area where this may be the case. If there is a need for in depth analysis, then a market reference should be considered. However, it would be wrong to measure the success of the markets

regime by the number of references that are made. Ideally, more effort should be used to highlight issues that can be resolved at the market study phase.

Whilst there is also a clear need for the markets regime to remain flexible, we do not advocate the regime straying into areas which should be the preserve of antitrust investigations.

3.2 Modernising the markets regime

(A) Enabling investigations into practices across markets

It is apparent that some practices, such as below cost selling, exist across many different markets. Given capacity constraints and the sector knowledge and expertise required, we envisage that it would be difficult in practice to investigate such practices on a horizontal basis. There is clearly a need to consider such practices in their market context and we are concerned that a horizontal approach would not sufficiently take into account the individual market nuances.

(B) Enabling the CMA to provide independent reports to Government

We are strongly in favour of preserving the competition focus of the markets regime. We have concerns in relation to whether expanding the scope of the CC/CMA's remit would put an unacceptable strain on its resources and detract from its main focus.

(C) Extending the super-complaint system to SME bodies

We agree that both barriers to entry and conduct by large companies which have a detrimental effect on small businesses are potential areas to be tackled to promote competition and growth. We note that this issue takes high priority in the Government's ongoing transparency drive. Broadening the super-complaint system to SME bodies would certainly fit with the efforts that have been made in the public procurement context to improve access to public sector contracts by SMEs. However, we have concerns over the resource implications for the OFT/CMA. The definition of an SME is very wide and it is arguably the smaller businesses which have a greater need for a platform to air their competition grievances. We therefore suggest restricting the scope of the super-complaint system to those issues which affect small enterprises as opposed to both small and medium enterprises, if it is determined that a change along the lines proposed is to be made.

3.3 Streamlining the markets regime

It is self-evident that the markets regime should operate efficiently without unnecessary delay or uncertainty. Statutory timeframes are helpful in providing certainty for businesses. Our concern would be the loss of flexibility that a rigid timeframe might entail in relation to a market study where there is an opportunity for participants in the market to resolve issues by giving voluntary undertakings, thereby avoiding a reference to the CC. For that reason, we would support a six month time frame for phase 1 market studies, provided there is some flexibility built in where voluntary measures are being negotiated in good faith by market participants.

As for introducing information gathering powers for phase I investigations, we do not think that this should be introduced for all market studies, given the excessive burden that it would place on businesses. We think that there might be scope for introducing such powers at a later stage in the market study, if it has become apparent that genuine competition concerns exist. A clear trigger point would need to be identified, however, for example some kind of reasonable suspicion

test (which of course would require the definition of a statutory threshold for intervention, which we favour).

In relation to phase II investigations, we think that there might be some merit in reducing the statutory timescale from 24 months to 18 months. However, we note that most cases to date have actually completed within the last month of the reference period and that one particular ongoing investigation has exceeded the 24 month period. There would need to be confidence, therefore, that phase II investigations could generally be completed within this revised timeframe. Some flexibility would clearly need to be built in to allow for cases which, for unavoidable reasons, overrun. We would, however, strongly support the introduction of a timetable for agreeing remedies, which in the past have on some occasions taken an unacceptably long time to conclude.

3.4 Increasing certainty and reducing burdens

We are generally in favour of introducing tools which make the markets regime less burdensome for business. A statutory definition of a market study with a statutory threshold for the commencement of an investigation is desirable, and necessary if enhanced investigation powers, as proposed, are to be granted.

On the issue of the interaction between market investigation references and antitrust enforcement, we do not think that the markets regime should be used to investigate specific breaches of competition law. The markets regime is concerned primarily with industry level market features whereas the antitrust regime is concerned (primarily) with individual competition law breaches. We are more concerned to see that enhanced and robust antitrust enforcement procedures are put in place so that individual breaches can be dealt with separately under the antitrust regime.

We would suggest that merits appeal to the CAT should be introduced for market investigation reference decisions. These are very similar to Chapter 2/ Article 102 procedures in their market and effects analyses, and can impose the remedy of break-up on free enterprise undertakings which can be more serious, so there seems no principled basis for distinguishing these procedures from antitrust cases – especially if the single CMA is formed.

4. <u>The merger regime</u>

4.1 General comments

As the consultation paper acknowledges, the current UK merger regime is a system that works well. It is a system which is highly ranked among its international peers in terms of technical competence, independence from political process, transparency, accountability and robustness of decisions.

The consultation paper identifies two principal disadvantages with the current UK merger regime:

1) the risk of missing anti-competitive mergers, the extent of which it acknowledges may not be significant;

2) a suggestion that the effectiveness of the competition framework is hindered because the competition authorities are investigating a high proportion of completed mergers – which may be more difficult to undo and/or where it may be more difficult to apply appropriate remedies.

The paper also notes that the current UK merger regime is considered slow in comparison with its peers and that any streamlining of the merger review process would be welcome.

We share the view set out in the consultation that the current regime is, in overall terms, working well. We are of the view that robust two phase decision-making is a large part of this. We agree that changes to certain aspects of the regime may be desirable, but we do not agree that a complete overhaul of the voluntary system is required or justified. We consider that the disadvantages identified above in relation to the current system should not be exaggerated and can be dealt with, in most part, by improvements to the existing regime. Improving the intelligence and market monitoring functions of the OFT's Mergers Intelligence Officer, for example, will mean that fewer anti-competitive mergers are missed.

4.2 Mandatory versus voluntary regime

In the context of a voluntary notification system it is inevitable that the competition authorities will have jurisdiction over a sizeable number of completed transactions. We do not accept, however, that the absolute number of completed transactions which created difficulties for the effective functioning of the competition framework is high. We do not consider that the limited number of cases is sufficient justification to change the current UK regime to a full mandatory notification or hybrid mandatory notification system.

The consultation paper notes that a change to a mandatory merger regime would increase the regulatory burden and cost to both business and the competition authority. The increased cost to business includes legal, administrative and management time. This cost also extends to the delay in completing transactions (because of the need to wait for a clearance decision), which means that efficiencies flowing from pro-competitive deals are delayed, and will also mean that parties no longer have the flexibility to move quickly where the commercial opportunity requires this. We would be concerned that the UK may become a less attractive jurisdiction for M&A activity as a result of the introduction of a mandatory and suspensory merger control regime. The consultation paper notes that there are also costs for the competition authority, because the number of transactions that they will need to review will be significantly higher. There would also be a significant set-up cost in implementing such a new system.

We would rather see sensible improvements being made to the current voluntary UK merger regime. We provide below specific feedback on the proposals in the consultation to improve the voluntary system. We also provide some specific comments on some elements of the proposals to introduce a (full or hybrid) mandatory notification system, which we do not consider to be necessary or justified.

<u>Specific comments</u>

4.3 Strengthened interim measures

Option 1 for strengthening interim measures is the proposal that a statutory restriction on further integration should apply automatically as soon as the competition authority commences an investigation into a completed merger. We are concerned that the use of such an automatic trigger would have disproportionate results for the many transactions where there is either no risk of further integration or no risk of ultimately identifying a substantial lessening of competition. The Government should be wary of this risk of disproportionality. The solution may be to find a sensible middle ground between the current system and what is being proposed in the consultation.

It is not entirely clear what the scope of the proposal for reversal measures put forward in paragraph 4.15 is. We believe that such a power would be inappropriate in a voluntary system. If the suggestion is that the contractual obligations in a transaction could be ignored so as to shift risk back onto the seller after a transaction has been completed, we would oppose this attempt to introduce a suspensory system by the back door. Indeed this would be an extraordinary and damaging change in the UK's corporate landscape.

We would have no objection, in principle, to a penalty being introduced to deter parties from taking integration measures in breach of interim restrictions. However, we believe that linking that penalty to the 10% of group turnover figure, even if that figure only provides for the maximum possible fine, is inappropriate. Given that the UK merger regime would still not be a suspensory one, we consider that this type of ongoing breach of a prohibition against integration would be better dealt with by periodic penalty payments based on a small percentage of average daily aggregate turnover of the party concerned.

4.4 Jurisdictional thresholds

Given that we do not consider that there is any need or justification to move to a (full or hybrid) mandatory notification regime, we have not considered the proposed jurisdictional thresholds in any detail. We would, however, note the following:

1) the jurisdictional threshold proposed for the full mandatory notification regime appears to us to be low, in absolute terms and in comparison to peer jurisdictions across Europe;

2) the jurisdictional threshold proposed for the hybrid mandatory notification regime seems to us to combine the disadvantages listed above (failure to capture anti-competitive transactions and the need to investigate completed mergers) for transactions where the target had UK turnover of less than £70 million together with the added burden to business and the competition authority of a mandatory system where the target generated UK turnover above that level.

The consultation also seeks views on whether there should be changes to the jurisdictional threshold if the current voluntary system is maintained. At paragraph 4.38 it is suggested that the current share of supply test lacks "objectivity" and that this is something that is not appreciated by the business community. The consultation paper then goes on to suggest a change whereby the competition authority would have jurisdiction to look at all mergers except those between small businesses (for which exemption the proposed thresholds are set quite low). We doubt the business community would welcome a system where the competition authority has jurisdiction to look at <u>all</u> mergers (apart from small mergers).

4.5 Small merger exemption

We are in principle in favour of a specific exemption for small mergers. We recognise that small mergers may cause a substantial lessening of competition within the markets in which the parties to that merger operate. However, we also consider that there is a point at which that competition concern is so limited that the public benefit of remedying it is outweighed by the costs incurred by the competition authority in having to investigate. This is consistent with the rationale behind the current *de minimis* exception. However, the current *de minimis* exception still contains considerable scope for the OFT to exercise its discretion. We consider that the business community would benefit from a bright-line, revenue-based exemption test for small mergers.

4.6 Information gathering powers

We consider that extending the competition authority's information gathering powers in relation to the main and third parties at phase I is a sensible proposal. We agree that this could reduce the likelihood of a merger under investigation being referred to Phase II. We accept that these extended powers would need to be accompanied by powers for the competition authority to stop the clock if information requests were not complied with.

4.7 Timing of remedies

We also consider that the business community would welcome the ability to offer remedies earlier in Phase II, even if these remedies are wider than what would be required if offered later. Parties

to mergers would then be able to consider what is important for them and take the best decision on that basis. We consider that parties to mergers are sufficiently sophisticated to be able to weigh up the mix of commercial, legal and risk factors involved in such a decision.

4.8 Merger fees

We understand that, given the current number of transactions being investigated, the current level of merger fees is not sufficiently high to ensure the recovery of the full costs of the merger control regime. However, we are not convinced that any of the options being considered in the consultation would resolve this situation.

We do not consider that it would be appropriate for the UK merger regime to be changed into a (full or hybrid) mandatory notification system in order to ensure that more mergers are notified, thereby generating greater merger fees and guaranteeing full cost recovery. We would be uncomfortable with such a disproportionate solution. Also, paragraphs 170 and 172 of the Impact Assessment appear to indicate that the fees proposed in the consultation for a mandatory notification regime would probably need to be higher than those set out in order to ensure full cost recovery as the costs of the mandatory system would themselves be higher.

We consider that the current level of merger fees is already high, both in absolute terms and in comparison with international peer jurisdictions. Therefore, we are resistant to any further increases. If such increases are unavoidable, we consider that the introduction of a fourth band with higher fees for transactions where the target has a high UK turnover would be the preferred route. Has any consideration been given as to whether calculating merger fees on the basis of the target's turnover might produce a fairer result? Simply increasing merger fees within the current bands could dissuade parties who currently notify voluntarily from doing so, thereby potentially reducing the number of mergers notified and defeating the purpose of the increase in merger fees.

5. The antitrust regime

5.1 General comments

BIS is concerned that the current regime in the UK has generated significantly fewer antitrust investigations than have other EU member states. It also notes a concern that UK cases, including appeals, take much longer to process than in other member states, in part a consequence of a system providing an appeal on the merits.

The Government aims to make it easier for the competition authority to bring cases and to make them stand, but properly considers that if reform does take place, it should have regard to due process and the requirements of Article 6 ECHR as implemented in the Human Rights Act 1998, namely the right to a fair hearing within a reasonable time before an independent and impartial tribunal established by law.

We share a concern that the antitrust regime is in need of improvement, but our concern is less that antitrust cases should be easier to bring, and more that they should be properly brought. In our view, part of the problem of protracted cases is to be laid at the door of inadequate procedures, inadequate case management and inadequate supervision by senior lawyers with competition and litigation expertise. This in turn is a consequence of inadequate resources. In our view, public antitrust enforcement requires staff with a high degree of skill and competition law knowledge and expertise, robust case management skills, information gathering and testing, and the whole process should be subject to sustained supervision by senior staff with exemplary litigation and competition expertise. In short, a world-class competition authority needs to be properly resourced.

BIS proposes three options for reform.

5.2 Option 1: retain and enhance the OFT's existing procedures

In our view, this option does not seriously address the real problem, which is the length of time that it takes a case to progress the robustness of decision-making and the risk of confirmation bias inherent in the present system.

5.3 Option 2: develop a new administrative approach

Option 2 proposes strengthening the independence and impartiality of the decision-making process within the proposed single CMA, and converting the current approach of appeal on the merits to one based on judicial review. It offers a partial answer to the concerns expressed by the business community and practitioners about the current lack of separation of powers, i.e. that the OFT is currently acting as investigator, prosecutor and adjudicator and subject to *"confirmation bias"*.

The two main approaches outlined by BIS to distinguish the decision makers from the investigators. These are:

- the creation of an Internal Tribunal within the competition authority appointed to adjudicate cases which have been investigated by a separate set of officials. The decision makers would therefore amount to a fresh set of eyes, or

- the establishment of a panel of independent office holders with an investigatory as well as an adjudicatory role, following a similar process as in phase II of a merger and market investigation. As an investigator as well as an adjudicator, it would take over a case at an earlier stage than the Tribunal.

Either of these suggestions could in theory help to resolve the issue of confirmation bias.

In principle, we are in favour of separating the investigation phase from the adjudication phase. Our reservations about these suggestions, however, are about how they would work in practice. Cases appear to be most delayed during the administrative stages of the investigation so that having two separate administrative procedures may exacerbate delay. Both of the options would therefore require very tight procedural deadlines, or there is a serious risk that cases would take even longer to process than at present. Paragraph 5.48 of the consultation paper addresses this issue, but also points out the risk that defendants may attempt to play the system if procedural deadlines are set.

In either of these options, it is proposed that the CAT would no longer be able to provide a full review on the merits as an independent and impartial tribunal, which, as the government recognises, could cause difficulties complying with Article 6 ECHR unless significant procedural safeguards are put in place. In the first of these options, the independence of the Internal Tribunal from the authority's investigating officers will need to be secured by way of formal procedural mechanisms, which may prove resource-intensive and unwieldy. In the second, the independent panel members will need to be selected with care to ensure that they are both impartial and have sufficient expertise to assess serious and complex competition issues. In either case, the information gathering of the OFT/CMA must be capable of withstanding rigorous review, and an appeal court with purely judicial review powers may not be capable of delivering this kind of oversight.

We have grave reservations about a shift to a purely judicial review approach. If the CAT is not probing the calibre of fact finding and factual assessment in the administrative procedure, this will deprive defendants of elements of their rights of defence, as well as potentially falling foul of Article 6 ECHR. Better, in our view, would be to leave to the CAT the full powers to carry out reviews on the merits. This would address both the ECHR points and issue of exercising a

supervisory function over the decision making process of the kind we have seen develop over the past few years.

5.4 Option 3: adopt a prosecutorial approach

Option 3 proposes a 'prosecutorial' approach whereby the CMA and sector regulators would prosecute cases before the CAT, which would decide on infringement and penalty. This option institutionally and functionally separates the investigative process from the decision-making function.

We recognise that this proposal would bring with it a number of advantages. The CMA would be able to focus its time and resources on investigations, without the burden of having to reach a decision, which, in theory at least, might speed up antitrust proceedings.

The disadvantage is that Option 3 would constitute a major change of the UK antitrust regime which comes with considerable risks in the short term. At present, the OFT does not have the resources or the skills to prosecute cases before a tribunal. It would therefore have to invest in recruiting and training and would need considerable time to develop the skills required. The few prosecutions that the OFT has brought in the context of the cartel offence appear to suggest that the OFT is finding it difficult to prosecute cases. Option 3 therefore risks the CMA being unable successfully to prosecute any cases in the early stages following the implementation of the proposed changes. This would have the unintended consequence of still fewer cases being pursued and fewer decisions being issued than under the current regime. We note that, like the OFT, the CAT may face a similar learning curve in the first years after such a change was introduced.

We also recognise that there is some merit in the argument that competition authorities are better placed than a tribunal to drive competition policy. We agree that competition authorities have a degree of discretion which they often use to drive competition policy in a given direction, and that this element of the current regime would be partly lost if cases were decided upon by the CAT. However, as the construction cases have recently demonstrated, the CAT is already driving policy by supervising and directing the OFT's approach.

We note that the prosecutorial approach is rare in the European Union, and that the administrative system is applied by most Member States as well as having the support of the European Commission. On balance we do not consider that, at present, the potential advantages of Option 3 would justify such a major change in the UK antitrust regime. We would therefore favour Option 2, with the proviso that it should involve a full merits review by the CAT.

5.5 Cost recovery

The Government is proposing that the CAT recovers its full costs from the losing party or in some cases from all parties, except where the interests of justice dictate that the costs should be set aside. The Government notes that it costs approximately £4m a year to operate the CAT and is of the view that it would seem equitable for the CAT to have the power to reclaim its expenses.

Although we appreciate the costs involved in operating the CAT, we consider that the antitrust enforcement regime should be looked at in the round. The institution fulfils a policy role, by ensuring that the Article 6 ECHR guarantees are met, and by ensuring that the decisions of regulators and competition authorities are judicially sound. In that context, the CAT functions as an important check and balance on the enforcement regime as a whole. We believe that the significant sums paid to the Consolidated Fund by way of Competition Act penalties and merger fees should also be taken into account when considering the relatively small cost of operating the CAT.

Furthermore, the proposal provides that the CAT would have to assess the extent to which it can recover its costs on a case by case basis, having regard to the substance and degree of success of the appeal. We consider that in practice it would be difficult for the CAT to assess the extent to which a party has succeeded in the appeal. For example, although an appellant may have appealed 20 points and have been successful only on 3 points, the CAT would have to exercise considerable discretion to assess the merit of each individual point, whether some of the points were vexatious and whether overall the substance of the decision under appeal has been upheld. Furthermore, there may be situations where an appellant loses the appeal on liability but succeeds in challenging the level of the penalty imposed by the CMA. In such a case, it is difficult to envisage how the CAT would assess the degree of success of the appellant and the extent to which it should be liable to pay some or all of the CAT's costs.

Overall we consider that it is likely that this proposal would result in potentially inconsistent and unpredictable judgments for costs. Appellants are also likely to complain that the CAT has discriminated amongst them when issuing judgments for costs. In our view, the current regime is still maturing, and such a radical step as seeking to make it fully or mostly funded at this stage is premature. Indeed, given its overall function, we do not consider that it should become a fully self-funded entity even in the future. This would put it out of synch with other UK judicial bodies, and we see no reason for distinguishing the CAT in this way. Worse, it would be likely to discourage legitimate challenges to the decisions of the competition authorities. However, once the system is mature, there may be scope to consider introducing costs assessments to discourage vexatious points being run.

6. The cartel offence

Section Six of the consultation document considers the reform of the cartel offence. BIS suggests that the deterrent effect of the offence is being limited because there have been so few completed cases to date, and focuses on the argument that the dishonesty element may be artificially limiting the scope of the cases that can be brought, and makes the offence disproportionately difficult to prove.

6.1 The proposals

The proposed solution is to strip the dishonesty element from the offence, essentially, downgrading the offence to make it easier to secure a conviction. We would dispute the proposition that the concept of dishonesty is the reason why there have been so few prosecutions to date. We therefore disagree with all four options for removing the dishonesty element from the definition of the offence and believe it is not appropriate to change the definition of the offence at this time.

We are concerned also that changing the definition of the cartel offence may have unintended consequences in terms of allowing extradition from the UK of UK citizens and others in the UK where one requirement for extradition is "double criminality".

Option 1: to remove the 'dishonesty' element from the offence and introduce guidance for prosecutors.

In our view, the disadvantages of this solution outweigh any possible advantages. It would leave the UK with a very broad offence which grants a wide discretion to prosecutors and is capable of capturing agreements that may have the potential to fulfil the conditions for exemption. It is not impossible even for a price fixing agreement to satisfy the conditions for exemption in some circumstances.

Option 2 is to remove the 'dishonesty' element from the offence and define the offence so that it does not include a set of 'white-listed' agreements.

In our view this is a retrograde step. The "white list" approach has been discarded at EU level because it focuses on form rather than function and because it ignores the economic effects of agreements.

Option 3 is to replace the 'dishonesty' element of the offence with a 'secrecy' element.

This suggestion potentially broadens the scope of the offence unacceptably, as well as bringing it close to the territory of the Chapter I infringement. This in turn carries with it the risk of the offence being categorised as 'national competition law', which would bar the OFT from pursuing a parallel prosecution of individuals in cases that the European Commission is pursuing at EU level.

In our view, the "secrecy" option does not provide a legitimate means of distinguishing conduct which should attract criminal liability and conduct that should not. As well as being an element of cartels, secrecy is also an element of much legitimate business activity. It is not clear to us how Option 3 will distinguish between legitimate and illegitimate secrecy and, in the context of illegitimate secrecy, between the more and the less serious cases: between cases that potentially fulfil the exemption criteria and those that do not; between active secrecy (concealing/deceiving) and passive secrecy (not revealing). As a mens rea, this could only work if the prosecution were required to show "active secrecy", that is, measures to conceal or disguise the agreement, and we do not see a way to distinguish the many situations where businesses legitimately apply strict confidentiality requirements to their agreements (and see our comments on Option 4 below). Even if an active secrecy element would be limited to appropriate cases, first, it would shift the emphasis from the cartel activity to attempts to hide it, and second, there is little to choose between the OFT/CMA having to prove secrecy and having to prove dishonesty. We would take the latter over the former: the Ghosh test has the merit of a significant legal tradition behind it.

Option 4 is to remove the 'dishonesty' element from the offence and define it so that it does not include agreements made openly.

We understand that this is the government's preferred option on three grounds: first, as a means of decreasing the need for juries to hear complex economic evidence; second, as a means of striking a balance between excluding from the scope of the offence the kinds of agreement that might have countervailing benefits under the civil antitrust prohibitions; and third, as a means of differentiating the offence from those prohibitions to reduce the risk that the offence would be categorised as 'national competition law'.

We have very considerable reservations about the width of the scope for prosecution to which Option 4 would give rise, and the lack of distinction between the types of conduct/agreement which it covers. Our scepticism arises because the bulk of quite legitimate commercial agreements are not made openly but in confidence – i.e. in business secrecy. This raises the spectre of different kinds of secrecy warranting different treatment, that is, requiring a further set of distinctions to be made as to secret agreements that would trigger potential criminal liability, and agreements, which, notwithstanding that they are secret, would not.

6.2 Should the dishonesty element remain?

In our view, all the original reasons for including the Ghosh test remain fundamentally correct. It remains necessary to:

- differentiate agreements that are pro-competitive or have countervailing benefits
- reduce reliance on complex economic evidence to secure a conviction
- provide a recognisable test and signal the seriousness of the offence

- differentiate the offence from the civil antitrust prohibition to reduce the risk that the offence will be classified as "national competition law". This would prevent it being prosecuted where the European Commission had initiated an administrative investigation.

However, in our view, if the offence is intended to catch serious offences only, it needs a serious and accepted criminal standard for the mens rea, or else strict liability must apply (which we believe would be wholly inappropriate). The goal of carving out agreements that fulfil the conditions of Article 101 or Chapter I prevents strict liability from applying, as does the risk that it would bring the criminal offence within the definition of "national competition law".

6.3 Alternative proposal

We believe that at the heart of the problem of successfully prosecuting the offence is the public's perceptions about cartel activities. The consultation paper suggests that a significant minority (20%) of the population does not think that price fixing is dishonest. If this is the case, the chances of a conviction in a jury trial are reduced. This figure comes from a (single) piece of research undertaken in 2007 by one individual (A. Stephan) in the ESRC Centre for Competition policy and Norwich Law School at the University of East Anglia. Whilst interesting of itself, this single piece of research seems to us too limited a basis on which to build an alternative theory of the offence.

The proposition that a conviction may well be more difficult to secure because of the problems associated with members of a jury applying the Ghosh test is not in our view made out. It appears to work in practice in criminal prosecutions.

Our suggestion, therefore, is that the test be retained, but that the OFT should undertake two things: first, it should commission further research on the public perceptions of dishonesty in relation to hardcore cartel activities; second, if warranted by the results of the research, it should undertake a major initiative to educate people about the seriousness of the cartel offence, so that the nature of the offence is recognised for what it is.

If it would assist you further, we would be happy to elaborate further on the points made in our response: please contact Martin Smith on 0207 825 4469 or Tony Woodgate on 0207 825 4477.

Simmons & Simmons LLP
EU, Competition & Regulatory Group **10 June 2011**

Sky

BIS consultation of the UK competition regime
Sky response

1. We have set out below a number of comments on the proposals contained in the BIS consultation document "*A competition regime for growth: a consultation on options for reform*".

No need for major overhaul of the UK competition regime

2. The Government recognises that the UK competition regime is already highly regarded, by international standards, by practitioners and by the NAO. BIS considers that the UK regime is recognised for its clarity of analysis and decision-making, transparency, business awareness of policy, effectiveness of legislation, technical competence and political independence. This position suggests that significant changes to the regime are unnecessary, given that there does not appear to be any fundamental existing deficiency with the present system.

3. Sky therefore disagrees that there is a need, at this time, for a major overhaul of the UK competition law regime – with respect of any of the merger, market investigation or anti-trust regimes. This view is based on the extensive direct experience Sky has had of the UK competition regime, having been subject in recent years to a monopolies investigation by the OFT, a Competition Act investigation by the OFT, investigation by Ofcom using its sectoral competition powers (most notably the pay TV review which is currently under appeal at the CAT), a market investigation into movies by the CC, and several merger reviews by the OFT and CC, as well as responding to many information requests and making submissions on other competition law-based investigations.

No need to merge the OFT and CC to create the CMA

4. One of Government's main proposals concerns the merger of the OFT and CC to form the CMA: we do not consider that such a significant change to the UK regime is required. It is likely to create a significant period of upheaval for business (as a result of changes to the staff and working practices of the OFT and CC). It is not clear to Sky that the creation of a single competition body would, of itself, lead to improvements in how competition law is enforced in the UK. Many of the concerns raised in the consultation document relate to procedural issues, and to address them does not require the creation of the CMA. We therefore consider that the less disruptive alternative of the continued existence of the OFT and CC to be preferable.

5. Instead, it would be more effective if the OFT and CC were encouraged to work more closely together (when appropriate), and develop and co-ordinate their own processes, in order to improve their identification and handling of suitable cases. Retaining the OFT and CC as separate organisations would also help avoid the genuine risk of 'confirmation bias':

otherwise stringent measures would need to be put in place to protect against these risks. It is not clear to Sky that the proposals advanced in chapter 5 of the consultation document would be sufficient in this regard, with the risk that the second phase of an investigation does not have adequate independence from the first phase.

Improve how the existing institutions operate

6. Sky considers that any concerns that do exist with the present regime primarily relate to procedural matters – i.e. how the existing institutions identify and handle cases – rather than those institutions being ill-equipped or ill-suited to enforcing the UK competition law regime. Such concerns (including the perception that there are insufficient UK anti-trust cases) could, and should, be addressed by changes to improving the way the existing regime works, rather than undertaking more extensive (and disproportionate) reforms. In this regard, we note that the OFT and CC already have ample scope to cooperate (e.g. through producing joint guidelines or sharing information) and that the OFT in particular is taking steps to improve its enforcement processes. Such initiatives, which avoid the need for more fundamental reforms to the UK competition regime, should be allowed the chance to succeed.

7. Many of the concerns raised by BIS relate to the number of cases (notably anti-trust cases and market investigations) and the speed for their review. BIS appears to consider that volume and speed *per se* should be regarded as hallmarks of success, rather than thoroughness of analysis, robustness of decisions, and having due regard to the rights of defence of companies under investigation. This is concerning as it suggests that the former should be regarded as more important than the latter.

8. Competition law investigations are highly complex cases which involve difficult questions of law, economics and fact; they place a heavy burden on the companies involved. An integral aspect of ensuring that rights of defence are properly respected is that sufficient time must be left, inter alia, for (i) parties to make reasoned submissions (by parties to an investigation, as well as third parties providing comments), (ii) a comprehensive base of evidence be collated, and (iii) the authority to review and have due regard to all evidence and submissions. Timetables for investigation should not be therefore unduly truncated, for the sake of meeting artificial, self-imposed deadlines.

9. Sky's experience of the CC's market investigation into movies, for example, demonstrates the difficulties that an overly ambitious, self-imposed timetable creates. The CC had initially set itself the very challenging target of reaching provisional findings within 8 months. As the investigation progressed, given the complexity and range of issues that the CC has had to consider - which has led the CC to publish 27 working papers to date - it has needed to defer the deadline for its provisional findings twice. This has led to the date for provisional findings being put back by 4 months - i.e. which is much more realistic than its initial aspirations. The point is that the CC has been able to do this, given that the EA02 allows up to two years in which it must complete market investigations. Notwithstanding such delays, the investigation has still imposed (and continues to do so) a very significant burden on Sky, to supply information to the CC and to provide reasoned responses to all of the CC's working papers, usually within very tight deadlines.

10. Nonetheless, Sky recognises the specific concern with overly long anti-trust cases, and considers that there should be scope to improve existing processes to introduce greater

efficiency in how anti-trust cases are run, without the need for fundamental institutional reform. Sky notes that the OFT has already begun to introduce timetables as a means of doing so.

11. A further important aspect of ensuring that a competition law regime reaches robust decisions relates to transparency and openness of the investigation. Intermediate steps in an investigation such as publication of working papers or provisional/draft decisions are important protections, as they provide companies under investigation the opportunity to comment and input into the thinking of the authority as the case develops, and to address (and correct) any misunderstanding or errors on the part of the authority, before that authority reaches a more developed view. This includes having adequate direct access to the decision-makers, as well as the case team, to ensure that those tasked with reaching the decision have a full understanding of the arguments being made by the companies under investigation.

12. It is important that such stages of an investigation are not sacrificed in the interests of speed, or to enable more cases to be handed by the same resources. Were an investigation to be truncated in order to meet an artificial deadline, or if key procedural stages were cut out of the process completely, not only would that threaten legitimate rights of defence, but it would likely contribute to inadequacies in final decisions, and so an increased number of appeals.

Concurrency and sectoral regulators

13. BIS mistakenly states that competition law and sectoral regulators have a common objective of promoting or enabling fair competition, and indicates that Government is considering whether the "mission" for a newly-created CMA would be assisted with "*a primary duty to promote competition*". Sky considers that such a proposal is both inappropriate and unnecessary. The proper role of a competition authority should be limited to the administration and enforcement of competition law – i.e. to prevent mergers and agreements between firms that significantly lessen competition (without sufficient offsetting benefits) and to address abuses of market power by dominant firms or adverse effects on competition. It is wholly inappropriate for a competition authority's role to be extended to the promotion of competition – i.e. such as, in this instance, the CMA could consider it appropriate to promote competition by seeking to "reshape" markets.

14. Sky recognises that some sectoral regulators have been given such a duty (in Ofcom's case this is to further the interests of consumers, where appropriate, by promoting competition). However, Sky considers that the introduction of such a duty can only be justified for sectoral regulators in relation to the task of overseeing the introduction of competition in sectors previously dominated by former State monopolies. In contrast, such a duty is <u>not</u> appropriate for use by sectoral regulators, or competition authorities generally, in relation to other sectors - i.e. those not previously dominated by former State monopolies. This includes, in Sky's view, the application of Ofcom's duty in relation to the broadcasting sector (in this regard, the exact scope of Ofcom's powers under s.316 Communications Act 2003 forms an important part of Sky's appeal of the Ofcom's pay TV decision).

15. Sky notes that BIS supports the continued role of concurrency for the sector regulators, but is considering that there is scope to strengthen the primacy of competition law over sectoral regulation. Sky agrees with this proposal and that a strong obligation should be placed on the sectoral regulators to use their competition law powers in preference to their sectoral regulation.

A voluntary merger regime should be retained

16. Sky considers that the current voluntary approach to merger control should be retained. It has proved to be a proportionate and sensible approach to merger control in the UK, and there are advantages to business of the flexibility that a voluntary regime allows. Any concerns that may exist with completed mergers resulting in an SLC (which Sky understands to represent a very small number of cases) could be addressed through steps that are less interventionist, e.g. by providing greater clarity in OFT guidelines of the risks of the imposition of hold-separate obligations where there is the prospect of competition concerns. The alternatives of requiring all mergers to be notified would be disproportionate and would place an unnecessary burden (and resultant costs) on businesses.

The existing anti-trust regime should be retained

17. The Government needs to be careful that the "*lightening the overall process and allowing a swifter throughput of cases*" for Competition Act cases is not a means to an end: such cases are by their nature lengthy and complicated; significant sanctions are involved. As BIS notes in the consultation document, "*businesses rightly expect due process in the investigations of allegations that they have broken the law*". Out of the options proposed in the consultation document, Sky considers that Option 1 should be favoured - the procedural improvements that the OFT has put in place should first be given a chance to succeed.

18. The other options presented in the consultation document represent more fundamental reforms. It is not clear or certain that they would result in an improvement in enforcement of the Competition Act and, in the case of the administrative proposals to introduce internal tribunals, risk introducing greater opacity in the process, rather than necessarily helping improve the efficient conduct of cases.

19. BIS notes concerns with the volume of UK Competition Act cases, highlighting that this results in a lack of precedents and thus deterrence. BIS fails, however, to reflect that under s.60 Competition Act 1998, the jurisprudence of the European Courts is effectively imported into the UK competition law regime. This provides a very significant body of case law that act as precedent and deterrent, to which businesses operating in the UK already have regard.

20. We also consider that it is imperative that the current full merits appeal to the CAT is retained for Competition Act cases – particularly as we do not agree that the case for changes to decision making for competition cases has been made. It is appropriate for an authority's decision to be subject to a right of appeal on the merits, and we do not agree with the characterisation that this allows a case to be run twice. An appeal to the CAT is not a decision taken lightly, and the grounds of appeal will be narrowed down to the specific issues which the appellant considers have been decided incorrectly by the relevant

authority (rather than running the case as a whole again). As the CAT has shown itself very capable of overseeing relatively quick processes (in contrast, for example, to the General Court), its role should be retained and full merits appeals should not be seen as a problem with the UK anti-trust regime, but rather a virtue which should be retained.

Market investigations

21. From Sky's experience of the current market investigation into movies on pay TV, the current 2 year timescale for market investigations should be retained. Whilst it may be possible to complete some market investigations within a shorter period, this will not always be the case, particularly in those investigations which raise complex issues or involve significant amounts of evidence. As noted above, it is important for parties subject to the investigation to have sufficient time to make reasoned submissions, and for the CC itself to have sufficient time to have due regard to all evidence and submissions. There is a significant risk that, were the maximum time for a market review be reduced to 18 months, this would adversely impact the rights and obligations of the parties and the CC.

Sky **June 2011**

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10 June 2011

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Dear Mr Lawson,

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

We refer to the consultation paper on the UK's competition regime published by the Department for Business Innovation & Skills in March 2011 (the '**Consultation Paper**'). This letter sets out the views of the Slaughter and May Competition Group on the Consultation Paper.

1. Overview

1.1 We welcome the opportunity to comment on the Consultation Paper, and we support the Government's broad aim to strengthen and to streamline the UK competition regime.

1.2 We set out in sections 2-12 below our views on the specific questions raised in the Consultation Paper.

1.3 In particular:

(i) **We strongly support the retention of the voluntary merger notification regime** - we believe that the current regime amply equips the competition authorities to address competition concerns in relation to problematic mergers, completed or otherwise. The introduction of a mandatory regime would significantly increase the regulatory burden and costs of merger control for both the authorities and business. (See further section 4 below.)

(ii) **We support the retention and enhancement of the existing antitrust enforcement procedures** – we do not support the proposal to adopt a prosecutorial system of antitrust enforcement. (See further section 5 below.)

(iii) **We do not support the removal of the dishonesty element from the criminal cartel offence** – we do not believe that there are grounds to remove this element of the offence at this stage. (See further section 6 below.)

(iv) **We do not agree with the principle that investigatory costs ought to be recouped from infringing parties** – nor do we agree that the CAT should recover its full costs. For mergers, we believe that fees should be proportionate to the amount of work and resources allocated to the case in question. (See further section 11 below.)

2. Chapters 1 and 2: Why reform the competition regime?

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

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

2.1 We broadly agree with the Government's objectives for reform. In addition, we consider that a key objective should be to reduce unnecessary regulatory burdens on business.

2.2 We also think it important to emphasise that the UK's current competition regime is rightly regarded as one of the most robust and effective in the world. Further, there are clear benefits in having a settled regime: over the last ten years a number of legal and procedural issues arising in connection with the present regime have been resolved, providing greater certainty to business, regulators and legal practitioners. As a general rule, we would advocate incremental rather than radical changes.

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

2.3 We understand that the main driver for this proposal is the potential to achieve cost-savings, rather than any problem with the current institutional arrangements as such. We think that it is important that cost-driven reforms do not jeopardise the integrity and effectiveness of the regime as a whole.

3. Chapter 3: A stronger markets regime

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

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

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

Enabling investigations into practices across markets

3.1 While it is true that certain types of anticompetitive practices can occur across more than one market, we do not consider it desirable for the Competition and Markets Authority ('**CMA**')[1] to be enabled to conduct in-depth investigations across markets.

3.2 Our primary concern with this proposal is the difficulty that would arise in framing appropriate remedies. Individual markets are unique: each has its own economic and legal environment, its own make-up of businesses and consumers. This means that one remedy package is unlikely to be suited to more than one market.

3.3 Further, the unique conditions existing in different markets make it very difficult to analyse practices across markets in a uniform fashion. It is unclear what benefits would flow from such a broad-brush analysis.

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[1] For the sake of convenience, we refer to the CMA as the UK's future competition authority throughout this letter, notwithstanding that the majority of the proposals could be implemented without this institutional restructuring.

3.4 In addition, we are unsure how cross-market investigations would tie in with the proposals for reform of statutory timescales, especially given the inevitable discrepancies in the speed at which different markets can effectively be investigated.

3.5 To the extent that similar issues arise across a number of markets, the fact that regulators' reports are published means that in practice a level of guidance is provided to participants in other relevant markets under the current arrangements.

Enabling the CMA to provide independent reports to Government on public interest matters

3.6 We are not opposed to this proposal in principle. However, we question whether the CMA would be equipped to deal with these kinds of questions.

3.7 If the CMA were tasked with providing independent reports on public interest matters, this should be separate to the market study regime. We also think that it would be necessary to obviate the risk that as a result the CMA becomes - or is perceived to become - in any way politicised. One of the key strengths of each of the Office of Fair Trading ('**OFT**') and the Competition Commission ('**CC**') is a reputation for impartiality. The Government should consider whether enabling the CMA to investigate politically sensitive non-competition matters might hinder its ability to maintain such a reputation.

Extending the super-complaint system to SME bodies

3.8 We believe that this proposal is unnecessary and would be burdensome. The OFT is currently obliged to investigate and to report on super-complaints within 90 days. This obligation places an onerous burden on the OFT and restricts its ability to prioritise work streams. Extending the number of organisations empowered to make a super complaint has the potential significantly to increase the CMA's workload. We consider that the more efficient approach would be for concerned SME bodies to make representations to the CMA on the need for a market study. This would allow the CMA to focus its resources on those cases where it sees a *prima facie* cause for concern.

Reducing timescales

3.9 We welcome the Government's proposals to reduce timescales for phase II market investigations from 24 months to 18 months and to introduce a statutory timescale of six months for phase I market studies. As the Government notes, the length of cases and the corresponding costs involved are a major concern to business.

3.10 In addition, we should welcome statutory timescales for the imposition of remedies following phase II market investigations. The current remedies process can be very lengthy (up to two years in some cases). A statutory timescale would introduce much needed certainty in this area.

3.11 We do not consider that the implementation of (i.e. the putting into effect of) remedies, as distinct from the imposition of those remedies by the authority, requires a statutory timescale. Under the present system, the CC has the flexibility to set timescales for implementation according to the circumstances of the businesses and markets in question. We see no benefit in curtailing that flexibility.

3.12 We accept that there would need to be appropriate safeguards, as outlined in the Consultation Paper, to ensure that the robustness of the regime be maintained. We should also welcome an element of flexibility in any phase I statutory timescale, to ensure that references to phase II are not made simply because time has run out.

Introducing information gathering powers at phase I

3.13 We do not think that it would be necessary to introduce information gathering powers at phase I if the CMA were to be under an obligation to report within a specified timeframe.

3.14 In our experience, businesses almost always comply with information requests in a timely and complete manner. We consider that it is important that any information gathering powers should be proportionate and not unduly burdensome on business, especially in respect of the markets regime, where there is not necessarily any allegation of wrong-doing.

Facilitating prompt referrals to phase II

3.15 We agree in principle that it would be efficient to provide for a fast track to phase II. However, in order to avoid unnecessary phase II referrals, the statutory threshold for fast-tracking should permit the CMA only to use the procedure where it is inevitable that a case will require in-depth investigation.

Introducing statutory definitions and thresholds

3.16 We agree that if the CMA were to have information gathering powers at phase I there should be a statutory threshold for opening a phase I investigation, since it is in the interests of legal certainty for legislation to specify the circumstances in which a public body is able to exercise such powers.

Improving interaction between market investigation references and antitrust enforcement

3.17 We believe that it would hinder the efficient operation of market investigations for the CMA to have the power to investigate antitrust breaches as part of a market investigation.

3.18 Antitrust procedures, which involve the investigation of potentially illegal behaviour, are fundamentally different from market investigations, which involve the review of certain features of a market. Since an antitrust investigation can result in an infringement finding,

it is of paramount importance that due process be observed throughout. If market investigations had the potential to evolve into antitrust investigations, it would be necessary for those investigations to observe the same level of due process from the outset.

3.19 While it is important that market investigations are fair and transparent, we consider that it would be inefficient to have to apply antitrust due process standards in every market investigation. Therefore, we consider that it would be inefficient to empower the CMA to investigate antitrust breaches in the context of a market investigation.

Ensuring remedies in mergers and market investigations are proportionate and effective

3.20 We broadly agree with the Government's proposals on these matters. However, we have some concerns over the proposal that the CMA be given the power to require parties to appoint and to remunerate an independent third party to monitor and/or to implement remedies. Given that in a market investigation there is not necessarily any element of fault, it does not seem appropriate for the companies involved to pay for such a monitoring trustee.

Clarifying powers following remittals of mergers and markets

3.21 We agree with the Government's proposals on these matters.

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

3.22 We agree with the Government's proposals on this matter.

4. Chapter 4: A stronger merger regime

Q5: The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular:

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

Q6: The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?

Q7: The Government welcomes further ideas on streamlining the mergers regime.

General comments

4.1 The proposed reforms to the merger regime appear to be driven by two main concerns:

(i) that up to 50 per cent. of anticompetitive mergers are escaping review as a result of the voluntary nature of the mergers regime; and

(ii) that the current practice of investigating mergers post-completion prevents full remedy of anticompetitive problems identified.

4.2 In respect of the first concern, we consider the 50 per cent. figure to be a gross over-estimation. We are not aware of there having been any anticompetitive mergers which escaped review during the last ten years. Nor does the report cite one instance of a merger that raised serious competition issues which escaped review by the OFT because it went unnoticed. The OFT has powers to refer completed transactions up to four months after completion. If so many cases were escaping 'under the radar', we should expect a significant number of customer and competitor complaints to be voiced within this timeframe.

4.3 A report previously prepared for the OFT found that the average size of mergers that went 'under the radar' is not substantial: they were 'on average smaller than the mergers for which the OFT either requires a remedy or refers' and 'would have qualified on the basis of the share of supply test, rather than the turnover test.'[2] As a result, we question whether reforming the merger regime merely to ensure that such mergers are caught would justify the costs involved.

4.4 We consider that the second concern, over the difficulty of remedying completed mergers, is largely historical, given the swift and effective implementation of hold-separate undertakings/orders in cases where a merger has already completed. In any event, as the impact assessment published alongside the Consultation Paper (the '**Impact Assessment**') acknowledges, 'the unscrambling problem has only affected a handful of the many [cases that were found to give rise to a substantial lessening of competition] the OFT has investigated' (para. 103).

4.5 Further, it is likely that as a general rule transactions which give rise to the most serious competition concerns are the larger transactions, which are well publicised and may also require merger notification in a number of other jurisdictions. In these circumstances,

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[2] *The deterrent effect of competition enforcement by the OFT* (Report for the OFT by Deloitte, November 2007), paras 4.54 – 4.55.

voluntary notification is likely to occur at an early stage, allowing the CMA to impose hold-separate undertakings before, or early on in, the integration process.

4.6 We therefore consider that the current voluntary regime amply equips the OFT to address competition concerns in relation to problematic mergers, completed or otherwise. It also reduces burdens on business for the majority of transactions that do not raise competition issues. We also note that the OFT has recently enhanced its merger intelligence function, and we are confident that this will further reduce the number of undetected completed merger cases.

Option 1: Improving the current voluntary notification regime

4.7 We understand the Government's desire to strengthen the arsenal of interim measures available to the regulator, but we consider that the current hold-separate undertakings/orders provide the OFT with sufficient powers in this regard. Since their introduction, hold-separate undertakings/orders have been successful in preventing integration that would otherwise interfere with the merger review process, while allowing the OFT flexibility to allow non-problematic and/or necessary integration by means of waivers. We note that, contrary to para. 4.12 of the Consultation Paper, the OFT's practice is not to negotiate hold-separate undertakings with the parties – these are not in practice negotiated, although it is possible subsequently to agree specific waivers to the undertakings/orders. We therefore do not consider that any changes need to be made to the current regime.

4.8 In the event that changes are considered necessary, we note several issues in relation to each of the two Government proposals, which are considered in turn below.

4.9 In relation to the first option (a statutory restriction on further integration that would apply automatically on commencement of an inquiry into a completed merger), the exact extent of the proposed statutory restriction is unclear; for example, would the statutory restriction comprise a complete suspensory requirement or simply a non-integration obligation (similar to the current hold-separate arrangements)? We consider that a restriction on integration would be unworkable unless there were scope for the CMA to permit integration of the businesses, for example in circumstances where senior management has left the business being acquired and the financing is about to expire. Further clarification is required on this issue. Second, imposing a strict statutory restriction on integration risks encouraging parties to notify only after a satisfactory level of integration (in the merging parties' eyes) has been achieved. Third, a suspensory obligation risks delaying global transactions. We consider this risk to be particularly relevant given the current non-binding nature of the OFT's timetable for review. Lastly, it is unclear from the Consultation Paper as to when the restriction would bite and for how long it would run. To provide greater certainty, thought could be given to imposing the obligation from signing or announcement.

4.10 Similar concerns apply in relation to the second option (granting the CMA the ability to trigger statutory restrictions in its phase I investigation pending negotiation of tailored hold separates) – namely, the lack of clarity in relation to the nature and extent of the suspensory obligation, the risk of encouraging delayed notifications of completed mergers and the increased risk of delay to global transaction timetables. This option would also introduce a degree uncertainty to merging parties since the CMA would have the ability at any stage in its phase I investigation to trigger the statutory restrictions pending negotiation of hold separates. We are particularly concerned by the Government's suggestion that the CMA would have the ability to require reversal of action that had already taken place. This power appears wholly disproportionate and would likely impose a burden far beyond the potential harm which it seeks to address. Moreover, it would have the potential to cause significant harm to the business and employees concerned.

4.11 We support the introduction of financial penalties as a deterrence against breaching hold-separate undertakings. The use of financial penalties appears practical, proportionate and likely to prove effective.

Option 2: Introducing a full mandatory or hybrid mandatory notification regime

4.12 We do not believe it necessary to introduce a mandatory merger notification regime in the UK. A mandatory regime would significantly increase the regulatory burden and costs of merger control for both the CMA and business, which is contrary to the stated objectives of the reforms, while also undermining the CMA's ability to focus resources on high-impact cases.

4.13 The cost to the UK competition authorities would significantly increase as a result of the higher number of cases falling for review. We note that the Impact Assessment estimates that under a full mandatory regime the CMA's caseload is likely to increase tenfold with direct additional costs of up to £8.5 million – an increase of 82 per cent. from 2009/10. Under a hybrid regime the caseload is likely to increase up to fivefold, creating up to £3.1 million of direct additional costs, an increase of approximately 37 per cent.[3] These cost increases are unjustifiable. In our view, focussing resources on cases that raise competition issues represents a more efficient use of resources. This ought to be of particular relevance at a time when Government policy is to cut back on unnecessary regulation and 'red tape' and to streamline public resources.

4.14 The resulting burden on businesses under a mandatory notification regime would also be onerous and disproportionate. A mandatory regime such as that proposed will create

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[3] See Tables 18 and 19, Impact Assessment.

scenarios in which parties will incur significant costs in cases where there are no competition issues. These expenses would include implementation delays, management time, legal and merger fees. In short, the substantial costs would outweigh any potential gains.

4.15 The abolition of the voluntary notification regime would materially prejudice businesses' flexibility. Under the current regime, buyers of businesses who are prepared to proceed to completion are not disadvantaged in an auction process relative to bidders who have no competitive overlaps. Likewise, sellers who wish to dispose of businesses quickly for financial reasons can proceed to completion without the burden of going through a regulatory review process. This flexibility enhances the attractiveness of the UK as a place in which to conduct business.

Small merger exception

4.16 We do not support the replacement of the existing *de minimis* exception with the proposed small merger exception, for the reasons set out below.

4.17 First, the *de minimis* exception has a different aim to the SME. The *de minimis* exception allows the OFT to clear a transaction even where the transaction is found to give rise to a substantial lessening of competition, provided the market is not of sufficient importance to warrant reference. Accordingly, its application is dependent on the market under review rather than the size of the parties concerned.

4.18 Secondly, if the small merger exception were introduced, small companies that fell below the thresholds would effectively be able to consummate anticompetitive mergers in small markets. This clearly runs counter to the public interest and the aims of a rigorous antitrust regime.

4.19 We suggest that it would be preferable to retain the *de minimis* exception and to issue clearer guidance as to its applicability in order to allow parties to benefit from its use.

Streamlining the merger regime: Statutory timescales

4.20 We are in favour of greater certainty in relation to the timing and length of the CMA's merger investigations. However, the imposition of a statutory timetable should not come at any cost to the robustness of the phase I assessment.

4.21 There are two principal issues to consider in respect of statutory timetables:

(i) Time constraints may erode the checks and balances built into the phase I review, which may lead to a higher proportion of unmerited cases being referred

to phase II. This would be overly burdensome on business and could potentially have a chilling effect on merger activity.

(ii) Introducing tighter statutory timetables could serve to put further emphasis on the importance and length of the pre-notification period, thereby producing no net gain in administrative efficiency or certainty for merging parties.

4.22 Given that the risks inherent to the introduction of statutory timetables may outweigh their benefits, it may be preferable to retain the current non-binding timetable, supplemented with clearer guidance and engagement from the CMA in relation to indicative timing on a case-by-case basis. If this approach is adopted, timetables should be internally reviewed by the CMA where case teams appear to be drifting beyond the stated 40 working-day non-binding timetable.

Streamlining the merger regime: Information gathering and stop-the-clock powers

4.23 We recognise that the introduction of statutory time limits would be likely to require the introduction of a host of complementary powers. Such powers may include the ability to extend time limits and the power to require relevant information.

4.24 We welcome the proposal to enhance information gathering powers in relation to third parties at phase I. Such powers would enable the CMA to mitigate against situations where material information could only be accessed during phase II of the merger review process.[4] They might also give phase I investigators more confidence in their decisions, which might in turn lead to shorter review times, fewer phase II references and greater precision in the allocation of resources to high impact cases. However, even with mandatory information gathering powers, the achievement of these benefits would depend in practice, *inter alia*, on the willingness of relevant third parties to become involved in the process.

4.25 We support the introduction of a discretionary 'stop-the-clock' power to enable the CMA to suspend or to extend its statutory review timetable for a period of three weeks should it believe cancellation or significant alteration to the merger is likely.

4.26 Given that parties may re-evaluate the merger rationale on a reference to the CMA, this measure should ease the regulatory burden on all concerned. However, care should be

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[4] For example, in *Zipcar/Streetcar*, the CC's enhanced information gathering powers at phase II were determinative in allowing it to clear the merger.

taken to ensure that merging parties that indicate their desire to continue with the merger notwithstanding the reference should still be able to proceed to phase II immediately.

Streamlining the merger regime: Enable the CMA to consider remedies at an earlier stage in phase II

4.27 We question the feasibility of implementing and monitoring this measure.

4.28 First, it is unclear how the measure would function in practice. It would be necessary for the CMA to set out a clear timetable as to when, and for how long, in the phase II process remedies could be considered. Careful consideration would also need to be given to the implications for the broader phase II timetable. In addition, it is unclear whether all mergers that progress to phase II would qualify for early remedy discussions.

4.29 Secondly, this measure appears at odds with the underlying purpose of having a second-stage in the review process: specifically, to enable a 'fresh pair of eyes' to re-examine the merger, free of any past bias. The more the phase II process is forced to rely on phase I findings without its own substantive assessment, the more the impartiality of the phase II process might be called into question. Moreover, if the phase II case team is obliged to focus on remedies during the early stages of the phase II process, this may undermine the robustness and quality of the phase II process itself.

5. Chapter 5: A stronger antitrust regime

Q8: The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime, in particular:

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

Q9: The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.57, and the costs and benefits of these.

Q10: The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.

General comments

5.1 We note the Government's concern that antitrust cases 'take too long and result in too few decisions' (Consultation Paper, p.45). We welcome the proposal to improve the process of antitrust enforcement, and we agree that a key improvement required is the expedition of this process. However, we consider that increasing the number of antitrust investigations in any given year should not be treated as an end in and of itself. Rather, an effective antitrust regime should result in robust decisions being reached in respect of those breaches of Chapter I and Chapter II of the Competition Act 1998 ('**Competition Act**') which merit an enforcement response. This may mean that the number of decisions taken by the OFT remains relatively low, but that the deterrent effect of these decisions is high. In addition, the OFT should continue to bring test cases, but only where there is a clearly novel or uncertain aspect of the law, and only where undertaking such an investigation represents the efficient commitment of the OFT's resources.

5.2 We think the CMA could usefully issue more clearance decisions relating to antitrust investigations, as these would provide helpful guidance to business. Greater use of the short-form opinion procedure that has recently been introduced may be appropriate here.

Option 1: Retain and enhance OFT's existing procedures

5.3 This is in our view the most appropriate option. We consider that the measures recently introduced by the OFT (outlined at paras 5.24-5.26 of the Consultation Paper) have already resulted in some improvements and that it will be most efficient to build on these within the current enforcement framework. Introducing a new decision-making structure would entail a high degree of risk and uncertainty. While we believe that the antitrust procedure can and should be improved, we are not convinced that the weaknesses of the current approach justify fundamental structural change.

5.4 We note in particular that the OFT has committed to greater transparency in its antitrust investigations, with parties being granted greater access to decision-makers and to the case team. We strongly support this development. One of our key concerns about the current process is the lack of access that parties have to decision-makers. Providing greater access will speed up the process and will ensure that those subject to intrusive, expensive and time-consuming investigations are treated justly by being able to put their case directly to the ultimate decision maker.

5.5 We should also like to see improvements to the way in which evidence is handled by the competition authority. Evidence, and particularly witness evidence, ought to be critically assessed and shared with the parties under investigation at an earlier stage. We believe that the OFT often relies too readily upon evidence provided by a whistleblower, only to discover at a later stage that the evidence does not satisfy the relevant legal threshold. These changes would expedite antitrust investigations, bring greater transparency to the

OFT's processes and ensure that resources are used more efficiently (i.e. by not pursuing cases that cannot be supported by sufficient evidence).

5.6 Unless the resources that the CMA has at its disposal for antitrust enforcement increase substantially from those currently available to the OFT, we consider that further improvements to the existing antitrust enforcement model should be focused on achieving efficient outcomes. Prompt settlements should be incentivised and encouraged, and enforcement action should focus on breaches of the Competition Act that have caused, or are causing, consumer detriment, and which are supported by robust evidence. Improving the ability of the CMA to close or reduce the scope of cases would also assist in this regard.

Option 2: Develop a new administrative approach

5.7 We do not support this option. We do not consider that the antitrust regime is well suited to separation into phases I and II. If such a framework were to be adopted, we suspect that most cases would be referred to phase II for further investigation as there is a high risk that a panel would find it difficult at phase I to be satisfied that there are no further issues to investigate. Consequently, we consider that such an approach would in practice be likely to result in cases taking longer to be resolved.

5.8 In addition, we are not in favour of replacing the current appeal process with judicial review. It is essential that appeal judges are able to review the substance of a case and to reassess the evidence. The Competition Appeals Tribunal ('**CAT**') has shown itself to be able to assess competitive effects robustly and we see no reason to deprive parties of this substantive right.

5.9 In the event that a new administrative approach were introduced, we think that panels should have both an adjudicatory and investigatory role. This would ensure that panels are able to access to all of the information on a case that they require to be confident in reaching a final decisions independent from the case team.

Option 3: A prosecutorial system

5.10 On balance, we do not support Option 3. We do consider that certain aspects of the prosecutorial enforcement model are attractive, in particular the fact that it obviates the need for the CMA to play the double role of prosecutor and adjudicator. We recognise, however, that this model would require significant legislative reform and would require a lengthy implementation period. In addition, as the model is radically different to the current antitrust regime, there would be a significant degree of uncertainty over the final outcome.

5.11 Moreover, the CAT would need to take on enough staff with appropriate skills in order to perform the proposed adjudicatory function. If the CAT were short-staffed, cases would

take too long to be heard and this would undermine the Government's objective of reducing the time it takes to resolve cases.

5.12 We are also concerned about the way in which the proposed model could affect parties' ability to settle cases. If only the CAT were able to impose fines agreed for settlement, parties would not be able to settle in advance of adjudication. Again, this would present a challenge for cases to be efficiently resolved.

5.13 Although we do not support Option 3, we should like briefly to address the observations in the Consultation Paper relating to the need to provide guidance to the CAT on fining levels and how to replace the guidance currently received by businesses from non-infringement decisions.[5] We do not share the Government's concerns here. The CAT's ability to assess fines without reference to guidance was demonstrated in the recent judgment against the OFT's construction cover pricing decision and also in the construction recruitment appeals. Moreover, legislative provisions and case precedent will assist in guiding both businesses and the CAT. Guidance to business will also be provided by cases brought by the CMA before the CAT and which are unsuccessful.

6. Chapter 6: The criminal cartel offence

Q11: The Government seeks your views on the proposals set out in this Chapter to improve the criminal cartel offence, in particular:

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

6.1 For the reasons set out in response to question 12 below, we think it is unfortunate that all the proposals in the Consultation Paper are based on the assumption that the dishonesty element should be removed from the criminal cartel offence. The Government could usefully have taken the opportunity to canvas a proposal to improve the offence which did not involve removing the dishonesty element. As set out below, we do not think that it is

[5] See para. 5.46, Consultation Paper.

appropriate to remove the dishonesty element. Notwithstanding this, we set out our views on each of the Government's proposals below.

Option 1: Removing 'dishonesty' from the offence and introducing prosecutorial guidance

6.2 We do not consider this option to be appropriate. The criminal cartel offence turns on an individual's agreeing to make or to implement certain prohibited arrangements. The concept of an agreement is understood broadly in EU competition law, and merely 'agreeing' to participate in a cartel should not be considered sufficient to provide the *mens rea* element of such a serious offence. This is highlighted when considered in the context of a case such as *Anic*[6], where mere attendance at a meeting involving an exchange of information was enough to create a presumption that the person attending was an active participant. Although the criminal cartel offence is UK-specific, the problems associated with determining when an agreement is made under EU law are indicative of the types of issue that might arise if this option were adopted.

6.3 Further, and as discussed in more detail below, the potential imposition of prison sentences should require a very high level of *mens rea* on the part of the individual. Criminal offences which are capable of being committed by an individual (notwithstanding they are acting in their corporate capacity) are already more serious than an offence committed by a corporate entity. An offence that carries the possibility of a prison sentence is obviously even more serious. Taking this into account, it would be inappropriate to rely on prosecutorial discretion, which would be likely to create significant uncertainty.

Option 2: Remove 'dishonesty' but carve out certain 'white listed' agreements

6.4 If the Government decides to remove the dishonesty element of the criminal cartel offence (which, as discussed above, we do not consider to be appropriate), we think that Option 2 is the best means of ensuring that only the most serious types of conduct are caught.

6.5 The key advantage of creating a list of agreements that would be carved out from the arrangements described as falling within the criminal cartel offence is that the list could be tailored to fit changing circumstances. Specifying a set of 'white listed' agreements would also help to avoid the perceived uncertainty associated with the concept of dishonesty. However, we note that there are still deficiencies with this approach; for example, it may not be straightforward to identify such agreements in practice.

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[6] *Commission v ANIC* [1999] ECR I-4125.

Option 3: Replace the 'dishonesty' element with a secrecy element

6.6 We agree with the Government that this option is not appropriate. This option would not resolve any of the difficulties purportedly incumbent upon proving legal dishonesty, since similar issues would be likely to arise in proving secrecy. Further, it is not clear how the secrecy element would apply in the context of commercial agreements (such as joint ventures) which typically contain confidentiality provisions.

6.7 We are also concerned that replacing the dishonesty element with a secrecy element might lead to an odd result where individuals involved in a cartel might avoid criminal sanction simply by publicising their conduct (although they might face civil penalties).

Option 4: Removing 'dishonesty' and defining the offence so that it does not include agreements made openly

6.8 Although this appears to be the Government's preferred option, we do not consider it to be appropriate for a regime under which prison sentences can be imposed on individuals.

6.9 As with Option 3, it is not clear how defining the offence to exclude agreements made openly would work in circumstances where standard confidentiality provisions are in place.

6.10 It is proposed that the list of types of arrangements that fall within the offence under s.188(2) would be amended to provide that the offence will not be committed where 'the customers would be told about the arrangements [...] at or before the time of purchase of the relevant product or service' (para. 6.50 of the Consultation Paper). The proposal does not address which 'customers' must be told about the arrangements for these purposes. In certain cases the direct customer may not be concerned about anticompetitive arrangements, for example if it can pass on the higher cost to its customers (who may not know of the cartel).

6.11 Further, this option does not address how (or to what extent) customers must be informed about an agreement to show the agreement was made 'openly' for these purposes.

6.12 There is also an assumption that customers can choose to contract elsewhere, which may not always be the case.

6.13 Finally, bearing in mind that this is an offence for individuals, it is not clear whether the offence would be committed in a situation where an individual does not have the power within an organisation to decide that the arrangements be publicised, and therefore made 'openly' for these purposes.

Q12: Do you agree that the 'dishonesty' element of the criminal cartel offence should be removed?

6.14 We consider that the dishonesty element should not be removed from the criminal cartel offence. The Consultation Paper does not provide sufficient evidence to support such a fundamental change to the regime.

6.15 The Government considers that the dishonesty element of the cartel offence is the reason why so few cases/convictions have been brought/made, but does not provide any evidence to support this view. We believe that the available evidence shows that the key reason for the lack of cases/convictions may be a combination of a lack of potential suitable cases and also a lack of OFT resources and appropriate criminal prosecution training. We note that the public reports of the BA/Virgin fuel surcharge price fixing case appear to suggest that a lack of OFT resources and appropriate criminal prosecutorial training may have been a central reason why the OFT's case eventually collapsed.

6.16 According to the Consultation Paper, the evidence suggests that the main reasons for originally including the dishonesty element in the offence may no longer apply (para. 6.11). We disagree with this conclusion, for the following reasons:

(i) Criminal offences carry sanctions and a status that differ from civil offences. Individuals found guilty of a criminal offence are more likely to lose their employment, face public opprobrium and might receive a custodial sentence. That is why criminal offences almost always require a specified *mens rea* and involve a higher burden of proof. Removing the dishonesty element does away with an important threshold in this respect.

(ii) The Government considers that evidence of effects, including economic evidence, would be relevant to the issue of dishonesty. According to the Government, juries might find it difficult to understand economic effects evidence. We consider that this is to underestimate the capacity of juries to deal with complex factual and conceptual issues, as required in other areas of the law. Even if the Government were correct, the relevant argument would be around the appropriateness of trial by jury in cartel cases, not the nature of the offence itself.

(iii) The Government's view is that price fixing is so serious that the *mens rea* should be set at a lower level than dishonesty. We do not consider that this view is supported by the arguments put forward in the Consultation Paper. Reference is made to a 2007 report entitled '*Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain*', which found that only around six in ten people in Britain believe that price-fixing is dishonest and that two in ten juries believe that it is not. However, this survey was conducted in a different context to a trial, in

which juries are under directions from a judge. It is not clear to us that this provides adequate evidence to conclude that juries cannot determine whether conduct is legally 'dishonest' in the *Ghosh* sense. Further, taken on its face this survey seems to indicate that a significant proportion of people do not consider that price fixing should be a criminal offence at all, not that it should be easier to prosecute. The author of the report states in his concluding remarks: '*only 6 in every 10 people think price-fixing is dishonest; suggesting that, while a social stigma against such behaviour exists, it is not strong enough to support imprisonment.*'[7]

Q13: The Government welcomes further ideas to improve the criminal cartel offence

6.17 As discussed above, our view is that the criminal cartel offence should be left as it currently stands. We consider that it would be preferable to increase investment in resources and training for relevant OFT officers, rather than to amend an offence which has yet to be tested before a jury.

6.18 One further point we wish to make is that any change to the criminal cartel offence should be assessed for any effects it may have on the OFT's and the European Commission's leniency regimes. For example, the Government should consider whether lowering the threshold for criminal liability (for example by removing the dishonesty element) will discourage individuals or corporate undertakings from applying for leniency in both the UK and the EU. If this were to be the consequence of such a change, this would be a further factor weighing against amending the offence.

[7] Stephan, A: *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain* (2007) ESRC Centre for Competition Policy and Norwich Law School, University of East Anglia at page 29.

7. Chapter 7: Concurrency and sector regulators

Q14: Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?

7.1 In its Consultation Paper, the Government infers from the relative paucity of Competition Act cases completed (and the number of MIRs made) by the sector regulators that there is an inherent weakness in the current concurrency regime.[8] In addition, the Government notes that there has been a much larger number of non-infringement decisions.

7.2 Given that this relative infrequency of completed cases does not appear to be due to insufficient information gathering powers under the current regime, it is unclear whether these statistics are due to the regime's being weak, or the sector regulators themselves not pursuing cases (or the right cases).

7.3 As the Government notes in its Consultation Paper:

'It was envisaged that there would be a period where effective competition would develop and that over time the need for sectoral regulation would reduce as the generally applicable competition and consumer law took over.'[9]

7.4 This, however, has not occurred. Indeed, the regulated arena has actually expanded as sector regulators have sought to open up markets, preferring to use their regulatory tools to do so. In our view, the Government is correct to surmise that part of the reason for this situation is that the overlap between regulatory rules and competition law allows sector regulators readily - perhaps too readily - to use the former.

7.5 Given the Government's objective to adopt a uniform approach to competition law enforcement across all sectors, it is our view that the Government should have regard to the distinction between markets that are competitive, prospectively competitive and non-competitive, and apply this distinction in the Government's approach to competition law enforcement across the regulated sectors and the economy generally.

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[8] The Government notes that sector regulators have made only two antitrust infringement decisions (and many more non-infringement decisions) as compared to 25 infringement decisions and 9 MIRs made by the OFT across the economy as a whole.

[9] See para. 7.1, Consultation Paper.

7.6 With regard to sectoral concurrency, our view is therefore that sector regulators should:

(i) retain their regulatory powers, but only in respect of monopoly or 'non-competitive' markets;

(ii) retain their powers to investigate cases involving prospectively competitive, or not fully competitive, markets through market investigation references ('**MIRs**') as appropriate; but

(iii) not retain concurrent powers to conduct Competition Act cases in markets where effective competition exists. In such cases, we consider that the CMA should instead assume the sole role of *ex post* competition enforcement. Such enforcement action could potentially arise at the prompting of a sector regulator, where appropriate; however, our view is that responsibility for ultimate decision-making and the conduct of the case should be placed within the CMA's exclusive remit.

7.7 Such an approach would be consistent with the expectation that effective competition should develop in regulated sectors and that over time the need for sectoral regulation should reduce. Moreover, it would avoid the confusion that could ensue from the Government's alternative proposal, whereby case allocation as between sector regulators and the competition authorities is determined at a later stage, or via a referral system, depending on the nature of each case.

7.8 The Government's proposal to allow sector regulators to bring cases but not to decide them (under the Internal Tribunal model) would represent an extension of this approach; in our view, however, this would likely be less effective than giving the CMA full and sole jurisdiction. We consider that the Government overstates the 'highly complex interface'[10] required to give the CMA access, on the ending of concurrency, to the sector regulators' specialist expertise.

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[10] See para. 7.16, Consultation Paper.

Q15: The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:

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

Q16: The Government welcomes further ideas to improve the use and coordination of concurrent competition powers

Process improvements – primacy of competition law, resource sharing and the prominence of the CMA's role

7.9 We believe that there is no reason why the process improvements proposed elsewhere in the Consultation Paper should not, where appropriate, also apply in the regulated sectors. However, where concurrency is retained, it may not be sufficient to adopt measures that simply 'encourage' the CMA or sector regulators to use their powers in respect of the regulated sectors in a consistent manner.

7.10 As with the current regime, factors such as a lack of resources or expertise, timing and complexity would still be likely to play a part in case management. For that reason, there is no guarantee that the proposal to give the sector regulators a 'strong common obligation' would, in practice, necessarily correlate to an increased use of those powers.

7.11 We believe that the alternative proposal of tasking the CMA with acting as a central resource for, *inter alia*, information sharing between sector regulators may also struggle adequately to resolve this issue.

7.12 It is possible to conceive a mid-way approach whereby the CMA is given the responsibility of 'proofing' at an early stage those cases that the sector regulators intend to pursue, and to guide the conduct of the case; but such approach would appear duplicative and therefore contrary to the Government's objective of streamlining the process.

7.13 Similarly, the Government's alternative proposal for the CMA to 'co-ordinate' the strategic use of competition powers does not seem to us to offer substantive improvement over the current regime. As the Government notes in its Consultation Paper:

'the mandate and approach of general competition authorities is quite different from those of the sector regulators'.[11]

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

Q17: Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?

8.1 Yes. As noted in the Consultation Paper, the CMA would have the requisite expertise, resources and procedures in place to carry out these functions.

8.2 In relation to the two alternatives:

(i) It is our view that the CAT is not particularly well placed to exercise these functions; although it may have the relevant expertise, we do not consider that it has the necessary resources to deal with the types of issues raised by regulatory references and appeals.

(ii) We agree that creating a separate appellate body seems counterintuitive given the focus on streamlining.

8.3 We note that the issue of regulatory appeals cannot be considered in isolation from the question of concurrency. Any changes to concurrency must avoid compromising the independence of the CMA in hearing regulatory appeals.

Q18: The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

[11] See para. 7.5, Consultation Paper.

8.4 We are of the view that, unless the Government plans to reform each regulatory regime, there will necessarily be a patchwork approach to dealing with regulatory references and appeals. Regulatory provisions and processes are often statutory and cannot simply be overridden.

8.5 Therefore, we do not see any benefit in putting in place model processes that will simply apply to any additional regulatory functions that may be conferred upon the CMA. Indeed, in some cases there will be statutory limitations preventing the application of these model processes to a particular regime (e.g. the initiation process or type of appeal hearing required in relation to a particular regulated sector is often set out in statute). Given this, and the fact that the Government is not proposing to reform current regimes, the patchwork approach to these functions will remain despite the introduction of model processes.

8.6 We suggest that it would be preferable to invest instead in clear guidance on how the current system and the individual regulated regimes operate.

9. Chapter 9: Scope, objectives and governance

Q19: The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.

9.1 The Government intends for the CMA to keep economically important markets or sectors under review. We agree that this should constitute a high-level objective for the CMA and consider that the capacity for the CMA to consider such markets should be an 'objective' rather than a specific 'duty' imposed on the CMA. This will allow the CMA to have the appropriate flexibility to determine which markets it wishes to review in detail and in what circumstances. We are concerned that imposing a duty on the CMA to review certain sectors would be unhelpful for businesses operating in those sectors and would potentially stifle innovation, as well as imposing an additional burden on the CMA's resources.

9.2 The Government has also questioned whether the CMA's objectives should be included on the face of legislation (as is the case currently for the FSA and Ofcom).

9.3 In our view, there is merit in outlining the overarching objectives of the CMA in legislation (and we note the advantages outlined by the Government in para. 9.4 for doing so). This may assist in promoting clarity as to the scope of the CMA's role and provide it with a strong mandate. It may also assist in ensuring that the CMA is ultimately held accountable to these objectives.

9.4 It is important that any legislative definition of the CMA's role and objectives is clear and straightforward, so as to avoid confusion as to the scope of the CMA's remit. Any definition should also not be overly prescriptive, in order to provide an appropriate level of flexibility. Accordingly, any legislative definition of the CMA's role should be limited to key objectives only, for example 'to promote competition' or 'to further the interests of consumers in relevant markets through promoting competition' rather than a lengthy and discursive description of each potential aspect of those objectives.

9.5 The use of broad objectives may also assist in avoiding the potential disadvantage noted by the Government of constraining the CMA's flexibility to act in relation to future changes in the economy.

Q20: The Government seeks your views on whether the CMA should have a clear principal competition focus?

9.6 We agree with the Government's proposal that the CMA have a principal focus on competition. Any other objectives of the CMA (e.g. keeping economically important markets under review) should be relevant to this principal focus.

Q21: The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.

9.7 We agree with the proposal that the CMA be independent of Ministers but accountable to Parliament. We also agree with the Government's proposal that the CMA have:

(i) a Supervisory Board with overall responsibility for the CMA including overall governance, resourcing, strategy and policy; and

(ii) an Executive Board responsible for the day-to-day running of the CMA including the responsibility for certain casework decisions.

9.8 In relation to the Supervisory Board we note that:

(i) the Board should be responsible for the discharge of the CMA's statutory functions, as well as its overall governance and strategy; and

(ii) we agree that the composition of the Supervising Board should include a majority of non-executive directors in order to ensure the appropriate separation of Supervisory Board level tasks from the day-to-day running of the CMA.

9.9 It is important that there is no disconnect between the day-to-day activities of the CMA and those responsible for the ultimate policy and resourcing of that body. Any separation of Supervisory and Executive Board should therefore allow for ready interaction between the two boards and include appropriate mechanisms for information sharing. One way to assist this interaction could be for one person to sit on each of the two Boards and to be responsible for reporting between the two bodies. Another option may be for appropriate reporting mechanisms between the two Boards to be specified in detail and provided as a key task or role of each Board as required.

Consumer enforcement powers

9.10 The Consultation Paper outlines the Government's plan to transfer 'most or all' of the OFT's consumer enforcement powers to consumer bodies such as Trading Standards and the potential for other consumer bodies such as Citizens Advice to undertake the kind of consumer market studies currently delivered by the OFT. The Government has noted that it plans to consult on the reform of the consumer landscape separately and, in particular, on what role the CMA will have within this landscape.

9.11 Our initial view is that competition and consumer enforcement involve separate considerations and, accordingly, that mechanisms should be put in place to ensure that the bodies best suited to analysing consumer enforcement have the capacity to do so. However, we would appreciate the opportunity to comment on the Government's proposed plans in relation to the consumer landscape as part of the Government's forthcoming consultation, 'Institutional changes for the provision of consumer information, advice, education, advocacy and enforcement'. In particular, it is not yet clear which entities would have the responsibility for consumer issues if not the CMA.

10. Chapter 10: Decision making

Q22: The Government seeks your view on the models outlined in this Chapter, in particular:

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

Q23: The Government also seeks views on the appropriate composition of the decision-making bodies set out in this Chapter, and in particular what the appropriate mix of full-time and part-time members is.

Q24: The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process.

10.1 We are concerned that independence be maintained at the second stage of decision-making and therefore think that a degree of separation between phase I and phase II is necessary when investigating mergers and markets. However, the option of having a new case team at phase II is likely to generate some duplication of work and may create institutional tension. The preferred option would therefore be to allow some of the members of the case team at phase I to move to phase II.

10.2 The proposal to retain certain members of the case team needs to be accompanied with appropriate checks and balances. It is important to ensure that those members of the team who have already had exposure to the details of the case do not influence the thought pattern of the rest of the new team.

10.3 It is also necessary to attract people with the right skill-set to form part of the proposed panels. Ideally, the panel should be made up of people experienced in the relevant area. However, it is important that such members are not inadvertently biased by virtue of their own experience. Institutionalising the panel should be avoided in order to reinforce independence.

10.4 We also think that the proposed model should allow for parties to settle cases with the Executive Board, as is currently the case.

10.5 Finally, we should welcome greater transparency during the decision-making process in merger investigations. The OFT has recently committed to greater transparency in its

antitrust investigations (see para. 5.4 above), and we think that this development could usefully be applied to the mergers arena. Providing greater access will speed up the process and assist in ensuring that the decision is reached through a full and fair legal process.

11. Chapter 11: Merger fees and cost recovery

Q25: What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/ mandatory notification regime?

11.1 We are not in favour of the introduction of a mandatory merger regime for the reasons set out in response to question 5 above. If a mandatory regime were to be introduced, we would question whether full cost recovery is the right objective, given that the Government would be imposing an unnecessary burden on the majority in order to catch a minority of cases.

11.2 As a basic principle, we believe that merger fees should be proportionate to the amount of work and resources allocated, in order to protect business from a disproportionate pecuniary burden. A more proportionate fee structure could have the additional benefit of encouraging timely merger notifications. As a result, we urge the Government to review international models of competition cost management, in particular that of Germany, where merger fees are directly linked to the complexity of the merger analysis.

Q26: Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons.

Q27: What are your views on recovery where there has been an infringement decision being based on the cost of investigation?

Q28: What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?

Q29: Do you agree that this would be an appropriate way to collect the costs, separates the fine from costs in a way that makes appeals clear and that the costs should go to the consolidated fund rather than the enforcement authority?

Q30: Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?

Q31: Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?

11.3 We do not agree with the principle that investigatory costs ought to be recouped from infringing parties.

11.4 First, we question the rationale for seeking to recoup investigatory costs. Infringers already pay heavy financial penalties, the amount of which significantly surpasses the cost of investigations. As a result, it is unclear why infringers should pay additional costs for what is essentially a service for the public good. Recovering costs in this way would be out of line with the practice of other investigatory/regulatory bodies, such as the police.

11.5 Secondly, we believe that it would be extremely difficult to design an equitable investigatory cost-charging structure. No investigation is carried out with perfect efficiency; for example, within any investigation avenues may be explored that are subsequently abandoned or do not result in a finding of infringement. Parties should not be liable for such costs if no finding of infringement is made in relation to those aspects of a case.

11.6 In addition, even if the Government were to pursue investigatory cost recovery, which we oppose, a number of administrative and logistical questions arise; for example: would CMA staff 'record their time'? would the CMA staff record which aspects of an investigation they

are working on in order to reach this figure? would parties be able to request that the fees be audited by a costs assessor (even if a party does not appeal the merits of a finding)? There is a lack of detail, clarity and practicality to the Government's proposal as set out in the Consultation Paper.

11.7 Finally, it would be unjust for companies to sustain investigatory costs when the underlying aim of the investigation is to establish a test case or has a wider political significance. Parties should not have to shoulder the costs of a predominantly, if not purely, public function.

Q32: Do you agree that telecoms appeal should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing? If not, your response should provide reasons supported by evidence where appropriate.

11.8 We cannot see any reason in principle why telecoms appeals should be treated differently to other regulatory appeals.

Q33: What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?

11.9 We do not support this proposal.

11.10 The CAT is an appellate court carrying out a public function. Given its function, and given that analogous courts such as the Court of Appeal and House of Lords are unable to recover their costs, there appears to be no justification for permitting the CAT to recover its costs.

11.11 Further, we note that under the current proposals, the CAT would be granted the 'flexibility' to decide whether its costs should be enforced.[12] This could function as a disincentive to parties' bringing appeals (therefore raising access to justice issues) as the potential costs of elements of litigation would be uncertain. This clearly runs counter to the public interest.

12. Chapter 12: Overseas information gateway

Q34: How well is the current overseas information disclosure gateway working? Is there a case for reviewing this provision?

12.1 Although the current overseas disclosure information gateway permits information gathered in CA 1998 cases to be disclosed for the purposes of civil and criminal antitrust cases in other jurisdictions (without the need for permission of the parties involved), the current regime does not allow disclosure of information gathered in merger or MIR cases, unless the relevant parties consent (or unless disclosure is necessary to facilitate the exercise by the OFT / CC of its own functions).

12.2 We consider that the current approach is appropriate. In antitrust cases there is a 'penal' element that can justify cross-border information sharing. In merger or market investigation cases, by contrast, there is not necessarily any fault attaching to the parties in question. In these circumstances, parties should not have to be concerned that the information they disclose may be disseminated more broadly. Where information exchange would be particularly useful, for example in cross-border mergers, this can easily be dealt with through waiver letters.

Yours sincerely,

Slaughter and May

Slaughter and May

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[12] See para. 11.50, Consultation Paper.

Spottiswoode, Clare

A Competition Regime for Growth: A response to the consultation on options for reform

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General Comments: There is constant reference to sectoral regulators throughout this consultation paper. It is not clear that this phrase covers the proposed Financial Conduct Regulator. The implication is that it probably does not.

If not it is a very strange omission. The financial sector is one of our most important industries, one which is key to the success of the UK economy. Of all industries its competitive health is therefore even more important than most to the wealth of the UK. There can be no good reason for excluding this sector from the conclusions of this paper.

There are concerns about the prudential health of the financial sector, just as there are concerns about safety in other industries. There is a specific regulator for the prudential health of the financial sector, just as there are specific regulators for safety in other sectors. The economic regulators work with these prudential / safety regulators and the questions of cost vs. activity are a common interchange between these regulators. Prudential / safety concerns will always, within reason, come first (although in practice the two remits are usually not in conflict). The Financial Conduct Regulator should be explicitly included in the ambit of this paper.

The Independent Commission on Banking has recommended that the Financial Conduct Regulator is given a primary duty to promote effective competition. This is key to creating a competitive regime for growth in the financial sector.

Chapter 3: A stronger markets regime

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

3.31 I strongly support the introduction of powers to enable independent third parties to be appointed to monitor and or implement remedies. Where undertakings have been obtained they have been powerful and effective in ensuring implementation of CC remedies.

3.32 The power to require parties to publish non-price information is highly desirable. There are many aspects of competition that are not due to prices, and this power will enable these aspects of competition to be encouraged.

Chapter 7: Concurrency and the sector regulators

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

I strongly agree that these concurrent powers should remain, and should be introduced for those sector regulators (including the Financial Conduct Authority) who do not already have them.

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

There has been an apparent reluctance in recent times for sectoral regulators to use their competition powers, but rather to use their sectoral powers which may be seen as faster and more flexible than using competition powers. This tendency has probably moved too far, and therefore I would support giving the sectoral regulators a greater obligation to use their competition powers.

However it is important for sectoral regulators to have concurrent powers, otherwise they are not able to make market investigation references or use anti-trust powers, and will be even more likely to use other, less effective, ways of looking at how markets are working. It is particularly important in our large regulated sectors, to look at the structure of markets as well as conduct in them. If concurrent powers were ended there would be a conflict between the use of sectoral powers by the sectoral regulators and the use of competition powers by the CMA where each could be used to address the same problem albeit in a different way. This would push the regulators further apart, when the aim should be to make them work together more effectively and encourage the use of competition powers.

This points to ensuring that those sector regulators who do not have concurrent powers already should be given them. The clearest omission is that the proposed FCA is currently not being provided with these powers, or indeed a primary duty to promote effective competition. Given that Financial Services is the largest of the sectors that has its own regulator this is potentially significantly damaging to the UK economy.

It also makes sense for the CMA to act as a central resource for the sector regulators on competition cases, and for greater use of secondments and interchange of staff between these bodies to share and spread expertise. It is important that in using their concurrent powers the expertise of the CMA is utilised and that the CMA benefits from the experience gained by the sectoral regulators. If the sectoral regulators are given a greater obligation to use their competition powers there should be more investigations undertaken, and this should result in more competitive markets and less detailed behavioural regulation.

Asking the CMA to be responsible for coordinating the use of competition powers and addressing strategic issues, and providing a pro-competitive challenge to the sectoral regulators also has merit. As does allowing either the sectoral regulator or the CMA to take the lead, and for this lead to be changed during the process where it became apparent that one or other body was better placed to take on this role.

Comment on table 7.1:

Sectoral Regulators can in certain circumstances impose structural and behavioural remedies, and these are important powers. In order to understand what is happening within their industries they also need to pay close attention to the complaints arising and to any implications for policy that might arise.

Stubbs, Mr A.W.G.

BIS | Department for Business Innovation & Skills

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

Response form

Name ___**A W G Stubbs**
Organisation (if applicable) ____**Formerly Managing Director New Cheshire Salt Works – CC Case 2005**

Address Sandings ,_____

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_____

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Return completed forms to:

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3rd Floor, Orchard 2
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SW1H 0ET

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

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

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

	Central Government
	Legal
	Academic
	Other (please describe):

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

I was the Managing Director of and a major shareholder in New Cheshire Salt Works Ltd, which was taken over by British Salt Ltd in 2005. The merger was notified to the OFT after completion. It was referred to the Competition Commission whose preliminary findings were against the merger. In November of that year The Commission decided for the first and possibly only time to reverse its own Preliminary Findings and clear the merger.

Consultation Questions

1. Why reform the competition regime?

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

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

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

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

Comments:
1, The present regime spends too much time on the "trivial" and I have consistently put forward higher "threshold" limits in previous consultations to the OFT. These have been ignored. I disagree with your comment in Para 106 that the 63 SLC cases below a turnover of £70m would have produced any significant consumer detriment. By ignoring this and concentrating on the small cases you are liable to miss or fail to have the right calibre of staff available for dealing with the big ones – Lloyds/HBOS etc.
2. On pages 90 and 91 you examine the potential problems of a single entity and the need to have a two-stage decision-,making process. The current proposal for merging the CC with the OFT is roughly equivalent to merging the High Court with the Crown Prosecution service and ensuring that the latter is the senior partner. It seems that inadequate consideration has been given to the impact of Article 6 of the European Convention on Human Rights.
3. Other possible cost saving solutions would be to merge OFT, OFWAT,OFGEM, OFCOM etc in to one single entity and then palce the CC as part of say the High Court – thus preserving its judicial independence from the OFT.
4.The merger case I was involved in was the purchase of a very small SME and yet the costs were over £0.4 million for the seller, well over £1 million for all the "private sector" parties and the timescale, which was well-adhered to was 9 months. Both time and more particularly cost were disproportionate to the size of the merger.
5. The time-scale could easily be cut by taking forward the OFT "prosecution case" rather than having the CC start all over again as investigator and

prosecutor.

- 6. I have not found reference to the deterrent effect on possibly "desirable efficiency-enhancing" mergers of SME's of the possibility of incurring such costs. Any proposals to increase merger fees just increases the deterrent effect . Examination of the "abandoned" cases on the CC website does provide evidence that reference (and its costs) do cause abandonment of mergers. There is also evidence that "Competition Enforcement" as currently practiced with regard to merger control does deter merger activity and this was accepted by the OFT in its Consultation Document 933.

7. On pages 88 onwards you consider the effects of the proposals vis-à-vis of Article 6 of the European Convention on Human Rights. BUT

- Article 1 of the First Protocol of the European Court of Human Rights states "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions ***except in the public interest*** and subject to the conditions provided for by law and by the general principles of international law."
- For shareholders in companies, Merger Control can be an infringement of the right to peacefully enjoy their possessions (in this case - shares in a company).
- There has been no Impact Assessment regarding "Article 1".

2. The UK Competition regime and the European context

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

Comments:

3. A stronger markets regime

This chapter sets out that there is scope to streamline processes and make the markets regime more vigorous. The key options are: enabling in-depth investigations into practices that cut across markets; giving the CMA powers

to report on public interest issues; extending the super-complaint system to SME bodies; reducing timescales; strengthening information gathering powers; simplification of review of remedies process; and updating remedial powers.

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

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

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

Comments:

4. A stronger mergers regime

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

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

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

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

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

Comments:

5. A stronger antitrust regime

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

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

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

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

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

Comments:

6. The criminal cartel offence

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

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

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

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

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

Comments:

7. Concurrency and sector regulators

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

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

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

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

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

Comments:

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

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

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

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

Comments:

9. Scope, objectives and governance

This chapter sets out that the CMA should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA and proposes that the CMA will: have clear, and potentially

statutory, objectives to underpin prioritisation; be accountable to Parliament; and, have an appropriate governance structure for a single decision making body. We ask:

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

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

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

Comments:

10. Decision making

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

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

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

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

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

Comments:

11. Merger fees and cost recovery

Merger Fees

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

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

Recovering the cost of anti trust investigations

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

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

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

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

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

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

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

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

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

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

Recovery of CC costs in telecom price appeals

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

Recovery of CAT costs

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

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

Comments:

12. Overseas information gateways

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

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

Comments:

13. Questions on the impact assessment

Mergers

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

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

Anti-trust

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

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

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

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

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

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

Comments:

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June 2011

Dear Mr Lawson

Response to BIS Competition Regime Reform Consultation

This short letter is TalkTalk's response to BIS's consultation titled: "*A Competition Regime for Growth: A consultation on Options for Reform*". TalkTalk is one of the UK's largest phone and broadband providers with over 4 million customers and a turnover of £1.8bn. The issues that the consultation raises – particularly in relation to the scope of Ofcom, concurrence and appeals of Ofcom decisions – will have a significant impact on our business.

We have answered those questions where we have a view below.

Q3: The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime …

We agree with the proposal to allow the CMA to carry investigations across markets (§3.8). Harmful practices can occur across multiple markets and having to investigate them on a market-by-market basis is inefficient. We consider that a number of the initiatives taken by Ofcom in respect of potential harmful practices are not telecom specific but are common to many markets and therefore are best handled by a cross-sectoral regulator such as the OFT (or CMA or a new consumer body in future). Examples of this are Ofcom's work on automatically renewable contracts, early termination charges, additional charges and switching.

We agree that it is preferable that independent regulators (and not Government) analyses and decides on public interest issues (§3.10) since regulators are, in general, more competent, more objective and have more transparent decision-making. Though

it may not be appropriate in every case the rebuttable presumption should be that regulators take these decisions.

Regarding the SME bodies who may make super-complaints (§3.14) it is not clear from the document who these bodies might be. It is self-evidently important, that these powers are limited to bodies with both strong representation and integrity.

We agree with the proposal to allow the CMA to require independent monitors to oversee remedies (§3.31). In the case of BT's organisational separation and a semi-independent body (the Equality of Access Board) was set-up to oversee implementation and compliance that was effective and useful for all parties. It is a model that has been copied elsewhere in the world.

Q8: The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime …

We agree with the proposals to allow merits based appeals rather than just judicial review. In the context of Ofcom decisions (albeit in the area of Communications Act rather than Competition Act) access to merits-based appeals have been essential to be able to correct materially wrong decisions made by Ofcom. These arose, we think, due to in part confirmation bias[1]. If these decisions were only subject to judicial review, many of the decisions (though materially wrong in terms of their substance) would have been unimpeachable.

Q14: Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?

This question is set in the context that sectoral regulators (such as Ofcom) have, according to some commentators, brought a 'paucity' of antitrust cases and MIRs. We consider that the low number of cases is due (certainly in the telecoms sector) to the availability of *ex ante* powers under the Communications Act to address dominance and abuse that both can be deployed in advance to avoid abuse and are also more effective in ensuring competition[2]. We also have some concerns over Ofcom's track record in

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[1] Confirmation bias is the tendency to selectively search for, and give more weight to, evidence that confirms one's prior belief (see Consultation footnote 61)

[2] A good example of such a difference is in the case of margin squeeze protection. Under Communications Act powers the margin can be wide enough to allow a reasonably efficient entrant (with say a 20% market share) to operate profitably whereas under Competition Act powers the margin cannot be set so wide since it is based on an 'equally efficient operator' model whereby the incumbent's market share (may be 80%) is assumed

being able to address effectively competition concerns using its concurrent ex post powers.

At §7.12 the consultation explains how the MIR approach led to the creation of BT Openreach. It is fair to say, given the train of events in 2004/05, that the Undertakings given under the Enterprise Act were a legal mechanism for implementing what Ofcom considered to be an appropriate solution to the problems in the sector rather than the Undertakings being a result of a market investigation process.

We agree that sectoral regulators should retain their antitrust and MIR powers. Even though little used they are useful to have to address certain sectoral problems.

_____

Q24: The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process that is compatible with ECHR requirements.

We note that much of the discussion regarding the right and need for appeal focuses on the ECHR Article 6 requirement. Whilst this is a legitimate objective we see the ability to access an effective appeal remedy as not only essential as a matter of fairness but also essential in order to correct poor decisions that would otherwise be harmful to consumers. Our experience of Ofcom is that they have made a number of decisions that are materially harmful to consumers that could only be corrected through an appeal.

_____

Q26: Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons

Yes

_____

Q32: Do you agree that telecoms should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing … ?

And Q33: What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?

Yes, in principle we agree with the CC/CAT reclaiming their costs from unsuccessful appellants (considering the extent an appellant is unsuccessful on their respective grounds of appeal). However, it would be grossly unjust if unsuccessful appellants were required to pay the CC's (or CAT's costs) when the appeal was brought because Ofcom was not transparent in its evidence and/or reasoning and the evidence and/or reasoning only became transparent during the appeal process. In this case it would be wholly inappropriate for the appellant to be charged for the CC's costs. Therefore, any cost refund decision must consider the circumstances.

We do not agree with Ofcom not having to bear the CC costs. Though in many cases Ofcom is required to make a decision it is critical that Ofcom feels the force and financial impact of its decisions in order that it makes robust and evidence-based decisions in the first place. As in the case of a cost award against an (unsuccessful) appellant, the decision on whether Ofcom should refund CC/CAT costs (in the case the appellant is successful) must consider the circumstances. So for example where Ofcom's decision lacked evidential support and/or they were not transparent in their evidence or reasoning then cost refund would be appropriate – whereas if Ofcom's original decision and judgement was finely balanced then a cost reclaim would not be appropriate.

If you have any questions regarding this response please do not hesitate to contact me.

Yours sincerely,

Andrew Heaney
Executive Director, Strategy and Regulation

Tesco

A COMPETITION REGIME FOR GROWTH
Tesco Response to BIS Consultation on Options for Reform, June 2011

Introduction

Tesco is a strong supporter of effective competition policy that works in the public interest. Good competition is what makes markets thrive. We agree with the view that competition drives productivity and growth and ultimately benefits consumers through greater choice, lower prices, better quality and improved service.

We welcome the opportunity to respond to this consultation, as it is crucial that we achieve the right changes to deliver the Government's objectives of stimulating growth by allowing the market to be dynamic and competitive.

We have significant experience as a user of the current system, through merger inquiries, Competition Act investigations and two market inquiries in recent years. Although many aspects of the current system are working well, there are also a number of areas where improvements could be made, including:

- Competition Act investigations can take too long;
- The UK merger control regime can create uncertainty due to the lack of clarity as to whether a merger will be called in for review;
- The purpose of market investigations is often unclear and there is insufficient legal redress;
- The division of labour between the existing authorities has given rise to duplication, undefined roles and increased burden to parties.

Key Recommendations

This review provides the opportunity to address these issues and create a competition regime that provides robust outcomes through a more streamlined and efficient decision making process. It should result in less uncertainty and unnecessary cost for business, and any proposed remedies must be proportionate to any problems that are identified. We would therefore propose the following key recommendations:

- We support the merger of the CC and OFT into a single authority to increase efficiency and prevent duplication;

- We support a model that separates the investigative role from the adjudication function in mergers as well as antitrust and improves the panel system;

- We question the need for market investigations at all in their current form;

- We do not believe there is a need to extend "super-complaints";

- We support clear jurisdictional thresholds and quicker review of mergers.

1. The merger of the CC and OFT into a single authority

We broadly support the creation of a single competition authority that has clearly defined decision-making processes, eliminates duplication and therefore results in a more efficient regime overall. This will benefit the authority and bring benefits to business through more clarity, less duplication of input and reduced cost and uncertainty that are currently a symptom of long running inquiries. To ensure efficiency, good decision-making and the elimination of duplication, this means merging the physical location of the office as well as the functions and having one, effective team of staff so that the issues are seamlessly processed from beginning to end. There must also be clear milestones and exit points within the process to encourage an early end to an investigation if sufficient evidence has been examined.

2. A system that separates the investigative role from the adjudication function

We believe that the system would be fairer and reach more robust conclusions if it were to move away from the current model where the competition authority is essentially investigator, prosecutor, judge and jury. This is currently a significant issue.

The role of **panels** is one aspect of this which needs to be reviewed. The benefits of a panel are that the members are independent and not attached to the competition authority, they may have different or wider experience than the case team and can act as a check and balance on the case team. In Korea, for example, the panel makes a decision on proposed mergers, ensuring that the decision making is independent and separate from the investigative function.

However, the current panel system in the UK was designed for the 1970s and 1980s and is not equipped to deal with the modern reality of highly technical arguments backed up by detailed econometric studies nor the volume of data and evidence they are required to absorb and fully consider to reach a robust conclusion. In our experience, panels are often made up of 'experts' whose knowledge is primarily academic and theoretical rather than practical. They also have an inadequate time commitment to cases, so often rely on information provided by the case team rather than the raw data outlined above or industry experience which would greatly enhance the robustness of their decision-making.

Therefore if the panel system is to be retained as a way of using independent experts and of separating the decision making from the initial findings, then it needs to be radically reformed. Individual panel members must be fully involved, and this has to include access to the parties and all the data/ economics.

The consultation raises the possibility of a **prosecutorial system** in the case of antitrust enforcement. We agree that a prosecutorial system could also help achieve the separation of 'prosecutor, judge and jury', as the person deciding to commence an investigation would not be the same as the final decision maker. We are concerned about the impact on timings. If it led to a system that was more streamlined and achieved swifter outcomes, then BIS should consider it. For instance cartel investigations tend to take around 1 year in Austria and around 2-3 years in Sweden where they have a prosecutorial approach – which is significantly faster than our experience in the UK.

Whichever system is adopted, the objective must be to separate the investigation and initial findings from the final decision making to achieve, timely, robust and fair decisions. It is essential that parties then have the right to appeal on the full merits of the case, should the decision require challenge, rather than a judicial review process.

3. Market Investigations

Our experience of market investigations is that they have not contributed to the public policy outcome for which they were designed. We would question the need for market investigations at all in their current form. They are unique to the UK competition regime and are supposed to provide an opportunity for the competition authorities to fully understand an industry. Yet in their current form, they often lack clear objectives and exceed the boundaries of their scope.

Market investigations are instigated too frequently. The Competition Commission has chosen to investigate over 10 markets. In almost every case they have taken the full two-year limit. This number of intensive investigations has resulted in a range of remedies, the costs and benefits if which, even the CC and OFT have found it hard to evaluate. There has also been an apparent unwillingness to stop an investigation once it has begun.

Market investigations can also have the unintended consequences of undermining the Government's own cost-saving and growth agendas. The IA estimates that the inquiry costs to the OFT and CC range from £1.2m (Domestic bulk petroleum gas) to £5.1 m (Groceries). The costs to industry are many times the costs to the OFT and CC. The CBI has estimated that the Groceries investigation cost businesses at least £20m – around four times the cost borne by the regulators – and that would not include the real costs of lost management time, internal resource and potentially stalling further investment and distracting from growth strategies. The markets that have been investigated make up a sizeable proportion of the UK economy. The investigations have caused strain on those businesses – tying up financial and human resource – and created uncertainty that makes decisions about growth difficult.

If market investigations are to remain, they should only be progressed where there is wide recognition that there is a serious competition issue. Any remedies that they recommend must be proportionate to any problem identified and must be supported by a rigorous cost benefit analysis to ensure that the do not produce unintended perverse consequences. Remedies should also be subject to a full merits review, to ensure that the focus is on the merits of the case rather than avoiding judicial review.

To bring the UK system in line with other effective jurisdictions like the EU, the CMA should only have the ability to make recommendations rather than impose the remedies themselves. This is another good way of ensuring that the findings and the final decision making are separate and therefore suitably robust.

We are also concerned at the suggestion that the CMA might be enabled to carry out investigations across markets. This would increase the regulatory burden and cost on a large number of businesses and it is not clear what benefit they would bring that cannot be addressed within individual markets.

4. Extension of "super-complaints"

We do not believe it would be helpful to grant SMEs special status as super-complainant. In our view all businesses in the UK are able to raise concerns that affect their industry without being granted special privileges – indeed SMEs already make good use of the current system. The OFT is already very responsive and does a good job at managing priorities. It could however do more to promote itself to small business and to engage more effectively with SME groups.

In our view the provision for super-complainants in the current system already compromises the autonomy of the competition authorities and this proposal will only serve to further distort legitimate enforcement priorities. It will force the CMA to drop some priorities and tie up their resources, concentrating on these special cases. This will have an adverse effect on the already limited resources of the CMA. The CMA should have autonomy to decide which areas to prioritise, not least to be seen to be safeguarding their independence.

If the objective is to help SMEs achieve growth, then that should be addressed through wider economic policy and removing regulatory hurdles that impede small business growth. This recommendation will not help SMEs grow, but it might slow down the growth of larger companies who are hugely important to the UK economy, by tying up their resources in this type of case.

5. Clear jurisdictional thresholds and quicker review of mergers

We support the retention of voluntary notification, which is currently working efficiently. The current merger control regime creates significant legal and commercial uncertainty due to lack of clarity on whether a merger will be called in for review and unreliable timelines. This would be addressed by a bright line test based on turnover, which is set at the right level to ensure that resources are targeted at mergers that will have a material impact on the market and the wider economy. There should also be a clear timetable for review and clearance.

END

The Carpet Foundation

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Mr Duncan Lawson
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13 June 2011

Dear Duncan,

THE PROPOSAL TO MERGE THE OFT AND THE COMPETITION COMMISSION TO FORM A NEW COMPETITION AND MARKETS AUTHORITY

1. INTRODUCTION

The Carpet Foundation is the Trade Association for the UK Carpet Industry with membership amongst the top UK based carpet manufacturers and nearly 900 independent carpet retailers.

The CF was formed 12 years ago and took over the British Carpet Manufacturers Association (BCMA) which had been the trade association for the industry dating back to the 1920's.

The manufacturing members have a total turnover of approximately £350 Million selling their products into UK and World export markets. The UK retail members (875) sell approximately £150 Million of carpet to UK residential consumers.

The CF introduced a Consumer Code of Practice under the OFT Consumer Codes Approval Scheme and OFT approval was formally given in December 2006. The CF Code has now been in use for 6 years and extensive monitoring studies of actual consumer purchasing experiences over this period have shown outstanding levels of consumer satisfaction. There is no doubt the CCAS works!

The CF has been dealing with the OFT for the best part of 8 years and we are more than aware of their strengths and weaknesses.

2. SCOPE OF THE CF RESPONSE TO THE REQUEST FOR INPUT TO THE CONSULTATION PROCESS

The main concerns the CF have about the BIS "merger" proposal are related to the following areas:-

i. The CCAS and the future of "approved codes"
ii. Market investigations
iii. Enforcement of consumer legislation
iv. A coordinated approach to consumer complaints

We have little or no experience of mergers and our only dealings with competition issues are confined to the normal trade association member conduct matters.

However, our input to the OFT study on misleading pricing has made us more than ever aware of the impact of orchestrated misleading pricing, carried out by multiple retailers, on competition in the market.

As a consequence we have confined our response to those areas with which we are familiar and we have not used your pre-printed form.

3. The Basic Carpet Foundation Position

There is little widespread understanding of the scale of consumer detriment as a consequence of the provision of poor quality goods/services by traders who regularly breach consumer legislation. In 2008 there were 26.5 million consumer complaints and the annual financial loss to consumers is estimated at £6.6 Billion.

In a world requiring improved standards across the economy, why should consumers remain vulnerable to exploitation by many commercial organisations?

i. A merger of the Office of Fair Trading and the Competition Commission would do nothing whatsoever to protect consumers from a wide range of rogue traders operating in the UK.

ii. The OFT name **must** be preserved in view of the investment already made in the brand by the taxpayer since its formation in 1973 to "make markets work well for consumers". The OFT name has very good consumer and business awareness and is synonymous with high standards of trading. It has excellent world-wide recognition and it is commercial insanity to dump such a well recognised name!

iii. The Consumers Codes concept is a brilliant example of controlled self regulation and should be maintained; speeded up; and extended. It costs little to run and it is excellent value for money in terms of its impact upon consumers.

OFT should continue to run the Consumer Codes Approval Scheme and Code users should be required to publicise Codes. (Publicity costs are probably the most significant element of the cost of operating CCAS!) If necessary, Code users should be prepared to meet some of the running costs in a partnership with OFT.

It is estimated that £150 Billion of sales is dealt with each year via OFT Approved Consumer codes.

iv. A much greater sense of urgency is required in the new OFT to reduce bureaucracy and take on board more Approved Code Users to extend coverage. Setting targets for growth and code approval speed should achieve this. OFT needs to speed up!

v. Enforcement of consumer legislation should remain with the OFT. This cannot be left in the hands of weak fragmented bodies such as CAB or TSS who do not possess the skill or knowledge to deal with such a wide ranging problem. Local political issues should not determine consumer protection standards and only the OFT has the clout to deal with national offenders.

vi. Known corporate offenders using illegal or sharp practices to mislead consumers should be identified, challenged and prosecuted. This requires a centralised organisation with the resources and the power to tackle such problems.

vii. Trade Associations should be encouraged to play a more important role in raising standards and enforcing consumer protection legislation.

viii. The government must recognise the investment Consumer Code Users have made in the OFT brand – in the case of the Carpet Foundation we have invested £1.5 Million in supporting the OFT brand in the past 5 years.

ix. Research has shown that Code Users deliver much higher standards of service to consumers and greater levels of pre and post contractual protection.

The Consumer Codes system is raising standards of consumer protection and should be maintained

4. CONSUMER PROTECTION AND ENFORCEMENT OF REGULATIONS

The suggestion that the network of Citizens Advice Bureaus and the Trading Standards Service can deal with consumer protection enquiries and the enforcement of selling legislation is totally unworkable for the following reasons:-

(a) Both TSS and CABs are part-financed by local government and are not competent to deal with consumer enquires.

(b) They do not have the power to deal with well organised companies who employ orchestrated practices to deceive consumers.

(c) Both types of organisation are under financial pressure and facing cuts. Some CABs will close for this reason and TSS departments will be reduced in staffing.

In 2008 there were 26.5 million complaints about goods/services made by consumers (costing them £6.5 Billion in losses due to poor quality etc). How could the CAB and TSS be expected to cope with this scale of problem?

(d) It should be remembered that many of the organisations investigated by OFT for price fixing, misleading pricing, breaches of regulation, competition issues are actually high street names which employ systematic policies aimed at deceiving consumers. It requires a formidable body like the OFT to deal with these organisations and localised "enforcement" will achieve nothing.

(e) The BIS proposal shows a dismissive attitude to the plight of the consumer who regularly faces companies employing sharp practices. The OFT CCAS is only mentioned in a passing sense and this excellent self regulatory concept has been dismissed without any consultation. Were it not for the letter we received from Edward Davey, we would have no idea that the BIS proposal will effectively end OFT support for consumer codes.

(f) Significant numbers of consumers purchase products/services via Approved Codes and they are usually high ticket items. It is estimated that the 10 code users have 420,000 outlets in the UK achieving sales levels of approximately £150 Billion per annum.

Why is this important sector of the UK economy being treated in a highly dismissive way?

5. STRUCTURAL ISSUES

(a) The costs of running the OFT are not really significant when compared with the generation of consumer benefits and income from fines etc. The suggestion that a merger of OFT and CC would at worst only save £2.75 Million p.a. and average reorganisation costs are £15 Million shows that no commercial organisation would undertake such a project.

(b) The previous proposal to merge the two organisations was rejected only 2/3 years ago.

(c) Although recognised on the world stage as being of a very high standard both the CC and the OFT are known to be slow at delivery (like virtually all of the public sector). The merger of two slow organisations does not produce a fast one!

What is needed is the setting of higher standards for delivery on a commercial timescale. Duplication can be avoided by much more precise terms of reference.

6. IMPLICATIONS FOR CODE USERS

The removal of the OFT link from consumer codes will cause chaos for those well respected trade bodies who have invested in the OFT brand.

In the CF case we have invested £1.5 Million in the OFT Consumer Codes concept and the removal of OFT endorsement will create massive switch over problems for the high quality trade bodies who have responded to the OFT initiative to become Code Sponsors.

Who will fund this?

In conclusion, we believe that there is no objective justification for the merger. It looks distinctly like a political measure to appease those large organisations which have in the past been fined or prosecuted by OFT for various competition breaches.

The removal of OFT will leave a vacuum in the field of consumer protection which it would appear that the Government is happy to ignore.

Yours sincerely

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7 June 2011

Dear Mr Lawson

Re: City of London Law Society Competition Law Committee response to BIS consultation on reforming UK competition regime

Please find attached the response of The City of London Law Society's Competition Law Committee to the consultation paper issued by BIS in March 2011, *A competition regime for growth: a consultation on options for reform*.

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The Committee's response highlights legal and practical implications of the reforms being consulted on, drawing on the Committee's collective experience advising and acting for clients on competition law matters.

The Committee's response does not offer legal advice but, rather, attempts to draw attention to issues that would need to be addressed in any firm policy proposals and subsequent legislation.

The authors of this response are:

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Robert Bell, *Speechly Bircham LLP* (Chairman, Competition Law Committee)

Howard Cartlidge, *Olswang LLP*

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Nicole Kar, *Linklaters LLP*

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Yours sincerely

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8 June 2011

The City of London Law Society

Competition Law Committee

RESPONSE TO BIS CONSULTATION ON REFORMING UK COMPETITION REGIME

City of London Law Society Competition Law Committee

RESPONSE TO BIS CONSULTATION ON REFORMING UK COMPETITION REGIME

1 Contents

2 Overview

2.1 This paper is submitted by the Competition Law Committee of the City of London Law Society in response to the Department for Business, Innovation and Skills's paper *A Competition Regime for Growth: A Consultation on Options for Reform*, published on 16 March 2011.

2.2 The City of London Law Society (CLLS) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government Departments, often in relation to complex, multijurisdictional legal issues.

2.3 The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

2.4 The CLLS Competition Law Committee has prepared this submission. The Committee is made up of solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who advise and act for UK and international businesses, financial institutions and regulatory and governmental bodies on competition law matters.

2.5 The authors of this response are:

Antonio Bavasso, *Allen & Overy LLP*

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2.6 We are grateful for the contributions of colleagues on the Committee, and to Ian Winter QC of Cloth Fair Chambers, specialising in criminal law and fraud, for his insights and contributions to Section 6 on the criminal cartel offence.

2.7 The Committee was extremely impressed with the quality of the BIS consultation paper, noting that it was well-thought through and well-argued, and that care had been taken to take account of points made by competition law practitioners and by business in advance of its issuance.

2.8 Specifically, on the substance, the Committee **strongly supports and advocates**:

- **Greater procedural fairness in antitrust:** We endorse the proposals that, in investigations under the prohibitions - so-called "antitrust" - greater fairness could be achieved if there were a proper separation of powers between the investigators and those taking the final decision and possibly imposing penalties, i.e. both "Option 2" and "Option 3" in paragraphs 5.30 to 5.47 of the consultation paper. We see such proposals as necessary to redress the inherent unfairness of a single group of officials being investigator, prosecutor, judge and jury - the problem of "confirmation bias".

  On balance, we favour a modified form of Option 2 - the key features being

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

  (ii) but with **no need for a full internal tribunal**

  (iii) crucially, retention of a **full merits appeal to the CAT**.

  See paragraphs 5.2, and 5.11 to 5.16 below.

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

- **Retention of voluntary merger notification:** We welcome the consultation paper's recognition that mandatory merger notification is not necessarily the right way forward; indeed, we believe that it would be very damaging (see below).

  We welcome the consultation paper's identification of more proportionate, and practical, ways to address concerns about completed mergers (along the broad lines set out in paragraphs 4.12 to 4.16 of the consultation paper).

  We endorse **strengthened interim measures**, including the possibility of an order to reverse integration, and we favour the "second option" referred to in paragraph 4.13. *See paragraphs 4.25 to 4.43 below.*

2.9 As regards the proposal to amalgamate the OFT and the Competition Commission into a single competition authority - the CMA - we do not believe that such a major restructuring of the institutions is necessarily the most effective way to achieve the main reforms to the system that are urgently needed. Indeed, we fear that the proposed amalgamation potentially involves some real disadvantages, including (i) the institutional upheaval inevitably ushering in a period of transition and adjustment during which competition enforcement is bound to be less, rather than more, effective; and (ii) the loss of the "fresh pair of eyes" in mergers and market cases resultant on losing the separation of powers between the Phase 1 and Phase 2 bodies (although, as noted below, if there is to be a single CMA, we advocate a decision-making structure within it that would preserve at least some of this "fresh fair of eyes", guarding against confirmation bias).

2.10 That said, and notwithstanding our misgivings, the Committee wishes to engage constructively with the proposals being made in the consultation paper which assume the existence of a single CMA, and we have framed our response in that constructive spirit.

2.11 Specifically, if there is to be a single CMA, the Committee **welcomes**, and considers **essential**:

(a) the proposals that, within a single CMA, the decisions in "Phase 2" of both merger control and markets processes should be made by different people from those conducting the initial examination at "Phase 1" - so as to minimise the dangers of "confirmation bias" that might otherwise arise from an amalgamation of the two existing competition authorities; *see paragraphs 10.5 to 10.9 below.*

(b) the proposal that those "Phase 2" decision-makers within the CMA should be senior and experienced individuals to which the companies under investigation have access, and who are of roughly equivalent status and experience to those senior management executives of the investigated companies who appear before them; *see paragraphs 10.11 to 10.12 below.*

2.12 The Committee also has a number of serious **concerns** about some of the proposals - notably:

- those relating to the **cartel offence** - we do not believe that there are grounds, at this stage, to remove the "dishonesty" element in the offence; *see Section 6 below*

- the possibility of **mandatory merger notification**

  - we believe that this would represent an *unnecessary* regulatory burden on parties to mergers raising no competition issues, and would have the perverse effect that innocuous mergers would be caught by the regime while, as a consequence, many mergers with anti-competitive effects would escape scrutiny;

  - moreover, our analysis of completed mergers considered by the Competition Commission in recent years does not suggest a major crisis of completed anti-competitive mergers that would warrant the draconian legislative change to mandatory merger notification;

  see paragraphs 4.2 to 4.22, and 4.49 to 4.51 below

- the suggestions on **fees for merger control and antitrust investigations** - which the Committee considers disproportionate and excessive in the case of mergers (*see paragraphs 11.1 to 11.8 below*), contrary to proper principles of the administration of justice in the case of antitrust investigations (*see paragraphs 11.9 to 11.12 below*), and out of line with international best practice in the case of both (*see table at end of section 11*)

- **SME "super-complaints" in market investigations**; *see paragraphs 3.35 to 3.37 below*

- proposals on the workings of the **sector regulators' concurrent competition powers**; *see Section 7 below*.

General principles

2.13 Before dealing with our specific points, however, we thought it would be helpful to set them in their proper context - by explaining the general principles which have informed our approach. The Committee thinks that the appropriate objectives for a reform of the UK competition system should be:

(a) to reduce unnecessary regulatory burdens - both on British businesses, which (as the Government recognises) risk losing competitiveness as a result of excessive "red tape", and on the competition authorities which need to concentrate their limited resources on the things that really matter

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

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

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

2.14 The Committee does not accept the criticism that the current system generates too few cases. Indeed, we do not see that volume of cases, e.g. relative to other countries, is an appropriate measure of the effectiveness of the regime; other factors, such as the actual existence of anticompetitive practices in Britain compared with other countries, and the way the volume of cases is measured, are also relevant. More specifically:

- We do not consider that there are too few market investigations. Rather, we believe that the increased regulation of hitherto unregulated sectors of the economy, as a result of market investigation remedies, is by no means an ideal, or even productive, way of achieving economic growth and well being.

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

2.15 Finally, we appreciate the opportunity afforded us to comment on these proposals and, following submission of this response, the Committee remains happy to assist BIS in its deliberations in developing the proposals.

3 Section 3 - "A Stronger Markets Regime"

General comments

3.1 The consultation paper states, in paragraph 3.5, that there have been too few market investigation references and that the markets regime system is under-utilised. It calls for the increased use of the markets regime.

3.2 However, in the Committee's view, to equate the proper functioning and efficient operation of the markets investigation regime with the number of cases taken misses the point. An increase in cases alone will not mean a more effective system. Making market investigation references (MIRs) purely in order to produce a greater number of cases is likely to lead to the investigation of a greater number of unmeritorious cases or markets of peripheral importance to the economy. This in turn would lead to a needless increase in the regulatory burden on business without having any corresponding consumer benefit. It will also create a more market interventionist policy; the effect of MIRs is often highly regulatory, with remedies involving costly changes to business practices and sometimes (for example in the case of airports) forced break-up of companies.

Q3: Comments on the proposals

Market studies (paragraphs 3.20 and 3.25 to 3.28)

3.3 Given the vague wording of section 5 of the Enterprise Act 2002 - the OFT's general duty to obtain and keep under review information relating to the carrying out of its functions (which we understand to be the statutory ground for OFT market studies) - there is a need to clarify the objectives and scope of the CMA's powers to commence market studies. It is essential, in the Committee's view to establish appropriate statutory criteria for the commencement of market studies/Phase 1 market investigations and the role of the CMA in that process given the associated proposal to confer upon the CMA information-gathering powers. We discuss this in more detail in paragraphs 3.7 to 3.10 below.

3.4 So what should the appropriate statutory criteria be?

3.5 In the Committee's view, market studies are useful filters for situations which may require regulatory scrutiny but do not immediately advertise themselves as being as candidates for CA 1998 enforcement or consumer protection remedies. We believe that the two-stage market investigation procedure works well. A "Phase 1" investigation helps to highlight whether a more detailed investigation of a particular market is warranted under a MIR. This two-phase process we believe provides an appropriate balance between achieving appropriate regulatory inquiry and minimising the burden and cost to business in taking part in the process.

3.6 It has been suggested, in discussions during the consultation period, that market studies might also be able to cover situations where the CMA wishes to undertake longer term reports where no competition or consumer remedies are contemplated. This is to a certain extent a reflection of the current practice where the OFT undertakes longer term studies as an aid to Government and which may for example conclude by recommending the need for future legislation. In our view it is hard to accommodate these types of report within the confines of the new proposed

reforms. Its short timeframes and use of information-gathering powers are not in our view appropriate for use in this context.

3.7 We are therefore in favour of dividing market studies into two specific types;

- "market studies" for long-term reports where the exercise of competition powers is not envisaged; and
- "Phase 1 market investigations" which would be competition based.

3.8 We would recommend that a new separate statutory power distinct from those relating to Phase 1 market investigations for the CMA to undertake longer term reports as an aid to Government. This process could possibly enable the CMA to set their own timetables if this was thought to be appropriate but would not benefit from information gathering powers. We would suggest that these reports are referred to as "market studies". In the event that a competition related issue arises during the course of a "market study" the CMA would need to commence a Phase 1 market investigation. Criteria for initiating Phase 1 market investigations clearly needs to be set at a lower standard than those for making an MIR under section 131 of the Enterprise Act, which requires the OFT to have "reasonable grounds for suspecting" a restriction, distortion or restriction of competition.

3.9 An alternative approach might be to frame the test around the EU "sector inquiries" test. Under Article 17(1) of Council Regulation 1/2003, the European Commission may start a market study

> "where the trends of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market".

This latter test lends itself to the approach, referred to in paragraph 3.3 above, of keeping key markets under review. Although the criteria need to be competition based they do not rule out subsequent exercise by the CMA of their consumer powers. .

3.10 Accordingly, whatever wording is chosen, it is essential to state clearly the scope and objective of Phase 1 market investigations. The Committee think the test could be entirely competition based. Given that the threshold for MIRs at Phase 2 (in section 131 of the Enterprise Act) is merely "reasonable suspicion", it would have to be even lower. A possible approach might be along the following lines:

(a) *The [CMA] may carry out investigations into any markets in the UK or a part of the UK in connection with the supply or acquisition of any goods or services where it has reason to believe that a feature or a combination of features may merit the exercise of its powers under section 131 ("a Phase 1 market investigation")*

(b) *Where the [CMA] decides to start a Phase 1 market investigation it shall announce-*

(i) the enactment under which it is made;

(ii) the description of the goods or services to which it relates;

(iii) its geographic scope; and

(iv) the reason or reasons why it has exercised its powers under [subsection (a)] above.

(c) *The [CMA] shall prepare and publish its Phase 1 market investigation under [subsection (a)] within a period of six months beginning with the date of its announcement in [subsection (b) above].*

Consumer protection and market studies

3.11 Although this is not a response to the Government's consultation paper on consumer powers, we do feel it is appropriate to emphasise our support for the CMA retaining some, if not all, of its consumer powers. We believe that Phase 1 market investigations should start with the CMA as long as the competition based test is triggered regardless of whether they appear to be consumer focused or not. The Committee has considered some form of remittal system to a consumer body to deal with consumer-related cases, but we have rejected this because we do not believe it would work and we think that it would certainly not be in the interests of consumers.

3.12 We believe that it is important that the CMA should retain consumer based remedies, and should be able to deploy its consumer enforcement measures alongside its competition based powers. This is because there is often a substantial overlap between the two areas. This can be seen from the fact that a number of MIRs to date have been heavily consumer-focused, notwithstanding the current test, which expressly requires a competition concern before a reference can be made. When these powers exist within a single body they can be exercised in a joined up way to the advantage of consumers and business.

3.13 Various possible structures for a trading standards organisation have been suggested during the consultation. One solution was the creation of an overarching Trading Standards Authority. This Trading Standards Authority would be given the benefit of an indemnity fund. We do not have any details about how such an authority would be structured, including in particular whether it would be a single entity or made up of local trading standards bodies representatives.

- Even if it were a new single entity we believe it would be less effective than the current system, for the reasons given in paragraphs 3.11 to 3.12 above.

- We would be even more concerned if such a Trading Standards Authority adopted a less centralised structure. We hope the Government shares our view that it is important to have a strong central national body which has the experience and resources to take on flagship consumer related cases while leaving other types of cases to trading standard bodies to pursue at a local level.

3.14 Without a single national body speaking with one voice like the CMA we believe that there will be an inevitable increase in the bureaucracy of enforcement (especially if trading standards bodies have to work with each other loosely within the terms of the Indemnity Fund or a similar financing structure). The uncertain allocation of responsibilities among a fragmented class of enforcement authorities runs the risk of severely compromising consumer protection in high profile complex cases.

Statutory time limits (paragraphs 3.18 to 3.20)

Phase 1 market investigations

3.15 The Committee favours the setting of a six-month time limit for Phase 1 market investigations.

3.16 We believe that a statutory limit will impose discipline and efficiency into the process which has not always been evident in the past. Finite limits to the investigations would also help limit the cost burden on business. We believe that all Phase 1 market investigations should be capable of being finished within six months. As mentioned above Phase 1 market investigations are preliminary filters to determine what further action, if any, is necessary under the CMA's competition or consumer powers. They should not be allowed to run on beyond this period.

3.17 In paragraph 3.20, the consultation paper asks whether all market studies should be completed within the six months time limit or only those which have the potential to be referred under section 131. We believe that all Phase 1 market investigations should be concluded within the six month period. Any other approach would compromise the efficiency gains derived from introducing a rigid six month time period. In paragraph 3.6 above we have suggested setting up a separate statutory process for long term reports which we have called "market studies" outside the fixed time limits regime with greater discretion for the CMA as to time limits.

MIRs

3.18 MIRs can be complex and involve a considerable number of parties in the provision of substantial quantities of information. Although we are conscious that the CC is now setting itself a target of completing MIRs within an 18 month timeframe past experience has shown that they are often hard pressed to complete their investigations within the current statutory 24 month period. Companies involved in the investigation would also have an increased burden imposed upon them as the CMA struggles to complete its investigation with the 18 month time limit. A hurried inquiry with equally hurried remedies is not a recipe for creating a world class competition regime. In addition, given the potential severe remedies such as divestment which the CMA has at its disposal, we believe it is essential that due process at MIR stage is not compromised by the shortening of time scales and this is particularly true at the remedies stage. We believe that the CMA should be given adequate time to carry out its role effectively. Consequently we believe the current statutory period of 24 months is the most appropriate period and a reduction to 18 months should be resisted. However we do believe that it is important to get as close as possible to remedies finalisation within this two year period. The present position is unsatisfactory as there is no timetable at all for agreeing remedies and this process can drag on for months or even years

3.19 If, however, BIS did decide to reduce the period to 18 months, careful consideration needs to be given to the powers of the CMA to extend an MIR. We believe the CMA needs generous powers to do so for the reasons mentioned above. There should be the power to extend for two periods each of twelve weeks. However a second extension should only be used in exceptional circumstances. Such a power of extension should only be exercised on grounds that:

(a) the inquiry involves either a large number of parties and cannot be completed within the original timescale envisaged;

(b) the complexity of the issues involved require extra time; and

(c) the CMA and the parties need more time to consider appropriate remedies.

Information gathering powers at Phase 1 (paragraphs 3.21 to 3.21)

3.20 We support the introduction of information gathering powers for Phase 1 market investigations to be completed within the six-month time period subject to an appropriate threshold for the commencement of a Phase 1 market investigation. However we would be opposed to extending such powers to those studies or long-term reports referred to above as Market Studies where there is no realistic proposals that the CMA will use its competition based powers.

Interaction between MIRs and antitrust enforcement (paragraphs 3.27 to 3.28)

3.21 If the CMA is given information gathering powers for Phase 1 market investigations, how will it treat such information if it decides to commence an "antitrust" investigation (i.e. under the prohibitions in the Competition Act 1998 and/or Articles 101 and 102 TFEU) following the conclusion of a Phase I investigation?

3.22 The Committee considers that the commencement of an antitrust investigation should be the opening of a new separate regulatory procedure. Information gathered at Phase 1 market investigation stage should not be used or be admissible in antitrust investigations. Nor should it affect in any way the ability of companies to request leniency within the context of the antitrust investigation. The CMA should be required to request that information afresh from the parties involved in the inquiry or to negotiate with them and gain their express consent on how far the parties would be willing to allow the CMA to make use of data previously provided at market study stage.

Remedies (paragraph 3.31)

3.23 It is important that the CMA is given not only the required time but also the necessary remedial tools to carry out its job effectively and efficiently. We therefore support the Government's proposals to extend the scope of Schedule 8 to the Enterprise Act, so as to include extra information provision powers and the payment of a Monitoring Trustee or such other arbitral body. However in relation to this latter aspect the power to order parties to make payment should be used in limited circumstances and only where it is essential in default of agreement with the parties. However this is with the proviso that the Monitoring Trustee or such arbitral body should only be used to enforce remedies set out in Schedule 8 and should not have a wider role

3.24 Divestment is a controversial remedy and it will remain so in any proposed reform of the MIR system. We believe it is still appropriate for the CMA as the investigating body to retain the power to make divestment orders.

3.25 That said, forced divestment is generally economically disadvantageous for the vendor and can be ordered under the Enterprise Act when the vendor owns on an entirely legitimate basis and has committed no offence. From an ECHR perspective this has something in common with an

expropriatory remedy, since it deprives the vendor of the enjoyment of its property, and should be subject to the highest standards of protection.[1] Accordingly, in order to retain business confidence and add further safeguards into the new proposed CMA process we would advocate a change from the present appeal rights before the CAT based on judicial review principles to a full merits review of MIRs in all cases. However if the Government wishes to continue the existing judicial review procedure for MIRs we would ask the Government to give special consideration to providing a full merits review where the CMA orders divestment remedies. Forced divestment is generally economically disadvantageous for the vendor and can be ordered under the Enterprise Act when the vendor owns a business on an entirely legitimate basis and has committed no offence.

Cross-market references (paragraphs 3.8 to 3.9)

3.26 The consultation paper proposes that the CMA should have the power to investigate across markets. It has been put to us that there may be situations where common practices are present across different markets or industries and that it will be a benefit to be able to review these practices within the context of a single inquiry.

3.27 Although this is a superficially attractive proposition we believe it is inappropriate and impractical. First, it is inappropriate because we feel that any remedies need to be taken in the context of an investigation of the particular industry as a whole and the issues it faces. They should not be taken in isolation. There may well be different reasons for the same practice in different industries and it would be wrong to apply generalised conclusions. Secondly, taking the above example it would involve a huge number of parties which would render any investigation unduly complex and unwieldy. This is likely to be the case in most cross-market studies. We do not believe that regulators are well equipped to handle such large numbers of participants and such large quantities of data. The end result is likely to be a significant delay in outcomes for such enquiries which would be the exact opposite of the intended result.

Where, however, there is in fact a close relationship between markets with similar practices, then either a broad product or service description would enable them to be dealt with in a single reference or two (or more) references could be conducted in a coordinated manner under existing rules. We would not go further.

Public interest (paragraphs 3.10 to 3.13)

3.28 Under the Enterprise Act 2002, political considerations were taken out of competition policy and so the sole criterion for merger and market investigations, except in certain limited circumstances, was that decisions were to be taken on competition grounds. The only exceptions to this were certain public interest exceptions within the merger regime, and also the ability to intervene on public interest grounds (currently only national security grounds) under the market regime (sections 139 and 153). The latter power has, however, not been used to date.

3.29 It is now contemplated that the Secretary of State should be able to ask the CMA to consider and report on public interest issues, as well as competition issues, in the context of a market

[1] This is not the same in mergers cases, where the party which has completed a merger in advance of clearance, buys in the full knowledge that the business may have to be sold and chooses to take the risk.

investigation. Currently, the Secretary of State has the power under the Enterprise Act 2002 (section 153(3)) to add additional public interest considerations which can be taken into account when making MIRs. In addition the Secretary of State may, either before or after the making of the MIR, issue an intervention notice (section 139) to allow himself, after the Competition Commission's Phase 2 market investigation, to order remedies to any adverse effects on competition identified by the Competition Commission taking account of national security or other public interest considerations specified in the intervention notice (section 147), and to require the Competition Commission to make recommendations as to the remedies the Secretary of State might order in respect of the adverse effects in competition (section 141(3)). These public interest powers for MIRs are narrower than those applicable in merger investigations, and, as we understand it, the consultation paper contemplates widening those powers so that they are in line with those under the merger control regime.

3.30 The Committee does not, however, favour the Secretary of State being given the power to order the opening of an MIR in order that it can add non-competition issues to the scope of the CMA's mandate. We take the view that there are substantial risks in mandating the CMA to look at public interest issues even where they are closely allied to an MIR.

3.31 Issues of public interest in markets are for Ministers and Parliament and not for competition authorities. We think it is a slippery slope which could result in public interest issues dominating future MIRs which should be primarily competition-based. We would not want to see the tail wagging the dog.

3.32 In addition the CMA does not have the required expertise or experience to opine on public interest issues and would, as contemplated in paragraph 3.13 of the consultation paper, need to have the ability to co-opt appropriately qualified independent individuals to the market investigation panel. This would further increase costs and put pressure on scarce financial resources. We also believe it would compromise the focus of the CMA as a centre of competition excellence. It also appears incorrect to us that non-elected representatives will be required to sit on judgment mandated to spine/report on what are essentially public policy, indeed political, issues within the context of a competition law based system. This is so even if the panel members are only charged with making recommendations with the Minister taking the final decision.

3.33 Establishing wider public interest considerations within the context of an MIR would also be very restrictive for politicians, Ministers and Parliament. It should be up to politicians to design the investigating panel, appoint its members and agree the scope and terms of reference of the inquiry freely. It is wrong, we believe, to shoehorn this whole process into the context of an MIR.

3.34 If, nevertheless, the Government were to take forward these public interest proposals, we think that they need to be used in a limited way subject to four principal conditions:

(i) only those public interest issues which arise directly in relation to an MIR which is being referred on competition based grounds by the CMA should be considered. In this context we do not think it is appropriate for the Secretary of State to have the power to make a reference on his own initiative under section 132 of the Enterprise Act and then to issue an intervention notice setting out various public interest considerations. Although we appreciate that the Secretary of State would still have to satisfy the competition test, we think such a development would be highly dangerous and open to potential abuse. This would further exacerbate the concerns outlined in paragraphs 3.31 to 3.33 above;

(ii) the areas of public interest should also be narrowly defined. We would suggest that these should be limited to the areas such as media plurality and financial stability in addition to national security which is already been included in section 151 - this is similar to the current merger control regime;

(iii) extra resources, the appointment of properly qualified individuals and sufficient time needs to be given to the CMA to carry out these duties; and

(iv) the public interest panel should make recommendations to Ministers and be separate from the CMA MIR panel deliberations and decisions.

Super-complaints (paragraphs 3.14 to 3.16)

3.35 The Committee is not persuaded that SME representative bodies should be given the ability to make super complaints.

3.36 Giving privileged status to SMEs sends out the wrong message in terms of competition policy. Competition policy should be about the protection and promotion of consumer welfare and are not about promoting the interests of SMEs, even those which are at an intermediate stage in the distribution chain. First, SMEs are able, like any other company, to file a complaint with the CMA in relation to competition based issues. Secondly, there is a danger that SME representative bodies could misuse this procedure to attack efficient practices of large companies. This would be a perverse result from the policy which is ostensibly designed to promote competition. It could also damage consumer welfare. In addition the use of the super-complaint powers by SMEs could result in an extensive cost burden for the CMA and divert scarce resources away from dealing with its main functions to dealing with investigating and answering super complaint requests from SMEs.

3.37 We believe that super-complaint powers are an appropriate tool in certain circumstances, notably when consumer interests need to be protected. However, the Committee does not believe that it is right or appropriate to give special rights of protection to SMEs as a class. If BIS is anxious to ensure SMEs as a business grouping are adequately heard and represented within the CMA, we would advocate the establishment of an SME desk within the CMA specifically to focus on SMEs' issues and concerns.

Q4: Further ideas

Greater focus

3.38 We would encourage better focusing and targeting of references on key markets by competition authorities. This will produce more meaningful outcomes and have a greater effect on promoting the efficient working of markets than solely increasing the numbers of MIRs. Another more structured approach could be to impose a duty the CMA to keep certain identified key markets under review.

A *de minimis* exception for small markets?

3.39 The Committee has also considered whether the provision of a *de minimis* exception for small markets might assist in focusing the CMA upon markets that are important to the national economy. However we feel that there is a danger that important issues to consumers in localised or regional markets could escape scrutiny if they feel under any statutory de minimis threshold. Therefore on balance we think it is best that the CMA retains its present wide discretion whether to pursue a particular case

Timescales

3.40 Much has been made in the draft proposals for reform of the need to streamline the market investigations regime by reducing timescales to produce faster decisions. The Committee generally supports greater efficiency in the system, but we believe that care needs to be taken not to compromise due process. Although we can see the advantages of introducing a short statutory time period for Phase 1 market investigations, we do not believe that the timetable for MIRs should be shortened. It is particularly important that the business community maintains full confidence in the transparency and fairness of the MIR process. An essential part of this is having adequate time to put their case to the authority. Accordingly compressing timescales is likely to compromise the investigation parties' rights of "defence". This is particularly so during the remedies stage where among other things the CMA could be contemplating divestment which would have serious financial and other implications for the businesses concerned.

4 Section 4 - "A Stronger Merger Regime"

General comments

4.1 In the Committee's view, the current UK merger regime works well on the whole – it is sophisticated, nuanced and flexible, and is rightly regarded as one of the best in the world. We do agree that there is room for improvement but consider that this should be incremental and should build on the current regime rather than fundamentally changing it. Although the current regime's voluntary nature is unusual[2], this does not mean that it is, therefore, by definition, the wrong system to have and we would caution against change for change's sake.

4.2 As foreshadowed in the Overview, we have serious concerns about the proposals for a mandatory merger regime (whether full or hybrid, and whether suspensory or non-suspensory), and we consider them hard to reconcile with the Government's growth agenda.

4.3 A full mandatory notification regime would, in our view, impose unnecessary regulatory burdens and costs both on business[3] and on the authorities (the CMA) in requiring the notification *even of mergers that raise no competition concerns*. The proposed jurisdictional threshold for the full mandatory regime is too low and its introduction at that level would, in our view, damage the UK's reputation as a world class competition regime. If a full mandatory system were to be introduced, the jurisdictional threshold would need to be set at a sensible level which would entail acceptance that the regime would not catch every acquisition that might be of concern.

4.4 A hybrid mandatory notification system would simply be too complex and, itself, an unnecessary added regulatory burden and cost. In addition, it would address neither the concern about unscrambling completed anti-competitive mergers referred to below nor the fact that a significant proportion of the problematic completed mergers arise from the application of the share of supply test, as opposed to the turnover test[4].

4.5 Our view is that the most proportionate way of addressing the principal concern which seems to be driving the merger reform proposals - namely, the difficulties encountered by the competition authorities in unscrambling completed anti-competitive mergers - is to strengthen the current voluntary regime through the practical and creative proposals set out in paragraphs 4.12 to 4.16 of the consultation paper, rather than engaging in wholesale reform of the regime[5]. We also consider that these difficulties are likely to be easier to address, in any event, within a single competition authority which would have the benefit of the combined expertise and experience of the OFT and the Competition Commission in dealing with hold separate arrangements.

4.6 The other supposed drawback of the current voluntary regime identified in the consultation document - namely missing anti-competitive mergers - is, in our view unproven and highly unlikely.

- Importantly, the voluntary regime does not give *carte blanche* to anti-competitive mergers. Even under the voluntary system, the penalties for completing an anti-competitive merger without prior notification and clearance are immense: the risk, post-

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2 In that it is one of very few OECD countries that operate on this basis (paragraph 79 of the Impact Assessment).

3 Estimated in Table 23 of the Impact Assessment at £78 million.

4 See footnote **[31]**.

5 We note that paragraph 103 of the Impact Assessment comments that the unscrambling problem has only affected a handful of the many SLC cases the OFT has handled.

completion, of a costly investigation lasting many months followed by the risk of the acquirer having to sell the acquired business, and having to do so at a "fire-sale" price (this entails both very significant financial loss as well as reputational damage). The voluntary system offers "relief" only to those mergers that are innocuous in competition terms.

- Indeed, although the Deloitte report suggests that, *back in 2007*, 50 per cent of potentially problematic mergers were going undetected (which is not, in any event, consistent with the Committee's experience), the consultation paper acknowledges that this does not seem to represent a serious failing in the current regime. The improvements in the OFT's merger intelligence function will presumably have helped significantly in this regard.

4.7 Further proposed areas for improvement include increasing the speed of decision making and streamlining the end-to-end merger review process. We support these aims in principle - they should also help to address the difficulties inherent in unscrambling completed mergers by reducing the length of time for which a target's future remains uncertain. However, care will need to be taken that the current high quality of analysis and decision making at Phase 1 is not compromised by compression of the Phase 1 timetable and that the process is not, in fact, lengthened by protracted pre-notification discussions of the type experienced at EU level.

4.8 A further consideration, flowing out of an amalgamation between the OFT and the Competition Commission into a unitary CMA, is whether it makes sense any longer to retain the "duty" of the OFT to refer mergers to the CC (in section 22(1) of the Enterprise Act 2002). On balance, the Committee favours retention of a "duty" (within the CMA) to commence a Phase 2 investigation - not least because a new test would render irrelevant the existing case law and practice, and create new uncertainty for business - but this depends on there being the flexibility in practice that, if a merger is referred by the CMA to Phase 2, there is the possibility in reality of early termination of the Phase 2 investigation[6]. Otherwise, there is a risk that the duty to refer will entail businesses having to go through a full Phase 2 investigation when the burden of this is disproportionate to the size or value of the merger - which would be a particularly burdensome outcome for SMEs.

Q5 and Q6: Options to address the "disadvantages" of the voluntary regime

Voluntary or mandatory notification

4.9 Our overall view is that the current voluntary notification regime should be retained. As mentioned above, it is a sophisticated, flexible and well established system which minimises the burden that it imposes on businesses while effectively capturing, in our view, all or almost all potentially anti-competitive mergers. Its flexible nature has enabled the regime to evolve over time to deal with new and unexpected scenarios[7] and has given the competition authorities the ability to focus in on the real mischief rather than being preoccupied with non-problematic cases[8].

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6 Either because the merger does not raise real issues, or because the parties can agree remedies at an early stage of the Phase 2, or because the merger is abandoned at an early stage.

7 For example ITV/BSkyB.

8 By contrast, under a mandatory system, in order to arrive at a sensible jurisdictional threshold, it would, in our view, have to be accepted that there would be some problematic cases that the CMA would not be able to review.

4.10 A voluntary regime is likely, by its nature, to result in parties notifying transactions only where there is some possibility of an adverse effect on competition (together with a small number of transactions where the buyer is particularly risk averse and/or has a policy of notifying all mergers irrespective of the degree of competition risk). Added to these proactive notifications will be those cases that the authority chooses to investigate, either on its own initiative or as a result of a third party complaint, both categories of which will often tend to be transactions where there is, at least potentially, a substantive competition issue.

4.11 If, however, there were to be a mandatory regime, the authorities would need to investigate not only mergers that may raise substantive competition issues, but also those where the risk of a substantial lessening of competition is non-existent or minimal. This is an inefficient and wasteful use of both the competition authority's and the parties' resources, and costs are likely to be incurred for deals that plainly do not warrant it. The waste of national resource (both private-sector and public-sector) and the (by definition) *unnecessary* burden on business would hardly make for a "competition regime for growth" (the Government's stated intention in these reforms).

4.12 It seems to us, then, that a mandatory regime - whether full or hybrid, suspensory or non-suspensory - has disadvantages (some of which are recognised in the consultation document) which vastly outweigh any possible benefits, and would be wholly disproportionate in its burdens and, as a consequence, inimical to the Government's growth objectives.

4.13 In our view, a mandatory notification system would:

(i) place a significant[9] - and unnecessary[10] - regulatory burden on businesses engaged in non-problematic mergers.

Even if a short form notification were to be introduced, if the EUMR process is any guide, parties to transactions that raised no material competition concerns would still be required to submit considerable information and argumentation by way of merger notification (and, indeed, in order to convince the CMA that short form notification was appropriate). The CMA would then have to consider and process these notifications - with pressure to do so within tight timescales in order to avoid unnecessary delay to completion of the transaction.

(ii) perversely result in the added burden being borne by parties to *innocuous* mergers; parties to mergers that raised material issues would be likely in any case (in voluntary regimes) to notify, rather than take the risks of completing without clearance. The same point can be made about the use of regulatory resources: the additional work is likely to involve mainly administrative processing of straightforward notifications rather than substantive analysis of transactions that are likely to raise significant competition concerns. This is the very opposite of an efficient use of scarce regulatory resources.

(iii) be at odds with the overall recent *trend* in competition process. In merger control, the UK is one of the most advanced countries in allowing self-assessment by the parties, with serious consequences for them if they get it wrong, rather than a formalistic system of notification of all transactions, whether or not materially anti-competitive. In the context of

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[9] In terms of cost (for both merging parties), management time and distraction of management attention (for both merging parties), and delay.

[10] Because there is no need to impose an obligation of notifying competition authorities of mergers with trivial or nil competition implications.

"antitrust", the recent trend - embodied in the "modernisation" of the competition prohibitions under Regulation 1/2003 at EU level and the 2004 reforms of the UK Competition Act - has been to abolish notification obligations, to require businesses to "self-assess" for competition risk, and thereby to free the competition authorities from having to waste resources on reviewing cases raising no serious competition concerns and to focus only on the most seriously anti-competitive cases. For the UK to move its merger regime in the opposite direction - from focussing only on anti-competitive transactions with the parties self-assessing risk, to having to review all mergers - would be a retrograde step, contrary to the spirit of "modernisation" in competition policy.

(iv) deprive negotiating parties in transactions of the flexibility to determine, according to their own judgement of the particular commercial circumstances they face, whether antitrust risk in a merger should be borne by the seller or the buyer[11]. It would *automatically* - and for no good reason - place the risk on the seller.

(v) distort, and unnecessarily restrict, competitive bid processes for companies that are put up for sale (whether by businesses or governments) by preventing bidders that did face some antitrust risk from being allowed to assume the risk and participate in the tender process on a "level playing field".

(vi) make it harder to rescue companies in financial difficulties from insolvency (where a rescue often needs to be completed in days rather than weeks) - so making it harder to save jobs, particularly in small and medium-sized businesses[12]; we recognise that this could be partially mitigated by the proposed derogation from suspension in a mandatory regime, although the experience of such a derogation system under the EU Merger Regulation (slow to obtain, and often refused) is not encouraging.

(vii) necessitate a change in jurisdictional criteria: (a) the removal of the material influence criterion (because it is too vague so that it would be uncertain whether parties had fallen foul of the mandatory regime - and if material influence were subject to a voluntary regime in a hybrid system that would add needless complexity and, hence, regulatory burden); and (b) probably also the removal of the share of supply threshold (for similar reasons). This would mean that - perversely - potentially anti-competitive mergers would escape scrutiny, while innocuous mergers were subject to mandatory notification.

The fact that a merger creating a 45 per cent share of supply might not meet the turnover threshold, because it is in a small market, does not mean that it should escape scrutiny

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[11] In a mandatory regime, the risk of entering into a transaction that is ultimately prohibited lies largely with the sellers – following an adverse finding, the buyer can simply walk away, while the sellers are left in the (potentially embarrassing) position of having acknowledged that sale of the business is an attractive strategic option - and suffered the attrition of staff, business and morale that occurs once this becomes public - but having failed to achieve that sale. Under a voluntary regime, this position can be replicated if the buyer can negotiate with the sellers to make completion conditional on UK merger clearance, but the sellers will often seek to resist such conditionality unless the buyer's offer is so commercially attractive as to outweigh the risk of future competition intervention. The voluntary regime therefore gives more flexibility to sellers, as conditionality can be a negotiating point in a transaction.

[12] This is because, in recent years, increasing numbers of near-insolvent companies have been saved by "pre-pack administrations"; the process by which a buyer is found for a company in financial difficulty, and the sale is ready by the time it goes into administration, so that it can go out of administration with the sale completed within 24 hours. If the sale could not be completed until competition clearance were obtained, i.e. after a minimum of four weeks at very best, that would in most cases be fatal to the prospects of such a rescue. Indeed, the very act of having to notify, and so make public that the company was up for sale, would be highly prejudicial - deterring companies from embarking on this process. Such rescues would therefore be much less available if compulsory pre-notification were introduced. (Of course compulsory pre-notification exists under the EU Merger Regulation, but pre-pack administrations are typically used to rescue SMEs which would not normally meet the EU Merger Regulation thresholds.)

(subject of course to a basic *de minimis*/materiality test). Consumers in small markets have rights too - including the right to be protected from anti-competitive mergers.

Supposed drawbacks in the voluntary system

4.14 The Government has identified two principal drawbacks to the current voluntary system, as follows.

(i) The risk that some anti-competitive mergers are escaping review (paragraph 4.3)

4.15 We would be surprised if, in reality, many anti-competitive mergers escape scrutiny by the competition authorities, and, indeed, the Government acknowledges that the lack of complaints and the smaller size of the mergers in question indicate that this is not a serious failing. It seems to us that the risk that a potentially anti-competitive merger will be missed entirely by the OFT is a relatively limited one given its monitoring activities and the vested interests of third parties in complaining, as well as the possibility of investigating a merger more than four months after completion (and then potentially ordering disposal of the acquired business) if it has been given insufficient publicity[13].

(ii) The voluntary system leads to the investigation of a large proportion of completed cases, which makes it difficult to apply appropriate remedies if they are found to be anti-competitive (paragraph 4.3)

4.16 There are a number of points to make to address this concern.

4.17 First, in the Committee's view, some of the problems identified would arise *regardless* of whether there is a voluntary or a mandatory system. For example, we understand that the Competition Commission has identified the departure of key senior personnel as a particular problem when trying to ensure that a target can be divested as a viable independent competitive entity following a prohibition decision. We think that this is more a function of a company being "in play" for a number of months (while the merger is under review by the OFT and the Competition Commission) in which circumstances it is unsurprising that key personnel should want to leave and look for alternative, possibly more secure, employment. In our view, the introduction of a mandatory regime is not the solution to this particular problem - it seems to us that given that the target's future will still be in doubt over a long period (its having been announced that the company's owners wish to sell it), key personnel are at least as likely to leave as under a voluntary system; the only difference between the two being that, in a mandatory (and suspensory) regime, the merger would not yet be completed and the target would remain in the hands of the sellers until clearance, albeit that it would be known that the sellers no longer wished to retain it with key personnel still facing the same uncertainty.

4.18 Second, the powers which the competition authorities already have to prevent prejudicial business integration[14] seem to us generally to work, although the scope and terms of the undertakings requested could benefit from more focus and further refinement. We also accept

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[13] Section 24 (2) Enterprise Act. An anti-competitive merger cannot escape scrutiny simply by being "hidden from view"; as soon as it becomes known, the OFT has four months to decide to refer it to the Competition Commission. That is plenty of time for the OFT to become aware of it and/or for anyone who is concerned about its effects (customers, suppliers, competitors) to draw the OFT's attention to it.

[14] Through hold separate measures and the statutory restrictions which apply following a reference.

that difficulties can arise where completed mergers do not come to the OFT's attention in good time[15] or where hold separate undertakings are imposed relatively early but integration has already progressed[16] which reduces the efficacy of the undertakings; although again in our experience these problems have not been significant in practice. In fact, if anything, the OFT appears to be using hold separate arrangements increasingly early and in a wide range of cases, including where there is little risk of potential harm arising from irreparable integration.

4.19 Third, while we do appreciate and understand the concerns which have been expressed (by the Competition Commission and others) about the difficulties of unscrambling completed mergers where practical integration is already well advanced[17], the solutions to this need to be proportionate and targeted.

- The concern about completed mergers, while real, should be kept in perspective. As the table at the end of this Section demonstrates[18], in the nearly five years since January 2007, there have only been 15 completed mergers referred to the Competition Commission, and ***only five of these completed mergers (i.e. just one a year) have been found to result in a substantial lessening of competition***.

- Likewise, the possibility of this problem being "solved" by mandatory merger notification should not be exaggerated, either. ***12 of the 15 completed mergers (i.e. 80 per cent) referred to the CC since January 2007 were referred only because they satisfied the share of supply test; a mandatory notification system, which could not possibly include a "share of supply" test would have been useless to "solve" the problem for that 80 per cent***.

- The solution should, instead, be focused, proportionate and effective. We therefore very much welcome the consultation paper's creative suggestions[19] for addressing the "unscrambling" concerns without going to the lengths of mandatory notification, discussed in paragraphs 4.25 to 4.43 below. By contrast, addressing this issue by requiring all mergers (whether or not anti-competitive) to be prenotified, reviewed by the competition authorities and suspended pending clearance would be a wholly disproportionate and unnecessary regulatory burden (on businesses and authorities alike) - a sledgehammer to crack a nut.

The Kraft/Cadbury issue

4.20 We are aware of the concerns, following the *Kraft/Cadbury* takeover early last year, about some of the dangers of takeovers being too easy. It has been suggested that mandatory notification might be a way of inhibiting undesirable or unwelcome takeovers. It is not the Committee's intention to enter into the debate about the merits of UK takeover policy other than to observe that

(i) Such considerations are a matter of takeover law and policy (the Companies Act, the Takeover Code, etc) rather than competition law and policy, and we doubt that it is a

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15 Although the evidence suggests that this is rare.

16 For example, through staff dismissals or branch closures.

17 Although, as noted previously, this does not necessarily accord with the experience of most members of the CLLS Competition Law Committee. We also note the comment at paragraph 103 of the Impact Assessment that "the unscrambling problem has only affected a handful of the many SLC cases the OFT has investigated".

18 See also footnote 22 below.

19 Paragraphs 4.12 to 4.16 of the consultation paper.

legitimate function of competition law and policy to reduce takeover activity.

(ii) A move to mandatory notification would have the perverse effect that it would be the more innocuous (in competition terms) takeovers that were harmed. Anti-competitive mergers are generally notified in any case under the UK voluntary system, because the risks of not notifying are too great (as discussed above), whereas the change to a mandatory system would have the greatest impact on mergers raising no serious competition concerns, which are often those between smaller players in a market.

(iii) A UK mandatory notification system would not make much difference to the likelihood of another *Kraft/Cadbury* takeover. In this context, it is striking that:

- *Kraft/Cadbury* itself was subject to EU jurisdiction, so that the UK competition regime was irrelevant
- *Kraft/Cadbury* was subject to a mandatory notification regime (the EUMR) - and still went ahead!

Hybrid mandatory notification (paragraphs 4.28 and 4.29)

4.21 Under the "hybrid" proposal, mergers where the value of the UK target turnover exceeded £70 million[20] would be required to be notified. In addition, the CMA would have jurisdiction over mergers where the turnover test was not met but either (i) the share of supply test was or (ii) where the small merger exemption did not apply. (4.28/4.29)

4.22 We consider the hybrid mandatory notification proposal to be almost the worst of all worlds. It would impose a notification burden on non-problematic mergers where the turnover test was met and still leave the difficulties of unscrambling completed mergers to be addressed in relation to those mergers which met the share of supply test[21] which is where a significant proportion of the difficulties under the current regime seem to have arisen[22].

The Singapore model (paragraphs 4.10 to 4.11)

4.23 We welcome the Government's indication, in paragraph 4.11 of the consultation paper, that it is not minded to pursue a similar route to that which is operated in Singapore, Australia and New Zealand.

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20 We note that paragraph 120 of the Impact Assessment assesses the impact of a turnover threshold of £40m as well.

21 Or did not fall within the small merger exemption.

22 As is shown by the table at the end of this Section, out of the 15 completed mergers referred to the Competition Commission under competition powers in the nearly five years since January 2007, only three have satisfied the turnover test - the other 12 (80 per cent) were referred only because they satisfied the share of supply test. It should also be noted that all but the most recent of these (*Sector Treasury Services/Butlers*) had been subject to "hold-separate" undertakings. Moreover, as the table also makes clear, of these 15, only five (in almost five years) were then found to give rise to an SLC - whereas eight were found to have no SLC and one provisionally found to have no SLC (with provisional findings for the *Sector Treasury Services/Butler* case expected to be announced in early July). These figures do not suggest a major crisis of completed anti-competitive mergers that would warrant the draconian legislative change of mandatory merger notification.

4.24 We think that it would be entirely inappropriate to impose penalties for anti-competitive mergers. The whole European competition framework - both at EU level, and in the individual Member States (including the UK) - recognises a fundamental conceptual distinction between, on the one hand, anti-competitive agreements and abuses of dominance, which are prohibited, illegal and subject to penalties - and, on the other, mergers, which are not illegal but, rather, subject to scrutiny ("merger *control*"). Implicit in this is that merger activity, which is perfectly lawful, can be stopped if it is likely to have anti-competitive effects, but not penalised. The "Singapore model" would fatally blur that distinction, and be incompatible with the conceptual structure of UK and European competition law and policy (and indeed that in the United States).

Strengthened interim measures (paragraphs 4.12 to 4.15)

Suggested options

4.25 The two potential options which are being considered by the Government[23] are as follows:

- **Option 1** – introducing a statutory restriction on further integration which would apply automatically, as soon as the CMA starts an inquiry into a completed merger, pending negotiation of initial undertakings. This would be akin to a strengthened form of the restrictions contained in section 77 of the Enterprise Act 2002 which apply automatically under the current regime once a reference has been made to the Competition Commission; and

- **Option 2** – giving the CMA the ability to trigger these powers[24] in its Phase 1 investigation to suspend all integration steps pending negotiation of tailored hold separate undertakings.

4.26 **The Committee's view is essentially to favour Option 2 - but with the CMA having discretion to exercise these powers in Phase 1 (not automatically when the CMA sends the parties a request for information), with published guidelines to give predictability to both parties and the CMA as to how the discretion will be exercised.**

Option 1 / Option 2

4.27 The principal difference between Options 1 and 2 is that, under Option 1, the prohibition on further integration would apply "across the board" in respect of all completed mergers that are investigated by the CMA (whether problematic or not) whereas, under Option 2, the CMA would be in a position to adopt a more targeted approach to such prohibition. It also seems that it is only in relation to Option 2 that the Government is considering clarifying the legislation to "make clear the type and range of measures that the CMA could take, including at Phase 1, in order to prevent pre-emptive action" (paragraph 4.15 of the consultation paper).

4.28 The advantages of Option 1, which have been identified in the consultation document, are that it would prevent the harm caused while initial undertakings are negotiated and may mean that the ability to obtain effective remedies is enhanced (paragraph 4.14). While we recognise these

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[23] Paragraph 4.13 of the consultation paper.

[24] We assume that the reference to "these powers" is a reference to a similar form of restriction to that contemplated under Option 1 but would welcome clarification of this and also of the interaction between "these powers" and the powers contemplated in paragraph 4.15. See further our comments on paragraph 4.15.

potential advantages, it seems to us that Option 2 offers similar advantages (depending on the timing of triggering of the powers by the CMA) but is more consistent with the nuanced, flexible and sophisticated merger control regime we currently have in the UK.

4.29 We consider Option 2 (which is discretionary, proportionate and targeted) to be more in keeping with a voluntary regime and prefer it to Option 1.

- We recognise that such a discretionary approach potentially carries some risks of uncertainty, both for the parties and for the CMA - and that the CMA has the additional concern that, if the decision to impose the statutory restriction is a discretionary one, it will be open to judicial review challenge. We believe that this concern can be very substantially mitigated (and in practice removed) by the publication of guidelines as to the criteria by which the discretion would be exercised.

- In the absence of such discretion, there is a potential for absurd outcomes. For example, a merger which is technically within UK jurisdiction (e.g. because of the turnover test) but which manifestly raises no competition concerns whatever (and was therefore not notified) should not always be held up - particularly when it is a merger between multinational companies, such that the UK holding up integration would have severe international effects on the businesses (truly, the tail wagging the dog).

4.30 In our view, a blanket restriction of the kind contemplated in Option 1, which applies from the very outset of the CMA's Phase 1 investigation and applies to all completed mergers, whether or not they are problematic, would be rather a blunt instrument. It would also be very damaging for the prospects of rescuing failing businesses where immediate measures are needed. By contrast, Option 2 could prove to be a more sophisticated and apposite tool as the CMA could presumably be selective about the cases in which it applied these powers and, as seems to be current OFT practice, not apply them in those cases where there was clearly no competitive overlap.[25]

4.31 Both options would, in our view, be likely to lead to more notifications of potentially problematic mergers as the inability[26]/potential inability[27] to integrate the merging businesses post completion would be a more significant factor and could lead more buyers to seek certainty before completion. However, we think that Option 1 would be more likely than Option 2 to lead to an increase in the number of non-problematic mergers being notified to the CMA as buyers would be less likely to be prepared to take the risk of completing without clearance if they were unable, in any event, to integrate pending a Phase 1 decision. By contrast, the more targeted approach of Option 2 would give buyers of businesses where there was no/limited overlap with their existing activities more latitude in deciding to proceed unconditionally and would be particularly helpful where insolvency makes this an urgent matter. This, again, would be more consistent with a voluntary regime.

4.32 Under either option, the initial restriction would, of necessity, have to be as broad as the restriction in section 77 in order to capture the widest range of pre-emptive conduct and would, as a consequence, be quite difficult to interpret in practice and would lack certainty. It would,

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[25] By way of clarification, we are not suggesting that the current thresholds for seeking initial hold separate undertakings or imposing hold separate orders be retained but we would hope that the CMA would be in a position to adopt a more targeted approach given its considerable experience in identifying potentially problematic mergers at an early stage.

[26] In the case of Option 1.

[27] In the case of Option 2.

therefore, in our view, be in the interests of all stakeholders for the restriction (under either option) to apply for as short a time as possible. This issue would be exacerbated, in the case of Option 1, by the restriction's blanket application to all mergers pending the negotiation of individual hold separate undertakings. In this context, the CMA ought to be empowered to release purchasers from its application altogether in non-problematic cases (rather than replacing the statutory restriction with individual undertakings).

4.33 In any event, the scope of the restriction should be delineated to ensure that, in public takeover offers which had closed, the restriction or integration did not prevent the acquirer "mopping up" remaining minority shareholdings.

4.34 We note that the drawback which has been highlighted in paragraph 4.14 of the consultation paper – namely that Option 1 might discourage parties from notifying completed transactions until they had already achieved a level of integration - could be overcome by giving the CMA an ability to require reversal of action that had already taken place as proposed under Option 2. Our thoughts on this "reversal" proposal more generally are set out in the following paragraphs.

Type and range of measures which could be taken under Option 2 - reversal measures

4.35 Under Option 2, the Government is considering clarifying the legislation to make clearer the type and range of measures that the CMA could take (including at Phase 1) in order to prevent pre-emptive action. These would include an ability to require reversal of action that had already taken place and to prevent further pre-emptive action notwithstanding the existence of any contractual obligations on the part of the merged entity (the "reversal measures").

4.36 We welcome this proposed clarification and support a strengthening of the powers available to the CMA to tackle pre-emptive action. However, the legislation (or, at least, guidance by the CMA) should make clear, and closely circumscribe, the circumstances in which it is contemplated that such measures could be taken. We think that it is important to ensure that their use is appropriate and proportionate. This is particularly the case in relation to the reversal measures and especially so as regards their use in Phase 1.

4.37 The Committee has doubts about the appropriateness of the reversal measures being exercisable in Phase 1, before the CMA has even reached a view on whether the reference test is met. In any event, whether or not they were exercisable in Phase 1, we would expect the reversal measures to be used sparingly[28] by the CMA[29], and we would expect the CMA to publish guidelines on its approach to the use of all of the powers that it is to have to prevent pre-emptive action.

4.38 As mentioned above, there should be clarification of the interaction between the reversal powers (referred to in paragraph 4.15 of the consultation paper) and the statutory restriction powers (referred to in paragraph 4.13) in relation to Option 2 - which we are assuming to be a form of the statutory restriction contemplated under Option 1. In particular, it should be clarified whether the reversal powers are to be exercisable only in those cases where the CMA does not trigger the Option 2 powers in a particular case or more widely.

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[28] The ability to override contractual obligations, in particular, could create unfairness for third parties who were unaware of the risk.

[29] Particularly in Phase 1, if it was decided that the measures should be exercisable then.

Negotiation and monitoring of undertakings

4.39 Whichever option is pursued, the CMA will need an experienced (and preferably dedicated) team to negotiate, monitor and deal with follow up queries/requests relating to both the individual hold separate undertakings and derogations from the statutory restriction/interim CMA restriction in a flexible, speedy and pragmatic way (which current experience suggests might be a possible concern). However, the creation of a CMA combining the experience and personnel of the OFT (which is already making increasing use of hold separate undertakings), and of the Competition Commission, could potentially help in this area.

4.40 In this context, we are assuming that there are no plans to give the CMA the ability to require third party "monitors" of hold separate undertakings at Phase 1 or extending the proposed ability to require the parties to pay for third party monitoring of remedies (paragraph 3.31 of the consultation paper) to the monitoring of hold separates. We would not support any such plans.

Timing

4.41 Another issue for consideration, in relation to both options, is timing. Paragraph 4.13 contemplates the statutory restriction applying as soon as the CMA commences an inquiry into a completed merger. The Committee's view is that Option 2 - giving the CMA the ability to trigger the powers in Phase 1 - must be a matter of discretion for the CMA. It should not apply necessarily or automatically on the commencement of a Phase 1 inquiry into a completed merger, or on the sending of an information request to the parties, but at a point (which may well be very early on) where the CMA considers it appropriate.

4.42 Separately, there is the question of when the restriction should *cease* to apply. In the Committee's view, the restriction should not necessarily, or always, continue to apply until the clearance decision. Again, the CMA should be given discretion over this. For example, in the case of a multinational merger which raised no competition issues in the UK, but which did raise some competition issues in other countries but had subsequently been cleared in those countries, we see no reason for the UK restriction to remain in place following clearance in other jurisdictions.

Penalties

4.43 The Committee does not object, in principle, to the proposal to introduce financial penalties for breach of hold separate obligations. However, we have concerns about the practicality of this proposal and would observe that it would need to be made very clear to the merging parties exactly what was and was not permitted (which, in our view, would be a particular challenge in relation to the section 77 style restriction). In addition, there would need to be a speedy, flexible and pragmatic procedure in place for checking grey areas/obtaining consents/derogations which would impose an additional burden on the CMA. We would also suggest that the CAT be given unlimited jurisdiction to review the imposition and level of any penalty levied in such cases.

Jurisdictional thresholds in a voluntary notification regime (paragraphs 4.38 to 4.39)

4.44 The Government is seeking views on whether there should be changes to the jurisdictional thresholds in the UK's voluntary merger regime.

4.45 One possible suggested approach is the replacement of the current tests with the ability for the CMA to have jurisdiction over all mergers except those which benefit from the proposed small merger exemption[30].

4.46 The Committee sees no reason to depart from the current thresholds; why should mergers which *neither* result in a 25 per cent share of supply, *nor* include taking over a business with turnover above £70 million, be newly subject to merger control? Moreover - in the absence of evidence that such a change would catch mergers which ought to be caught but currently escape scrutiny - this measure would simply be an unjustified and unnecessary extension of regulatory burdens, inconsistent with the Government's "growth" agenda.

Jurisdictional thresholds in a mandatory notification regime (paragraphs 4.23 to 4.33)

4.47 If the Government decided to introduce a mandatory notification regime, it would be critical to ensure that the jurisdictional thresholds were set at reasonable levels, balancing the benefits of *ex ante* review against the large costs to both business and the public purse. As noted in paragraph 4.23 of the consultation paper, any threshold would need to be clear and objective - which entails that, as acknowledged in paragraph 4.25, retention of the share of supply test would not be appropriate in a mandatory regime.

4.48 The jurisdictional threshold proposed by the Government for full mandatory notification ("Option 1", in paragraph 4.27 of the consultation paper) - i.e. notification wherever target UK turnover exceeds £5 million and acquirer worldwide turnover exceeds £10 million - has been universally recognised as unreasonable, unworkable and oppressively burdensome (both for business and for the competition authority). In practice, it would mean that vast numbers of mergers, which were not only innocuous in competition terms but also relatively insignificant even in financial terms, would be subject to the burden of mandatory notification and suspension pending clearance.

4.49 Indeed, it is hard to see how a mandatory notification system could work without thresholds being very high - much higher, indeed, than under the current voluntary system (otherwise, the CMA will be inundated with a huge increase in notifications, and UK business correspondingly subject to increased burden). Although views within the Committee differed, no one thought that it would be reasonable to subject a merger with less than £70 million UK turnover and less than £100 million global turnover, to mandatory notification.

4.50 This issue brings to the fore the problem with a mandatory system (already referred to above). The plain truth is that the consequence of a mandatory system is that jurisdictional thresholds must be raised substantially.

- Otherwise, the competition authority becomes inundated with notifications, and, given finite resources, its analysis necessarily becomes more superficial than at present - weakening the rigour of the scrutiny, and allowing possible anti-competitive effects to go undetected.

- But a mandatory system with raised thresholds also creates problems. As mentioned above, neither the concept of "material influence" nor the "share of supply" test could

[30] Paragraphs 4.40 to 4.42.

realistically survive in a mandatory notification system; they are just too uncertain in scope for it to be just or reasonable that a party within their terms be subject to sanctions for non-notification. However, both tests (unlike a turnover threshold) relate to potential anti-competitive effects - and abolishing the tests would mean a number of transactions with anti-competitive effects escaping scrutiny altogether.

4.51 In short, the consequence of the mandatory notification system would be that, however, thresholds are set, more innocuous mergers become notifiable, while potentially anti-competitive mergers escape detection. It is an entirely inappropriate outcome.

4.52 Finally, on thresholds, there is the proposal for a hybrid mandatory notification system. For the reasons explained in paragraphs 4.21 and 4.22 above, we consider this to be possibly the worst of all worlds.

Costs and benefits of the options

4.53 In the Impact Assessment (page 39), the Government asks whether respondents have any evidence about the costs to businesses of notifying mergers to the OFT, in terms of management time and legal fees. A number of the firms represented on the City of London Law Society Competition Law Committee have each given separate individual responses to this question to BIS.

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

4.54 We welcome the acknowledgement that some mergers are likely to be too small to warrant the time and cost of a review by the OFT and the notion that such mergers should fall outside the scope of the mergers regime altogether (unlike the current *de minimis* exception which involves all concerned in considerable time and expense in going through a Phase 1 review).

4.55 Indeed, we think that the *de minimis* exception should be extended to cover not just small markets, but small enterprises in large markets.

4.56 Nevertheless, we think that, if the voluntary system is retained, it would be possible and right that there should not be a blanket exemption for such mergers, but rather a strong presumption that such mergers would not be investigated in the absence of very strong evidence of anti-competitive effects. This is because the test that the Government suggests be applied does not have regard to the size of the market in which the companies in question operate, and such mergers could have seriously anti-competitive effects in small local markets; as noted in paragraph 4.13 above, consumers in small markets have the right to be protected from anti-competitive mergers. However in a mandatory system it is essential to have bright line rules wherever possible so that parties know where they stand.

Q7: Streamlining the merger regime

Statutory timescales (paragraphs 4.43 to 4.47)

4.57 The Government is considering whether to introduce statutory timescales for Phase 1 and the undertakings in lieu and remedies implementations stages of both Phase 1 and Phase 2 (4.43) in order to achieve quicker results and outcomes, give business certainty as to when decisions will be made and incentivise a speedier end to end merger process. No change is proposed to the statutory 24 week time limit for Phase 2[31].

4.58 We support the aim of speeding up the end-to-end merger process provided that this does not compromise the current quality and robustness of decision making.

Phase 1

4.59 In principle, we agree with the introduction of a statutory timetable for Phase 1, although we query whether this would necessarily speed up the end to end process. If the experience under the EU Merger Regulation is a guide, this could result in lengthy pre-notification discussions which could extend the timetable rather than reduce it. We suggest, therefore, that the Government considers also imposing a statutory time limit on pre-notification discussions.

4.60 We also wonder whether a 30 working day timetable would work in a mandatory regime given the large increase in notifications which is foreshadowed in the Impact Assessment and the fact that it would apply to non-problematic and problematic mergers alike. In our experience, it is sometimes a challenge for the OFT to meet the extended merger notice timetable of 30 working days and merger notices are generally only used in non problematic cases. We would suggest giving the CMA the ability to extend the timetable by a further 10 working days – as mentioned above, if a mandatory regime is to be introduced, our view is that it should be non-suspensory in which case this ability to extend the timetable should not be unduly problematic for the parties.

4.61 In a voluntary regime, we agree that a 40 working day timetable would be appropriate (paragraph 4.45 of the consultation paper) – effectively putting the current administrative timetable on a statutory footing, coupled with the extended information gathering powers referred to in paragraphs 4.48 to 4.49 of the consultation paper.

4.62 In addition, the current merger notice system should be retained in a voluntary regime. We can see no reason to deprive parties of the option to use the prescribed form of notification in return for a decision within a guaranteed time period (20 working days, extendable to 30 working days).

Phase 2

4.63 We agree that the 24 week statutory time limit for Phase 2 investigations should not be reduced.

4.64 We support the proposal to introduce a statutory timescale of 12 weeks (extendable by up to six weeks) on Phase 2 remedies implementation between the publication of the final report and either acceptance of undertakings or the making of an order by the CMA and agree that this

[31] This does not include remedies and is extendable by up to eight weeks.

would need to be accompanied by extended information-gathering powers for main and third parties during the remedies implementation stage of Phase 2.

Information-gathering and "stop the clock" powers (paragraphs 4.48 to 4.49)

4.65 We agree that, in both a voluntary and a mandatory notification regime, the CMA should be given the same powers to obtain information from main and third parties in Phase 1 as those which currently apply in Phase 2. We also agree that these powers would need to be accompanied by "stop the clock" powers if the main parties did not comply, as well as powers to impose a penalty if main parties did not comply; however, we think that such a penalty for third parties would be an unreasonable imposition. We note that this would rely on the CMA using its information gathering powers responsibly and guidance on the circumstances in which a fine might be pursued would be welcome.

Anticipated mergers in Phase 2 (paragraph 4.50)

4.66 We agree with the proposal, in the case of anticipated mergers, to introduce a discretionary stop the clock power 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. This would be a very welcome change to the current system and significantly reduce the burden on all concerned.

Enable single CMA to consider remedies earlier in Phase 2 (paragraphs 4.51 to 4.52)

4.67 Our understanding is that, even now, there is no statutory impediment to the CMA considering remedies at an earlier stage in Phase 2.

4.68 That said, there is clearly a balance to be struck here. On the one hand, it is clearly more efficient to have a system where, if parties are able to agree remedies with the CMA at an early stage in Phase 2, both they and the CMA are spared the burden, time and expense of proceeding with the investigation to its natural conclusion. On the other hand, if this is encouraged too much, that would reduce the incentive on parties to agree remedies ("undertakings in lieu") at Phase 1, giving them every reason to gamble that they can avoid concessions at Phase 1 with little downside in terms of the risk of having to go through a full and lengthy Phase 2 investigation.

4.69 A possible alternative would be to give greater opportunity for transparent and meaningful negotiation of remedies (undertakings in lieu) at the end of Phase 1 than exists under the present system. Instead of the parties having to propose remedies "in the dark", the CMA at Phase 1 could show them its draft decision to refer Phase 2 and give them a period (of, say, two weeks) to negotiate undertakings before a final decision is published. The need to avoid a "false market" could be met by publishing the fact that an extension to Phase 1 is being given to enable the parties to negotiate undertakings (as is currently the practice under the EU Merger Regulation Phase 1 system); there would be no need to publish the draft decision to the world at large, and doing so would be destabilising and potentially (and unnecessarily) damaging to the parties.

Appeals in merger cases (paragraph 4.53)

4.70 Please see our comments on Chapter 10 of the consultation paper.

Remedies (paragraphs 3.29 to 3.38)

Appointment and remuneration of third parties to monitor and/or implement remedies

4.71 We do not see the need, in the mergers context, for an amendment of Schedule 8 to the Enterprise Act to enable the competition authorities to require parties to appoint and remunerate an independent third party to monitor and/or implement remedies. We are not aware of circumstances in which the current powers have proved insufficient and, in any event, it seems to us that the merged/merging parties, in any event, have every incentive to agree to such a proposition if the alternative is a prohibition decision.

Requirement to publish non-price information

4.72 We welcome the proposal to amend Schedule 8 to the Enterprise Act to enable the CMA to require parties to publish non-price information.

Streamlining of the remedies review process and revision of the threshold for review

4.73 We also welcome the proposals, in paragraphs 3.34 to 3.36 of the consultation paper, for streamlining the review of remedies process and revising the threshold for review so that it is clear that remedies can be reviewed to ensure that they operate as intended, rather that there being a need to identify a "change of circumstances".

Clarifying powers following remittals of merger

4.74 These proposals are very welcome indeed. As noted, the current uncertainty is unsatisfactory and gives rise to unnecessary costs and delays.

Summary of OFT references to the Competition Commission since 1 January 2007

	Parties	Date referred	Basis for UK merger jurisdiction	Completed?	Hold separate undertakings?	Outcome
1	Kemira GrowHow / Terra Industries	26/1/07	turnover test	No		SLC
2	MDA / Quest Associates	14/2/07	share of supply test	No		Cancelled
3	Greif Inc / Blagden Packaging Group	21/2/07	share of supply test	Yes	OFT, adopted by CC	Approved
4	Woolworths / Bertram Group	3/4/07	turnover test	Yes	OFT, adopted by CC	Approved
5	Tesco / Co-Op Slough	19/4/07	share of supply test	Yes	CC	SLC - divestment order
6	Sportech / Vernons	3/5/07	share of supply test	No		Approved
7	G4S Cash Services / Abbotshurst Group	18/5/07	share of supply test	No		Cancelled
8	BSkyB / ITV	25/5/07	public Interest	Yes		Report to Secretary of State
9	Polypipe Building Products / Verplas	11/7/07	share of supply test	No		Cancelled
10	Macquarie UK Broadcast Ventures / National Grid Wireless Group	8/8/07	turnover test	Yes	OFT, adopted by CC	SLC - undertakings required
11	GAME Group / GameStation	9/8/07	turnover test	Yes	OFT, adopted by CC	Approved

	Parties	Date referred	Basis for UK merger jurisdiction	Completed?	Hold separate undertakings?	Outcome
12	Cineworld Group / Hollywood Green Leisure Park	17/3/08	share of supply test	No		Cancelled
13	BOC / Ineos Chlor	29/5/08	share of supply test	No		SLC
14	Project “Kangaroo” - VOD joint venture - BBC Worldwide / Channel 4 / ITV	30/6/08	share of supply test	No		SLC
15	Nufarm / A H Marks	29/8/08	share of supply test	Yes	OFT, adopted by CC	SLC - undertakings required
16	Hospedia / Premier Telesolutions	7/10/08	share of supply test	No		Cancelled
17	Long Clawson Dairy / Millway	8/10/08	share of supply test	Yes	OFT, adopted by CC	Approved
18	Capita Group / IBS OPENsystems	19/11/08	share of supply test	Yes	OFT, adopted by CC	SLC - partial divestment order
19	Holland & Barrett / Julian Games	20/03/09	share of supply test (contested)	Yes	OFT, adopted by CC	Approved
20	Stagecoach / Eastbourne Bus	13/5/09	share of supply test	Yes	OFT, adopted by CC	Approved
21	Stagecoach / Preston Bus	28/5/09	share of supply test	Yes	OFT, adopted by CC	SLC – divestment order

	Parties	Date referred	Basis for UK merger jurisdiction	Completed?	Hold separate undertakings?	Outcome
22	Live Nation / Ticketmaster	10/6/09	turnover test	During CC investigation (following remittal by CAT)		Approved
23	Sports Direct / JJB Sports	7/8/09	share of supply test	Yes	CC	Approved
24	RMIG / Ash & Lacy Perforators	26/8/09	share of supply test	No		Cancelled
25	Brightsolid / Friends Reunited	3/11/09	share of supply test	No		Approved
26	Getty Images / Rex	8/7/10	share of supply test	No		Cancelled
27	Zipcar / Streetcar	10/8/10	share of supply test	Yes	OFT, monitoring trustee appointed by CC	Approved
28	Dorf Kettal Chemicals / Johnstone Matthey	19/11/10	share of supply test	No		Cancelled
29	Stena AB / DFDS Seaways Irish Sea Ferries Ltd	8/2/11	share of supply test	Yes	OFT, monitoring trustee appointed by CC	To be determined (provisionally approved)
30	Ratcliff Palfinger / Ross & Bonnyman	18/2/11	share of supply test	No	CC	To be determined (provisionally approved)

	Parties	Date referred	Basis for UK merger jurisdiction	Completed?	Hold separate undertakings?	Outcome
31	Thomas Cook / Co-operative Group / Midlands Co-operative	2/3/11	turnover test, following successful request under Article 9(2) of Council Regulation (EU) 139/2004 and fast-track reference	No		To be determined
32	MBL/Trigold Crystal	17/3/11	share of supply test	No		Cancelled
33	Sector Treasury Services/Butlers	31/3/11	share of supply test	Yes	CC	To be determined

Overall: 33 references - 6 on the turnover test, 26 on the share of supply test (and 1 on public interest grounds).

5 Section 5 - "A Stronger Antitrust Regime"

Summary and recommendation

5.1 The Committee agrees that there is a case for enhancing the efficiency of the current administrative approach to antitrust enforcement introduced by the Competition Act 1998. While a number of the recent streamlining and procedural improvements introduced by the OFT[32] are to be welcomed, the Committee believes that the current structure, whereby the OFT plays four roles - carrying out investigations; "prosecuting" an alleged infringement in the form of a Statement of Objections; deciding whether an infringement has in fact occurred; and determining the level of any penalty that should be imposed - gives rise to the very real risk of confirmation bias and is likely to contribute to inefficiencies. It is the Committee's view that the structure itself is likely to have materially contributed to the fact that many antitrust cases have taken too long and for a number of years there were few actual infringement decisions. Moreover, the Committee believes that the absence of senior experienced decision-makers who review the evidence and arguments in detail and engage with the parties as part of an effective oral hearing procedure is likely to have led to a greater number of appeals to the CAT than would otherwise have been the case.

5.2 **The Committee's favoured option is to maintain the single CMA as an administrative decision-making body, but with materially enhanced decision-making structures - essentially Option 2. However, as a variant of Option 2, the Committee considers that a full merits appeal to the Competition Appeal Tribunal (CAT) must be retained.** Both of these enhancements to procedural fairness are essential given the very significant adverse consequences of competition law infringements, not only in relation to the large fines imposed on companies, but also the possibility of directors being disqualified for up to 15 years.

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

5.4 The Committee believes that the case for reforming the current administrative approach is compelling. The Committee has given detailed consideration as to whether it should support Option 3, i.e. the "prosecutorial" approach. However, on balance, the Committee believes that that prosecutorial approach may result in very significant economic pressure on smaller businesses to settle their cases with the CMA in the light of the costs of conducting litigation before the CAT. Instead, the Committee favours a variation of Option 2(b) i.e. the "independent office holders" (who would be involved in Phase 2 mergers and market investigations) would hear the parties' oral submissions following the Statement of Objections (SO), read their written representations, and engage actively with the parties through questioning and ultimately decide which of the allegations set out in the SO are sufficiently robust to form part of the CMA's decision. We would envisage that such an oral procedure would last 1-2 days, would not provide for cross-examination and therefore would not constitute an "internal tribunal" within the meaning of Option 2(a). Nevertheless, the Committee feels that such a development would

[32] Office of Fair Trading, *A guide to the OFT's investigation procedures in competition cases*, OFT1263, March 2011.

introduce a much needed degree of impartiality, objectivity and rigour at an important stage of the decision making process; it would separate the investigation part of the case from the decision-making part and would therefore make a significant contribution to the elimination of confirmation bias. It is also believed that such a process would, in time, come to be recognised by officials within the CMA (particularly those responsible for conducting investigations) as imposing very clearly defined internal checks and balances. Such a panel of independent decision-makers would not be sufficient to satisfy the requirements of Article 6 of the ECHR and accordingly a full merits appeal to the CAT would need to remain.

5.5 However, if Option 2 were not to be combined with a full merits appeal to the CAT, the Committee would favour Option 3 (prosecutorial approach) as necessary to give the requisite impartiality, fairness and rigour.

Overview: the need for change

Structural concerns - the risk of confirmation bias

5.6 The OFT's enforcement structure is based on the European Commission model and involves the OFT playing four roles: (i) it carries out investigations, having satisfied itself that it has reasonable suspicion of an infringement in order to exercise the stringent investigatory powers at its disposal, which include dawn raids and statutory demands for information, both of which are supported by the threat of criminal sanctions; (ii) it prosecutes alleged infringements in the form of a SO; (iii) it then adjudicates 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 thereafter taking an infringement decision; and (iv) finally it decides on the level of penalty that should be imposed. Case law has confirmed that competition law penalties, which can be extremely high, are criminal in nature. A similar investigatory, prosecutorial and adjudicatory structure exists within each of the concurrent regulators.

5.7 It is uncontroversial that this decision-making structure gives rise to the risk of confirmation bias. In this connection, most common law jurisdictions have adopted a clear separation between investigation and prosecution on the one hand and adjudication on the other, for example, in Australia, Canada, the Republic of Ireland and the USA, prosecutions are brought by the competition authority (or relevant governmental department) before an independent judge who decides whether an infringement has arisen and, if so, what penalty should be imposed. It is also relevant to note that in Hong Kong the Competition Bill, which is expected to be enacted during 2011, has adopted the judicial enforcement model, with enforcement actions being brought by the Competition Commission before the Competition Tribunal.

5.8 Following the OFT's August 2010 consultation in relation to its investigatory procedures, the OFT has sought to demonstrate that, in seeking to overcome the inherent risks that an integrated structure entails, a range of individual decision-makers, committees and processes have been introduced into the decision-making machinery. For example, a "Team Leader" is identified as running the case day-to-day; a "Project Director" directs the case and is accountable for delivery of high quality timely output and a "Senior Responsible Officer" (SRO) is accountable for delivery of the case. The SRO "decides whether there are sufficient grounds for opening a formal investigation and whether the evidential requirements of an infringement

have been met"[33]. The SRO can consult with other senior officers as he/she considers appropriate but does not necessarily review the evidence available on the case file, although he/she can call for it if he/she thinks that it would be of assistance in exercising his/her functions[34]. The SRO is described as being in attendance at oral hearings "unless it is impractical to do so"[35]. The decision maker ("who is generally, but need not be, the SRO"[36]) decides whether to issue an SO. It appears that the decision to issue an SO is taken by the SRO, but it is not clear who takes the final infringement decision, although it is stated that consideration of the parties' written and oral submissions "will primarily involve assessment of the representations by the case team"[37]. Accordingly, at no time during the process can the parties under investigation be sure that they are submitting their views and evidence to the actual decision maker(s) and, in particular, to decision-makers that are free from confirmation bias as they had no role in the investigation and prosecution (SO) stages of the case. Experience shows that clients value very highly the opportunity to present their arguments and evidence to the actual decision-maker(s). This has been a particular strength of the Competition Commission's procedures; unfortunately it has been entirely lacking in antitrust cases.

Number/quality of cases

5.9 The efficiency of the OFT's antitrust decision-making procedures has been considered in detail by the National Audit Office (NAO) in a number of reports. Most recently, in March 2010, the NAO observed that the case law that had arisen out of OFT and sector regulator investigations is not as rich as it needs to be, the decision-making process is unduly lengthy, most decisions are appealed to the CAT (which may reduce the appetite for sector regulators to use their enforcement powers), the sector regulators have so far made limited use of their enforcement powers, and there appear to be too much use of early resolution procedures.

5.10 The Committee agrees that many cases have taken very long periods of time before a decision was adopted (see the chart at the end of this Section) and that, overall, relatively few decisions have been taken. However, the Committee recognises that the number of cases in itself is not necessarily indicative of a failure of policy or that there are significant infringements in the UK that are not being addressed. As regards the length of cases, in the Committee's view the delay has arisen for a variety of reasons which include satisfactorily collecting evidence and dealing with witness evidence (difficulties in this regard have recently been highlighted by the CAT in the construction cases[38]), apparent delay in identifying the theory of harm with the consequence that prior investigation was often unfocused (this seems to have been a particular difficulty in the tobacco case) as well as too many "iterations" in formulating a Statement of Objections, Supplementary Statements of Objections etc. In the Committee's view, one difficulty would appear to have been the lack of significant senior oversight from an early stage in a case throughout the administrative phase to the SO and beyond. In addition, frequent changes of case-team, particularly for the larger, longer running, investigations, would appear to have been a factor contributing to delay and to deficiencies in process.

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33 A guide to the OFT's investigation procedures in competition cases, para 5.2.

34 Ibid, para 11.18.

35 Ibid, para 12.13.

36 Ibid, para 11.17.

37 Ibid, para 12.21.

38 *Durkan Holdings Ltd v OFT* [2011] CAT 6 paras 108-110.

Q8: Options for change

Option 1: retain and enhance existing approach

5.11 The Committee does not believe that "retaining and enhancing" the OFT's existing procedures is likely materially to address the concerns identified above; in particular, it will do nothing to address the structural concerns and the existence of confirmation bias. However, as explained in the summary above, the Committee's recommendation that the existing administrative approach be retained, but that it should be supplemented with the introduction of a group of second stage expert decision-makers (but without creating "an internal tribunal"), recognises the significant steps that the OFT has taken in improving the transparency and effectiveness of decision making in recent years and, in particular, the steps outlined in its 2011 guidance. The Committee doubts that further significant enhancements are possible without structural changes.

Option 2: develop a new administrative approach

5.12 For the reasons set out in the summary above (paragraphs 5.1 to 5.5), the Committee believes that the optimal approach is to retain the existing administrative structure with a full merits appeal to the CAT, but with a clear improvement to the structure of decision-making within the administrative process.

5.13 Within Option 2, the Committee does not accept that the creation of a full “internal tribunal” would be appropriate, as it would replicate the CAT and would increase costs (even if the CAT's jurisdiction were "down-graded" to that of judicial review). Rather, after the SO is delivered, there should be within the CMA a group of expert decision-makers, separate from the investigating team who prepared the SO - essentially the independent office holders who would be involved in Phase 2 mergers and markets decisions - who would conduct the “second stage” of the process and reach the final decision.

5.14 But retaining a full merits appeal to the CAT is essential if Option 2 is to deliver an improvement in fairness. Without full merits appeal, the Committee does not believe that Option 2 offers sufficient fairness, robustness and impartiality - and the Committee would then think Option 3 preferable.

Option 3: a prosecutorial system

5.15 One possible approach that would seem to hold out the prospect of enhancing the efficiency and fairness of the enforcement process would be for the CMA to "prosecute" an SO before the CAT (Option 3 in the consultation paper). This could potentially significantly reduce the duration of cases before the CMA and the sector regulators which would have the consequence of freeing up resources for other cases. In addition, there could be material savings for the parties who would simply submit their arguments and evidence in response to the SO to the CAT, rather than make such submissions before the CMA and then before the CAT in appealing against the final decision. Such an approach is also likely to avoid the issue of supplemental SOs and remittals to the CMA from the CAT. It may also encourage the sector regulators to use their enforcement powers and would certainly seem to hold out the prospect of consistency of outcomes as between the CMA and the sector regulators.

5.16 On balance, however, the Committee has concluded that - provided that the changes in relation to decision making outlined above are introduced to the administrative process in order to enhance its efficiency and fairness, and provided that the right of full merits appeal to this CAT

is retained - it would not be appropriate to move to a prosecutorial model. This is because it will lead to lengthy trials in those cases that are not settled which is likely to increase costs and which may be particularly disadvantageous for smaller businesses which would accordingly be encouraged to settle rather than contest a case. With a reformed administrative process having experienced "independent decision-makers" as described above, smaller businesses could, at a relatively low cost, instruct legal advisers to review the SO and key elements of the case file and make short written/oral submissions which may have the effect of "knocking out" certain allegations (or even the entirety of them) in the CMA's case, potentially resulting in a lower fine than a settlement would be likely to produce in a prosecutorial system. Moreover, it is not clear that a prosecutorial system would lead to more cases, and most of the Committee shares to some extent the OFT's concerns as to the likely adverse effects on policy, particularly as regards producing guidelines and encouraging compliance initiatives within the business community. We should stress, however, that even an enhanced administrative process would not remove the need for a full appeal to the CAT on the merits in order to meet ECHR standards.

Q9: Other changes proposed - timetable

5.17 In relation to the proposal in paragraph 5.48 of the consultation paper, a further reform that could be introduced would be to impose a fixed statutory time limit on the CMA's ability to issue an SO, subject to the possibility of an extension being granted by the CAT in light of particular circumstances. Such a limit, which might be fixed at, say, two years after the fact of the investigation first becomes known to the parties (e.g. through a section 26 request for information), would focus the CMA's resources on individual cases, and may well encourage the CMA to allocate resources to the most promising cases.

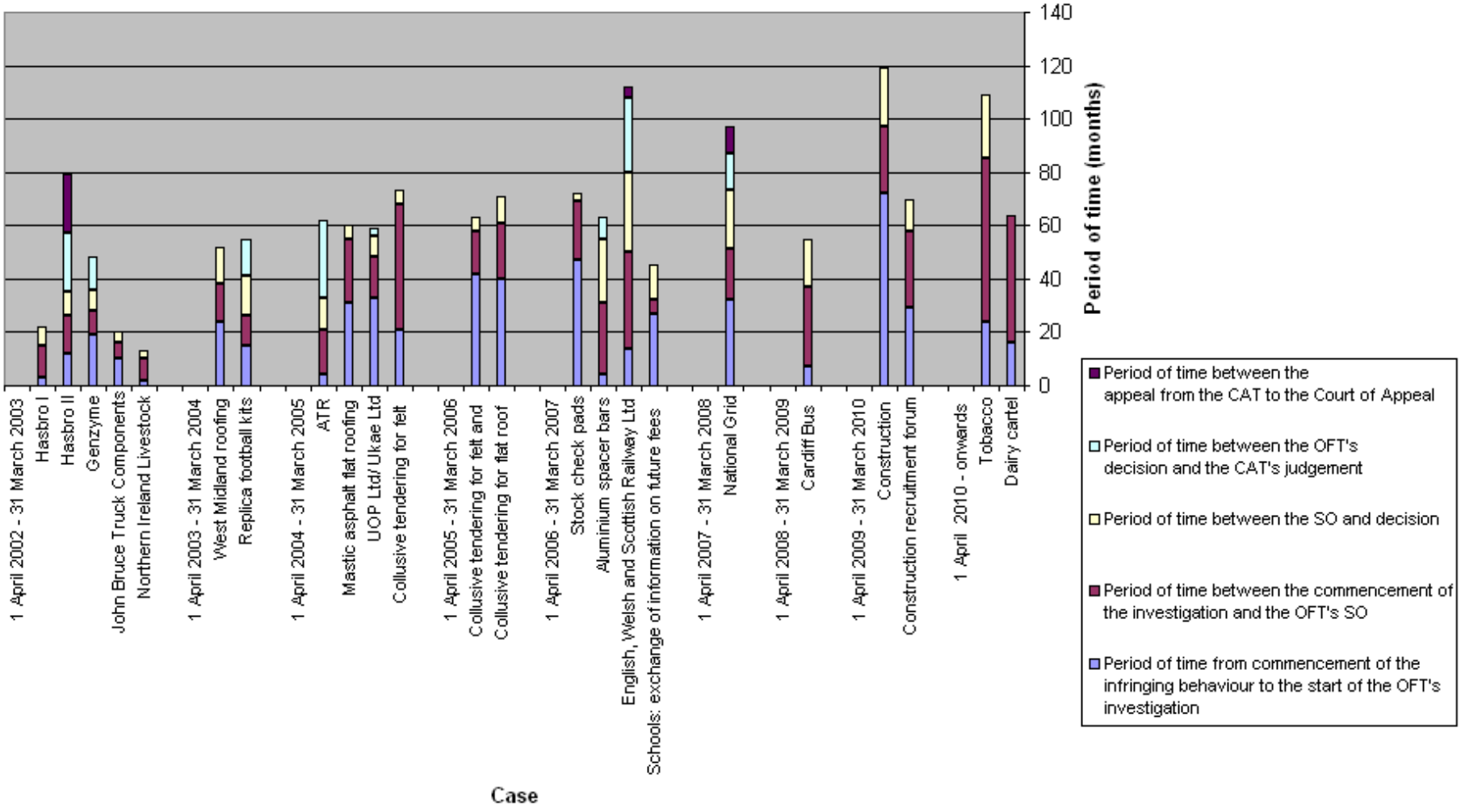
5.18 The Committee believes that such statutory time limits would provide much needed focus and discipline to investigations of antitrust infringements. We would be concerned that merely adopting *administrative* time limits would not impose an effective discipline.

5.19 We are aware of the concern that statutory time limits could be abused by parties who are under investigation deliberately drawing things out (delaying in providing information, etc) so as to escape an infringement decision through its being time-barred. However, we consider that effective use of stronger information-gathering powers would in practice remove this risk.

Q10: Further ideas

5.20 Further savings might be introduced if the CMA could avoid the need to engage in the redaction of documents on the case file, for example, by a confidentiality ring being instituted, as is the case for the Appellants before the CAT.

Infringement decisions under Competition Act 1998



6 Section 6 - The Criminal Cartel Offence

6.1 In Chapter 6 of the consultation paper, the Government states that the "dishonesty" element of the cartel offence appears to make the offence harder to prosecute. The Government also considers that the "dishonesty" element puts the United Kingdom at odds with developing international best practice on how to define a hard core cartel offence.

6.2 Accordingly, the Government is considering the following options for reform to the offence:

- Option 1: removing the "dishonesty" element from the offence and introducing guidance for prosecutors;
- Option 2: removing the "dishonesty" element 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 and defining the offence so that it does not include agreements made openly.

6.3 The Committee, having carefully considered these options, has come to the conclusion that the "dishonesty" element of the cartel offence should be retained, at least until further time has elapsed to form an empirical judgement on how well the current offence works. In the Committee's view, the case for removing the "dishonesty" element at this stage has not been made out.

Q11: The options

6.4 The Committee's views on the options set out in Chapter 6 are as follows.

Option 1: Removing the "dishonesty" element from the offence and introducing guidance for prosecutors

The proposal is premature

6.5 Before considering whether the element of dishonesty should be removed from the criminal cartel offence it is worth considering whether the case for a change to the law is made out. The consultation paper proceeds on the basis of two assumptions: (i) that the offence is harder to prove as a result of the requirement to prove dishonesty, and (ii) that the deterrent effect of the legislation is weakened by the inability of prosecutors to bring cases as a result of that difficulty. In our view, neither basis has been established as a matter of fact as a result either of failed prosecutions or as a demonstrable reason for candidate prosecutions not being brought. It would be wrong in the absence of satisfactory empirical data to reach either of the two assumptions. Only two prosecutions have been brought since the Enterprise Act 2002 came into force:

- In *R v Whittle, Allison and Brammer* (2008)[39] - arising out of the marine hoses cartel - the defendants pleaded guilty to the cartel offence in section 188 of the Enterprise Act 2002. This would tend to suggest that the presence of the element of dishonesty in the UK offence was not a bar to a successful prosecution. Although the case is plainly complicated by the global deal struck by the defendants in the United States, where dishonesty is not an element of the equivalent US criminal offence, the reason the defendants accepted in the UK that they had behaved dishonestly must have been, at least in part, because of the strength of the evidence in that regard. This evidence came from the covert nature of the cartel which involved, among other aspects, secret meetings where those attending came and went in ones and twos to prevent alerting customers or the authorities to the fact of the meetings and use of code names and false email accounts.

  Although not conclusive evidence, because of the pressure in the US to agree a global disposal of all cartel issues, the case does not support the assumption that the element of dishonesty prevented a successful prosecution of the offence.

- In *R v George* (2010)[40] - arising out of the British Airways/Virgin fuel surcharge agreement - the Court of Appeal held that it was not necessary for the prosecution to prove that both parties to the cartel had behaved dishonestly. All that was necessary was to establish dishonesty in the defendant on trial. This removed a potential hurdle for a prosecution that might be relying upon the evidence of the other party to the cartel and would otherwise require the full dishonesty of prosecution witnesses to be admitted.

  In the same case at first instance the trial judge, Owen J., ruled that:

  > "It is clear that Parliament intended that dishonesty would be assessed against the standards established in the case law, in particular by application of the *Ghosh* test, which requires the jury to consider both whether what was done was dishonest according to the standards of reasonable people, the objective element, and whether the defendant realised that this was the view of such people, the subjective element. As was submitted on behalf of the prosecution, an agreement to fix prices is capable of being inherently dishonest, but will not always be dishonest. Each case will be judged on its facts, and on the inferences properly to be drawn from the facts. I therefore rule that the proper construction of section 188 does not require the prosecution to prove additional dishonest conduct over and above the price fixing. It is obliged to prove dishonesty by reference to the *Ghosh* test."[41]

  It is clear from this ruling that the trial judge did not consider there to be anything particularly problematic or unusual about the dishonestly element in the offence. It would be considered by the jury in the usual manner by applying the two stage test in *R v Ghosh* (1982)[42], on the basis of the facts proved and the inferences properly to be drawn from those facts. The fuel surcharge case provides no support for the suggestion that the prosecution (which failed for procedural reasons) could not be brought because of an inability to prove dishonesty.

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39 [2008] EWCA Crim 2560.

40 [2010] 2 Cr. App. R. 17.

41 Ruling of 24 July 2009, unreported.

42 [1982] Q.B. 1053.

6.6 The OFT website states that there are three criminal investigations currently underway, each commenced in 2010[43]. Bearing in mind that the Court of Appeal in the marine hoses case (*R v Whittle*, above), considered that covert behaviour was sufficient evidence of dishonesty to support the conviction - and given the obvious essential requirement for any cartel to operate in secret - the difficulty, if any, in proving dishonesty would appear to be an unlikely reason for not prosecuting. It would certainly appear to be premature to reach such a conclusion prior to the decision by the OFT in relation to those investigations.

6.7 Very few, if any[44], of the other Competition Act 1988 decisions reached after the coming into force of the Enterprise Act 2002 (from June 2003) would appear to have satisfied the definition of "hard-core" cartel activity covered by the criminal offence. This appears to demonstrate that the reason for the lack of prosecutions is not the requirement to prove dishonesty but the fact that most cartel agreements are not of the "hard-core" type that the criminal offence was designed to cover.

6.8 The Committee's principal submission, therefore, is that the need for change in relation to the cartel offence has not been made out evidentially and further time should be allowed before any action is taken.

The consequence of removing dishonesty from the cartel offence

6.9 If dishonesty were removed from the cartel offence, it would become an offence for a person to enter into or implement an arrangement perfectly honestly but which (i) had the consequence of directly or indirectly fixing the price of the supply of a product or service, (ii) limited or prevented the supply of a product or service, (iii) divided the supply of a product or service between two suppliers or customers, or (iv) amounted to a bid rigging arrangement [see Enterprise Act 2002 s188 with the word "dishonesty" removed.

6.10 The removal of the word "dishonesty" would utterly transform the offence from one focused upon the intention of the cartelist to one wholly dependent upon the direct or indirect consequence of any particular business arrangement. An individual would be guilty of the offence, however careful that individual had been to prevent the consequence of an arrangement if in fact, albeit indirectly, that arrangement fixed, limited or divided the supply of products or services or rigged a bid. This would be damaging to business and contrary to the public interest.

6.11 The Law Commission concluded in Working Paper No. 31[45] that to make a man liable to imprisonment for an offence which he does not know that he is committing and is unable to prevent is repugnant to the ordinary person's conception of justice and brings the law into contempt. Removing the element of dishonesty would in effect render the cartel offence one of strict liability and dependent not upon what the offender intended to do or wished to achieve but on the consequences that in fact occurred as a result of his actions, however unintended they might have been.

6.12 Unless Parliament were to enact the removal of *mens rea* from the offence in the clearest of terms, the courts would be likely to read *mens rea* back into the offence (see the common law

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[43] Involving the automotive sector, the agricultural sector and commercial vehicle manufacturers.

[44] The few possible exceptions might be Construction Recruitment Forum, Aluminium Spacer Bars and Stock Check Pads.

[45] Law Commission, *General Principles: The Mental Element in Crime,* 16 June 1970.

principle enunciated in *Sweet v Parsley* (1970)[46]). The new offence would therefore have to state clearly that it would be committed without any form of *mens rea*. It is very difficult in our view to justify the creation of a strict liability offence in relation to cartel activity.

6.13 The reduction of the offence to one of strict liability would also devalue it. Strict liability offences criminalise actions not intentions, normally because of an overwhelming public interest in preventing such actions (such as driving without a licence). In the case of cartel activity, the action (the existence and operation of the cartel) is already unlawful by virtue of the Competition Act 1998. There is accordingly no public interest in criminalising the action itself, as opposed to the *mens rea* of the offence since it is already unlawful and subject to a stringent enforcement regime that involves the power to levy heavy fines.

6.14 The central point of making cartel activity a crime was to deter individuals from becoming involved or allowing their companies to become involved in "hard core cartels" which, because of their dishonest criminal intent, would be much harder for the authorities to expose and prevent. If the dishonesty element were to be removed so as to render the offence effectively a mirror of the civil law position, Parliament would, in respect of those hard core cartel activities, have removed the distinction between actions that are prohibited and subject to civil enforcement and those that are criminal.

6.15 In the Committee's view the answer is not to leave the matter in the hands of the prosecutor as the consultation paper suggests. It is for the courts to determine whether conduct is such as to amount to a crime and not for the prosecutor. If the reality of the position is that only cartels that contain dishonesty are to be prosecuted, but under an offence that does not require dishonesty to be proved, the decision as to whether dishonesty is present will have been made by the prosecutor and not by the court. This is unconstitutional. Either dishonesty is required in which case it must be proved or it is not.

The supposed problems with the requirement to prove dishonesty

6.16 The consultation paper identifies four supposed problems in relation to the element of dishonesty. In the Committee's view none of those problems in fact pertains:

6.17 First, it is suggested that the element of dishonesty introduces a lack of certainty into the offence. If this were correct then all offences that included dishonesty would be uncertain and would risk falling foul of Article 7 of the European Convention on Human Rights (see *R v Rimmington* (2005)[47]. It has long been established that the test in *Ghosh* (above), is sufficiently certain both for it to be lawful and for it to be a sensible, workable basis for resolution of whether someone has behaved dishonestly. People well understand what dishonesty means and cartelists are no exception. We do not understand why it is thought that a cartel involves any more complex a factual matrix than conspiracy to defraud, for example. Parliament deliberately included the requirement to prove dishonesty in the Fraud Act 2006.

6.18 Second, it is thought that the requirement to prove dishonesty will introduce analysis of the economic consequence of cartel activity which would be difficult for juries to comprehend. In fact, in our view, the opposite is true. If dishonesty were to be removed the only element in any prosecution would be the consequences of the cartel arrangement and thus would focus the case on the detailed economic effect on consumers. Dishonesty would be established not by

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46 [1970] A.C. 132.

47 [2005] UKHL 63.

an analysis of the economic consequences but by proof of the deceptive, secretive or fraudulent behaviour of the defendant.

6.19 Third, it is thought that 40 per cent of ordinary people do not think that price fixing is dishonest and there is a fear that juries will decline to convict them. Many people think that cannabis should be legalised, for example, but that does not stop juries doing their duty when trying such cases. Juries are told what the law is by the court and must apply it to the facts of the case. There is no basis, as far as we are aware, for thinking that juries refuse to apply the law as they are directed by the court.

6.20 Fourth, it is thought that cartel activity is particularly problematic when it comes to dishonesty because it may not be possible to prove that the individuals involved had a sufficiently clear financial motive to behave dishonestly. This, with respect, is an argument for criminalising non-dishonest behaviour rather than a reason for why dishonest behaviour cannot be proved. If the evidence shows that the individual involved in the cartel was dishonest, because it proves deceptive, fraudulent or secretive behaviour there is no difficulty with the offence requiring the element of dishonesty. If on the other the evidence does not prove such behaviour then the cartel is one that did not go beyond the boundaries of the activity covered by the Competition Act 1998. In any event the purpose of criminalising cartel activity was to dissuade directors and directing minds from using their companies as vehicles for cartel activity, it was not primarily designed to cover mid-level employees.

Option 2: Removing the "dishonesty" element and defining the offence so that it does not include a set of "white-listed" agreements

6.21 This is unworkable in our view and suffers from all the defects identified above. The European Commission no longer favours "white-listed" exceptions because of the uncertainty it creates for business. They have been abandoned in the context of EU block exemptions. It is difficult to see why considerations that no longer apply in the context of the civil prohibition should be applied to criminal sanctions where penal consequences are involved.

Option 3: Replacing the "dishonesty" element of the offence with a "secrecy" element

6.22 The observations about the problems of removing the element of dishonesty from the cartel offence in paragraphs 6.9 to 6.15 above would obviously be answered, to a degree, by the replacement of "dishonesty" by an alternative *mens rea*. It would be important to remember that by doing so Parliament would be deliberately downgrading the offence to one significantly less serious than in its current form. It is difficult to see why Parliament would wish to send a message that is the diametric opposite of its stated intention.

6.23 There is also the difficulty of finding an alternative *mens rea*, below dishonesty but appropriate to cover the intentions of a cartelist. Recklessness would be inappropriate since it too would be wholly dependent on the consequences of the cartel arrangement and would require an analysis of the cartelist's foresight of those consequences. Deliberate intention would be meaningless since one does not ordinarily end up in a cartel arrangement by accident. It is not the deliberateness of the corporate activity that matters it is its criminal purpose.

6.24 Likewise we are of the view that it is inappropriate to replace the element of dishonesty with that of secrecy. If it were sufficient for the offence to be committed by the mere fact that no persons outside of the cartel knew of its existence then the secrecy element would not be part of the mens rea of the offence at all. It would merely be a question of fact as to whether any person outside the cartel knew of it. This offence would be equally subject to the criticisms levied in relation to Option 1 above. It would also be vulnerable to the problems that prosecutions experience in seeking to prove negatives. How does a prosecution prove that no one knew of the existence of the cartel? If the burden in this regard were reversed (i.e. secrecy is presumed) would it be sufficient for the defence to produce one person, outside the cartel who knew of it? This would be open to abuse.

6.25 To achieve its aim therefore the element of secrecy would have to be defined in terms of *mens rea* - namely, that the cartelist intended that the cartel should remain secret. The offence would be one of entering into the cartel arrangement intending that no person outside of the cartel should learn of it. The offence would focus upon the steps taken by the cartelist to ensure that its existence remained hidden. Such an offence would not catch cartelists who took no overt acts to ensure the secrecy of the cartel. Those cartels that were in fact secret but not thanks to any actual covert activity would not be caught. This would be absurd. To define a crime in terms not of its inherent criminal mens rea but in terms of the steps taken to ensure that it is not uncovered risks bringing the law into disrepute.

6.26 In the Committee's view, the offence should focus upon the clear criminal activity that dishonesty involves. Such dishonest cartel activity is significantly more serious than the prohibited civil cartel activity and is therefore rightly a crime. It is not clear why activity that is prohibited by the Competition Act 1998 should become a crime merely because the cartelist took positive steps to keep it secret. It is also not clear why a cartelist who did not need to take such positive steps because there was no risk of the cartel being exposed (but who would have done had the need arisen) should fall into a different category under the criminal law.

6.27 In our view the definition of secrecy in paragraph 6.41 of the consultation paper does not deal with the concerns described above and would mean that the gravamen of the offence was the taking of measures to prevent publication of the existence of the cartel rather than of the essential criminal cartel activity itself. The law should focus upon the core criminal activity sought to be prevented rather than on ancillary activity connected to it.

6.28 It is also important, in the Committee's view, to note that the replacement of the element of dishonesty with that of secrecy will remove all features of deception, fraud or dishonesty from the offence with consequences in sentencing terms. The offence would become one of keeping a cartel secret and not one of operating a criminal cartel. This would in turn have the effect of rendering the actual cartel activity non-criminal. This is the diametric opposite of Parliament's stated intention.

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

6.29 There is an essential right to privacy in English and EU law such that commercial arrangements are entitled to be conducted in private. Not only is this proposal unworkable it threatens the essential right to conduct one's business in private. It is not in the public interest to undermine such fundamental principles by requiring companies to publish their agreements for fear that

otherwise they might amount to criminal cartels. It further runs the risk of catching the lawful and beneficial market sharing activity permitted under European Union anti-trust law. In our view it suffers from all the problems identified above in relation to Option 3. This Option is just another way of seeking to criminalise the secrecy element of cartel activity.

Conclusion

6.30 In the Committee's view, the dishonesty element has not yet been adequately tested in the criminal context. It is far too early to pass judgement on whether it actually creates a barrier to prosecuting cartel activity. Bearing in mind that most hard-core cartels will, by definition, contain the sort of covert activity from which dishonesty can be inferred it is difficult to see the imperative for change. Parliament should not, in our view, be quick to undermine the ability of juries to know when true criminal dishonesty is present. They are very good at it and rarely fail to identify it when it is truly proven to have occurred.

6.31 The purpose of the criminal law is to prevent conduct that goes beyond that which is prohibited by the civil code. The purpose is to prevent conduct that ordinary people readily understand to be criminal conduct. When a jury is directed that a dishonest cartel is a crime because of the damage it does to markets, consumers and in the end to ordinary people they will readily understand why that is the law. They will then look for the indices of dishonesty just as they do under the Fraud Act 2006, in relation to conspiracy to defraud at Common Law, under the Theft Act 1968 and in relation to all financial crimes and those involving dishonesty. In our view there is no evidence to justify a conclusion that juries would be unable or unwilling to find dishonesty just because the factual matrix of the case happens to be a cartel.

6.32 Moreover, Parliament should, in our view, be slow to down-grade the offence to one not involving dishonesty. Cartel activity is a serious crime and one, where dishonesty is established by the tribunal of fact, that ought to result in a custodial sentence. It is much more difficult to justify such a sentence where dishonesty is not present or where the criminality involved amounts merely to keeping a cartel secret. There should be a clear distinction between the conduct that is prohibited by the Competition Act 1998 and that which is criminal.

Q12: Do you agree that the "dishonesty" element of the criminal cartel offence should be removed?

6.33 For the reasons set out above (paragraphs 6.5 to 6.20, and 6.30 to 6.32), Question 12 of the consultation paper is therefore firmly to be answered in the negative in our view.

Q13: Improving the criminal cartel offence

6.34 The cartel offence has not been on the statute book for very long. Time should be given for the proper assessment of the offence by a judge and jury. If a proper deterrent is sought for cartel activity then it comes with the understanding that a cartelist is at risk of being convicted of a serious offence of dishonesty not by the fact that he may be convicted of what is effectively a strict liability offence or an offence of keeping the cartel secret. In our view the element of

dishonesty should not be removed from the cartel offence, at least until it is shown (if that be the case) that prosecutions cannot be brought or fail because of it. That has not yet occurred.

7 Section 7 - Concurrency and the sector regulators

General comments

7.1 The Committee is concerned that the current position in relation to sector regulators does not, in relation to most regulated industries, achieve efficiency or consistency in the application of competition law in the UK. We are also concerned that this situation will be exacerbated by the fusion of the OFT and the Competition Commission into the proposed new CMA, which, unless there is reform of the relationship between the CMA and the sector regulators, will give rise to a very confused (indeed topsy-turvy) position - with the sector regulators (not the competition regulator) in control on "antitrust/competition" cases[48] in their sector, able to carry out preliminary (but probably not Phase 2[49]) market investigations (which they would refer to the CMA, as currently they would refer to the CC) and apparently subject to appeal or direction by the CMA on matters such as price reviews. This confused picture will extend from the industries currently subject to economic regulation to other sectors, including aviation (subject to the CAA), and banking and finance (where it is proposed that a financial sector regulator has concurrent powers) and possibly also health (where the Government is contemplating giving the proposed competition functions to the proposed Monitor).

7.2 It is, moreover, important to consider what would happen to the current non-competition (regulatory) functions of the CC (see also Section 8). Given that these functions were placed with the CC because it has the economic skills and resources to carry out those functions, we have assumed that they pass to the CMA: we consider (see Section 8) that this is the only efficient way to deal with these functions, as the CAT is not an inquisitorial body and does not have the resources to carry out these reviews. The non-competition functions include the review on the application of an affected utility of price cap determinations in quinquennial reviews in the rail, water and energy fixed distribution sectors, the quinquennial review of airport charges[50] and the price aspects of certain matters on which the CAT hears appeals from decisions by Ofcom. Given the importance of these determinations for the economic health of the regulated industries, any removal of the right to call for a full economic review would be likely to be counter-productive for the industries concerned and a mere right of judicial review would not be an adequate substitute.

7.3 The Committee thinks it important that there should be a consistency of relationship between the CMA and each of the sector regulators, both so that efficiencies can be improved and also so that the UK has a competition law regime which is coherent in its operation and fit for purpose when compared with those of other countries, few of which spread competition powers to any sector regulator and none of which, so far as we are aware, has adopted widespread concurrency, such as is found in the UK. We perceive that one of the Government's concerns about the relative paucity of competition cases stems from the concurrency powers and the understandable preference by sector regulators for the use of regulatory powers; although we question whether the lack of high numbers of cases is a cause for concern, there is no doubt that the concurrency regime as currently operated does nothing to encourage the use of Competition Act or Article 101/102 powers in relation to businesses in regulated sectors.

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48 That is, cases under the Competition Act 1998 Chapter I and Chapter II prohibitions, and Articles 101 and 102 TFEU.

49 The position on Phase 2 market investigations is not entirely clear, but only the CMA would have the appropriate resources.

50 Although a new regime for airports is under consideration.

7.4 It has also to be recognised that regulatory powers may, in some cases, be more suited to dealing with a potential problem than the use of competition powers. This is particularly so where a licence amendment for a licensed utility or for all or a class of licensees in a sector can nip a problem in the bud and deal with it for the longer term. In those cases, it will often not be cost-effective to use competition remedies to address any infringement of competition law prior to the licence amendment (although this would not prevent any aggrieved private party from taking action).

7.5 The question is one of striking the right balance and not inhibiting the effective use of regulatory tools, while ensuring that competition law is effectively and consistently applied where appropriate, bearing in mind the differences in the businesses and practices of the various regulated industries.

Q14: Should sector regulators retain their antitrust and MIR powers concurrently with the CMA?

7.6 In short, we consider that concurrency should be retained, but that the CMA should be clearly the senior body on competition matters. We see no case for the expansion of the range of areas of competition law and policy in which sector regulators have concurrent powers, although this does not preclude other sector regulators being given the same powers as some already have. We would warn, however, that the more regulators there are with concurrent powers, the more important it is that the CMA is not inhibited from acting in their respective areas; already we would estimate that around half of the economy falls within concurrent regulation and this will grow enormously if these powers are extended as contemplated. Sector regulators are, rightly, concerned only with their own sector, and only the CMA can provide a national overview and also interface effectively on all UK matters with international bodies including the European Commission in areas of concurrent or interfacing powers.

7.7 As regards MIRs, we see no difficulty in maintaining the status quo in which the sectoral regulator can carry out an initial “Phase 1” market study or market review and, if it has concerns, then refer to the CMA (in place of the CC) for an in-depth “Phase 2” investigation. Only the CMA will have the competition economics and legal resource appropriate for this type of in-depth investigation. It is for debate whether the CMA should have the right to reject or amend the reference in the light of the initial report. We consider that sector regulators should be subject to the same rules as the CMA in relation to phase I and that there should be an option for the CMA to conduct phase 1 reviews within regulated sectors.

7.8 As regards mergers, the sector regulators have no concurrent powers and in the case of water, OFWAT has a specific role before the CC (Phase 2 CMA) which would be wholly inconsistent with concurrency powers for mergers. We do not believe that the sector regulators should be given any concurrency powers for mergers.

7.9 As regards “antitrust” (i.e. the UK Competition Act 1998 prohibitions and the EU prohibitions in Articles 101 and 102), while we think that there are some strong arguments against retaining regulators’ concurrent powers, on balance we conclude that it would be more efficient in terms of flexibility in use of knowledge and resources to maintain concurrency, provided that the CMA is clearly given the senior role and is not inhibited (as by the present protocol and practice) from acting at all in the regulated sectors. This would mean that the CMA would have oversight of the sector regulator's cases using their concurrent powers and the right to call in cases or to

commence cases in sector areas. We anticipate that these powers would be used by the CMA where the sector regulator does not appear to be addressing competition concerns or where issues of case management mean that the CMA is more suited to lead the case management (e.g. the CMA will be the repository of skills such as managing evidence in cases with concurrent criminal proceedings, dealing with dawn raids and dealing with cases where the EU dimension requires close liaison with the European Commission and/or Member State national competition regulators). The CMA will also be the repository of expertise where other regulators (e.g. in the USA) are taking action on the same factual situation. The ability of the CMA to act with confidence as the decision taking body in relation to cases with an international dimension, seems to us essential. The CMA needs to measure up to DG Comp at the European Commission, which applies EU competition law in regulated sectors (the remaining competition powers of the Transport Directorate were transferred to DG Comp in the last Treaty amendment), and to national bodies with similar wide competition enforcement powers as DG Comp. Also it is not practical (and would not be a good use of resources) for all the sector regulators to be represented on the bodies that interface internationally on competition matters (for example, the ECN) or otherwise to maintain relations with competition authorities outside the UK.

7.10 These powers are essentially the same as those of the European Commission in relation to national regulators (including OFT/CMA and all regulators with concurrent powers) in the administration of Articles 101 and 102. This would involve at least recasting the protocol which currently governs relations between the OFT and the sector regulators and it would be sensible if an approach similar to that in Article 11 of Council Regulation (EC) No 1/2003 on the Implementation of the Rules on Competition were to be applied to relations between the CMA and sector regulators with this being enshrined in the enabling legislation. It seems to us that this would be a coherent approach which would clearly make the CMA the "senior partner" in competition matters and also as an appellate body on the most important regulatory functions.

7.11 Under such a co-operation process, the sector regulator could have the lead role in relation to an investigation; alternatively, where the CMA is leading the investigation, the sector regulator could lend specialist resource to the CMA where appropriate, so preserving the benefit of the regulators' knowledge of their particular sectors in the application of competition law. At each stage we envisage a co-decision process in which the CMA would have the power to approve or veto the use of competition powers, but the sector regulator would be free to take regulatory action which would address the issues for the future, where it has suitable tools. Where regulatory powers were used, the impact of this would be taken into account in any competition proceedings, for example where the use of regulatory powers limited the duration of infringement or reduced it to a de minimis case not worth further public resource to pursue.

7.12 In the event that the sector regulators remained the prime investigatory body, we would envisage the CMA having the right to approve the following steps in relation to any case under the "antitrust" prohibitions:

- initial opening of an investigation
- any on the spot investigation
- the Statement of Objections and its content
- any decision on liability and penalties and its content.

7.13 This would help to promote consistency of decision-making, but would not address the cases where a sector regulator decided against use of competition powers altogether.

7.14 This is why we consider it important that the CMA should, in practice, be able to open competition investigations itself and to take over investigations, and that the CMA should be able to decide these matters independently. It should be the case that, where the CMA takes the lead in a competition case in a regulated sector, the sectoral regulator would be bound to co-operate and lend expertise and share information (including documents collected under regulatory powers). The sector regulators would remain free to take regulatory action and the CMA would be bound to take its effects into account (as above). This approach would ensure consistency and efficient deployment of experience and also that use of competition powers was not neglected or "traded off" in the regulator's debate with the regulated party (an issue where the sector contains a very small number of large regulated businesses). There would be a consistent relationship between the sector regulators and the CMA across all their interactions, with the CMA as senior partner on competition matters and in relation to its non-competition functions. This would enable the resources of the sector regulator to be used to assist in industry understanding and information gathering as well as in the decision making process, but it would not require (as the present approach to concurrency does) duplication of capacity for full competition case management and support.

7.15 Just as it would enable the CMA to take cases where its core procedural expertise is needed (see paragraph 7.9 above), it would also ensure that when a regulated industry throws up a case which has little to do with the core business of the sector, the expertise of the CMA in other sectors is fully available: for example, Ofcom does not seem to be the ideal body to consider conduct by one of its regulated companies on the sale of fixed line telephone equipment through high street and internet outlets, when the market is mostly supplied by non-regulated electronics manufacturers and the OFT has substantial experience of retail distribution cases - and yet under the current concurrency rules, the OFT/CMA could not insist on taking the case.

7.16 There would be some risk of over-much regulation on an individual case, but on balance we conclude that the better course would be to remove the current concurrency approach in favour of a co-operative process, where the CMA clearly has the senior role on competition matters.

Q15: Proposals for the use and co-ordination of concurrent competition powers

Strengthening the primacy of competition law over sectoral regulation - majority view

7.17 The overwhelming majority of the Committee does not think that mandating the use of competition law by sector regulators in preference to regulatory solutions is at all appropriate. This is because regulatory solutions may be quicker and more effective to stop and prevent further anti-competitive conduct to the benefit of consumers. Because the regulatory process is not one with the high burdens of a quasi-criminal burden of proof (whereas that is precisely what the antitrust process has) the process may also be considerably cheaper. The processes allow the regulator to take account of its statutory duty to promote competition, where it has one, in choosing and applying regulatory solutions.

7.18 There is no value in the use of specific competition law powers for their own sake if they are not the best tool to address the issue. One of the functions of competition powers is to punish

wrong-doing or to rebalance anti-competitive markets. This is not precluded by taking an effective regulatory measure under sector specific legislation and both private action and CMA action (if cost effective) under the antitrust/competition prohibitions and MIR would remain open. For some regulated businesses (e.g. Network Rail, Scottish Water, Channel 4), the fines imposed for breach of competition law simply remove resource which would otherwise be available to the business, so that consumers would be doubly punished by high fines. The ways of encouraging a compliance culture for publicly owned businesses is outside the scope of this response, but it would not lie in the primacy of competition law over regulatory solutions. Giving the CMA the power to ensure that appropriate use of competition law is not unnecessarily neglected, should in itself be a spur to sector regulators making sure that they have considered competition law solutions where appropriate.

Strengthening the primacy of competition law over sectoral regulation - dissenting view

7.19 A dissenting view on the Committee is more sympathetic to the proposal, in paragraph 7.23 of the consultation paper, to establish the primacy of competition law over sectoral regulation by way of a statutory obligation on all the sector regulators. This view proceeds from the premise that competition solutions are potentially more flexible and fluid. While acknowledging that regulated sectors (which are usually the old nationalised monopoly utilities) may never be fully competitive, and that most are, at least in part, natural monopolies (even in the most competitive of the regulated sectors, telecoms, the local loop remains essentially a natural monopoly), the dissenting view submits that the competition law prohibition on abuse of dominance is a much more effective way of controlling the adverse economic effects of natural monopolies than direct regulatory intervention through enforcement of regulators' licence conditions; the competition law prohibition on abuse of dominance can be targeted to prevent unfair or exploitative treatment of customers, to ensure that third party competitors have access to essential infrastructure facilities on terms which are reasonable and non-discriminatory, to prevent the natural monopolist using exclusionary tactics against downstream competitors (such as margin squeeze, predatory pricing, etc) and provides a basis for follow-on damages actions.

7.20 The dissenting view would favour a statutory obligation (slightly less strong than that proposed by the Government in paragraph 7.20 of the consultation paper) such that the regulator must, before taking action under its direct regulatory powers, first consider whether the objective could be achieved through a competition law solution. If the regulator then decides not to use competition law, that should be allowed, but the statutory obligation on the regulator to consider competition law would entail that the regulator, in line with its public law duties, must have defensible reasons for making that choice.

7.21 In response to this, the majority view is that competition remedies are not necessarily quicker and that it is better to leave the regulators with discretion on the choice of remedy they wish to pursue:

- Use of remedies under the prohibition on abuse of dominance is limited to those who have actually infringed - whereas a regulatory remedy can catch all with similar opportunities (e.g. in the case of industries with parallel regional monopolies such as water and electricity distribution).

- Market investigations involving a whole industry or class of regulated party are very resource intensive and do not readily lend themselves to agreed solutions, which are often possible in regulatory discussions.

- Mandating primacy of competition law may lead to use of a process which is less suitable to achieving the best outcome or to wasteful disputes about the form of process rather than the substance of the problem.

- It may require more expensive resource for all regulators to have the capacity to use competition law processes, which seems inherent in the primacy proposal.

The majority on the Committee would not go beyond ensuring that revised protocols emphasise that sector regulators should consider competition law remedies at the outset and that they should notify the CMA where they are using their regulatory powers to address actual or potential competition law issues. The majority would advise that care be taken to avoid opening up scope for disputes about form of process.

The CMA to act as a pro-active central resource for the sector regulators

7.22 As indicated above, we do not think this is the right approach. It is simply not a solution for a world class competition authority. There are two principal reasons.

7.23 First, in other areas (mergers, MIRs, non-competition price reviews) the CMA will be the senior regulator. The CMA cannot at the same time operate with its resources or some of them at the beck and call of the sector regulators, competing both among themselves and with the needs of the CMA itself. This creates muddle and tension with no clear lines of control. It would be likely to lead to friction and poor decision taking.

7.24 Second, if sector regulators have final decision-making powers without any role for the CMA (which is effectively the present position on the prohibitions as regards the OFT), then this militates against consistency of decision making, as sector regulators will be considering their decision in the context of other regulatory considerations, not competition policy for the UK and in relation to EU and international competition policy.

Giving the CMA a bigger role in the regulated sectors

7.25 As indicated above, we consider this is the only sensible solution following the merger of the OFT and the CC in order to produce consistent and effective decision taking, reduce duplication and inefficiency and allow the CMA to operate as an effective national competition regulator. The greater the part of the economy in which sector regulators have concurrent powers, the more important it is to ensure the primacy of the national competition authority on competition matters. In the interests of efficiency and clarity of relationship, we would give the CMA a clear role in all cases and the clear right to decide to run or take over antitrust/competition investigations within regulated sectors.

7.26 It has been suggested that use of competition powers by sectoral regulators would be bolstered if they knew that the Secretary of State could remove concurrency by statutory instrument, rather than full Parliamentary process. We doubt that this would have much effect one way or another.

7.27 Please refer to the full discussion in response to Question 14.

Q16: Further ideas to improve the use and coordination of concurrent competition powers

7.28 Please see the response to Question 14.

8 Section 8 - Regulatory Appeals and Other Functions of the OFT and CC

Q17: Should the CMA take on the CC's regulatory reference / appeal functions

8.1 The Committee agrees that, following amalgamation of the OFT and Competition Commission, the CMA would be the most appropriate body for considering regulatory references/appeals currently heard by the Competition Commission. We believe that only the CMA would have the right set of skills to consider these matters.

Q18: Model regulatory processes

8.2 In relation to the model regulatory processes set out in paragraph 8.12 of the consultation paper, the Committee agrees that these would be a useful tool for the CMA. The Committee would favour a full redetermination following which the CMA replaced the regulator's decision with its own.

9 Section 9 - Scope, Objectives and Governance

See Section 2 above (overview) for the Committee's thoughts on this.

10 Section 10 - Decision-making

General comments

10.1 The present UK system – and in particular, the rigour and independence of the Phase 2 process – is highly-regarded internationally.

10.2 Accordingly, it is essential that any reform of decision-making processes is not considered in the "abstract", but rather is undertaken in the context of the present system, based on experience gained from the operation of that system and with the retention of as many of the existing benefits of that system as possible as a primary objective.

- The Government should remain conscious of possible unintended consequences for the quality, speed and rigour of enforcement that might result from extensive changes to present decision-making processes.

- Given the specificities of each of the antitrust, merger and markets "tools", we consider that structural solutions should be tailored for each tool individually. Of course, where similarities do exist (particularly between the merger and markets regimes), we would encourage procedural and structural commonality, if this will enhance efficiency and reduce unnecessary duplication and costs. However, any such harmonisation of processes across tools should not be at the expense of procedural fairness for parties subject to investigation.

10.3 For both the merger and market regimes, we consider it essential to maintain (and to be *seen* to have maintained) effective separation and independence between Phase 1 and Phase 2 investigations and decision making. The combination of the OFT and the Competition Commission into a single CMA will inevitably create conditions in which, either from the outset or over time by evolution, there will be greater scope for the independence of the Phase 2 process to be eroded.

10.4 Although any reforms will necessarily involve some trade-off between the various objectives being pursued by the Government, we consider the maintenance of such independence to be of such importance that it warrants being given precedence over any desire to increase the speed of decision making or the efficiency of case transition from Phase 1 to Phase 2:

- That said, we do not see these dual objectives as wholly incompatible. For example, even if present structures (and thus the separation of Phases 1 and 2 bodies) were, as far as possible, retained, scope would remain for the CMA to introduce further internal process and procedural innovation aimed at expediting investigations over time, based on its early operational experience.

- We note also that the OFT and Competition Commission have recently introduced a variety of measures with precisely such efficiency-enhancing aims. The impact of these changes has yet to be seen. BIS should therefore bear in mind that retention of the status quo will not necessarily preclude further advances in case processing.

Q22: Arguments and costs/benefits of the models

10.5 For both mergers and markets, we regard the "base case" – under which current structures will be largely unchanged subject to wider process improvements – as the most compelling of the models presented by BIS. In our view, the "base case" would, in each case:

- best maintain the impartiality and robust decision-making that are strengths of the current system; and
- as far as possible, mitigate the likelihood of confirmation bias (albeit that, in our view, additional protections would be required).

10.6 As noted above, we consider a vital feature of any future authority to be the greatest practicable independence of the Phase 2 decision-makers from the Phase 1 panel and that, institutionally, the exercise of independence is valued more highly than consistency with the relevant Phase 1 decisions.

- The consequences for parties resulting from an adverse finding in a market or merger investigation can be extremely serious. As a result, we regard the existence of an independent and impartial Phase 2 body to undertake its own examination of the evidence to be essential.
- We do have some concerns, however, that the very "co-location" of the Phase 2 and Phase 2 processes within a single agency and any resultant mixing of staff and agency-wide *esprit de corps* will – in and of itself – give rise to a greater risk of confirmation bias.
- Consequently, it is all the more critical that a clear institutional framework is established within the CMA to promote – both structurally and culturally - the independence of the Phase 2 process. We are concerned that, without such strong cultural and structural internal safeguards, the risk of confirmation bias is only liable to increase over time.

10.7 In the light of the above, we do not consider appropriate the proposal that, for mergers, the same body (the Executive Board) could have decision-making authority at both Phase 1 *and* Phase 2, even if the decision at each Phase were undertaken by different Board members. For the same reasons, we do not support – for either mergers or markets cases – *any* transition of a Phase 1 decision-maker into the Phase 2 panel for that case.

10.8 We do agree, however, that there may be operational synergies and benefits for case transition if members of the Phase 1 case team also form part of the investigatory team at Phase 2. The rationale for such transition would appear to be particularly strong in market investigations, given the depth and breadth of the inquiry in such cases. However, any commonality of membership in the Phase 1 and Phase 2 case teams will necessarily increase the risk of confirmation bias: it is therefore critical that any such reform is accompanied by the imposition of certain internal safeguards to minimise those risks to the greatest possible extent, for example ensuring:

- that the Phase 1 team members who "transfer" across are supplemented by a sufficient number of "new" team members at Phase 2 to ensure that the majority of the Phase 2 case team were not involved at Phase 1; and

- that no members of the Phase 2 case team above an appropriate level of seniority were involved at Phase 1.

10.9 We also advise against the adoption of a more "prosecutorial" system, in which the Phase 2 panel solely opines as final adjudicator on a fully-worked case presented to it by the staff team, and does not have any further involvement in the investigatory process:

- It is not apparent that such a system would enhance the independence of the Phase 1 and Phase 2 processes any more than adoption of BIS's base case.

- It would also represent a significant cultural change for the CMA, overturning the long tradition of Phase 2 inquisitorial review that is currently so valued in the UK regime. Moreover, the significant re-skilling and "learning process" for CMA staff that such a shift would necessitate might be difficult to achieve in the short to medium term. Such radical reform thus also risks impeding the rigour of decision-making and the momentum of enforcement.

Appeals

10.10 We do not believe that significant reform of the existing appeal process is required, at least in respect of mergers and markets. This view is premised, however, on the maintenance of the independence, thoroughness and impartiality of the Phase 2 process. If the proposed reforms would limit such separation, the Government should review carefully whether an appeal on judicial review grounds alone remains sufficient to ensure compliance with the ECHR and we would think that a full appeal on the merits would need to be introduced.

Q23: Composition and appointment of the decision-makers

10.11 As noted above, we believe that the Phase 1 and Phase 2 decision-makers should - in so far as possible - remain independent of each other. For this reason, we also favour effective retention of the current composition of the decision-makers at each phase, i.e.:

- at Phase 1, one or more (clearly identified) senior members of the CMA Executive Board; and

- at Phase 2, a panel of members with a range of economic, business and legal expertise. We consider that the majority of such a panel should be appointed on a full-time basis (or, at least, with a greater time commitment than the current Competition Commission members). This is to ensure greater consistency of decision-making, with the same members being involved in a larger number of cases. This core of full-time members should be supported by a minority of part-time members with specific industry or other expertise. Where conflict of interest rules permit, we propose that this would include individuals currently or previously active in the industry sector that is under scrutiny.

10.12 The current method of appointing panel members and the use of fixed appointment terms provides a valuable safeguard, and has produced a high calibre of panel member. Accordingly, we see no compelling reason for fundamental change to this system.

Q24: Other suggestions

10.13 Finally, and irrespective of the identity of the decision-makers at Phase 1 and Phase 2 - we consider that this reform programme presents an important opportunity to enhance the rights of affected parties in merger and markets cases to engage directly with those decision-makers.

- Under the present system, an actual (or at least perceived) lack of direct access to the decision-maker, particularly at Phase 1, is a source of frustration for merger parties and gives rise to concerns that the parties' key arguments have not been fully or adequately articulated by the case team to the decision-maker.

- Greater transparency for the parties as to the specific identity of the decision maker at Phase 1 is also desirable. However, we do not believe it to be sufficient, in and of itself, to alleviate the access-related concerns that presently exist.

11 Section 11 - Merger Fees and Cost Recovery

Merger fees

Q25: Merger fee options

11.1 As a overarching point, the Committee questions whether it is appropriate for the Government to seek full cost recovery from the merger control regime. The Government has previously stated that its policy is to charge full costs for many publicly provided goods and services[51]. However, we are of the view that the merger regime is a cost that should be borne primarily by the Government and not the merging businesses. The merger regime does not provide a service to the parties to a merger but rather a service to society and it is the general public that ultimately benefits from merger control. As such, the regime should be - at the very least in part - paid for by the taxpayer.[52]

11.2 We consider that any decision to raise merger fees should be made in accordance with the principle that fees charged are fair and proportional. A move to full cost recovery would be counterproductive for a number of reasons.

11.3 First, the levels of merger fees contemplated by the Government based on full cost recovery would result in the UK having excessively expensive merger fees compared to the vast majority of other jurisdictions, particularly if the proposed fees under a voluntary system are adopted. In our view, the fee options proposed by the Government are disproportionate in scale, and out of line with international standards. This is clear from the Table at the end of this Section, which contains a comparison of the proposed UK fees in a voluntary regime against current filing fees in other major countries with a greater GDP than the UK. We note that, although the Government acknowledges in its Impact Assessment that UK merger fees are already high by international standards, it has not attempted to benchmark against other jurisdictions. The table demonstrates that countries with a higher GDP have lower merger filing fees than those proposed for the UK.

11.4 Secondly, the ever-escalating merger fees in the UK place a major regulatory burden on businesses wishing to undertake merger activity in the UK. We are concerned that excessively high merger fees could have a chilling effect on transactional activity in the UK, which would ultimately be detrimental to the UK economy. It is hard to see this as being consistent with the Government's "growth" agenda. As it is, companies already incur considerable costs in carrying out a legal assessment of transactions[53]. Excessively high fees could discourage merger activity, particularly for smaller mergers, but also for some larger mergers where the economic rationale for the transaction may be marginal. In some transactions, filing fees may represent a substantial portion of the costs associated with merger control[54] and there is a risk that the proposed fees could be disproportionately high for mergers that raise few or no competition concerns.

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51 HM Treasury, *Managing Public Money*, 2007, paragraph 6.1.1.

52 This view has been expressed by other jurisdictions such as Canada, Japan and New Zealand (ICN Report: *Merger Notification Filing Fees*, 2005).

53 According to BIS, the cost of notifying per case is estimated to be around £50,000 to £200,000 in legal fees (BIS Impact Assessment, paragraph 119).

54 PricewaterhouseCoopers, *A tax on mergers? Surveying the time and costs to business of multijurisdictional merger reviews*, 2003. This study found that, although legal costs were the greatest component of external costs associated with merger control, filing fees were the second most significant component, accounting for an average of 19 per cent of external costs.

11.5 Thirdly, the fees would fall disproportionately on smaller companies in the UK, contrary to the Government's objective of protecting SMEs. Mergers involving larger companies are more likely to be notifiable to the European Commission under the EU Merger Regulation - where no merger fees are payable. It would be perverse if the burden of disproportionately high fees were to fall primarily on smaller businesses which are subject to national merger control.

11.6 We note that the Government estimates that the total annual cost of the merger control regime is likely to be around £9 million in coming years, even though in 2008/9 actual costs were £14.5 million, and in 2009/10 actual costs were around £10.4 million - in years of relatively low merger activity[55]. We are concerned that this assumption of £9 million is too low and may be distorting the proposed fee level. It may be that, in fact, the actual fees charged will be substantially higher, in view of the Government's aim of recovering the full costs of merger control from businesses. Indeed, the consultation paper states, in paragraphs 11.14 and 11.15, that, at least in a mandatory regime, the cost of merger control to the competition authority may increase and that fees may need to be higher. We would welcome some clarification from BIS as to how it has reached the figure of £9 million has been calculated.

11.7 With respect to the fee options under a voluntary regime, the proposed levels are excessively high for both Options 1 and 2. Such high merger filing costs could have adverse consequences for a voluntary regime, as it is likely that some parties would be discouraged from notifying their transactions to the competition authority, particularly in the case of small mergers.

11.8 Regarding the fee options in a mandatory regime - a prospect which the Committee strongly opposes, for the reasons explained in Section 3 - we do not consider that a flat fee would be appropriate for either a full mandatory or a hybrid regime. The reason for this is that the costs would fall disproportionately on smaller mergers and could discourage some smaller transactions. The Government recognises this as a concern in respect of a voluntary regime, and in our view the same concern equally applies to a mandatory regime. Moreover, if a mandatory regime were to be adopted, costs to the competition authority would escalate as the CMA would need to review a higher volume of notifications (many of which raising no competition issues whatsoever, and therefore being "pointless" notifications). To this end, it is questionable whether the proposed flat fee of £7,500 in a full mandatory regime is realistic. If the there is a huge increase in the number of filings (and hence costs to the CMA), the proposed flat fee would no doubt need to increase correspondingly. We would welcome further clarification as to the basis for the proposed flat fees. Therefore, if a mandatory system were to be adopted, we would favour Option 2 (retention of differentiation of fees by turnover instead of a flat fee). We consider that any increase in the level of fees (in either a voluntary or mandatory system) should only be made in line with inflation in order to achieve greater cost recovery (as opposed to full cost recovery).

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[55] In 2008/9 and 2009/10 the OFT considered 72 and 55 mergers respectively under the Enterprise Act, compared to 106 mergers in 2006/7 and 97 mergers in 2007/8. In 2009/10 there were 337 acquisitions of UK companies compared to 656 acquisitions in 2008/9 and 1061 acquisitions in 2007/8 (OFT Annual Reports 2008/9 and 2009/10, Annex D).

Introducing a power to reclaim the cost of antitrust investigations

Q26 and Q27: The principle of recovering costs in antitrust investigations

Principle

11.9 The Committee is opposed to the principle that the CMA should be able to recover the costs of an antitrust investigation arising from a party that is found to have infringed competition law. But if the Government were minded to make such a move, then the principle of fairness dictates that such a system should be reciprocal; that is, a party should be able to recover the costs of an investigation arising in cases where the CMA abandons an investigation or takes a non-infringement decision. In such circumstances, the party that was under investigation should be able to recover all or at least some of its costs from the Government[56]. Alternatively, if there were a non-infringement decision, or if a case were abandoned, following an investigation that arose out of a third party complaint and which was found to have been based on erroneous or misleading information, the CMA should seek to recover its costs from the complainant rather than the non-infringing party.

11.10 We are aware that a very few other jurisdictions allow for cost recovery of antitrust investigations but, even in those cases, that does not amount to full cost recovery. For example:

- Czech Republic: The competition authority can only recover a lump sum of CZK 1,000 (around 40 euros) from an infringing party, which may be increased in complex cases or in case an expert opinion is needed to CZK 2.500 (100 euros). The lump sum is increased by 1,500 CZK for every appointed expert. However, the maximum amount is limited by CZK 6,000 (250 euros), so the amount that can be recovered by the authority is marginal.

- Canada: Although a liberal interpretation of the Canadian Competition Act suggests that the full recovery of costs is possible, there is no reported case law on the matter.

- Austria: An undertaking found to infringe competition law will be liable to pay a standardised fee (up to 30,000 euros) in respect of costs of the investigations. The sum is paid into the consolidated fund.

Practical effects

11.11 In addition, we are concerned that if the CMA had the power to recover the costs of its investigation from the infringing party, this could have the counterproductive effect of discouraging efficiency, which would fly in the face of one of the overriding objectives of the proposed reform of the UK competition regime. There may be less of an incentive for the CMA to streamline and target appropriate cases for investigation if costs become less of a concern as they could be recouped.

11.12 A further counterproductive effect would be that it would put pressure on the accused parties - particularly on SMEs - to settle rather than fight a case (or at least to concede rather than

[56] For example, the OFT closed its recent investigation into suspected price coordination involving a number of retailers and suppliers in the UK grocery sector on grounds of administrative priority. The companies that were investigated incurred substantial costs in responding to the OFT's requests for information but had no ability to recoup this expenditure.

contest key points) because they could not afford the prolongation of the case entailed in the issues being fully and fairly heard. That would be manifestly unjust, and moreover would reduce the number of cases resulting in a full decision (so reducing the body of precedent which is so important for the effective functioning of the antitrust regime).

Q27: Immunity, leniency, settlement and commitments

11.13 As explained above (Q26 and Q27), the Committee does not support the proposal that the competition authority should have the ability to recover its costs from the infringing party - the costs of the investigation should already be covered by the penalty for the infringement.

11.14 However, if the Government were to decide to adopt a mechanism for cost recovery, we are particularly concerned that this could disincentivise and undermine immunity and leniency applications. These options could appear much less attractive to companies that have infringed competition law if they are nonetheless pay for the costs of the subsequent antitrust investigation (on other parties). Immunity and leniency applications are in the public interest as well as the interests of the applicant parties; they are a major means by which the authorities uncover anti-competitive activity. We therefore consider that immunity and leniency parties, should not be required to pay for the costs of the investigation by the CMA[57].

Q29: Paying costs as an element of the fine

11.15 We do not agree that an additional costs element should be added to the fine payable for the infringement itself. However, if the Government were to move towards cost recovery, we agree that the increased penalty should be payable to the consolidated fund rather than the enforcement authority (in the same way that penalties are paid into the consolidated fund). If the sum were payable to the CMA, there would be a risk that this could affect the incentives of the CMA; for example, it may encourage the authority to make an infringement finding where it might not otherwise have done so.

Q30: Costs on appeals

11.16 If the Government were to adopt a cost recovery approach, we agree that a wholly successful appeal on the substance of the infringement decision should mean that the appellant should not be liable for the costs element. A successful appeal on substance implies that the CMA should not have incurred the costs of an investigation in the first place because there was no anti-competitive infringement.

11.17 The costs recovery element for partially successful appeals could be more problematic. The Government proposes that, where the appeal is only partially successful, the appellant should be liable for the costs of investigating the upheld infringements at a level to be decided by the CAT, but not for the costs of investigating the overturned findings. This approach ignores the

[57] We acknowledge that, in the Czech Republic, the competition authority can recover its costs from such parties, but there the amount is limited to the sums stated above in paragraph **[11.10]** and cost recovery is thus minimal.

possibility that the points of appeal that were won were very important and/or alternatives to the points lost.

11.18 Another option could be to limit cost recovery to situations where an appellant is wholly unsuccessful or only wins on immaterial points. In any event, some clarity as to exposure to costs would be welcome, such as a fixed or maximum costs amount payable by the relevant party.

Q31: A power to allow the enforcer to recover their costs, or amending the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?

11.19 As indicated above, we consider that the penalty imposed should already be sufficient to cover the costs of the investigation, without the need for additional powers/amendments to the legislation.

Q32: Telecom price control appeals heard by the Competition Commission

11.20 The Committee cannot see any reason why telecoms should be treated differently from other regulatory appeals and it would be useful to understand the justification for the current inconsistency.

11.21 If the Competition Commission were given the ability to recover its costs for a partially successful appeal, the concern indicated above in our response to Question 30 would also be relevant to telecoms price control appeals. Moreover, a potential concern may be that a move to cost recovery could affect incentives on the part of the CC if its costs are only paid where an appellant fails. The temptation - in, say, a borderline case at the end of a tough financial year for the CC and in circumstances where the CC is self-funding - might be to find against the appellant in order to recover costs. In order to address this, perhaps any cost recovery should be payable to the consolidated fund rather than directly to the CC.

Q33: CAT recovery of costs

11.22 We are concerned that allowing the CAT to recover its full costs would be contrary to the principle of access to justice as potential appellants might then be deterred from exercising their rights of appeal if they may have to cover the costs of the CAT. However, we note that the Government proposes to allow the CAT to exercise its discretion as to whether or not costs should be set aside in a particular case. Some guidance on the types of circumstances where the interests of justice dictate that costs should be set aside would be helpful. In any event, we would not object to the CAT recovering reasonable costs, such as for photocopying, postage etc by way of (for instance) court fees.

11.23 The Government has not addressed how interveners in appeals would be dealt with in terms of cost recovery. The role of interveners appears to be changing as a result of a recent Court of

Appeal judgment causing them to take a more active role[58]. The judgment implies that there is a greater onus on interveners to advance more substantive cases, which means that they are likely to cause more costs to be incurred. There would be unfairness in requiring an appellant to bear costs caused by an active intervention but, at the same time, there would be potential unfairness in requiring an intervener to bear costs where their involvement is the result of an appeal which they did not initiate and because the Court of Appeal has effectively required them to take the lead role in defence. Interested parties may be more reluctant to intervene for fear of being exposed to the risk of paying the CAT's costs.

[58] *British Telecommunications Plc v Office of Communications* [2011] EWCA Civ 245, paragraph 86.

Table - Jurisdictions which have a greater GDP and lower merger filing fees than the proposed UK voluntary regime (in descending order of GDP)

Country	GDP (adjusted for PPP)[59] $million	Filing fees
EU	15,170,419	None
United States	14,657,800	Fees are as follows: • transaction value of US$66 million or greater but below US$131.9 million = US$45,000 fee; (approx **£27,000**) • transaction value of US$131.9 million or greater but below $659.5 million = US$125,000 fee; (approx **£76,000**) • value of $659.5 million or greater= US$280,000 fee (approx **£170,000**)
China	10,085,708	None
Japan	4,309,432	None
Germany	2,940,434	A filing fee of up to €50,000 (approx **£45,000**)
Russia	2,222,957	A filing fee of 20 000 roubles (approx **£400**) applicable only to transactions that require Pre-Transaction Filing. No filing fees for a Post-Transaction Filing.
UK **(proposed voluntary)** **Option 1:**	2,172,768	• Where the UK turnover of the target does not exceed £20 million, fee would be **£65,000** • Where the UK turnover of the target exceeds £20 million but does not exceed £70 million, fee would be **£130,000** • Where the UK turnover of the target exceeds £70 million, fee would be **£195,000**
Option 2:		• Where the UK turnover of the target does not exceed £20 million, fee would be is **£60,000** • Where the UK turnover of the target exceeds £20 million but does not exceed £70 million, fee would be **£120,000** • Where the UK turnover of the target exceeds £70 million but does not exceed £120 million, fee would be **£180,000** • Where the UK turnover of the target exceeds £120 million, fee would be **£220,000**

[59] International Monetary Fund, 2010. PPP is Purchasing Power Parity - takes into account cost of living/inflation differences to produce a more accurate figure.

Townley, Dr Christopher

ANNEX

Department for Business Innovation and Skills

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

Submission of Chris Townley

13 June 2011

1. INTRODUCTION

1. The Government has asked for comments in its proposed reform of the UK's competition regime.[1] The basis of this consultation is the proposed merger of the Office of Fair Trading and the Competition Commission, to create the CMA. Given the focus of the merger most questions centre around the role of the CMA in relation to mergers and market investigation references (MIRs).

2. This submission takes a broader perspective. I focus on the goals of EU and UK antitrust and the demands that these goals place on possible CMA structures. By antitrust decisions I mean decisions under Articles 101 and 102 TFEU and Chapters I and II of the UK's Competition Act 1998.

3. An effective CMA must be clear about its goals and its structure must take account of the goals of the laws that it enforces. I show that public policy has been considered in EU and UK antitrust. This was the intention of the relevant political actors. However, in the last 10 years, and against their political mandate, the EU Commission (in EU antitrust) and the OFT (in UK antitrust) have changed tack, making consumer welfare the sole goal of these rules.

4. This change has caused consternation.[2] A recent Business in the Community (BITC) consultation on business and the government's Big Society vision lists antitrust as a perceived barrier to firms collaborating, even when this would have a powerful social or environmental impact.[3] In a speech responding to this report, David Cameron talked of a deal where government reduces taxes and regulation if business helps tackle social challenges. In response to antitrust being a barrier to this he pledged to do "…everything we can to tackle those barriers head-on…"[4] The CMA Bill presents an ideal opportunity.

5. The structure of this submission is as follows:

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[1] Department of Business Innovation and Skills, A Competition Regime for Growth: a consultation on options for reform, March 2011 (the Consultation Paper 2011).

[2] See, for example, http://www.guardian.co.uk/sustainable-business/blog/red-tap-strangling-sustainable-ideas ; the WWF, http://www.guardian.co.uk/sustainable-business/precompetitive-behaviour-defining-boundaries?intcmp=122 and the views of the Food Ethics Council, in its 2010 publication 'Food Justice: the report of the Food & Fairness Inquiry', senior representatives from the farming, food manufacturing and grocery retail industries identified competition considerations as a practical barrier to them meeting consumers' expectations that goods they supply are healthy and sustainable (http://www.foodethicscouncil.org/foodjustice). The inquiry committee recommended: "The UK government should work with the OFT and consumer groups to develop publicly accountable mechanisms whereby businesses can collaborate to make progress on sustainability that is in the public interest."

[3] http://www.bitc.org.uk/document.rm?id=12635, page 6.

[4] http://www.bitc.org.uk/document.rm?id=12651 Similarly see, the successful protests of President Sarkozy at the time of the Lisbon Treaty changes, references in (Townley, 2010), 320.

a. Executive Summary (Section 2);

b. The aims of reform in the Consultation Paper (Section 3);

c. Reflection upon the multiple goals of (Section 4):

   i. Articles 101 and 102 TFEU;

   ii. Chapters I and II of the Competition Act 1998; and

   iii. The pros and cons of multiple goals;

d. Discussion of independence and accountability and the relevance upon them of multiple goals in EU and UK antitrust (Section 5);

e. Examination of the sectoral regulators' (and the OFT's) concurrent powers in EU/ UK antitrust (Section 6).

6. This is a consolidated reply, principally to Questions 1, 14, 16, 19 and 20, please see my official Response Form for more details.

7. Before starting the discussion, it is worth giving a practical example of how public policy goals might be relevant in antitrust. Assume that EU/UK antitrust's main goal is consumer welfare. Imagine an agreement between all EU washing machine manufacturers and importers not to make/ import washing machines below a specific environmental specification. This would raise the purchase price of washing machines in the EU (the cheapest washing machines do the most environmental damage). However, it would reduce environmental harm from washing machine use.[5]

8. Assuming that the agreement has an impact on both consumer welfare and environmental protection (the same would apply for any other relevant public policy goal), four scenarios are possible:

   a. The agreement might improve the environment and consumer welfare (even if the washing machines' purchase price increases, the savings in electricity used during their lifetime may outweigh this). There is no need to consider environmental benefits here. Agreements are cleared on consumer welfare arguments alone.

   b. The agreement might improve the environment and undermine consumer welfare (if the purchase price rises more than lifetime usage savings). These are the types of agreement that David Cameron promised to tackle and they are the focus of this submission.

   c. The agreement might undermine the environment and improve consumer welfare. I do not think that such agreements should be dealt with in antitrust because of a risk of misuse of powers.[6]

   d. The agreement might undermine both the environment (no environmental gains, for example) and consumer welfare. I agree with the OFT that these agreements are not desirable.

9. We will see below, in Section 4, that the OFT currently seems to believe that the sole goal of EU and UK antitrust is consumer welfare. As a result, it thinks that the agreements in paragraph 8(a) are permissible under EU/UK

[5] Other examples include the supermarkets and binge-drinking discussion in (Townley, 2007-2008) or the issues raised in the various documents at footnote 2.

[6] (Townley, 2009), 248. Yet, EU antitrust often protects public policy goals in this way. For example, in Joined Cases 56 and 58/64 *Établissements Consten SARL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299 the EU Court ignored the consumer welfare benefits of the agreement and focused on the fact that it divided up the EU.

competition law and that the agreements in paragraph 8(d) are forbidden. Coincidentally, this assessment is in line with the views of those who, like myself, believe that public policy considerations are relevant in EU and UK antitrust too.

10. Conflict between those of us who believe in public policy's relevance in EU and UK antitrust and those who do not (such as the OFT) exists in relation to the paragraph 8(b) agreements.[7] These are the agreements that the recent UK consultation on business and the government's Big Society vision called problematic. It is these that David Cameron said that he would deal with.

2. EXECUTIVE SUMMARY

11. As we will see in Section 4, many argue that the sole goal of EU and UK antitrust should be consumer welfare. This goal can help to promote productivity, innovation and growth. However, as we know from UK mergers and MIRs, public policy goals can be important too, think of the Lloyds/HBOS merger during the financial crisis, for example.[8] Section 4 shows that the same is true for EU and UK antitrust, the case law there (and the political aim of these rules) is that public policy should be considered within them.

12. These wider claims for the consideration of public policy in EU and UK antitrust are not surprising in the light of the increasing emphasis on corporate social responsibility throughout the EU and in the Government's Big Society initiative. They are affected by the goals that the CMA pursues in the substantive legislation. They are also affected by the prioritization of its tasks and the specific cases that it selects when applying these prioritization criteria.[9] It is important that the CMA's structure takes adequate account of its duty to consider public policy goals in EU and UK antitrust.

13. As the Consultation Paper 2011 points out (and we have good evidence of this from the sectoral regulators), setting out the CMA's objectives (and those of the substantive legislation) in the primary legislation sits at the heart of corporate governance.

14. Specifically, in relation to the questions raised:

    a. Question 1, the answer here is quite complex, but I think that the CMA will need to be able to balance competing goals in its antitrust decisions.

    b. Question 14, I believe that the sectoral regulators should maintain their concurrent antitrust powers, in parallel with the CMA.

    c. Question 16, I do not believe that there is any significant benefit to be gained from expending resources attempting to further co-ordinate the concurrent competition powers.

    d. Question 19, I believe that the CMA's objectives should be enshrined in statute.

    e. Question 20, I believe that the CMA should have a principal competition (by which I mean consumer welfare) focus. However:

        i. It should also be made clear in that statute that other public

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[7] And possibly the agreements in paragraph 8(c), but I ignore these here.
[8] www.parliament.uk/briefing-papers/SN04907.pdf
[9] Is it a good use of limited state resources for the OFT to have spent so long ensuring that public schools are cheaper or that the price of tobacco is lower, for example?

ii. It should also be made clear in that statute that these public policy goals can, where appropriate, out-weigh competition;

iii. I do not suggest listing the relevant goals as they are open-ended. That said, one could list some key ones, for examples those listed in the EU policy-linking clauses (and possibly also say that, in UK antitrust, the single market imperative is not a relevant goal.

iv. Transparency would also be enhanced if the proposed legislation explains how the tensions highlighted above in the consumer welfare test should be resolved

I am comfortable with the CMA doing this balance, including public policy goals, as it can get relevant expertise from outside, but I suspect that the Government will seek more political accountability.

(a) If the CMA is to conduct the balance then I suggest that the legislation obliges the CMA to explain how it will take account of public policy goals in UK (and possibly also EU) antitrust in public guidance. If there were unease at doing this for EU law[10] then the CMA could be instructed to push the issue in the European Competition Network and if agreement could not be achieved there to take an appropriate case to the EU Courts.

(b) If more political accountability is desired, then:

(i) A Minister should be made responsible for the CMA's decisions;

(ii) One could give the CMA responsibility for the consumer welfare assessment and give the Minister the duty to balance this against the public policy concerns. I do not think that we should ask the CMA to report on the other public policy goals. The expertise for assessing these currently lies elsewhere. The benefit of this system is that it already exists in the mergers regime.

(iii) This leaves the value judgments in the consumer welfare analysis to deal with. The proposed Bill can aid accountability by taking into account the concerns around footnote 86. The CMA could also help by being more explicit about how it has considered things like the balance between long and short term consumer welfare, price and quality, etc. in its decisions.

15. Even in such a system, it is not possible to be completely transparent in the outcome of antitrust decisions. Value-judgments (and often quite large ones) would then have to be taken by the CMA and we would have to accept that.

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[10] There is precedent for this, see the OFT's own, apparently abandoned discussion of this at http://www.oft.gov.uk/news-and-updates/events/roundtable-article101(3)/ and also the Dutch Competition Authority explaining how it takes account of public policy goals in national and EU antitrust at NMA, Annual Report 2009, 26-9 and 50-2, http://www.nma.nl/en/images/NMa_Jaarverslag_2009_EN23-156707.pdf

3. THE AIMS OF REFORM IN THE CONSULTATION PAPER

16. Cable explains that the Government's proposed reform aims for "…strong, sustainable and balanced growth…"[11] As the Consultation Paper 2011 stresses:

"The Government's overarching objective in reforming the regime is to maximize the ability of the competition authorities to secure vibrant, competitive markets that work in the interests of consumers and to promote productivity, innovation and economic growth."[12]

17. The CMA should have a:

"…primary focus on competition: ensuring fair and effective competition between companies and promoting competitive markets conducive to stability, growth, innovation and consumer welfare.**"**[13]

18. It is important that the Government explains what it means by 'competition'. This word has many meanings. One possible meaning is consumer welfare. Consumer welfare has widespread acceptance as a key (and as we will see in Section 4, some argue that it is the only) goal of EU and UK antitrust law. I agree that consumer welfare should be a relevant goal of EU and UK antitrust.

19. However, competition is only the primary focus. The implication is that other goals are relevant too. Echoing the EU Treaties, the reforms discussed in the Consultation Paper 2011 aim for "…sustainable and balanced growth…" This raises the question of whether, when and to what extent public policy considerations should be considered within antitrust, in order to help achieve this balance.

20. Balancing consumer welfare and public policy goals demands value-judgments from the decision-maker. Further value judgments need to be made within the consumer welfare test itself, see the discussion around footnote 65.

21. Section 4 shows that implication is supported by the both EU and UK antitrust as it currently stands. Then, Section 5 examines the implications of this for CMA decision-making.

4. THE GOALS OF ANTITRUST

22. This section is split into EU and UK law. I have to deal with both types of law for two reasons: the OFT applies both EU and UK antitrust; and, UK law uses the EU law as a starting point in the definition of the relevant chapters, such that these provisions are intertwined.

23. My discussions of the EU and UK law are structured in a similar way.[14] I start

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[11] Consultation Paper 2011, page 4, see also pages 11 and 87.
[12] Consultation Paper 2011, page 5.
[13] Consultation Paper 2011, page 87, see also page 86.
[14] The arguments outlined here have been made in brief for ease of reference. My papers below provide more detail, as does other recent work: on **EU goals**, see (Townley, 2009); (NMa, 2009); (Petit, 2009); (Roth and Rose, 2008); (Townley, 2007-2008); (Townley, 2007); (Sufrin, 2006); (Psychogiopoulou, 2006); (Prosser, 2005); (Monti, 2002); (Ehlermann and Laudati, 1998); and three forthcoming articles in 2011 European Competition Law Review. On **UK goals** see (Townley, 2010).

by showing what the EU Commission and the OFT think (consumer welfare is the sole goal of these provisions). Then, I argue that the Member States (those signing the EU Treaties); the EU Courts (who are the ultimate arbiters of the EU Treaties) and other key EU institutions, specifically considered whether public policy should be relevant in EU. They all decided that it should be. Similarly, Parliament was clear, when passing the UK Competition Act 1998, that public policy considerations are relevant in Chapters I and II (UK antitrust). The Consultation Paper 2011's reference to "…sustainable and balanced growth…", discussed in Section 3, may demonstrate a similar desire to consider public policy goals within UK antitrust.

a. Articles 101 and 102 TFEU

24. The EU Commission is the central administrative authority that applies Articles 101 and 102. It is in charge of developing competition policy for these articles, within the remit left to it by the EU Courts.

25. The EU Commission has said "[t]he objective of Article 81 [now Article 101 TFEU] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."[15]

26. The OFT (which also enforces Articles 101 and 102) seems to endorse this view when it applies these provisions, although it is unclear.[16] I can find no statement where it explicitly endorses this statement, which is itself unfortunate, if that is its view.

27. I show below that the EU Courts, the European Parliament and the Council of Ministers all reject consumer welfare as the sole goal of Articles 101 and 102. Consumer welfare may be one of the goals, but these institutions have all made it clear that competition can be balanced against public policy goals in these provisions.

28. The EU Courts (and the EU Commission[17]) regularly take public policy goals into account here. Recent EU Court judgments do too: *Meca Medina* (2006) – public health outweighed competition; *Laurent Piau* (2005) raising professional and ethical standards, etc. outweighed competition; *Wouters* (2002) – administration of justice outweighed competition.[18]

29. Incidentally, the EU Courts have only once explicitly endorsed a sole consumer welfare goal for Article 101 (and never for Article 102). This was in the General Court's *Spanish Glaxo* judgment in 2006. The European Court of Justice overturned this on appeal in 2009.[19]

30. Although, Article 101's wording seems too narrow to support diverse public policy goals, this description of public policy's relevance in the case law is

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[15] Commission Notice, *guidelines on the application of Article 81(3) of the Treaty*, OJ 2004 C101/97 at [13]. Article 102 has the same goals as Article 101 TFEU.

[16] "…the goal of competition policy is to optimise consumer welfare. This guides all of the OFT's competition policy actions." (Fingleton and Nikpay, 2008), 405, 406. These are their personal views, page 385, but one assumes that the OFT's CEO and the (then) Head of Policy know the OFT's goals.

[17] The washing machine example above is an actual case, Commission decision, *CECED*, OJ 2000 L187/47, that many believe was decided for environmental reasons. In 32% of Commission Article 101(3) decisions from 1993 to 2004, public policy considerations were decisive, (Townley, 2009), 6.

[18] Case C-519/04 P *Meca Medina v Commission* [2006] ECR I-6991 para 45; Case T–193/02 *Laurent Piau v Commission* [2005] ECR-II 209, para 102; and Case C-309/99 *Wouters and Others v Algemene Raad van de NOvA* [2002] ECR I-1577, paras 94-7.

[19] Joined Cases C-501/06 P, etc. *GlaxoSmithKline Services v Commission*, judgment of 6 October 2009, not yet reported, [61]-[63] and Joined Cases C- 468/06–C- 478/06 *Sot Lelos kai Sia EE and Others v GlaxoSmithKline AEVE*, judgment of 16 September 2008, not yet reported, paras 64, 65.

widely accepted in the literature.[20] This is because EU interpretation does not follow a word-focused methodology. We interpret EU Treaty provisions (including Article 101):[21]

(a) In the light of the EU Treaties' goals, including, Article 3(3) EU Treaty:

"…The Union shall establish an internal market. It shall work for the **sustainable development of Europe based on balanced economic growth** and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance …"

31. Note the emphasis on balancing 'economic growth' with other criteria.

(b) In line with the policy-linking clauses, there are at least 10 of them covering e.g. health and environment.[22] There is also a general one, Article 7 TFEU provides that:

"The Union shall **ensure consistency between its policies and activities**, taking all of its objectives into account…"

32. The European Council (the political body made up of the Member States of the EU) introduced these provisions on the understanding that they would influence the consideration of public policy in all areas of EU law, including EU antitrust. For example, when they introduced the policy-linking clause on culture (Article 167(4)) the Council said to the EU Commission:

"…the inclusion in the Treaty of Article 128(4) [now Article 167(4)[23]] has created a new situation, the consequences of which must be clarified with respect to the application of Community competition rules to cross-border fixed book prices…"[24]

33. The cultural policy-linking clause was intended to inject cultural criteria into the competition rules, amongst others. The EU Commission was asked to explain how it would do this; it did not reply on a technicality.

34. In conclusion, the EU Commission is the only EU institution that believes that EU antitrust's sole goal is consumer welfare. In fact, although it is confirmed in EU Commission guidelines, this view is principally held by DG COMP, other Directorate-General's encourage the consideration of public policy there. Furthermore, we have seen clear statements from the EU Council (the

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[20] See sources at footnote 14 and other references at (Townley, 2009), 2, fn 7.

[21] For more details please see, (Townley, 2010), 318-26; (Townley, 2009), Chapter 2; (Townley, 2007-2008). I publish a more recent paper in (2011) European Competition Law Review, forthcoming.

[22] Article 9 TFEU "**In defining and implementing its policies and activities**, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and **protection of human health**." and Article 11 TFEU "**Environmental protection** requirements must be **integrated into the definition and implementation of the Union's policies and activities**, in particular with a view to promoting sustainable development."

[23] "The Union shall take **cultural aspects** into account in its **action under other provisions of the Treaties**, in particular in order to respect and to promote the diversity of its cultures."

[24] Council Decision, *on cross-border fixed book prices in European linguistic areas*, OJ 1997 C305/2. Similarly, in relation to the cultural and other aspects of sports, see Council Declaration, *on the specific characteristics of sport and its social function in Europe*, made at the European Council of Nice on 7-9 December 2000. See other references at (Townley, 2009), 158.

Member States) and the EU Courts that public policy is relevant in EU antitrust. The European Parliament supports this stance.[25]

b. **Chapters I and II of the Competition Act 1998[26]**

35. These provisions are modelled on Articles 101 and 102. The OFT seems to seek a sole consumer welfare goal here too; although, to my knowledge, it has not clearly said so;[27] which is itself unfortunate, if that is its view.

36. The inclusion of public policy was a key issue in the House of Lords debates on the UK Competition Bill (which led to the Competition Act 1998). Lord Simon (the Bill's proponent in Parliament) said:

"Although the [section 9 CA98] exemption criteria may seem narrow, the Bill requires them to be interpreted in the light of the general principles (Clause 58 [now section 60, CA98] - which essentially says follow the EU law equivalents unless there are any relevant differences). I shall mention that clause frequently. It is the linking clause between EC [now EU] law and our own in our new [Chapter I] prohibition in the Bill.

In practice—this is important—the Commission has taken into account a wide range of countervailing benefits when making decisions under Article 85 [now Article 101 TFEU]. In particular, the Commission has taken into account the public health benefits of agreements when reaching decisions. However, the issue goes wider, as we have discussed, than public health. The Commission has, for example, taken into account environmental benefits of agreements…

It is clear that under the Bill the Director General [now the OFT] and Competition Commission can be expected to do likewise: to form the same judgments against the body of law that I have mentioned which have existed in the interpretation by the Commission under Article 85."[28]

37. Lord Simon justified this view of EU law by relying on a report that BIS (then DTI) commissioned Professor Whish to write on the relevance of public policy concerns in Article 101(3) (then Article 85(3) EC):[29]

"As Professor Whish has noted in the study on the breadth of Article 85(3) the exemption criteria are interpreted against the backdrop of the underlying principles and objectives contained in the EC Treaty [now EU Treaties]. Treaty objectives such

[25] (Townley, 2009), 2.
[26] This is a brief summary. For more details on UK antitrust's goals see (Townley, 2010).
[27] *Ibid*.
[28] Lord Simon, Hansard - HL Deb 13/11/1997 vol 583 cc278-9.
[29] (Whish, 1997).

as those to protect the environment contained in Article 130 [now Articles 11 and 191 TFEU] may be relevant in considering whether an exemption can be granted."[30]

38. This is in line with other areas of UK law, for example, section 371(12) Communications Act 2003 allows Ofcom to consider cultural and other considerations when applying Chapters I and II CA98.[31] There is a similar provision in the legislation for most of the sectoral regulators.

39. In conclusion, over the last 10 years, the OFT and the EU Commission have sought to **change** the substance of EU and UK antitrust by: (a) ignoring public policy; and (b) selecting a sole consumer welfare goal. This was done with little or no public debate on goals. It is also out of line with the EU Courts' case law and the will of the OFT/ EU Commission's political masters.

c. The pros and cons of considering public policy in antitrust

40. We have seen that the Member States, the EU Courts, the EU Treaties and the European Parliament (and Parliament in relation to UK law) want public policy concerns to be considered in EU (and UK) antitrust. The OFT and EU Commission's stance flies in the face of this and much EU law scholarship.

41. Considering public policy within EU and UK antitrust ties in with the Government's strategy for the Big Society. We have seen David Cameron (in the Introduction to this submission) specifically promising to 'tackle head on' the perception that EU and UK antitrust is closed to public policy considerations. The CMA Bill is an opportunity to make the current law even more specific on these points.

42. However, at this juncture it may be appropriate to reflect upon whether one *should* allow these social and economic goals to be considered in UK antitrust first.[32]

43. I consider several advantages of balancing public policy goals in UK and EU antitrust, and then four disadvantages.[33] As the EU Commission and the OFT have never really admitted their shift of the last 10 years (i.e. from the inclusion of public policy to a sole focus on consumer welfare), they have never really sought to justify it either. That said, it must be acknowledged that this shift has the widespread support of antitrust practitioners and academics. For example, Professor Whish thinks today that it is preferable if UK and EU antitrust follows a sole consumer welfare goal.[34]

Advantages of considering public policy goals in EU and UK antitrust

44. Imagine that two important policies clash, in our washing machines example it was competition and environmental protection. These conflicts can be dealt with in two ways. One could balance both policy goals within the antitrust decision (and in the environmental decision, if there is one), or one could ignore environmental concerns in the antitrust test (and presumably

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[30] Lord Simon, Hansard - HL Deb 25/11/1997 vol 583 cc946-90.

[31] The new merger provisions, introduced in Part III of the Enterprise Act 2002, are supposed to operate differently. The OFT/ CC consider efficiencies; the Secretary of State may consider specific public policy goals separately, see Part II, Chapter 2 of the Enterprise Act 2002.

[32] A more detailed discussion can be found in (Townley, 2009), chapter 2.
I restrict this to UK antitrust because a UK Act of Parliament cannot change EU law; Section 5 makes some suggestions of how the UK could influence this question in EU law.

[33] A more detailed account of this discussion can be found at (Townley, 2009), 28-43.

[34] See references at *ibid*, page 2, fn 10.

competition in the environmental one).

45. Some advantages of balancing are that:

    a. (subject to the limits of knowledge) one can come to the 'optimal' balance in a specific case. If one ignores environmental concerns in the antitrust assessment, then one would not allow the washing machine manufacturers to come to this agreement (assuming that it undermines consumer welfare) because it breaches antitrust. One would need to find another way to achieve the environmental goals. This might be through an Act of Parliament, for example.

    b. Yet, always waiting for Parliament to act is out of line with the Big Society aim to reduce regulation and encourage us all to work towards environmental and social goals. In addition, Parliament may not have the time or resources to legislate. The reality then is that environmental (and other social) goals are often sacrificed if we leave this to Parliament. Even where this is not the case, corporate social responsibility has received strong EU backing because time can often be of the essence in dealing with environmental or social problems.[35]

    c. Corporate social responsibility agreements are often better at raising awareness on particular issues and changing behaviour in general.[36]

    d. Society might also decide that it does not want companies to fixate on profit at all costs, regardless of the (legal) damage that they do. The Companies Acts have already been changed to force directors to consider the impact of the companies operations on the community ad the environment.[37]

    e. There are also some public policy goals (fairness and social cohesion may be examples) that sometimes cannot be adequately compensated for later with money.[38]

    f. Another benefit of considering public policy goals within antitrust is that it allows the decision-maker to adopt a seamless approach to 'legislation'.[39] A seamless approach is beneficial because then the legislator is neutral vis-à-vis the different regulatory or legislative techniques which it chooses to pursue various policies. Neutrality of this sort has many advantages, including increased efficiency.[40]

46. Having said that, prudence is needed. Some believe that government failures are more important and more frequent than market failure. Intervention in this manner should be exercised with caution. I suggest some limits below, in the text around footnote 54.

Disadvantages of considering public policy goals in EU and UK antitrust

47. Reasons commonly given in favour of ignoring public policy goals in EU and

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[35] See sources in (Townley, 2009), 35-7.
[36] See, for example, OECD, *Voluntary Approaches for Environmental Policy*, (2003) Paris.
[37] Section 172(1)(d) Companies Act 2006.
[38] Jenny, F., *Competition Law and Policy*, in Hope, E. (Ed.), *Competition Policy Analysis*, (2000) Routledge, London 24 and Bouterse, R., *Competition and Integration - what goals count?*, (1994) Kluwar Law and Taxation Publishers, Boston 62.
[39] Including mergers and MIRs, although the public policy goals that can be considered in UK and EU antitrust are much wider than the limited exceptions in mergers, for example.
[40] Gyselen, L., *The Emerging Interface between Competition Policy and Environmental Policy in the EC*, in Cameron, J., Demaret, P, and Geradin, D., *Trade & the Environment: the search for balance*, (1994) Cameron May, London, Volume I, 245-57.

UK antitrust include, fear of complexity.[41] Balancing is complex, the resulting lack of legal certainty might discourage investment (and may even undermine the rule of law). The more goals that have to be considered the more complex this exercise is.[42] The less legal certainty there is, the less likely that the competition regime will receive public and political support. This is important, without the support of these actors, antitrust will be less effective, which could undermine consumer welfare (which is also an important goal).[43]

48. Having said that, legal certainty is not the only goal of the law,[44] this is especially true of economic laws. The right decision is also important. One cannot normally ignore constitutional imperatives just to facilitate the decision-maker's task. Furthermore, the economy does not exist independently from society and the environment. Ignoring public policy goals in antitrust can have big impacts on social and environmental factors. The OFT/ EU Commission can no longer run away from engaging with complexity as Ofcom and other bodies have proven is possible. Surely it is better to balance these goals as best one can, even if this does not lead to perfect results, rather than to abandon the exercise altogether and ignore antitrust's impact on other areas of law? I would like to see the OFT and the EU Commission directing their efforts at guiding firms through the balancing process, i.e. improving the predictability of the balancing test that they are obliged to conduct, rather than using resources trying to avoid carrying out this role.

49. A second (potential) advantage of ignoring public policy goals in EU antitrust is that it facilitates the 2004 EU competition law procedural reforms. Until 2004, only the EU Commission could grant an exemption under Article 101(3), this is where most of the public policy goals were considered. When the Council decided (on the advice of the EU Commission) to decentralise the consideration of Article 101(3) analysis to all Member State courts and competition authorities, there was a fear that if public policy were relevant in EU antitrust, this might lead to protectionism and inconsistent decision-making. From a pragmatic perspective, one might remark that this has not worked. The Dutch Competition Authority says that it takes account of public policy interests in EU antitrust. In any event, one does not change the substance of an EU Treaty article, because a regulation changes the procedure.[45] Instead the EU Commission and Member State competition authorities should look for clearer ways to balance these goals.[46]

50. A third (potential) advantage of ignoring public policy goals in antitrust is that many economists think that it is more efficient to generate as much wealth as

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[41] "This may not only result in non-enforcement due to an overly complex framework…Therefore this potentially could end up with an incredibly complicated framework requiring the need to look at the effect on inflation, balance of payments, trade, environment, minorities and many other diverse goals." http://www.oft.gov.uk/shared_oft/events/Article101(3)-synopsis.pdf, page 6.

[42] This also means that each case will take longer. This is not ideal, the OFT is already criticised for taking too long and delivering too few competition decisions, Consultation Paper 2011, 45. However, this cannot justify the OFT (and ultimately the UK) ignoring its duties under EU antitrust. Many things can be done to deliver more cases (e.g. the OFT might focus on them and not just MIRs), but ignoring relevant goals is not the way to deal with this. It must be accepted that the antitrust assessment is a complex one, page 48.

[43] EU Commission, *Report on Competition Policy 2002*, points 20-2 and EU Commission, *Report on Competition Policy 2001*, 5.

[44] Case C-354/95 *The Queen v. Minister for Agriculture, Fisheries and Food, ex parte, National Farmers' Union and Others* [1997] ECR I-4559, paragraph 58.

[45] This involves a technical argument about different order norms in EU law, (Townley, 2009), 97-8.

[46] I have suggested a framework at (Townley, 2009), chapter 8.

[47] especially when the effectiveness of traditional regulatory instruments is increasingly being questioned.[48] An integrated approach is more in line with the Big Society aim to reduce regulation and encourage us all to work towards environmental and social goals. In addition, as we have seen, Parliament may not have the time or resources to legislate. It is extremely difficult to legislate in such a way that two or more goals optimally inter-relate, ex ante, and across the whole economy, it is simply too hard to predict all likely situations. Much better, especially in areas like competition (where information is easier to acquire after the event, there are few enforcement actions, individual situations vary substantially, and there are few examples of action by firms) to balance competing goals within the rule.

51. Finally, ignoring public policy in antitrust may help de-politicise antitrust.[49] This point raises a general argument as well as an institutional one. The general argument is that these values are too subjective and arbitrary to be part of law. Areeda and Turner argue (in a US context) that considering non-economic objectives would involve the courts in political decisions for which there are no workable legal standards. This would place them in a regulatory or supervisory role for which they are ill-equipped.[50] Given this, so the argument goes, the subjective nature of balancing public policy objectives should affect the institutional structure of the decision-making body, i.e. it should be done by political bodies.[51]

52. Yet, this is not just an argument against public policy in antitrust, it is an argument against considering social and environmental goals at all, including in legislation. Furthermore, the EU Courts' case law creates a duty to consider public policy goals; the UK has a commensurate duty (Article 4(3) EU Treaty) to ensure that the relevant decision-maker (here the OFT) can consider public policy goals. Otherwise, we must reform the decision-maker, I discuss this in Section 5 below. In addition, it is strange that, if they feel unrepresentative, the OFT and EU Commission make the even more political decision to never consider public policy in UK and EU antitrust, respectively

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[47] This is a complex area and the economics is not well developed here, however, interesting discussions can be found in: EU Commission Report, *On the "Action Plan for Consumer Policy 1999-2001" and on the "General Framework for Community activities in favour of consumers 1999-2003"*, COM(2001) 486 final, 16 and 17; Brau, and Carraro, *Are Voluntary Agreements a Threat to Competition?*, in Higley, Convery and Lévêque, *Voluntary Approaches: an introduction*, in CAVA, International Policy Workshop on the Use of Voluntary Approaches, 1 February 2001, at the Centre Borchette, Brussels, 64, 65;Sandmo, Towards a Competitive Society?, in Hope (Ed), Competition Policy Analysis (2000) Routledge, London and Gual, *The Three Common Policies: an economic analysis*, in Buiges, Jacquemin and Sapir (Eds), European Policies on Competition, Trade and Industry: conflict and complementarities, (1995) Edward Elgar, Aldershot, 39.

[48] EU Commission Working Document, *Integrating Environmental Considerations into other policy Areas – a stock-taking of the Cardiff process*, COM(2004) 394 final.

[49] The OFT/ EU Commission assumption here is that when one removes public policy from antitrust one is left with a value-neutral consumer welfare test. They can then apply this independently. Yet, the consumer welfare test contains many value-judgments, see the text around footnote 65; (Townley, 2009), chapter 5 and my forthcoming paper on balancing across markets (2011) European Competition Law Review.

[50] Areeda and Turner, *I Antitrust Law*, (1978) Little, Brown and Company, Boston, paragraph 105.

[51] The point being that balancing social and environmental goals is a political task (because it is re-distributive) and the OFT would not be an appropriate body to weigh such goals, given its independence.

(against the clear wishes of their political masters and the EU Courts), see above. If the OFT feels inhibited, the framework within which it operates must be more fundamentally reformed in the new CMA structure, see Section 5.[52] The reality is that this issue comes down to OFT interpretation and philosophy. This is reflected in the fact that, recognising the changing external environment, the OFT hosted a roundtable debate on this subject in May 2010, which I was invited to.[53] Sadly the OFT did not follow up on this initiative.

53. None of these are adequate reasons, to my mind. The basic truth is that EU law seems clear on this issue, public policy concerns should be considered in EU antitrust. We saw that this also seems to have been the intention of the Member States. As regards UK antitrust, we have a clear statement from Parliament that they wanted public policy goals to be considered there.

54. That is not to underestimate the difficulties of balancing public policy goals within antitrust. An appropriate institutional structure is needed, see Section 5. Furthermore, one would not want to balance consumer welfare and public policy in every case, this would be too costly; yet, I believe that it would be better to limit the amount of balancing to be done, rather than reject it out of hand.[54] Rather than seeking to avoid their duties at law, the OFT should focus on how to comply with the will of Parliament and EU law.

5. INDEPENDENCE AND ACCOUNTABILITY

55. Cable is keen to preserve the best features of the current regime, and to ensure "…transparency and political independence of decision-making."[55] The Government is mindful of the need to ensure that "…the decision-making of a single CMA is demonstrably independent of Government and accountable to Parliament…"[56] Furthermore:

"The Government is committed to maintaining the independence of a CMA from political interference. Final issues on competition issues would continue to be taken by independent competition bodies: Ministers will continue to take decisions only in the small minority of cases which raise defined, exceptional public interest issues."[57]

56. There is a tension between being politically accountable and independent. The following paragraphs set out some of the most obvious ways of ensuring accountability. I briefly discuss how they might affect the CMA's independence to a greater or lesser extent. Then, I ask why accountability and independence are desirable. This may help us to understand how to achieve an appropriate balance between them for a future CMA.

57. Before examining some benefits of independence and political accountability, we must be more precise about which aspects of the competition authority's

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[52] Having said that Ofcom (and the other regulators) manages to balance competing goals in their regulatory and antitrust capacities and they are also independent.
[53] http://www.oft.gov.uk/news-and-updates/events/roundtable-article101(3)/ See also my response in 2011 European Competition Law Review, forthcoming.
[54] Appropriate limits are beyond the scope of this submission and could be set out in CMA guidance, but they might include an appreciability doctrine for public policy concerns, further suggestions can be found in (Townley, 2009), chapter 8.
[55] Consultation Paper 2011, 4. See also, page 12.
[56] Consultation Paper 2011, 14. See also page 86.
[57] Consultation Paper 2011, 15.

a. **The criteria upon which antitrust decisions are decided –** the OFT has been asked to provide general guidance relating to UK antitrust.[58] Similarly, in relation to EU antitrust, the EU Commission has the role of defining competition policy, although this is subject to the EU Treaties and the judgments of the EU Courts.[59]

   In Section 4, we saw that the OFT and the EU Commission have steered their own course, ignoring the will of the relevant EU and UK political institutions and the EU Courts.

b. **The outcome of antitrust decisions –** This is also performed by the OFT (as well as the sectoral regulators and the UK courts). The outcome can be unclear in some cases. This is economic law, very little is black and white here, especially give the emphasis on an effects-based approach. However, more can be done to provide guidance in some areas, see below.[60]

c. **The cases to focus on –** At this point the OFT and the EU Commission select their own priorities and decide who to persue within these.

58. Accountability to Parliament on these two dimensions can be achieved in many ways. Each impacts upon the competition authority's independence to a greater or lesser extent. I set out the most obvious options below:

    a. Each antitrust decision could be taken by Parliament, or a Minister (who would also decide general policy). This would be time-consuming (although at the EU level antitrust decisions are taken by the EU Commission as a whole), In a sense, this issue is not about accountability, but rather substitution of the CMA for Parliament. Even under this system, the CMA may retain considerable 'political' power, if it decides which cases are brought and against whom.[61]

    b. Each antitrust decision might be taken by the CMA and approved by Parliament, or a Minister (who would also decide general policy). Here accountability is high and independence is low. Even in the absence of direct instructions, the CMA will learn what kind of cases the Minister will agree to and only take these cases.

    c. The CMA might take 'non-political' decisions and leave the rest to Parliament, or a Minister (who would also decide general policy). This suffers the same risks as (b) above, It also relies on the notion that there are some 'non-political' aspects to decisions. The discussion around footnote 65, shows that applying a consumer welfare test is not a value-neutral exercise.

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[58] Section 52 Competition Act 1998. This section does not provide for political control over the OFT in this respect.

[59] Advocate-General Kokott, Case C-95/04, *BA v Commission* [2007] ECR I-2331, para 28.

[60] It will also become clearer if we have more antitrust decisions and if greater effort is made to translate EU antitrust cases decided in other Member States.

[61] For example, in the OFT's UK antitrust decision on price-fixing by supermarkets in milk and cheese, the decision was not addressed to any farmers and yet, on the face of it, they seem equally to blame, indeed the cartel seems to have arisen at the farmers' insistence.

This is what happens in merger and MIR decisions at the moment.[62] In fact, there is a more restricted approach to this head in these regimes because the public policy grounds that might justify Ministerial intervention are severely circumscribed.

d. Parliament might set the goals for the CMA, but leave it to take the decisions. Depending upon how tightly these goals are defined, this may still leave the CMA with a lot of leeway.

e. Parliament might allow the CMA to set its own goals and take decisions, but have a tightly worded law, in relation to the substantive antitrust test.

f. Parliament might allow the CMA to set its own goals and take decisions and leave the CMA with a widely drafted law to interpret. This is essentially the position that we are in today with UK antitrust.[63]

59. Each of these methodologies can be supplemented by:

a. A reporting requirement to Parliament, this impacts upon the CMA by constraining its action today because it knows that it will have to justify them to Parliament tomorrow.

b. Tying the CMA's budget to specific goals. For example, the current agreement with the Treasury is that the OFT will achieve a certain multiple of its budget in competition benefits over a certain period. This may have a big impact on the type of work the OFT does.[64]

c. Allowing Parliament, or a Minister to select Members of the OFT Board, and/ or other senior employees.

60. I have then highlighted the two issues to which accountability might attach in our discussion and highlighted some of the mechanisms that might be used to achieve accountability here.

61. Next, I want to briefly show that value judgments are needed in EU and UK antitrust decisions. This can arise because of the need to balance consumer welfare against other public policy goals, see Section 4. In addition, **value judgments need to be made within the consumer welfare test itself**. It is currently unclear how these should be resolved in order to achieve "…strong, sustainable and balanced growth…" For example:

a. **Quality v price v choice -** The Consultation Paper 2011 highlights the benefits of open and competitive markets in driving "…lower prices and better products, services and choice for consumers…"[65] This can be true, yet often there is a tension between prices, quality and

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[62] Consultation Paper 2011, 23 and 24. Even here the impact of the CMA might be different. In mergers the Competition Commission currently advises the Minister whether a qualifying merger results in a substantial lessening of competition and whether, taking account of this and the public interest considerations, the merger operates against the pubic interest. The Minister decides. In MIRs, the Competition Commission reports to the Minister on the competition issues, it cannot investigate or make recommendations on the public interest issues. The Minister decides on the balance of competition and the public interest.

[63] Although the Parliamentary debates made it clear in the debates leading to the adoption of the Competition Act 1998 that public policy goals should be considered there, see Section 4 (but not EU antitrust, see above).

[64] For example, it might incentivise the OFT to emphasise market studies, which have a big immediate impact, rather than antitrust decisions with a smaller direct impact, but which might have enormous repercussions across many markets because of novel legal principles that they decide.

[65] Consultation Paper 2011, page 11.

choice.[66] When this happens, which should the CMA prefer?

b. **Short term or long term consumer welfare -** A focus on short term consumer welfare (which the competition authorities in effect have) can undermine R&D investment[67] and environmental considerations, for example.[68]

c. **Vulnerable consumers -** Should one seek to protect some consumers more than others? The Consultation Paper 2011 talks of protecting consumers, but specifically highlights a need to protect "…the most vulnerable..."[69]A similar emphasis can be found in Ofcom's goals, for example.[70]

d. **Where must benefits arise? -** Should one focus on ensuring that the consumer welfare in each relevant market is enhanced, or should one aggregate consumer welfare across all markets (the later approach could increase the welfare of consumers more than the former[71]).[72]

e. **Other types of welfare? -** Should one also consider producer welfare (as in Canada and New Zealand, for example), or just that of consumers? The Consultation Paper 2011 notes that open and competitive markets help small businesses to grow and enter new markets. This can be true, but it is not always the case. Sometimes economies of scale and scope enjoyed by large chains (and a key focus of the consumer welfare test, as least in the short term), means that small firms are unable to compete in the marketplace and close down.[73]

62. The next issue to discuss is what are the benefits in favour of independence (i.e. reducing political accountability)? Note that the Government's default position is political accountability:

"Our starting presumption is a preference for democratic accountability over bureaucratic accountability. That means that wherever possible, we will expect

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[66] Imagine an agreement between the firms within one industry to raise price, but increase product quality. Does this increase consumer welfare? The issue is discussed further in Townley, *The Relevant Market: an acceptable limit to competition analysis*, forthcoming 2011 European Competition Law Review, and the environmental example in the Introduction to this submission.

[67] For example, a focus on reducing the price of medicines today may mean less money for research and development and so current (or maybe even future) generations may not benefit from the possible improvements to the current stock of medicines. For more details and examples see Townley, *The Relevant Market: an acceptable limit to competition analysis*, forthcoming 2011 European Competition Law Review..

[68] Townley, *The Relevant Market: an acceptable limit to competition analysis*, forthcoming 2011 European Competition Law Review.

[69] Consultation Paper 2011, page 11.

[70] Section 3, Communications Act 2003.

[71] On the assumption that competition is not essentially eliminated in any relevant market.

[72] Townley, *The Relevant Market: an acceptable limit to competition analysis*, forthcoming 2011 European Competition Law Review.

[73] This was a specific concern when the UK Competition Act 1998 was being debated in Parliament. The Labour Government even lost in its attempt to block an amendment which excluded some price fixing agreements between small pharmacies from the law (although this has now gone)**.** These concerns are further highlighted in the many discussions on protecting the character of our town centres.

Some say that these goals can be pursued more efficiently outside of antitrust. I discuss this claim in Section 4(c), arguing that that is not always the case.

ministers to execute their responsibilities through their departments."[74]

63. Specifically in relation to the market economy and in the same speech, David Cameron said that sometimes Ministers best carry out their political responsibilities indirectly:

"Take, for example, the operation of our market economy. As individuals, we're free to create wealth and jobs for ourselves and each other. But it's the government's responsibility to set the framework within which the economy operates, to create the right rules, establish the right institutions and set the right cultural norms to make the market not just free, but fair."

64. Independence of competition authorities is widely accepted as important, but why? Given the Government's declared preference for political accountability, we must subject the arguments here to severe scrutiny.[75]

    a. The benefits of independence:

        i. Economic stability helps firms to plan their business strategy and investment. Political interference may inject short-term political expediency into antitrust decisions, possibly reducing investment.[76] A similar point could be made in relation to general antitrust policy, although there may be less pressure on the Government in this capacity from lobbyists. These points can be exaggerated. Removing political interference does not guarantee economic stability; especially during transitions to the CMA leadership.

        ii. The CMA may work harder to establish its own reputation if it is not protected by a Minister, or other body.

        iii. There is also a benefit to the competition authority in not being lobbied (this might be directly by firms, or indirectly by them through Ministerial influence). Dealing with lobbying can take up a lot of time; it might also expose the CMA to regulatory capture.[77] That said, lobbying can be beneficial, to the extent that it allows firms to make their views known. There is a clear mechanism for this to happen in individual cases.[78]

        What might be missing is a more formal method for this to occur (in an accountable way) when the OFT adopts decisions of principle, mainly in policy documents;[79] or decides who to

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[74] http://www.conservatives.com/News/Speeches/2009/07/David_Cameron_People_Power_-_Reforming_Quangos.aspx

[75] There is another reason why this is important. Independence has clear benefits to the CMA and its staff. Public Choice theory explains how this increases the amount of power that those in charge of the authority wield and shows how they have an incentive to argue for less control upon themselves.

[76] http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/complaw090200.asp Also see http://www.conservatives.com/News/Speeches/2009/07/David_Cameron_People_Power_-_Reforming_Quangos.aspx where David Cameron said that when there was a need for impartiality, quangos might have a greater role.

[77] http://www.oecd.org/document/17/0,3746,en_39048427_39049374_41887057_1_1_1_1,00.html

[78] I am less worried about lobbying to the OFT (in terms of regulatory capture) as there is a full merits appeal to the Competition Appeal Tribunal in relation to the substance of specific EU and UK antitrust decisions.

[79] The OFT takes decisions in individual cases that have a wider impact, but these can be challenged in court when they specifically affect a firm.

pursue in its antitrust decisions in the first place.

iv. Firms owned by the State (or the State itself) may restrict competition. Is it problematic if the State reviews its own behaviour? This may not be much of an issue in the UK, given the level of privitisation and the fact that EU antitrust does not normally apply to entities that only sell on the market (UK antitrust may be different here). In any event, this effect can be exaggerated: Parliament can normally legislate if it wants to achieve a specific aim, however anti-competitive that is; and there is a full merits review to the Competition Appeal Tribunal on the OFT's EU and UK antitrust decisions.

v. Some argue that it is appropriate to delegate technical matters to independent decision-makers. Are antitrust decisions of this type, some believe that they are:

"The independence of the competition authority, free from the influence of the government, is crucial if stakeholders are to believe in the integrity of the system. The application of competition law to particular cases is a technical matter."[80]

If value-neutral (or essentially value-neutral) technical tasks could be isolated, I accept the point that, in principle, independence may be acceptable, as long as there were some continuing Ministerial accountability for significant errors.

However, antitrust is not a purely technical matter:

(a) We saw the OFT and EU Commission selecting goals for UK and EU antitrust that are at odds with the political will. This can impact upon case outcomes.[81]

(b) Secondly, even within the consumer welfare test, value-judgments have to be taken and they can often have important effects on the level of investment, etc.[82]

So, I am more sceptical about defending independence on these grounds;[83] unless value-neutral (or essentially value-neutral) technical tasks can be isolated.

b. The benefits of political accountability

i. This is an important principle in a democracy and was a major

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[80] http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/complaw090200.asp Some support can be found here in relation to antitrust decisions from the Government. David Cameron has used Ofwat price-caps and Ofcom's 'narrow technical enforcement role' (in regulation but also, presumably UK antitrust) as examples of technical duties which are appropriate for quangos, http://www.conservatives.com/News/Speeches/2009/07/David_Cameron_People_Power_-_Reforming_Quangos.aspx

[81] See David Cameron's speech, cited in the Introduction to this submission.

[82] See text around footnote 65.

[83] Similarly, the argument that antitrust decisions require particular skill-sets, while true, does not mean that decisions have to be taken by an independent competition authority. Parliament (and other Government departments) often call in experts to get help on technical matters, as does the OFT. For example, it has commissioned from external economists http://www.oft.gov.uk/OFTwork/research/

issue in the election of the current Government. As David Cameron dealt with this matter in a speech on 6 July 2009:

"In a healthy democracy, the contract with the voters is simple. I voted you in. You're responsible for what happens. If things go wrong, I'm going to make you answer for it. And if I don't like the answer, I'm going to vote you out. That is what accountability means.

The problem today is that too much of what government does is actually done by people that no-one can vote out, by organisations that feel no pressure to answer for what happens and in a way that is relatively unaccountable.

This is a big part of the reason why people feel so powerless in Britain today…

And all too often, when you put the questions to the Minister, the answer is pretty much a 'not me guv' shrug of the shoulders. This really matters. There is a serious accountability problem with our political system. Any serious programme aimed at redistributing power from the political elite must address the role of quangos in creating this accountability problem and must include a serious plan to reform them."[84]

In the same speech, David Cameron said that one should not only worry about the cost and accountability of quangos, one should also consider:

"What impact have they actually had in helping to achieve the progressive goals we care about? Just take the issue of training for young people - something which is essential in bringing about a fairer society, one where opportunity is more equal."

As we have seen, the OFT has indeed ignored its role in achieving these progressive goals, in fact it has redefined the goals of UK antitrust to ignore them completely, see Section 4.

ii. EU and UK antitrust cover business activities throughout our economy. The CMA will be (and the OFT is) a powerful body whose decisions can have a massive impact. It is only right that such a powerful body should be accountable.

65. In conclusion, when the OFT was given its UK antitrust mandate it was clear that public policy goals should be considered in the assessment. Since then, it has (implied) that consumer welfare is the sole goal. This may be on the grounds that balancing public policy concerns within the competition assessment involves making re-distributive choices, for which the OFT (as an independent body) is ill-suited.

66. This is not acceptable, either the CMA must apply the competition test as Parliament intended (i.e. considering public policy goals there) or it must accept more political help with balancing the values it needs to consider in antitrust decisions (this may be balancing consumer welfare against pubic policy goals, or balancing values within the consumer welfare test itself).

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[84] http://www.conservatives.com/News/Speeches/2009/07/David_Cameron_People_Power_-_Reforming_Quangos.aspx

67. As long as it genuinely seeks to apply all relevant goals then I am not unduly worried by the lack of direct political accountability. First, because the OFT has a political mandate to balance competition (presumably consumer welfare) and public policy goals. Secondly, because value-laden balancing is carried out by many actors without direct political support. As Justice Holmes of the US Supreme Court has said in relation to judicial arguments:

"I think that judges themselves have failed adequately to recognise their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious."[85]

68. Much better to admit that balancing takes place throughout the antitrust assessment and to be explicit in the balancing process.

69. However, given that the OFT's track record on the consideration of public policy goals in EU and UK antitrust is so poor, there should be a clear statement in the proposed Bill to the effect that:

    a. The principal goal of (EU) and UK antitrust is consumer welfare;[86]

    b. However, other public policy goals can be considered in this assessment and can even out-weigh consumer welfare in appropriate cases;

    c. The CMA should make efforts to clarify the balancing of consumer welfare and public policy goals in appropriate guidance.[87]

70. If the Government's fears about a lack of political accountability are relevant in this case, however, this will not be sufficient. One must acknowledge that, as the structure currently stands, the OFT is required to make value judgments. These occur when: (a) selecting UK antitrust's goals (and their weight); (b) deciding which cases to pursue; and (c) applying the public policy balance (and consumer welfare test) in specific cases.

71. The Government has made clear that political accountability is its default position and:

"…even when power is delegated to a quango, with a new Conservative government, the minister will remain responsible for the outcomes. They set the rules under which the quango operates. And they have the power to ensure that the people operating the quango are qualified to do the job."[88]

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[85] Holmes, *The Path of the Law*, (1897) 10 Harvard Law Review 457, 467.

[86] Given the need for value judgments within this test, see the discussion around footnote 65, the legislation might further clarify it, for example to say that long term consumer welfare is what is relevant. I understand the New Zealand law does this, for example.

[87] For example, section 2 CA98 might be a consumer welfare test (similarly Article 101(1) TFEU) and public policy goals might be considered in the exception provision, see (Townley, 2009), chapters 6 and 7. Many jurisdictions, such as Australia, Canada, the Netherlands, South Africa balance public policy goals in antitrust, we can learn from them. See also (Townley, 2009), chapter 8 also provides a framework for balancing public policy goals in EU antitrust.

[88] http://www.conservatives.com/News/Speeches/2009/07/David_Cameron_People_Power_-_Reforming_Quangos.aspx C.f. Consultation Paper 2011, 86.

72. This means that a Minister should be made responsible for the CMA's decisions. Furthermore, as the OFT has ignored Parliament's will on the goals of UK antitrust (and done the same with the will of most EU institutions for the goals of EU antitrust) and as the OFT's staff will likely remain largely unchanged in the CMA, the Government should make sure that:

    a. As regards EU antitrust, the CMA actively encourages the EU Commission to:

        i. **Relevance of public policy goals -** accept that public policy goals are relevant in EU antitrust and can out-weigh consumer welfare there.

        ii. **The balancing mechanism -** provide at least a framework for balancing such goal in guidance.[89]

        iii. **List the precise public policy goals -** I do not think it is wise to list the relevant pubic policy goals. There is an open list of them and they will continue to change in future EU Treaty amendments.

    b. As regards UK antitrust, the proposed Bill should:

        i. **Relevance of public policy goals -** unless Parliament decides to change the goals of UK antitrust to a sole consumer welfare goal (which I do not think is wise in principle, see above), make clear that although consumer welfare is the principal goal of UK antitrust, public policy can be relevant there and, in appropriate cases, can out-weigh consumer welfare.

        ii. **The balancing mechanism –** instruct the CMA to provide at least a framework for balancing such goal in guidance, see previous footnote.

        iii. **List the precise public policy goals -** given the open list of public policy goals in EU antitrust, I do not think it is wise to seek to de-limit the goals that are relevant in the UK law, there are significant benefits in keeping EU and UK antitrust aligned (i.e. reducing legal costs for firms). However, Parliament did make clear that the single market goal was not relevant in UK antitrust and this might be enshrined in the Act. It might also increase transparency to list public policy goals that are relevant, perhaps in line with the policy-linking clauses in the EU Treaties, but make it clear that other public policy goals can be considered as appropriate.

73. Under this scheme, one might leave it to the CMA to balance relevant public policy concerns within its EU and UK antitrust decisions. The relevant expertise in the evaluation of public policy goals could be obtained from other Government departments (as the Dutch Competition Auhtority did on a healthcare merger, for example).

74. However, if the Government strongly believes that non-technical decisions of this nature should be given directly to a Minister, there may be a benefit in ensuring that mergers, MIRs and EU/UK antitrust decisions are taken in the

[89] Many jurisdictions, such as Australia, Canada, the Netherlands, South Africa balance public policy goals in antitrust, we can learn from them. See also (Townley, 2009), chapter 8 also provides a framework for balancing public policy goals in EU antitrust.

same way on public policy grounds. In relation to the:

a. Substance, this enhances the uniformity of approach between tools, which means that firms' investment decisions are less likely to be distorted.[90] If one were to do this, one would have to take account of EU law's effect as a superior legal norm.

b. Procedure, the same mechanism will reduce uncertainty and confusion, although the effect here is likely to minor. More importantly, effective procedures in one area may also work well in other areas, saving the need to reinvent the wheel.

75. In this case, one could give the CMA responsibility for the consumer welfare assessment and give the Minister the duty to balance this against the public policy concerns. In such a case I do not think that we should ask the CMA to also report on the other public policy goals. The expertise for assessing these currently lies elsewhere. The benefit of this system is that it already exists in the mergers regime.

76. This leaves the value judgments in the consumer welfare analysis to deal with. The proposed Bill can aid accountability by taking into account the concerns around footnote 86. The CMA could also help by being more explicit about how it has considered things like the balance between long and short term consumer welfare, price and quality, etc. in its decisions.

77. Even in such a system, it is not possible to be completely transparent in the outcome of antitrust decisions. Value-judgments (and often quite large ones) would then have to be taken by the CMA and we would have to accept that.

6. SECTORAL REGULATORS AND UK ANTITRUST

This discussion relates to Questions 14 and 16.

78. I believe that the sector regulators should maintain their antitrust powers. I also believe that the OFT should maintain its ability to exercise these powers in the sectoral regulators' areas of competence, but only because of the difficulty of clearly defining carve-outs.

79. The OFT takes few antitrust cases, it is even less likely (or able, lacking the specialist insight of these sectors and, more importantly, lacking insights of the way in which competition works in network industries) to take cases in the regulators' areas.

80. That said, I am a little worried about the OFT and sectoral regulators coming to different conclusions in specific antitrust cases. I am much more worried, now that there is no longer an adequate notification regime, that firms may find it difficult to make investment decisions because of a perception that the OFT and the sectoral regulators (may) have a different stance on the relevance of public policy in UK antitrust, see below.

81. Where there are two potential decision-makers, there needs to be an ultimate arbiter. One way of dealing with this conflict is to make a Minister the ultimate arbiter of who will decide a specific UK antitrust case (if both the OFT and the sectoral regulator want to take the case). This is the current system. I think that it would work well, although to my knowledge resort has never been made to a Minister.

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[90] The Consultation Paper 2011, 94, recognises this advantage.

82. The OFT has argued that this should not be a Minister.[91] I am not sure why it feels that having a Minister is problematic, it mentions policy consistency, but I do not follow the logic of the argument there. In fact, retaining Ministerial oversight seems particularly apposite, given the current Government's declared wish for Ministerial accountability, see discussion in Section 5.

83. However, if the ultimate arbiter is to be changed, I do not think that this should be the CMA. I do not think that:

    a. There is sufficient control over the underlying principles of the OFT's EU and UK antitrust decisions. It appears to have adopted an exclusive consumer welfare goal, which appears to be out of line with the EU Treaties and the will of Parliament, respectively.

       The Consultation Paper 2011 rightly notes that sectoral regulators have a duty to consider a range of economic and social issues in their work.[92] However, these duties often do not apply to their UK antitrust decisions unless the OFT could (not does) take them into account too.[93] I have argued that the importance that the sectoral regulators give to the wider social and economic goals they have (and the current state of EU law) may lead them to consider such goals in UK antitrust.[94]

       This risk of conflict could be resolved/ reduced, by accepting the recommendations that I make above (Section 5) on the goals of EU and UK antitrust.

    b. The CMA does not have the technical knowledge and expertise in network industries.

84. If change is needed, I suggest making the sectoral regulator the ultimate (UK) arbiter of who decides the EU or UK antitrust case in its area, if both the CMA and the sectoral regulator want to pursue the matter.

85. Nor do I suggest placing the CMA at the centre of a network, i.e. giving it power to mandate that certain actions are undertaken, without giving it any of the commensurate responsibilities of implementing these policies. The OFT may not have the requisite insight into the priorities in each sector (as the OFT made a similar point when the Competition Appeal tribunal sought to impose deadlines upon it in relation to its own decision-making).

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[91] http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/oft900a.pdf para 14.
[92] The Consultation Paper 2011, 72. For example, Communications Act 2003, sections 3 and 4.
[93] For example, section 371(12) Communications Act 2003.
[94] As section 60, Competition Act 1998 demands. More details provided in (Townley, 2010).

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

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

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

Consultation Questions

1. Why reform the competition regime?

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

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

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

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

Comments:
Much of the attached Annex develops my views on the answer to Question 1.
I have no comment on Question 2.

2. The UK Competition regime and the European context

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

Comments:
Much of my submission relates to the goals of and interaction between the EU and UK antitrust regimes.

3. A stronger markets regime

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

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

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

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

Comments:
No comment on Questions 3 and 4, except that there is a brief discussion on aligning the goals of the MIR and antitrust regimes in the Annex, Section 5. There is also a brief discussion about appropriate mechanisms for decision-making in the same place.

4. A stronger mergers regime

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

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

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

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

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

Comments:
No comment on Questions 5-7.

5. A stronger antitrust regime

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

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

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

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

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

Comments:
No comment on Questions 8-10.

6. The criminal cartel offence

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

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

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

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

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

Comments:
No comment on Questions 11-13.

7. Concurrency and sector regulators

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

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

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

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

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

Comments:
Please see Section 6 of the Annex for my responses to Questions 14 and 16.
No comment on Question 15.

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

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

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

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

Comments:
No comment on Questions 17 and 18.

9. Scope, objectives and governance

This chapter sets out that the CMA should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA and proposes that the CMA will: have clear, and potentially

statutory, objectives to underpin prioritisation; be accountable to Parliament; and, have an appropriate governance structure for a single decision making body. We ask:

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

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

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

Comments:
Most of my submission deals with my response to Questions 19 and 20, please see the Annex.
No comment on Question 21.

10. Decision making

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

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

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

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

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

Comments:
No comment on Questions 22-24, although there is a brief argument in favour of uniformity of approaches between tools in the Annex, Section 5.

11. Merger fees and cost recovery

Merger Fees

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

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

Recovering the cost of anti trust investigations

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

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

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

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

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

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

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

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

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

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

Recovery of CC costs in telecom price appeals

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

Recovery of CAT costs

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

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

Comments:
No comment on Questions 26-33.

12. Overseas information gateways

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

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

Comments:
No comment on Question 34.

13. Questions on the impact assessment

Mergers

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

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

Anti-trust

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

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

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

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

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

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

Comments:
No comment on Questions 35-39.

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Trading Standards Institute

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

Department for Business, Innovation and Skills consultation 2011

Response of The Trading Standards Institute

June 2011

June 2011

The Trading Standards Institute welcomes this opportunity to respond to the BIS consultation document "A Competition Regime for Growth: A Consultation on Options for Reform".

The Trading Standards Institute is the UK national professional body for trading standards professionals working in both the private and public sectors.

Founded in 1881, TSI has a long and proud history of ensuring that the views of our over 3,000 Members are represented at the highest level of government, both nationally and internationally.

TSI provides accredited courses on regulations and enforcement which deliver consistent curriculum, content, knowledge outcomes and evaluation procedures, with the flexibility to meet local authority, business and operational needs.

TSI sought the views of its membership through a variety of channels in preparing this response, which has been written by TSI Operations Director Andy Foster. If you require clarification on any of the points raised in the response, please do not hesitate to contact Andy at email andyf@tsi.org.uk or by telephone on 0845 608 9623.

TSI does not regard this response to be confidential and is happy for it to be published.

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

Trading Standards Institute response – June 2011

Introduction

TSI welcomes the opportunity to respond to this consultation. In responding, the Trading Standards Institute has limited its comment to matters concerning the proposed CMA's (Competition and Markets Authority) relationship with consumer policy. ***(Chapter 9; Scope, Objectives and Governance)***

In responding to the relationship between consumer law and competition law, we would like to point out that it has not been helpful to our members that this consultation has not run parallel to the forthcoming consultation ***'institutional changes for the provision of consumer information, advice, education, advocacy and enforcement'*** that this consultation makes reference to.

Whilst this has probably happened because of unforeseen consequence rather than design, it is difficult to form opinion as to the best mechanisms for consumer and competition market effectiveness if the two documents cannot be seen side by side.

Making markets work well for businesses and consumers

TSI has long argued that effective markets need effective bodies with appropriate powers and resource. We feel it would be disproportionately undermining the effectiveness of market functionality if the proposed CMA had too narrow a scope. We feel that it is imperative that the CMA retains consumer powers to enable it to be as effective as possible.

That doesn't necessarily mean the CMA should lead on consumer issues (that should be the role of the proposed National Trading Standards machinery), but the CMA should be able to intervene with consumer powers when it was appropriate to do so for the purpose of making markets work well for businesses AND consumers.

The question of resource is clearly pertinent here, and allowing the CMA to have consumer powers should not allow the proposals for the National Trading Standards machinery to be effectively de-railed because it becomes under-resourced. TSI believes that both bodies should be adequately resourced if the Government is serious about consumer protection and delivering growth based upon effective market performance.

Balance and Flexibility

TSI believes that consumer and competition matters are inextricably linked and the machinery in place to tackle such matters should reflect that, as it does in other developed economies around the world. The CMA should, therefore, retain powers to conduct market

studies and take action on supply-side and demand-side market failures using whatever instrument it deems necessary to achieve this.

We believe that there needs to be a balance maintained between the proposed responsibilities of the CMA and the proposed Trading Standards Policy Board, and we support the idea of regular communication, sharing of market studies, and a relationship which maintains a flexible attitude as to how and which body tackles the issues.

TSI believes that these two consultations should form the foundations of a consumer and competition regime that can stand the test of time for a generation and only with the right scope, resources, powers and relationships can the economy thrive through tackling those who choose to distort markets through exploitation of consumers and businesses.

Trading Standards Institute – June 2011

UK Competitive Telecommunications Association

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1. Introduction

UKCTA is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.com. UKCTA welcomes the opportunity to respond to this call for inputs since the subject matters which it encompasses are of fundamental importance to our member companies. While we have provided our views on the proposed reforms to Competition law we wish to highlight in particular our concerns about any reform which would impose a presumption that would oblige Ofcom to use Competition Law powers ahead of ex ante remedies under the Communications Act.

The views expressed by UKCTA in this response do not reflect the views of Sky and Virgin Media. These UKCTA members will be submitting their own responses to the consultation.

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

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

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

UKCTA supports the objectives set forth in the consultation document. We have previously called for a more robust standard of decision making by Ofcom generally, whether those decisions are taken under Competition Law powers or using ex ante powers under the Communications Act. Speed and predictability are key in our sector which is a particularly fast moving and developing industry. Indeed for these very reasons it is often preferable for business that Ofcom use its ex ante sector specific powers to deal with abuse of a dominant position quickly rather than relying

on the ex post powers available under Competition Law. Put bluntly it is preferable for action to be taken before irreversible harm has been caused by a dominant entity, rather than waiting until after the event. In these circumstances, our perception is that ex post remedies under Competition Law can be seen as less effective than timely regulatory intervention in a sector as fast moving as the electronic communications sector, particularly given the long duration of Competition Act investigations.

Insofar as it may assist in achieving the objectives outlined above, UKCTA supports the creation of a single CMA. However, it is important to ensure that a newly merged entity retains the strengths of its predecessors without inheriting any of their perceived weaknesses. We also believe that process reforms to address the current deficiencies within the Competition Law regime are required since as already noted, we have concerns about the time and expenses involved in competition law proceedings.

Q3: The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime …

We agree with the proposal to allow the CMA to carry investigations across markets (§3.8) but only in particular circumstances.

Harmful practices can occur across multiple markets and having to investigate them on a market-by-market basis is inefficient. We consider that a number of the initiatives taken by Ofcom in respect of potential harmful practices are not telecom specific but are common to many markets and therefore there may be advantages in having them handled by a cross-sectoral regulator such as the OFT (or CMA or a new consumer body in future). Examples of this are Ofcom's work on automatically renewable contracts, early termination charges, additional charges and switching. A great many examples of work which Ofcom undertakes typically on consumer protection matters are not unique to telecoms and could we believe be dealt with more efficiently by a body such as the CMA operating on a cross sector basis.

However, a cross market review would not always be appropriate and care would have to be taken in deciding when to investigate in this way. There is the real risk that practices can be taken out of context or that investigations could become very large and cumbersome. The telecoms sector does see a good deal of competition issues and these are typically very telecoms specific. We believe that Ofcom is much better placed in the first instance to investigate complex, telecoms specific matters and therefore we could not support a proposal to allow the CMA to conduct (phase 1) market investigations or reviews in respect of such matters.

We agree that it is preferable that independent regulators (and not Government) analyses and decide on public interest issues (§3.10) since regulators are, in general, better placed, more objective and have more transparent decision-making. Though it

may not be appropriate in every case the rebuttable presumption should be that regulators take these decisions.

We are less convinced that the introduction of an unfettered power to launch own initiative investigations and/or market reviews is a good idea. Market reviews and investigations are extremely costly for the businesses concerned and should only be commenced where there is a genuine issue of public concern that needs to be addressed. We believe that were such a power to be introduced it would be sensible to have the right to launch such initiatives to be subject to a degree of Government supervision, oversight or direction. In the electronic communications sector communications providers are already subject to an EU derived programme of regular market reviews so the potential for additional demands in terms of reviews would not, we believe, be a positive development.

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

Q8: The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime

We believe it is essential that the proposed modifications to the competition regime continue to allow for merits based appeals rather than a more limited form of scrutiny such as judicial review. In the context of Ofcom decisions (albeit in the area of Communications Act rather than antitrust) access to merits based appeals has been a vital means to allow for the correction of decisions which Ofcom got materially wrong, including some appeals which were not defended.

These erroneous decisions came about, we believe, due at least in part to a degree of confirmation bias. If these decisions were only subject to judicial review, it is possible that some of them (though materially wrong) would have been beyond challenge. This would not have been in the best interests of customers, the industry nor indeed the wider UK economy.

The fact that the right to an appeal with the merits taken duly into account is enshrined in EU law for the electronic communications sector has been an extremely useful tool in addressing the issues of abuse of dominance which have arisen in the sector and has helped address some relatively isolated instances of poor decision making by the regulator. Contrary to the perception given by some who would seek to restrict rights of appeal, the percentage of decisions which are actually appealed is extremely low as was shown in a recent research paper prepared by Towerhouse Consulting.[1] This revealed that the number of appeals each year is reasonably

1 http://www.towerhouseconsulting.com/docs_2010/TOWERHOUSE%20CONSULTING%20APPEALS%20REPORT%20FINAL.pdf

constant except in years when Ofcom takes controversial or important decisions, which tend to result in multiple appeals. Indeed the level of challenge against Ofcom decisions is significantly lower than in many other European countries.

Q.9 The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.59, and the costs and benefits of these.

UKCTA has no comment to make in response to this question.

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

UKCTA has no comment to make in response to this question.

Q11 – 13 CRIMINAL CARTELS –

UKCTA has no comment to make in response to these questions.

Q14: Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?

This question is set in the context that sectoral regulators (such as Ofcom) have made relatively little use of their powers under Competition law. We consider that the low number of cases is due in the telecoms sector, to the availability of *ex ante* powers under the Communications Act to address dominance and abuse. Unlike Competition law, ex ante powers can be deployed in advance to avoid abuse and are also more effective in ensuring continued competition as opposed to remedying infringements after the harm has already been caused[2]. We would therefore be extremely concerned were the Government to introduce a compulsory preference to use Competition Act powers rather than *ex ante* powers. This would we believe, be damaging to competition. Ex ante powers can provide a significantly more timely and efficient remedy. One only needs to look at the example of the Freeserve case which took eight years to conclude to see just how long it can take to use Competition Act powers to resolve the type of complex circumstances which all too often can arise in the electronic communications sector. By the time the case was concluded both the regulator and Freeserve had long since been replaced by successor organisations.

The wholesale calls case raised by THUS plc and Gamma Telecom in June 2008, and subsequently accepted by Ofcom as a Competition Act case in August 2008 is

[2] A good example of such a difference is in the case of margin squeeze protection. Under Communications Act powers the margin can be wide enough to allow a reasonably efficient entrant (with say a 20% market share) to operate profitably whereas under Competition Act powers the margin cannot be set so wide since it is based on an 'equally efficient operator' model whereby the incumbent's market share (may be 80%) is assumed

yet another example. Due to the complex and cumbersome nature of using the Competition Act powers, Ofcom was only able to issue a Statement of Objections in December 2010. Communications Providers received s.135 Information Requests from Ofcom as long ago as 2009 and yet in 2011 BT is still making representations so it is unlikely that this case will be concluded any time soon. As with the Freeserve case, while the legal process has moved on agonisingly slowly, events in the real world have moved on rather more quickly and one of the parties (THUS plc) has been taken over by another provider. We are therefore highly sceptical that ex post remedies should be preferred to ex ante regulation.

One criticism we would make of the way in which regulators use their concurrent powers would be that information requests are often framed far too widely and are not at all well considered. This in turn causes respondents to swamp the regulator with a great deal of often irrelevant information needlessly prolonging the investigatory process. The process could be improved by providing recipients with draft information requests in advance, discussing the questions with respondents and seeking to narrow the scope of the questions before finalising the information request.

SMEs in particular need rapid action and competition law may not always provide the most effective remedy for such companies. The experience of our members has been that the smaller a company is, the more likely it is that the damage suffered by virtue of an abuse of dominance will be irreparable. The fact that Competition law does not seek to preserve the position pending the legal process is a major weakness particularly for smaller companies.

We agree that sectoral regulators should retain their antitrust and MIR powers. Even though little used, they are useful to have to address certain sectoral problems.

Q15 The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:
The arguments for and against the options;
The costs and benefits of the options, supported by evidence wherever possible.

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

UKCTA has no comment to make in response to these questions.

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

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

Under the current regime, appeals against Ofcom decisions concerning price controls matters are referred by the CAT to the CC. The CC determines the specified price control matters referred to it, reports back to the CAT and the CAT then takes a decision on the appeal in line with the CC's determination (subject to the application of judicial review principles to the CC's determination).

We consider this process to be unnecessarily cumbersome. If it were furnished with the right expertise and resources, there is no reason why the CAT should not be capable of deciding price control appeals for itself without there being any need for it to refer price control matters off to the CMA for an "expert" opinion. Alternatively, if the Government considers that the CMA is the right body to decide such matters on appeal from Ofcom, it ought to be possible for those decisions to be appealed directly to the CMA without passing first through the CAT.

The involvement of two parallel bodies in the communications price control appeals process is an unfortunate anomaly which we believe should be addressed – and removed – through this review of the regime.

Q.19 The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.
Q.20 The Government see your views on whether the CMA should have a clear principal competition focus.
Q.21 The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.

UKCTA has no comment to make in response to these questions.

Q.22 The Government seeks your views on the models outlined in this chapter, in particular:
the arguments for and against the options;
the costs and benefits of the regime and to business, supported by evidence wherever possible.

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

Q24: The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process that is compatible with ECHR requirements.

We note that much of the discussion regarding the right and need for appeal focuses on the ECHR Article 6 requirement. Whilst this is a legitimate objective we see the ability to access an effective appeal remedy as not only essential as a matter of fairness but also essential in order to correct poor decisions that would otherwise be harmful to customers. Our experience of Ofcom is that they have made a number of decisions that were materially wrong and that could only be corrected through a merits based appeal.

The latest research which we have seen[3] (dated December 2010) reveals that a relatively high proportion of appeals result in a successful or partially successful challenge against Ofcom's original decision. As at December 2010 Ofcom's decision had been overturned in 12 of the 31 appeals which had been determined. Only 7 of the 31 cases involved Ofcom's decision being upheld. (the remaining 12 cases were disposed of on a purely jurisdictional basis).

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

Q26: Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons
Q.27 What are your views on recovery where there has been an infringement decision being based on the cost of investigation?

We do not agree with the proposal that the competition authority should be able to recover the costs of an investigation from a party found to have infringed competition law. The administration and enforcement of competition law by the competition authority is of general public benefit and it should be properly publicly funded. This proposal, if enacted, would influence the way the authority behaved and the types of cases it chose to investigate. For example, the competition authority may be less inclined to investigate difficult or borderline cases if it meant that it was less likely to recover its costs. Furthermore, in the interests of fairness, if the authority were able to recover costs from a guilty party, presumably the opposite would be true and a company investigated by the authority but ultimately not found to have infringed the law ought to be able to recover its costs of its defence from the competition authority, thus exposing the authority to greater risks.

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3 http://www.towerhouseconsulting.com/docs_2010/TOWERHOUSE%20CONSULTING%20APPEALS%20REPORT%20FINAL.pdf at page 11

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

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

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

Q32: Do you agree that telecoms should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing?

And Q33: What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?

We would not support a full cost recovery by the CAT. The barrier in terms of costs and management time required to mount an appeal already severely restricts the ability of many companies to appeal decisions. Any further raising of this barrier would be a retrograde step. We do agree that the CAT should have discretion to award costs in exceptional circumstances e.g. where an appeal can be shown to have been purely vexatious. It would be grossly unjust if unsuccessful appellants were required to pay the CC's (or CAT's costs) when the appeal was brought because Ofcom was not transparent in its evidence and/or reasoning and the evidence and/or reasoning only became apparent during the appeal process. In this case it would be wholly inappropriate for the appellant to be charged for the CC's costs.

Therefore, any cost order must take into account all of the relevant circumstances which led to the appeal. Courts and tribunals are well versed in considering the appropriateness of awards of costs on appeals. We consider that the optimal outcome is to maintain flexibility for courts and tribunals in this respect, calling on their expertise and experience to decide how and when an award should be made.

We do not agree with a blanket presumption that Ofcom should not ordinarily have to bear the CC costs. Though in many cases Ofcom is required to make a decision it is critical that Ofcom feels the force and financial impact of its decisions in order that it makes robust and evidence-based decisions in the first place. As in the case of a cost award against an (unsuccessful) appellant, the decision on whether Ofcom should refund CC/CAT costs (in the case the appellant is successful) must consider the circumstances. So for example where Ofcom's decision lacked evidential support

and/or they were not transparent in their evidence or reasoning then an award of costs against it, including where appropriate the CC's costs, might be appropriate – whereas if Ofcom's original decision and judgement was finely balanced then a cost reclaim would ordinarily not be appropriate. Again, we consider these questions are best left to the discretion of the courts.

CONCLUSIONS

While UKCTA supports any moves to improve and strengthen the competition law regime, especially where these help to improve the speed of decision making and cut the cost of proceedings, we believe that the particular circumstances of our industry mean that the regulator ought to be able to choose the most appropriate statutory tool on a case by case basis. This is a fast moving sector with a number of newer entrants competing at both the service and infrastructure levels with a former incumbent which retains a significant position of strength in the market. We have an experienced specialised regulator with a discretion to apply either ex ante or ex post remedies as the situation demands. This remains of vital importance to the development and maintenance of competition in the UK and we do not believe it would be helpful to fetter the regulator's discretion by means of a statutory presumption or duty to favour one set of powers over another.

In relation to the proposals to reform the rules around recovery of costs in relation to appeals in the electronic communications sector we do not believe there is a pressing need for change in this area. Parties appealing regulatory decisions already face significant deterrents in terms of the sheer cost involved both in terms of money and the considerable time and effort required. We also disagree with a blanket presumption that Ofcom should not ordinarily have to bear the CC's costs. As is the case of a cost award against an (unsuccessful) appellant, the decision on whether Ofcom should refund CC/CAT costs is, we believe, best left to the discretion of the tribunal to best determine what is appropriate in the circumstances of the case.

We would welcome the opportunity to discuss any of the matters raised in this response in more detail with the Department if this would be of any assistance.

24 June 2011

UK Competition Law Assoc

UK COMPETITION LAW ASSOCIATION

Consultation Response

Department for Business, Innovation & Skills, A Competition Regime for Growth: A Consultation on Options for Reform

June 13, 2011

1. Introduction and overview

1.1 This document is submitted on behalf of the UK Competition Law Association ("CLA") in response to the consultation on options for reform of the UK competition regime launched by the Department for Business, Innovation & Skills ("BIS") in March 2011.

1.2 The CLA is affiliated to the Ligue International du Droit de la Concurrence. The members of the CLA include barristers, solicitors, in-house lawyers, academics, and other professionals, including economists, patent agents, and trade mark agents. The main object of the CLA is to promote the freedom of competition and to combat unfair competition.[1]

1.3 The CLA welcomes the opportunity to comment on the Government's consultation for reform of the UK competition regime. We applaud the Government for seeking to reform what is already a world class competition regime with a view to maximising the ability of the UK competition authorities to secure vibrant competitive markets in the interests of consumers and to promote productivity, innovation, and economic growth. The CLA in particular supports the Government's attempts to improve the robustness of decisions and strengthen the regime, to focus the authorities on high impact cases, and to improve speed and predictability for business. As one of the leading competition enforcement regimes in the world, the structures and procedures adopted by the UK have

[1] Further details on the CLA can be found on our website at http://www.competitionlawassociation.org.uk/.

an important influence on the structures and procedures adopted by other antitrust agencies around the world.

1.4 While the consultation document covers a wide range of issues across different elements of the competition regime, we have in the time available sought to focus our attention on what we regard as some of the key issues, including the structure of the new regime, decision-making, antitrust cases, the merger control regime, the regulatory regime, and the cartel offence.

1.5 This response is structured as follows. Section 2 provides an overview of the main positions adopted by the CLA in this response. Section 3 deals with the antitrust regime and decision-making issues. Section 4 responds to Chapter 4 of the consultation on the merger control regime. Section 5 provides our views on the regulatory regime. Section 6 considers the cartel offence.

2. Summary of Positions

This section summarises the CLA's positions on the main areas on which we have focused.

Antitrust Regime and Decision-making

2.1 As regards the antitrust regime and decision-making:

- While we share the Government's concern regarding the length of antitrust cases and the burden this places on businesses, we believe that, when considering reforms, the emphasis should be on quality decision-making and due process rather than seeking to increase the number of decisions as an end in itself. In this context, the CLA has concerns regarding the current procedural framework for antitrust cases and the proposed new internal tribunal system because of the lack of separation of powers in relation to decisions and the limited opportunity for cross-examination of the evidence. These concerns are all the more serious given the significant increase in fines for antitrust infringements over the past few years, the ability to impose director disqualification orders, and the UK's criminal regime,

coupled with the question mark as to compatibility with the European Convention on Human Rights ("ECHR"). In these circumstances, a number of CLA members believe that there would be advantages in moving to a prosecutorial system, coupled with stricter prioritisation of cases and shorter timetables.

- To the extent that the Government is not minded to move to a prosecutorial regime, some of our members would propose extending to antitrust cases the tried and tested model for mergers and markets (*i.e.*, a phase 1 and phase 2 process). This would be coupled with strict administrative and possibly statutory timescales at phases 1 and 2.

- Regardless of the nature of the reforms, we believe that it is vital that companies have the right to an appeal on the merits against Office of Fair Trading ("OFT") OFT or Competition and Markets Authority ("CMA") decisions before the Competition Appeals Tribunal.

- In line with EU rules, we would propose introducing a five-year limitation period beyond which it would not be possible to pursue breaches of antitrust rules.

Merger Control

2.2 In relation to UK merger control regime:

- We advocate retention of the current voluntary merger control regime and the important flexibility this brings to the regime.

- We agree that, within a continued voluntary regime, the CMA should have strengthened powers to make it easier to halt integration and pre-emptive action. However, there should not be an automatic statutory restriction on further integration as soon as the CMA commences an investigation into a completed merger.

- We would advocate the UK using this opportunity to move to objectively quantifiable jurisdictional criteria even if the voluntary merger regime is

maintained. We believe that the Option 1 thresholds set out in the Consultation are extraordinarily low and would unnecessarily catch far too many transactions. The Option 2 thresholds would maintain the uncertainty of the current regime and therefore should not be adopted. The CLA would favour jurisdictional thresholds based only on turnover with a clear nexus to the UK but not catching insignificant transactions.

- We believe that the current consultation presents a good opportunity to introduce faster procedures more in line with other merger control jurisdictions around the world but without losing the UK's reputation for robust decision-making.

Regulatory Regime

2.3 As to the regulatory regime:

- We agree that the CMA would be the most appropriate body for hearing regulatory references/appeals currently heard by the Competition Commission. Under the new regime, it would be the body with the appropriate expertise, resources, and processes. By contrast, it would be counter-productive and inefficient to transfer these responsibilities to another body.

Cartel Offence

2.4 With respect to the cartel offence:

- The CLA considers that the key proposal contained in Chapter 6 (that there should be amendment to the requirement to prove dishonesty in the section 188 Enterprise Act 2002 offence) demonstrates a lack of clear thinking and purpose.

- On one hand the consultation document recognises that which is axiomatic, namely that criminal liability must be reserved for the most serious wrong doing, but on the other hand that the barriers to successful prosecution ought to be lowered by the removal of requirement to prove dishonesty. The argument is made in the absence of any

compelling data that demonstrate that prosecutions are hampered by the need to prove dishonesty.

- On balance, the CLA submits that the argument for the need for change has not been made out. Furthermore, there is fundamental objection to the removal of a mental element in an offence which carries a maximum penalty of five years imprisonment. The proposed options for change fail to remedy the perceived problems and are likely to lead to uncertainty and anomalous results.

3. Antitrust Regime and Decision-making

3.1 This section of the response deals with the issues raised in Chapter 5 of the consultation document. We note the Government's concerns that antitrust cases take too long and that there are too few decisions, thereby reducing the deterrent effect on anti-competitive conduct. While we share the Government's concern regarding the length of antitrust cases and the burden this places on businesses, we believe that the emphasis should be on quality decision-making and due process rather than merely seeking to increase the number of decisions. In this context, the CLA has concerns regarding the current procedural framework for antitrust cases and the proposed internal tribunal system because of the lack of separation of powers in relation to decisions and the limited opportunity for cross-examination of the evidence. These concerns are all the more serious given the significant increase in fines for antitrust infringements over the past few years, the ability to impose director disqualification orders, and the UK's criminal regime, coupled with the question mark as to compatibility with the ECHR. In these circumstances, a number of CLA members believe that there would be advantages in moving to a prosecutorial system, coupled with stricter prioritisation of cases and shorter timetables. Indeed, unless the reform that is put in place results in more efficiency in reaching decisions for business, it would not make sense to embark on such reform, which would be a deadweight loss on the economy.

3.2 The Government has made three main proposals in relation to the antitrust regime: (a) retain and enhance the OFT's existing procedures; (b) develop a new administrative approach; and (c) develop a prosecutorial approach. In the CLA's view, retaining and

enhancing the OFT's existing procedures is not a meaningful option. Moreover, we do not believe that creation of an internal tribunal would sufficiently resolve the fundamental concerns with the current regime. Of the three proposals, the preference of a number of our members (but not all) would therefore be for introduction of a prosecutorial approach. If, however, the Government chooses a new administrative approach, a number of our members believe that this should incorporate the mechanism for phase 2 decision-making which is utilised in other types of competition cases. We consider these issues in more detail below.

Retain and enhance the OFT's existing procedures

3.3 While we welcome recent improvements announced or being trialled by the OFT as a helpful interim step pending reform of the regime, these reforms are inadequate to address some of the fundamental issues with the present system and that of the EU on which it is modelled.

3.4 In the CLA's view, there are problems associated with the OFT acting as investigator, prosecutor, and judge for purposes of UK antitrust enforcement. Despite internal OFT processes aimed at improving the robustness of decisions, we do not feel that there are sufficient checks and balances within the system overseeing the power held by the OFT. The lack of separation of powers increases the risk of bias, unchecked mistakes, and decisions based on opinions rather than facts.[2] For example, when the OFT staff who are responsible for a lengthy investigation are also responsible for preparing the infringement decision, mistakes or biases can be overlooked. In the recent appeals on cover pricing in the construction industry, the raft of decisions against the OFT reducing the disproportionate and excessive fines imposed and dismissing certain allegations in their entirety due to lack of evidence will benefit only the 25 companies which could afford to appeal and whose management were prepared to take on the burden of fighting on appeal,

[2] These types of issues were recognised by the OECD in its 2005 peer-review report which considered that some explicit separation between the investigative and decision-making functions within the European Commission may be inevitable to secure judicial confidence in the quality of the European Commission's decisions. *See* Country Studies, European Commission – Peer Review of Competition Law and Policy, 2005, page 63.

not the 80 remaining companies largely denied justice. The Competition Appeals Tribunal has equally criticised the OFT in the past in relation to its fact finding.

3.5 The lack of due process in the existing system has serious implications for follow-on damages cases. Defendants in follow-on damages actions may be condemned to pay damages to alleged victims of antitrust violations (in addition to substantial fines imposed by the OFT) on the basis of an OFT decision adopted as a result of a proceeding where the defendant did not have an effective possibility to exercise his right of defence.

3.6 Moreover, it is questionable whether the current regime particularly when applied to cartel cases is compatible with Article 6(1) of the ECHR.[3] By way of example, in June 2009 the European Court of Human Rights ("ECtHR") ruled that disciplinary proceedings brought by the French Banking Commission violated Article 6(1), criticising the lack of impartiality and independence in the proceedings and highlighting the absence of a distinction between the Banking Commission's functions of prosecution, investigation, and adjudication.[4] There are good grounds for considering that the ECtHR would adopt a similar position in relation to UK antitrust procedures.

3.7 In light of these considerations, we do not believe that the current system should be retained.

Develop a new administrative approach

3.8 We do not favour creation of an internal tribunal as set out in the consultation document. In our view, this would lead to a number of problems:

i. There is a risk that cases will be prosecuted and defended before the internal tribunal, with full deployment of counsel and cross-examination, before what will become an inevitable appeal to re-run each case before the Competition Appeals Tribunal, having honed the arguments and witnesses in light of the findings of the

[3] Article 6(1) states that "*in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing...by an independent and impartial tribunal...*".

[4] *Dubus SA v France*, Application no.5242/04.

internal tribunal. This will inevitably increase costs and lead to delay in the end-to-end anti-trust process, and we consider that introducing an internal tribunal stage would impose a heavy burden particularly for smaller defendants.

ii. What will happen if the internal tribunal considers that a different avenue of investigation should have been pursued? Should the defendant's legal team and witnesses be stood down to await the prosecutor having a second bite at the cherry, when they must re-prepare witnesses and submissions to answer an altered case?

iii. Or does the prosecuting authority get one bite at the cherry and if they had not got it right by the internal tribunal stage (which is quite possible in complex cases or those raising novel issues), then the defendants would get off scot free?

iv. What about those cases where something is amiss in the market but breach of the antitrust rules is not made out or it would be appropriate to involve some other remedy beside director disqualification and fines? Is the whole matter to be remitted for a further investigation by a phase 2 body dealing with market investigations, thereby lengthening the process?

v. Finally, unlike a prosecutorial system, an internal panel would not permit references to the European Court of Justice on questions of interpretation of EU law.

3.9 However, if the Government ultimately decides to introduce a new administrative regime, some of our members believe that a preferable option would be to extend to antitrust matters the existing mechanism for phase 2 decision-making which is utilised in other competition cases. We elaborate on our thinking below.

Develop a prosecutorial approach

3.10 Although some of our members have identified certain drawbacks associated with a prosecutorial approach and would not support moving to such a regime,[5] a number of

[5] A prosecutorial model would represent a significant change for the enforcement agency, competition law fraternity, and business community alike. Arguably, a prosecutorial regime raises some of the same concerns

members consider that a prosecutorial approach would be a fast, efficient, and relatively cheap of improving quality and independence of antitrust decision-making (and thereby the reputation of and respect paid to the CMA by business), while fully complying with the ECHR.

3.11 Put crudely, prosecuting its case before the CAT would force the OFT to "raise its game" in terms of both fact gathering, substantive analysis, and procedural steps. It would also ensure that justice is seen to be done with an opportunity for parties to participate in a full independent hearing, where the investigative body is a party to the proceedings before an entirely independent fact-finder and decision-maker. Many in business have lost faith in the OFT, with the OFT moving the goalposts throughout long investigations, and some feel that this has damaged the incentives to settle cases with the OFT. Moving to a prosecutorial system would remove these concerns and ensure due process within antitrust cases and compliance with human rights.

3.12 There is also the potential for cost savings in requiring the OFT, after an initial investigation, to prosecute its case before the CAT (although we of course recognise that litigation is not a "cheap" option). In addition, a prosecutorial model may lighten the burden on the OFT as it would not have to take formal infringement decisions.

Proposal for a new administrative approach

3.13 If the Government seeks to introduce a new administrative model, some of our members would propose an administrative approach which sees the current tried and tested model for mergers and markets extended to antitrust cases. Those members believe that there would be benefits in introducing such a distinct phase 2, including strengthening the robustness of decisions, and independence of the ultimate decision maker.

(points iii and iv above in paragraph 3.8 of this response) raised by an internal tribunal proposed by the Government. A prosecutorial model would alter the dynamics between the enforcement agency and defendants, and may stymie dialogue between them. It might also push the CMA into favouring its market study powers over antitrust enforcement. Finally, it is arguable that a competition authority (with greater procedural flexibility and access to expert staff and resources) is better placed to conduct the fact finding particularly for cases involving detailed economic assessment in dominance and complex Chapter I cases. In moving to a prosecutorial system, it would therefore be necessary to ensure that the court before which cases were prosecuted had the resources and skills to make the original finding of infringement.

3.14 The OFT has good information gathering expertise, which could be used at phase 1 and where required on behalf of the phase 2 panel. It would be important to maintain these high standards of information gathering, not least because cases may spill over into criminal prosecutions. Even in antitrust cases where the ultimate outcome is to transfer to a market investigation with market specific, tailored remedies, it would be necessary while there remained potential for an adverse antitrust decision to maintain these strict standards.

3.15 At the very least a strict administrative timetable and possibly statutory timescales should be introduced at Phases 1 and 2. Phase 1 should be possible within one year. Phase 2 should also be conducted in a set timescale, drawing on the knowledge of certain members of the phase 1 team, who would transfer to phase 2. Normally one year at phase 2 should suffice, with the possibility of extension of up to six months in appropriate cases (perhaps to enable the authority to determine, in light of expert effects analysis, whether an alternative solution to a finding of unlawful activity would be more appropriate).

3.16 Not all cases will be suitable for phase 2. Some matters will be dropped at phase 1 after dialogue with the parties regarding the SO.

3.17 The phase 2 decision making panel should draw on the expertise of existing members of the Competition Commission / phase 2 body. The use of CC panel members would also be important in addressing concerns regarding confirmation bias within a unitary authority.

3.18 Appeals to the CAT should lie as a full appeal on the merits to ensure human rights compliance, given the potential size of the penalties for companies, disqualification for directors, and the potential for related criminal enforcement activity against individuals involved in the alleged antitrust breach.

<u>Comments on specific questions raised by the Government</u>

3.19 At the end of Chapter 5, the Government asks for feedback on a number of miscellaneous points.

- *Chapter 5.48 (timetables).* As discussed above, we are supportive of strict administrative or statutory timescales. Justice delayed is justice denied. Whatever the reform that is put in place, it needs to be more efficient at reaching a decision for business or it would not merit the resources required to implement the change.

- *Chapter 5.49 to 5.52.* While supportive in principle of one specialist court (probably the CAT) hearing standalone and damages actions and procedural challenges on antitrust cases, the current practice is pushing practitioners towards preferring the High Court in many instances and we would like to explore these issues separately with the Government.

- *Chapter 5.53 to 5.55.* We agree that the OFT or CMA should have power to impose financial penalties for delays in responding to requests, commensurate with improvements in the scope of information requests issued by the competition authorities (*i.e.*, the need for more focussed requests and appreciation of the sheer volume of data that requests can elicit).

- *Chapter 5.56 to 5.59.* We consider the dawn raid powers to be essential arms for the enforcement agency and would welcome debate on whether limited and appropriate use of such powers in the context of mergers and MIRs would assist enforcement (as per the European Commission).

3.20 While not currently proposed by the Government, we would propose introduction of a statutory limitation period for antitrust cases, drawing on the EU's five year limitation period. With the turnover of staff and deterioration in data, it is extremely hard for companies to defend themselves in any meaningful way when cases are brought relating to matters older than this.

3.21 We would welcome considered guidance on penalties in antitrust cases, particularly in light of the recent construction cover pricing appeals. We would suggest collaboration between the CAT and OFT on this project.

4. Merger Control

4.1 This section of the response responds to the issues raised in Chapter 4 of the consultation document. The CLA welcomes the desire to reform the UK merger regime so as to improve the speed and robustness of decisions. While the UK has one of the leading merger control regimes around the world, the investigations particularly in phase 1 are widely regarded as lengthy compared with other jurisdictions. We therefore believe that the current consultation presents a good opportunity to introduce faster procedures more in line with other jurisdictions around the world but without losing the UK's reputation for robust decision-making. In what follows, we comment on the Government's proposals in the order in which they appear in the consultation document.

Chapter 4.1 to 4.9 (Rationale for consultation)

4.2 We strongly advocate retention of the current voluntary merger control regime and the important flexibility this brings to the regime. We believe that the burden placed on business of a mandatory regime outweighs the two drawbacks identified in Chapter 4.3 to 4.5 of the Consultation. As acknowledged in Chapter 4.4, the first drawback (risk of anti-competitive mergers escaping review) is not a real or at least not a significant issue. Indeed, although there are an apparently large number of mergers which do not come to the OFT's attention but which external legal advisors to the companies involved believe would have been subject to a reference, the lack of third-party complaints is revealing. In addition, the Deloitte study referenced in Chapter 4.4 does not provide any indication as to the likelihood of such mergers ultimately being prohibited or subject to remedies before the Competition Commission. The large number of apparent reference candidates not coming to the OFT's attention may in part be attributable to the low threshold for reference to the Competition Commission on the part of the OFT. Moreover, given that the average size of such mergers is generally smaller, it is possible that a number would now fall within the *de minimis* thresholds introduced in October 2009. So, the CLA agrees with the view expressed in the consultation document that the potential for anti-competitive mergers escaping review does not represent a serious failing in the current regime.

4.3 In relation to the second drawback identified (the difficulty of imposing remedies in the case of completed transactions), the CLA believes that this is effectively and satisfactorily dealt with in almost all cases by initial undertakings. The OFT and Competition Commission already have broad powers under the Enterprise Act 2002 to prevent pre-emptive action, with the OFT in particular making more use of this power over the past few years. Combined with the proposals in the present consultation for the CMA to have strengthened powers to make it easier to halt integration and pre-emptive action, we believe that this should avoid any difficulties surrounding imposition of remedies in the case of completed transactions.

Chapter 4.10 to 4.16 (Improving voluntary regime)

4.4 We agree that, in the context of the voluntary merger regime, no penalties should be imposed for completing anti-competitive mergers.

4.5 We also agree that, within a continued voluntary regime, the CMA should have strengthened powers to make it easier to halt integration and pre-emptive action. However, there should not be an automatic statutory restriction on further integration as soon as the CMA commences an investigation into a completed merger since this would extend to transactions not raising any significant competition concerns, which represent the vast majority of cases. Rather, the CMA should be entitled (a) to require reversal of action already taken place if, absent such reversal of action, there is a heightened risk that remedies at the end of the CMA process would be less effective, (b) to prevent further pre-emptive action, and (c) to impose remedies if parties continue to integrate in violation of hold-separate obligations.

Chapter 4.17 to 4.22 (Mandatory merger regime)

4.6 As discussed, we advocate retention of the voluntary merger regime. There are a good number of mature jurisdictions around world with such regimes, including Australia, New Zealand, and Singapore. Further, a significant concern with mandatory regimes is that they tend to capture unproblematic transactions in large numbers, thereby giving rise to an unnecessary burden on businesses.

4.7 However, if a mandatory regime is to be introduced in the UK, we agree that, as in the case of the Italian merger control regime for example, the parties should be entitled to close transactions following notification unless the CMA issues a notice preventing this in cases raising significant concerns.

Chapter 4.23 to 4.33 (Jurisdictional thresholds)

4.8 The vast majority of major merger control regimes around the world have jurisdictional thresholds based on objectively quantifiable criteria (*i.e.*, turnover and/or assets), thereby giving certainty to merging parties on the need to notify. Indeed, with the exception of only Portugal and the UK,[6] all countries within the European Economic Area with merger control regimes have jurisdictional thresholds based on objectively quantifiable revenue criteria. It is also possible to see a shift in those jurisdictions without objectively quantifiable criteria moving towards such criteria. For example, Spain and Turkey have within the past year both removed the market share thresholds from their merger control regimes and now have only clear turnover-based thresholds. We would strongly advocate the UK using this opportunity to move to objectively quantifiable criteria even if the voluntary merger regime is maintained. This would be bring the UK into line with the 2005 Recommendation from the Organisation for Economic Cooperation and Development which stated that Member countries should "*use clear and objective criteria to determine whether and when a merger must be notified or, in countries without mandatory notification requirements, whether and when a merger will qualify for review.*"[7] However, it is important that such thresholds are not set at too low a level so as to ensure that large numbers of unproblematic transactions avoid exceeding the thresholds in the first place and businesses are given greater certainty on the potential for UK merger control review.

[6] Transactions require notification in Portugal *inter alia* where the parties have a market share exceeding 30%. While the main thresholds in Slovenia are revenue based, the parties are also required to notify transactions if they have a market share exceeding 60%.

[7] Recommendation of the Council on Merger Review, 23 March 2005 – C(2005)34.

4.9 We believe that the Option 1 thresholds set out in the Consultation (*i.e.*, the target's UK turnover exceeds £5 million and purchaser's worldwide turnover exceeds £10 million) are extraordinarily low and would unnecessarily catch far too many transactions. The CLA is not aware of any other mainstream merger control regime around the world with such low thresholds. Moreover, if a mandatory merger control regime in the UK was based on such thresholds, this would give rise to a heavy burden on business.

4.10 As regards the Option 2 thresholds set out in the Consultation (*i.e.*, a mandatory filing requirement where the target's UK turnover exceeds £70 million and then the CMA would have a discretion as to whether to investigate in other cases caught by the 25% share of supply test), we believe that these would maintain the uncertainty of the current regime and therefore should not be adopted.

4.11 The CLA would favour jurisdictional thresholds based only on turnover with a clear nexus to the UK but not catching insignificant transactions. This would be consistent with the 2005 Recommendation from the Organisation for Economic Cooperation and Development which, in addition to recommending clear and objective thresholds, stated that "*Member countries should, without limiting the effectiveness of merger review, seek to ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties*" and should in particular "*assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction*".[8]

4.12 Although arguably too broad, the CLA considers that the thresholds of the German merger control regime are to be preferred to the proposals in the Consultation. Pursuant to the German thresholds, mergers require notification where three cumulative thresholds are exceeded: (1) the parties' combined global turnovers exceed €500 million; (2) one of the parties' turnover in Germany exceeds €25 million; and (3) one other party's turnover in Germany exceeds €5 million. In the CLA's view, such thresholds should be implemented while maintaining the voluntary merger control regime. However, such thresholds would also be appropriate if the UK government is minded to move to a mandatory regime. Regardless of whether the UK merger control regime is mandatory or

[8] Recommendation of the Council on Merger Review, 23 March 2005 – C(2005)34.

voluntary, if thresholds along the lines of the German thresholds were to be introduced, the CLA believes that the CMA should not have jurisdiction to review mergers in the following circumstances:

(a) The target's UK turnover was below a certain level (we would suggest £10 million) and (b) there was no horizontal overlap between merging parties; or

(b) The overall size of any overlap market(s) is below a certain level (we would suggest £10 million).

Although such thresholds would not catch all small transactions potentially raising serious concerns, we believe that legal certainty as to whether or not transactions fall within the UK merger control regime, coupled with the disproportionate costs to business and the UK competition authorities associated with investigating small mergers, outweigh the benefits of being able to scrutinise small mergers. Moreover, it is worth noting that, although France has recently introduced alternative lower revenue thresholds so as to permit review of retail mergers not falling within the primary jurisdictional thresholds, the new lower thresholds for retail mergers are in fact materially higher than the thresholds proposed above for the UK.[9]

Chapter 4.34 to 4.37 (Material influence and mandatory regime)

4.12 Assuming that the UK government is minded to introduce a mandatory merger control regime, the CLA agrees with the approach suggested by the Government that only transactions giving rise to control would give rise to mandatory filing requirement, while those giving rise to material influence could be notified on voluntary basis and the CMA would have the jurisdiction to review such transactions (at least those exceeding the jurisdictional thresholds).

[9] The primary merger control thresholds in France are: (1) combined aggregate worldwide turnover of all the parties exceeds €150 million; and (2) at least two of the parties' individual turnover in France exceeds €50 million. The newer thresholds for retail mergers are: (1) combined aggregate worldwide turnover of all the parties exceeds €75 million; and (2) at least two of the parties' individual turnover in France exceeds €15 million.

Chapter 4.38 (Jurisdictional thresholds in voluntary regime)

4.13 As discussed above, the CLA favours adopting clear turnover-based thresholds if the voluntary merger control regime is to be maintained.

Chapter 4.40 to 4.42 (Small merger exemption)

4.14 The CLA agrees that a small merger exemption should exist. However, mergers satisfying the exemption proposed (the target's UK turnover was less than £5 million and the acquirer's worldwide turnover did not exceed £10 million) would not in any event fall within the CLA's merger control thresholds proposed in Section 4.12 of this Response above. Moreover, the CLA would propose introducing the two exemptions mentioned in Section 4.12 of this Response above.

Chapter 4.43 to 4.47 (Streamlining merger regime)

4.15 The CLA agrees that particularly the phase 1 UK merger process takes too long. The majority of transactions currently reviewed by the OFT are notified informally and therefore subject to the OFT's administrative timetable of 40 working days (although this period has been exceeded on occasion). While the CLA welcomes the Government's proposal to reduce the phase 1 period to 30 working days, it is difficult to see why the CMA could not adhere to the same phase 1 review period as the European Commission, *i.e.*, 25 working days. This period grants the European Commission sufficient time to review mergers and to prepare robust decisions.[10] Moreover, this review period, which should be a statutory timescale, should apply regardless of whether the UK moves to a mandatory merger control regime or maintains, as the CLA believes it should, the voluntary regime.

4.16 We do not think that there should be a change to the existing regime insofar as the decision-maker is not informed about any hypothetical remedies offered by the merging parties until he or she has first determined whether the transaction raises substantial

[10] With a shortened investigation period, it would make sense to entitle the OFT to issue short form decisions in cases clearly raising no competition concern along the lines of the simplified procedure before the European Commission.

competition concerns. In light of this, we do not believe that it would be appropriate (as happens in the European Commission process) merely to extend the phase 1 deadline by 10 working days where the merging parties offer hypothetical remedies in lieu of reference during phase 1. Instead, we think that the decision-maker should take his or her decision at the end of the 25 working day period regardless of whether remedies have been offered to the case team. If the decision-maker decides that the transaction raises substantial competition concerns and that one or more of the remedies offered by the merging parties resolves those concerns, the competition authority would then have an additional period of time in which to market test and finalise the remedies offered. We believe that an additional 15 working day period from the date of the phase 1 decision should be sufficient to market test and finalise the remedies. Although this would mean that the UK process is longer (by five working days) than the process before the European Commission, we consider retaining the ability to offer remedies on an effective hypothetical basis is preferable to a shorter investigation process without this feature.

4.17 In the CLA's view, a phase 2 investigation period of 24 weeks (with the ability to extend it to 32 weeks) is a considerable length of time by any standards. During this period, in addition to the disruption caused to the businesses of the parties involved, the parties cannot complete the transaction or engage in further integration, thereby losing synergies the transaction may produce. As with the phase 1 period, it seems to the CLA that the CMA should realistically be able to conduct the phase 2 process in timeframes similar to those adopted by the European Commission. In particular, we would recommend an initial period of 18 weeks with the possibility of a single extension up to a maximum of 6 weeks. Further, the CLA believes that the process of negotiating and approving any remedies offered by the merging parties should occur within this period.

<u>Chapter 4.48 to 4.49 (Information gathering and stop-the-clock)</u>

4.18 We agree that the information gathering and stop-the-clock powers already available to the Competition Commission in merger cases should apply to the phase 1 process under the new regime. This would enable the CMA to ensure that it has the information it requires to conduct timely investigations and to make the right decisions. In addition, we

believe that it would benefit the phase 1 process if merging parties were entitled to request a stop-the-clock of up to 10 working days with a view to avoiding a phase 2 investigation. The additional time might be used to submit additional evidence in support of the merging parties' case or to provide a longer period to offer hypothetical remedies.

Chapter 4.50 (Anticipated mergers in phase 2)

4.19 The CLA agrees with the proposal to introduce a stop-the-clock in phase 2 to enable the CMA to suspend or extend its statutory review timetable for a period of three weeks where it appears that the transaction might be abandoned following referral.

Chapter 4.51 to 4.52 (Enable single CMA to consider remedies earlier in phase 2)

4.20 We agree with the proposal that merging parties, at their option, should be entitled to offer remedies earlier in the phase 2 process. Although this might provide merging parties with a disincentive to offer remedies in phase 1, we believe that the potential for streamlined phase 2 investigations in appropriate cases outweighs any potential negative impact of such a change.

5. Regulatory Regime

5.1 This section of the response responds to the issues raised in Chapter 8 of the consultation document.

Chapter 8.7 to 8.8 (CMA to replace Competition Commission as appellant body)

5.2 We agree that the CMA would be the most appropriate body for hearing regulatory references/appeals currently heard by the Competition Commission. It would be the body with the appropriate expertise, resources, and processes. It would be counter-productive and inefficient to transfer responsibilities to another body.

5.3 There are disagreements about the appropriate standard of review in regulatory references/appeals and it may be that the standard of review is influenced by vesting responsibility with a body that is inquisitorial/investigative by nature. At the same time, though, the standard of review in telecoms appeals is an issue in respect of proceedings

before the fully adversarial Competition Appeals Tribunal at least as much as before the Competition Commission. Our view is that if the standard of review is considered to be too intensive then it would be more appropriately dealt with through modification of the statutory test for appeals than through shifting responsibility for determining the appeals.

Chapter 8.10 to 8.12 (Creating model regulatory processes)

5.4 We agree, in principle, that it is sensible for learning and best practices in one area to be adopted in other areas. There is also some value in harmonisation or, at least, consistency given that there will be some overlap between the panel members and practitioners dealing with the different types of proceedings.

5.5 At the same time, however, we agree that there will be limits as to the extent of the harmonisation that can be achieved consistent with European obligations and the requirements of particular sectors. We also agree that it is not likely to be worthwhile to amend primary legislation unless there is an identified problem (*i.e.*, rather than simply to achieve consistency across sectors). With this latter point in mind, we are unsure to what extent it will actually be possible to include in any model process the elements that are listed in Chapter 8.12 of the consultation document. To take the example of telecoms price control appeals:

i. The initiation process is set by Sections 192(3) and 193(1) of the Communications Act 2003 (the "2003 Act");

ii. The possibility of a filter is probably ruled out by Article 4 of the Framework Directive, given effect through the 2003 Act;

iii. The "approach" has arguably been set by the Framework Directive and 2003 Act but is certainly the subject of Tribunal decisions; and

iv. The appeal route against the Competition Commission's determination is set by Section 193(6) and (7).

5.6 Of the matters referred to in Chapter 8.12 of the consultation document, the only matters that arguably could be varied in the case of telecoms price control appeals without primary legislation would be:

i. How the CMA should deal with remedies;

ii. Who takes decisions on confidentiality; and

iii. Cost recovery arrangements.

However, we are not convinced that these are matters where there is a real need for action to harmonise different processes.

5.7 A more appropriate objective might be to seek to adopt guidelines on procedural matters that are similar across different subject areas. In this regard, the Competition Commission's recently published guidance on telecoms price control appeals might be a good starting point.

6. Cartel Offence

6.1 The CLA considers that the key proposal contained in Chapter 6 (that there should be amendment to the requirement to prove dishonesty in the section 188 Enterprise Act 2002 offence) demonstrates a lack of clear thinking and purpose.

6.2 On one hand the consultation document recognises that which is axiomatic, namely that criminal liability must be reserved for the most serious wrong doing, but on the other hand that the barriers to successful prosecution ought to be lowered by the removal of requirement to prove dishonesty. The argument is made in the absence of any compelling data that demonstrate that prosecutions are hampered by the need to prove dishonesty.

6.3 Two preliminary points might be made in response to the proposal.

6.4 First, it is important to recognise that the efficacy of a criminal prohibition is measured not by the number of successful prosecutions, but by the eradication of the wrong doing the offence is intended to deter. While it is not contended that the creation of the offence has eradicated anti-competitive behaviour, it is relevant to consider the extent to which the offence and the penalty it carries has had an effect on behaviour. As yet there is no data to illuminate the issue.

6.5 Second, the fact that there have only been two prosecutions since the offence came in effect on 20 June 2003, does not make the case that (a) there is a problem, or (b) if there is a problem, it is as a result of the need to prove dishonesty. The consultation paper does not provide any evidence or sources for the latter assertion. The *Marine Hose* case was a successful prosecution: the defendants pleaded guilty.[11] The *British Airways* case was unsuccessful due to significant failures in disclosure.[12] The consultation document's thesis is based upon a 'suggestion' from an unidentified quarter that 'one of the reasons' for the lack of prosecutions 'may' be the need to prove dishonesty (§6.6). It is submitted that that is a tenuous basis for such fundamental reform.

6.6 However, the fundamental objection the CLA has to the proposal is the apparent intent to decouple a serious criminal offence (carrying a significant term of imprisonment) from a culpable state of mind.

6.7 The touchstone of criminal liability is a mental element to the prohibited activity. Strict liability offences are few in number and predominantly apply either to corporate bodies (in which event the identification of a mental element attributable to the organisation is difficult hence the absence of such a requirement) or to 'regulatory' type offences imposed for breaches of technical requirements e.g. provision of financial services without authorisation under FSMA 2000. It follows that an offence of personal liability carrying a maximum sentence of five years imprisonment must require some wrong doing on the part of the offender coupled with a culpable state of mind. Any amendment to the need to prove dishonesty must be carefully considered in order to prevent unmerited prosecutions.

6.8 A comparison with other jurisdictions must be made on a like for like basis. The argument must identify in detail the jurisdiction concerned, the extent to which anti-competitive behaviour is dealt with as a criminal matter as opposed to civil, the full

[11] *See R v Whittle, Allison & Brammar* [2008] EWCA Crim 2560: the appeal was in relation to sentence only.

[12] The reports of *IB v The Queen* [2009] EWCA Crim 2575 and *R v George* [2010] EWCA Crim 1148 deal with preliminary issues of statutory construction rather than the failure of the prosecution. The latter appeal held that a prosecution only need prove dishonesty on the part of the defendant and not the counterpart in the other undertaking, a significantly lower evidential burden than if both parties had to be proved to have acted dishonestly.

legislative context and supporting case law, the penalties available and the practice in terms of sentences actually received. The assertion that the current law in the UK is 'at odds with developing international best practice on how to define a hard core cartel offence' does little to elucidate the argument.

6.9 Of the options for change set out in the consultation document, none serves to remove these fundamental concerns. Furthermore, the argument that inclusion of the requirement of dishonesty leads to uncertainty, even if right, would not be cured by any of the options proposed.

6.10 The suggestion that the requirement to prove dishonesty lets in 'by the back door' evidence of economic effects, is neither supported by evidence that such material is incapable of comprehension by a jury or that the options proposed would prevent such material being admitted into evidence in the future.

6.11 The test for dishonesty in *Ghosh*[13] has stood the test of time: it is applied on a daily basis by juries throughout the jurisdiction. The limited criticism that does exist, although compelling in jurisprudential terms, is not supported by empirical evidence.[14]

6.12 The first option, in effect, retains the requirement to prove dishonesty but removes it to a stage at which prosecutors decide to charge. It is constitutionally unsatisfactory to have an offence defined which would be too broad, the only brake to unmerited prosecutions being prosecutorial discretion (which is incapable of challenge, by way of judicial review or otherwise, save through ultimately, an acquittal at trial). In addition, rather than reducing uncertainty, this option would increase it.

6.13 Option 2 is cumbersome and unworkable. Experience demonstrates that it is impossible (a) to anticipate every set of circumstances, and even if it were possible, (ii) to neatly define a 'white list' in statute.

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[13] [1982] 2 All ER 689

[14] *See, e.g.*, the argument of Professor Edward Griew [1985] Crim LR 341 that the two stage test might involve the jury concluding that (i) the conduct in question was dishonest by ordinary standards, but that (ii) the defendant would not have appreciated that his/her conduct would be so regarded by ordinary people. The scope for such an argument succeeding with a jury is, it is submitted, limited.

6.14 Option 3 is a circular argument (i.e. that that which is kept secret is that which it is necessary to keep secret for fear of prosecution). In any event, secrecy is not a good indicator of criminal wrong doing in this (or any other context). Secrecy is just as good an indicator, if not a better one, of commercial sensitivity rather than anti-competitive behaviour. The proposed approach also begs the question as to the degree of openness necessary to rebut the suggestion of secrecy.

6.15 Option 4 involves the same arguments as option 3, although it does have the virtue of bringing the offence more into line with every day understanding i.e. that it is the distorting effects of cartels which makes them objectionable: remove the distortion and the wrong is cured.

6.16 On balance the CLA submits that the argument for the need for change has not been made out. Furthermore, there is fundamental objection to the removal of a mental element in an offence which carries a maximum penalty of five years imprisonment. The proposed options for change fail to remedy the perceived problems and are likely to lead to uncertainty and anomalous results.

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The CLA would be happy to discuss any of the comments provided above in more detail if it would be of assistance to BIS.

US FTC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of International Affairs

June 10, 2011

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

Re: Consultation concerning the United Kingdom's competition regime

Dear Mr. Lawson:

The staff of the United States Federal Trade Commission (FTC)[1] appreciates the opportunity to comment in response to the Government's consultation paper, "A Competition Regime for Growth: A Consultation on Options for Reform." Our comment focuses on Chapter 12 of the consultation paper, regarding the overseas gateway provisions. In particular, we suggest that the law be amended to allow information sharing with qualified foreign authorities in merger investigations as well as those involving anticompetitive conduct.

The FTC enforces U.S. competition and consumer protection laws. It often cooperates with the Office of Fair Trading (OFT) and the Competition Commission (CC) in matters of concurrent jurisdiction and other matters of mutual interest. We and our UK counterparts have learned how to work together effectively despite differences in our respective statutes and procedures. We believe, however, that current UK law is too restrictive with regard to overseas information sharing, and that changing the law to facilitate the ability of the UK agencies to cooperate more extensively with foreign enforcement authorities such as the FTC would benefit our agencies, our economies, and ultimately our consumers.

The widespread adoption of merger control regimes in Europe and elsewhere and the frequency of mergers with competitive effects in numerous jurisdictions have led to more communication and cooperation among competition enforcement agencies. This has enabled agencies to enhance the coordination of their investigations, which has led to more consistent analyses and a reduction of the risk of conflicting outcomes.

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[1] The views expressed are those of the FTC staff and do not necessarily reflect those of the Federal Trade Commission or its Commissioners.

Since 1967, the OECD has recommended that its members cooperate with each other in competition matters. Modern cooperation agreements such as that entered by the European Communities and the United States in 1991 have fostered effective cooperation among reviewing authorities. The U.S. agencies frequently communicate and cooperate with the OFT and the CC under the OECD Recommendation. The OECD Recommendation and bilateral agreements such as the EC-US Agreement are limited, however, by domestic statutes that do not permit the sharing of confidential information. Recognizing the limits this places on effective bi- and multi-lateral cooperation, a number of jurisdictions have enacted laws to facilitate sharing confidential information. Australia did so in 1992 and the United States in 1994, and they subsequently entered into a Mutual Assistance Agreement that permits them to share confidential information. The European Union's adoption of Regulation 1/2003 to modernize its enforcement structure authorizes information sharing among members of the European Competition Network. Even before adoption of Regulation 1, the UK's Competition Act of 1998 authorized its competition authorities to share certain confidential information in matters other than merger investigations.

With but a handful of exceptions, competition authorities have cooperated effectively to avoid enforcement conflict. Merger cases may involve global markets or individual national markets that pose similar competitive concerns. Designing remedies to address competitive concerns in cross-border transactions may require tailoring remedies in one jurisdiction to avoid creating problems in other jurisdictions. To reach compatible decisions, enforcers need to communicate on the basis of the best information available, which often consists of information provided by the parties and is subject to confidentiality constraints.

The competition authorities of the United States, the European Union, and numerous other jurisdictions have concurrently reviewed and cleared or conditioned dozens of mergers, in many instances with the cooperation of the merging parties. Merging firms increasingly recognize the value of cooperation among reviewing agencies and facilitate cooperation by waiving confidentiality protections. However, this is not always the case; for example, parties to a recent transaction that the FTC and the UK authorities reviewed were unwilling to waive or otherwise facilitate cooperation. Removal of the barrier to information sharing in merger cases would facilitate more efficient and effective review by the agencies. Exchange of confidential information is always subject to strict confidentiality commitments by the recipient agency, and the agencies have strong records of ensuring that confidentiality is maintained.

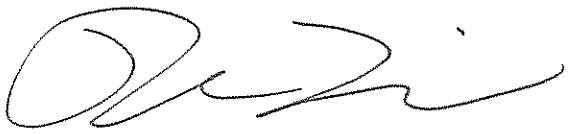
We also suggest that the Government consider relaxing the prohibition contained in Section 243, ¶ 10(b), of the Enterprise Act 2002 to allow use of evidence obtained for other law enforcement purposes ("downstream use"). Specifically, we recommend amending the law to give the UK competition agency discretion to consider and approve requests from foreign agencies to make downstream use of evidence provided by the agency. A disclosure system could be based on a list of overseas public authorities to which information could be disclosed on a discretionary basis in appropriate cases without protracted analysis. Criteria for inclusion on such a list could include that the agency has investigative or enforcement authority, a bona fide legal basis for keeping information confidential, and the ability and willingness to render reciprocal (but not necessarily same in kind) assistance. These factors are contained in the U.S.

SAFE WEB Act of 2006, which authorizes the FTC to share enforcement information in consumer protection matters with foreign law enforcement authorities. These criteria could be applied equally to competition and consumer protection enforcement. Indeed, the FTC's experience sharing information pursuant to these criteria, including with the OFT, has been positive -- it has improved the quantity and quality of evidence against common targets and helped to spur reciprocal information sharing from other jurisdictions.

We reiterate our appreciation for the opportunity to offer suggestions in the Government's consultation on reforming the UK competition regime. We have enjoyed excellent working relations with both the OFT and CC and look forward to continued and improved effective UK-FTC enforcement cooperation.

We would be pleased to respond to any questions this comment may prompt and we look forward to further developments in the consultation.

Sincerely,



Randolph W. Tritell
Director
Office of International Affairs

Virgin Media

VIRGIN MEDIA'S RESPONSE TO THE BIS CONSULTATION ON A COMPETITION REGIME FOR GROWTH: A CONSULTATION ON OPTIONS FOR REFORM

Virgin Media Limited ("**Virgin Media**") is an entertainment and communications business which offers a "quad play" of broadband, fixed line telephony, mobile telephony and TV services to residential and (in relation to some services) commercial customers in the UK. Virgin Media welcomes the opportunity to respond to this consultation.

Virgin Media agrees that the objective of the Government's competition regime reform should be to promote sustainable and balanced economic growth while also supporting consumer choice, innovation and market entry. Fast-moving sectors such as telecommunications and media require clear, agile and robust competition regimes and these regimes must work in close coordination with the relevant industry regulatory body. In the media and communications sector, we believe that the current competition and regulatory regimes have tended to focus on symptoms, rather than the underlying causes, of market failure. This has in turn resulted in a proliferation of rules and regulations that are suitable only for micro-managing particular aspects of the market.

Taken together, the proposal for a new Communications Act and the proposals to which this paper responds have the potential to impact significantly the future economic contribution and investment potential of the media and communications sector. It is of vital importance a holistic competition and regulatory framework is developed. **With competition law as the primary legal basis for intervention in the communications sector, Virgin Media is confident that the next decade has the potential to result in growth being shared amongst multiple parties driving a sustainable, healthy ecology for the long term.**

The key principles underlying an effective competition regime for the telecommunications sector, whether in the on-line or off-line world, are:

- Targeted and timely action focused on preventing dominant actors and monopolistic behaviour;
- Encouraging growth across a number of players in the media sector rather than empowering historically dominant actors; and
- Ensuring that old institutions and business models are not allowed to inhibit innovation and new offerings to consumers.

In the context of specific proposals within this consultation Virgin Media believes that:

- A reformed competition authority acting within the parameters of competition law principles is best placed to objectively apply competition law principles consistently across all sectors;
- A clear division of responsibilities between the sectoral regulator and CMA is required;
- The regime should focus on cases that represent the biggest threat to consumers;
- The sectoral regulator should inform and advise the competition body on issues requiring sectoral expertise and, if appropriate, provide input on the sectoral implications of proposed remedies;
- The CMA delivers excellent value for money to the taxpayer and so its costs should continue to be met by the public purse;
- The standard of appeal and the current approach to costs should remain unchanged;
- A strengthened voluntary merger notification regime would address any perceived failures in the current system without undue burden to business; and
- Price control appeals should be handled by the CMA.

The Government's policy objectives for the competition regime

Virgin Media is supportive of the overall approach that the Government is taking to competition regime reform through merging the Competition Commission and the Office of Fair Trading into a single body. If the strengths of the current system are preserved, institutional streamlining – in conjunction with the streamlining of processes - will lead to increased efficiency and greater clarity for industry.

More specifically Virgin Media stands fully behind the policy objectives in the consultation, namely to:

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

The role of the CMA and the sectoral regulators

Virgin Media believes that a growth in the communications sector, just as any other, will be facilitated by the principles of competition law. However, the application of competition law principles to the media sector has, at times, been inconsistent. The telecoms market has benefitted from clear policy statements from Government, and a comprehensive policy framework in the form of the EU Telecommunications Framework.

The broadcasting sector, in contrast, has seen a much more unpredictable policy and competition law climate. This area is also subject to an anomaly whereby one of the biggest players in the industry – the tax payer funded BBC - is subject to oversight and regulation by an entirely different body which cannot be said to be impartial and independent.

A reformed and strengthened competition authority acting within the parameters of competition law would be most effectively placed objectively to apply competition principles consistently across all sectors.

Virgin Media fully supports the creation of a strong, comprehensive competition authority that:

- Applies competition rules in a robust, independent and transparent manner.
- Has its duties and objectives clearly enshrined in legislation;
- Achieves optimal deterrence to anti-competitive behaviour through the enforcement of well chosen, objectively reasoned, soundly evidenced, high quality and consistent decisions.
- Reaches decisions independently and free from political interference;
- Applies its processes in an efficient manner without compromising the thoroughness of the investigation and avoids duplication of resource;
- Is subject to safeguards which ensure rigour, robustness and independence;
- Is fully transparent about the consequences (i.e. the processes and timings) of intervention so these are well understood by businesses;
- Coordinates with and complements the work of sectoral regulators, drawing on their expertise as necessary; and
- Achieves the above without undue burden and costs on business.

The success and efficient operation of any reformed competition regime will in large part be dependent on application of the above principles. It is also imperative that the division of responsibility between the CMA and the sectoral regulators be clearly defined and that that investigations are insulated from political pressure.

Recent experience of the approach of sectoral regulators to competition issues has pointed to inefficiencies that have restricted the timeliness and effectiveness of their interventions, or which in certain cases have resulted in a decision to take no action.

On occasion there has been a tendency for wider sectoral issues to inappropriately impact or cloud investigations that should be focused entirely on principles of competition law. This has led to anti-competitive structures embedding

themselves. Virgin Media believes that there may need to be a shift away from low-level 'sticking plaster' interventions targeted at the symptoms, and a refocusing on remedies targeted at the underlying root-cause of competition concerns.

What should be the role of the sectoral regulator?

In being obliged to apply the competition rules in priority to its sectoral powers, the sectoral regulator would be well-placed to make the initial assessment as to whether competition concerns may potentially arise in a given scenario. In undertaking this assessment, the emphasis should be on a relatively speedy judgement, and crucially, proactive intervention at the earliest stage possible. A referral to the CMA under the competition rules would then follow, which the CMA would assess in accordance with its prioritisation criteria.

The CMA should provide the central core of expertise in competition cases. It should have primary responsibility for conducting the full competition investigation and should ultimately take the decision on all aspects in competition cases. That does not presuppose the sectoral regulators' exclusion from the process, but rather provides it with a supportive and advisory role to the CMA, imparting its knowledge and experience in the sector which the CMA would take into account as appropriate. Sectoral regulators have the experience, information and expertise relevant to their particular markets. Virgin Media therefore considers it important that any reform of the regime recognises this.

If the CMA concludes that remedies are required to tackle an identified bottleneck, it could then seek input on the sectoral implications of proposed remedies. The sectoral regulator would, in turn, be responsible for monitoring compliance that remedy. The crucial outcome of any remedy must be on the twin benefits of improved outcomes for the consumer and extending the economic potential of the market.

The reformed regime

Virgin Media is concerned that some of the proposed reforms, such as a move to a prosecutorial system in antitrust enforcement, the move to a mandatory merger control system, the proposed changes to the appeals framework and the changes to the criminal cartel offence appear to be impulsive, overly reactionary responses to the current regime which may be based solely on the experience of specific cases. **Any reform to the regime must pass the test of whether it strengthens the existing regime, and achieves growth in the economy.**

Constructing a competition regime that is focused on cases that present significant consumer and market detriment in relevant markets is the right approach. We are concerned however that the detail of the consultation could result in an increased volume of cases. **In Virgin Media's view, the focus should not be about the generation of case volumes, but about the quality of the process and of decision making within cases.**

The priority for Government should be the enforcement of well chosen, objectively reasoned, soundly evidenced, high quality and consistent decisions – not a comparison of figures from other European jurisdictions. Effective enforcement and decision making in the right cases (both under the competition and merger regime) will have more impact and benefit to the economy than an increased number of cases processed across the board. The right cases to be considered by the competition authorities are those that present the clearest evidence of consumer detriment, dominant behaviour and impediments to cross-sector economic growth.

The consultation also makes a number of proposals to expedite the timing of investigations. This is something that industry has often requested of the authorities, and Virgin Media has had first hand experience of some of the prolonged time periods taken in investigations. **However, Virgin Media believes that investigations should not be expedited at the expense of a robust and thorough investigation.** Speed should not be the primary concern of any authority; its concern should be about reaching the correct decision, especially in more complex cases. Where speed is important however, and where the consultation does not fully address this, is in the content of mergers.

Any merger of the institutions must retain the strengths of the current two authority regime and place rigour, robustness and independence at the core. Virgin Media considers that maintaining the independence of the second phase decision makers (a role currently conducted by CC Panel Members) and the introductions of safeguards to protect against confirmation bias will be critical.

Costs

The consultation explicitly states that the reform should wherever possible reduce the cost to business and the public purse. However, at the same time, it is apparent in the detail of the consultation that the Government is seeking to recover the entire cost of the regime (i.e. including the cost of investigations) from larger businesses.

Whilst there is scope for reform of the regime, given the enormous value of a responsive competition regime to taxpayers and the public purse, Virgin Media believes that any proposal to shift the regime costs in their entirety to the private sector is entirely unjustified. The Government should not make the mistake of seeking cost saving considerations at the risk of the broad concept of procedural fairness.

The value of the competition regime to taxpayers is outlined in the consultation document itself, with the costs of the regime to taxpayers (at most in the tens of millions of pound) vastly outweighed by the benefit to consumers (running into several hundreds of millions). **The regime represents very good value for money (which could be even greater as a result of annual cost savings arising from the merger). Shifting the costs of investigations towards the private sector will make a negligible contribution to deficit reduction whilst threatening the operability of the regime.**

In conjunction with the proposal to transfer existing costs, the consultation contains proposals which could lead to increased volumes of cases with lower priority or lower impact cases. For example, in opening up the super-complaint mechanism to SME's the Government may risk driving up the number of cases entering the system, leading to congestion, which could reduce the number of high impact decisions and slow the processing of priority cases, thereby diminishing the actual value of the new regime to the taxpayer and increasing costs for businesses.

That outcome would fundamentally contradict the key objective of the Government's competition objective of targeting those restrictions of competition that do most harm to consumers and/or economic growth. Instead, Virgin Media suggests there may be existing mechanisms in the practice of the regulators that could be modified to address any perceived disadvantages for small companies without increasing the cost burden and decreasing the efficiency and effectiveness of the competition regime for businesses in general.

Appeals

The consultation contains a number of proposals which have a significant impact on the appeals process in two main respects: (i) the standard of appeal; and (ii) the costs of appeals.

Standard of appeal

In its consideration of antitrust investigations, the consultation has put forward an option whereby an internal tribunal is created within the CMA which would adjudicate on investigations. Any appeal from the CMA's decision would then be on the basis of judicial review principles only.

Virgin Media is aware that BIS is also currently considering the appropriate standard of appeal in Communications Act appeals. Virgin Media's view in that regard are equally pertinent to this consultation. The consultation refers to the need to maintain a regime that does not give excessive rights of appeal. Virgin Media strongly disagrees that the current rights of appeal are excessive.

The consultation document does not address a number of issues which Virgin Media thinks are crucial in any discussion of appeals. These include the following:

- Merits appeals provide real benefits to the regulator in question as well as to stakeholders. The scrutiny that judicial oversight provides has been welcomed by the competition authorities in the past.
- There is no evidence that companies have been bringing frivolous appeals and indeed there are clear commercial and practical reasons why companies have no incentive to do so.
- A large number of appeals against the decisions of the competition authorities have resulted in judgments overturning the decision either in whole or in part. This is particularly the case in relation to appeals against the decisions of Ofcom (and other sectoral regulators).
- Regardless of any efforts to introduce safeguards, a competition authority and a regulator is not immune from error.
- Virgin Media considers that the current standard of appeal acts as an incentive on the authorities to ensure that their decisions are correct and comprehensively compiled/evaluated, something that has also been echoed by the OFT in the past.
- The CAT has particular expertise in assessing merits appeals – a move to judicial review-only appeals would render these particular skills superfluous.
- The ability to appeal becomes even more important where the powers of the CMA are being strengthened (including the ability to recover costs).

Any decision to appeal by a company is not taken lightly – and Virgin Media speaks from extensive experience in this regard. Firstly the effort in terms of legal costs and management time in lodging and pursing an appeal is considerable. Secondly (and as set out below), there is always the risk that a party that raises a frivolous appeal and has that appeal dismissed will have a costs order made against them. Finally companies are concerned about the reputational impact of bringing a frivolous appeal and the impact this would have on their credibility in terms of future appeals.

Cost of appeals

When a company is deciding whether to bring an appeal against the decision of a regulator or competition authority, a key factor is the cost of bringing the appeal, in terms of both its own legal costs and management time, and the cost of covering the costs of the other party if unsuccessful.

Proposals within the consultation document to add the potential for a direction to pay the CAT's costs constitutes an additional risk of appealing and may have a disproportionate deterrent effect, unfairly impinging on a party's right of appeal in legitimate circumstances. This is particularly relevant in the telecommunications sector, where the Framework Directive guarantees effective mechanisms for the right of appeal.

Given the consultation's apparent direction to support the competition concerns of smaller businesses, then proposals are surprising and could act as a barrier to bringing meritorious appeals from all companies.

The consultation proposes amending the CAT's Rules of Procedure in order to give the CAT the right to recover its costs. However, no distinction is made between appeals of competition decisions and other appeals to the CAT.

It therefore strikes Virgin Media that these proposals in the consultation, which appear to be aimed at <u>all</u> appeals to the CAT, have a far wider impact than on merely those stakeholders who are interested in the issue of merger of the OFT/CC. The inclusion of this proposal as part of an extensive and detailed consultation on the competition regime, does not appear to be fully transparent and in keeping with the Government's scope of practice for consultations, i.e. they should be accessible to, and targeted at, those stakeholders the exercise is designed to reach. Such a change to the process of the CAT is extremely far reaching and should be being more widely disseminated amongst parties who will be affected by this proposal.

Virgin Media also notes that the consultation does not adequately justify why appeals to the CAT are being singled out for special - and in Virgin Media's view unreasonable - treatment, particularly where it has been identified that the competition and telecoms regimes result in considerable benefits to consumers.

Virgin Media is not aware of any other courts having a similar power to seek their costs and believes that this is for good reasons such as ensuring access to justice. Virgin Media also questions whether BIS has considered the risk of forum shopping whereby companies simply direct their appeals to the administrative courts where they would not be subjected to court cost penalties.

Virgin Media also notes that the consultation proposes that the CC should be able to recover the costs it incurs in dealing with a price control matter under the Communications Act. This suggestion is made on the basis that costs are currently recoverable in the water and energy sector. However all regulated sectors are not all the same (e.g. water and energy are non-discretionary spends) and consistency alone is not a sufficient basis for introducing this requirement.

Such an approach is likely to deter parties from raising price control matters even where the regulator has made a clear error relating to a price control mechanism. It also appears to be at odds with the requirement under the Framework Directive that there be an effective appeal mechanism – if parties are deterred from appealing purely for costs reasons, this cannot be said to be effective.

The BIS consultation seems to suggest that appeals on price control matters are an adjudication of Ofcom's exercising of its judgement in a particular case as contrasted with a Court adjudicating on the application of law. Virgin Media finds this to be a miscategorisation of the nature of an appeal of a price control matter. Whilst a price control matter may question Ofcom's judgement on a particular matter, it may also involve questions about the application of law.

Merger Control reform

Virgin Media considers that where mergers are concerned, the starting point for BIS should be an objective assessment of the current – voluntary - regime. As the consultation itself points out, the UK regime is well regarded around the world and was ranked second out of nine merger control regimes by KPMG.

The consultation considers that the central weakness of the existing regime is that it allows certain mergers to escape regulatory review or to proceed in advance of regulatory review, making it more difficult to unwind these transactions. The consultation relies heavily on a Deloitte report produced for the OFT in 2007 which concluded that for each merger either referred to the CC or in respect of which the OFT accepted undertakings in lieu of a reference, another merger which raises at least similar competition concerns would proceed un-notified.

In general, Virgin Media considers that the current voluntary regime works well, encouraging business development and growth via an efficient and essentially self-balancing notification system: in undertaking merger activity, businesses will form their own view of regulatory risk, and will not want to go to the very costly expense of proceeding with a transaction that may be subsequently unwound. If there is any material doubt as to whether a transaction could be said to raise competition concerns, then it will be in the interest of the parties concerned to await clearance from the authorities before undertaking extensive and expensive integration steps. Moreover, if cases that cause competition concerns are not notified or otherwise escape the detection of the authorities, those third parties who are directly and genuinely affected by the transaction are likely to submit complaints or otherwise notify authorities in order to protect their own interests.

Virgin Media tends to agree with the OFT's view as stated in the Impact Assessment that the Deloitte report is an overestimate as it was based on anecdotal evidence and that if genuinely anti-competitive mergers were taking place, then third parties would be likely to complain. Virgin Media notes that since 2007, the OFT has increased its mergers intelligence function. Virgin Media also considers it likely that the mergers that have

apparently escaped scrutiny are small transactions and, since they have not been subject to complaints by third parties, they are unlikely to have resulted in the most harm to competition.

In addressing any perceived weakness in the system, the Government should first consider whether the perceived flaws can be remedied through the strengthening of existing powers. A move to a mandatory notification system would be radical and costly and should be contemplated only if improvements to the current system would not prove effective. Further, any proposals to move to a mandatory or hybrid regime should avoid unnecessary complication (for example the avoidance of disparate rules on thresholds and the test for control).

A move to a mandatory regime runs contrary to the Government's general stated commitment to reduce red tape and would undoubtedly introduce additional complexity into merger activity. In addition, in some cases this could result in a decline in business activities and innovation if prolonged and costly processes become prohibitive.

Virgin Media does however agree that there is scope to strengthen the rules regarding pre-emptive action, for example through the introduction of a statutory restriction on further integration once the CMA starts its enquiry.

Also, given that the consultation recognises that one of the main issues with the current regime is the time taken to reach a decision (particularly in comparison with other jurisdictions), Virgin Media is surprised that there is no proposal to introduce any meaningful changes to the timing of the merger control process. Although the consultation proposes to introduce a statutory timetable for Phase I, this is not vastly different to current administrative timetables and, more importantly, does not seek to reduce the Phase II review period. Faster and more effective decision making would strengthen the current voluntary notification system. Virgin Media considers that a key benefit of the OFT/CC merger should be the removal of the duplication which occurs as a result of having a separate body look at a transaction completely afresh. If a streamlined authority cannot reach a decision in a quicker timeframe, Virgin Media questions the value in such large scale organisational change.

Virgin Media considers the Impact Assessment to contain a potentially flawed analysis of why a move to a mandatory regime would benefit businesses. By way of example it states that businesses would benefit as a result of reduced uncertainty of being investigated by the CMA and should face fewer information requests. This appears to ignore the fact that businesses are currently incentivised by the prospect of regulatory intervention to carry out their own assessment of whether to notify, and when they do notify, significant preparation goes into a filing. It also stands against the principle of self-assessment now applicable under general competition law. The Impact Assessment also states that fewer resources would need to be deployed in investigating whether to notify, as a filing obligation would be apparent from turnover. This is erroneous – significant legal spend and resources would be equally required in a mandatory regime to assess the overlaps and consider how the authority would treat the merger.

The proposed threshold for a mandatory notification strikes Virgin Media as being astoundingly low, and this would be one of the lowest in Europe. The consultation does not adequately justify why it would benefit the wider economy for the CMA to review significantly more (on the basis of the figures provided in the consultation) mergers than it currently reviews. The Impact Assessment acknowledges that the benefit to the economy stems from more findings of a significant lessening of competition as a result of the CMA considering more merger cases. Virgin Media does not necessarily agree that one will lead to the other. Once again the consultation appears focussed on quantity of cases over quality, and on some occasions appears driven solely by the objective of achieving full cost recovery.

Without the introduction of a sufficiently simple and expedient short-form procedure for smaller mergers, a mandatory system will drive up costs and increase administrative burdens and red tape for businesses. Such a system would introduce significant timing implications for transactions that involve no competition concerns. As the system becomes congested with the processing of all cases required by mandatory notification, so the time

taken and the costs incurred in all cases will increase. As the consultation recognises, the costs to business in submitting a filing in terms of legal spend, management time and delays to implementation are not insignificant.

Virgin Media understands that the Government is seeking to recover the entire costs of the merger control regime through the payment of increased merger notification fees, but questions whether BIS has fully considered:

- Whether disproportionate fees may have the effect of dissuading voluntary notifications in a non-mandatory system (particular where these would reach £220,000 for the largest transactions).
- Whether the benefits to the regime vastly outweigh the cost and therefore justify being transferred to businesses. The consultation refers to the consumer savings per case to be in the region of £31 million, together with the indirect deterrent effect which is determined to be five times this.
- That the cost of the current regime should be further reduced by virtue of the costs savings arising from the proposed merger.

The increased burden as a result of a move to a mandatory system would not just apply to notifying parties[1]. The consultation envisages strengthening information gathering powers from third parties in Phase I. If the number of cases increases by the level indicated in the Impact Assessment, this will place an enormous burden on businesses in general, particularly where parties do not identify any concerns with a transaction. The overall economy and consumers will be adversely impacted by such a waste of resources.

The Markets Regime

Again, the consultation relies heavily in this area on figures which suggest that the regime is underutilised. At the risk of repetition, one of the main principles which should underline the reform is choice of the right cases to investigate; adherence to artificial targets does not result in a regime which selects and scrutinises cases which have the greatest impact and benefit for consumers. In addition, whilst the streamlining of cases would be welcomed, this should in no way prejudice the need for thorough investigations.

In this context, businesses require certainty of the applicable regime to prevent legislation having a chilling effect on competition and innovation. The scope of the markets regime should be clear to businesses, both in terms of statutory definitions and in terms of transparent processes. The consultation states that there is a need for remedy powers to keep pace with changes in the economy. The key will be devising legislation that meets these objectives without subjecting industry to disparate, time-consuming and ever-changing legislation. It is important to ensure that, adhering to the principles of legal certainty and non-retrospectivity, businesses are afforded the opportunity to assess their conduct against the rules that are in force to determine what is considered acceptable.

In relation to the interplay between the markets regime and antitrust enforcement, Virgin Media would raise the possible risk that if market investigations are used as a method for screening competition law violations, they become solely a means to an end. Historically, market investigations have been relatively co-operative processes in comparison to antitrust investigations. If market investigations are seen as a stepping stone to antitrust enforcement, then some of the benefits of this process may be lost.

Whilst the introduction of cross-market investigations may be seen by BIS as a means to focus on specific practices common to a number of industries, Virgin Media considers that there may be a number of shortcomings in such a mechanism. Any such thresholds would need to be tightly defined to ensure that this does not lead to a disproportionate burden on business and protect against the risk of scope creep. As with the interplay with antitrust investigations, there would also need to be a clear delineation of the role to be played by the sectoral regulators. Virgin Media also notes that, whilst there may be issues common to different markets, the solution to remedying any underlying problems may well differ across markets.

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[1] Virgin Media notes that the Impact Assessment states that the additional costs to business would be in the region of £67 million to £237 million.

The consultation also makes a proposal to enable the CMA to provide independent reports on public interest to Government. As set out above, Virgin Media supports the bolstering of a competition regime which is independent from Government. We are therefore supportive of this proposal. The CMA (via the CC's expertise) would be well qualified to comment on public interest issues given its experience of doing so in merger cases.

The Cartel Offence

Virgin Media considers this to be one of the more radical proposals in the consultation and would have considerable concerns about a rushed and potentially ill-considered reform of the criminal cartel offence, particularly where this would contrast with mens rea requirements in other criminal acts. It appears to Virgin Media that any changes are extremely premature (no UK jury has had to consider the offence) and appear to be based on experiences which may have more to do with the investigation of such offences and the interplay with other jurisdictions, than the scope of the offence. Once again, to solely focus on the number of such prosecutions, rather than the impact and deterrent effect of such offences through the prosecution of the right cases, is the wrong approach.

Regulatory appeals on price issues

Virgin Media is of the view that price control matters under the Communications Act should be handled by the CMA. The new institution, (via the CC) will have the expertise, experience and knowledge pool to deal with such references. Whilst the functions could in theory be carried out by the CAT, in Virgin Media's view this would require a step change in the capabilities and processes of the CAT. Virgin Media notes that the CC has recently conducted a review of its practices in dealing with price control issues and has suggested a number of steps which could help to streamline the hearing of price control matters. Virgin Media sees no justified rationale for suggesting a transfer of responsibilities to the CAT. In the absence of a clear failing of the current process, price control matters should be left in the hands of the CC (CMA).

Harmonisation of processes relating to the various regulatory appeals/references

Virgin Media agrees that the scope for harmonisation would be limited by EU obligations in the various sectors. Virgin Media notes that the types of matters that BIS considers would be covered by a model process (such as the initiation process, the approach on a hearing, whether the CMA is expected to seek a definitive solution, the preferred appeal route against the CMA's determination) are, in the case of the telecoms framework, already set out by in a combination of the Communications Act and the CAT Rules, as well as relevant judgments of the CAT. Virgin Media is therefore unclear what a model process would add to this existing framework. As a result, Virgin Media questions whether the Government is seeking to implement harmonised model processes merely for the sake of harmonisation, without carefully considering what - if any - benefits such model processes would bring.

Virgin Media
June 2011

Vodafone

DBIS CONSULTATION RELATING TO PROPOSED REFORMS OF THE UK COMPETITION REGIME

RESPONSE OF VODAFONE LIMITED

1. Introduction and summary

1.1 Vodafone Limited ("Vodafone") welcomes the opportunity to respond to the consultation undertaken by the Department for Business, Innovation and Skills in relation to the possible reform of the UK competition regime. Given the very wide-ranging nature of the issues under consideration in the consultation document, we have necessarily devoted our attention to those elements of the consultation with which we have familiarity and where we are best placed to comment on the course of action proposed by HM Government. Our response therefore focuses on:

(i) possible changes to the concurrency regime enabling sector-specific regulators to apply and enforce competition law;

(ii) proposals relating to changes to the process for price control appeals;

(iii) proposals for changes to the current legal test used to establish when an individual has been guilty of the criminal cartel offence.

1.2 In the specific field of telecommunications, we would strongly endorse the view expressed by HM Government that the concurrency regime should be maintained. Ofcom is clearly best placed to apply competition law, not least because the ex ante sector-specific regulatory framework that it is also empowered to apply is itself founded on competition law principles. We therefore would have concerns about the introduction of any procedural changes that have the effect of creating uncertainty amongst industry stakeholders about the identity of the authority that will be primarily responsible for competition law enforcement in the communications sector.

1.3 HM Government's proposal to bring the price control appellate function of the Competition Commission under the aegis of the new competition authority (the "CMA") raises a number of questions that require further consideration before any such decision is adopted. More detail is required about how, following this transfer, the relevant division of the CMA will be capable of undertaking the type of intensive review that is inherent in a merits-based price control appeal. Further consideration should also be given to the issue of how the independent appellate role currently performed by the Competition Commission will be ensured if its functions are transferred to an administrative enforcement body.

1.4 We have significant concerns about the proposal advanced by HM Government that would result in unsuccessful appellants in telecoms price controls appeals being subject to costs orders to enable the Competition Commission to recover its costs. Such an approach neglects to take into account the highly complex and detailed nature of a price control appeal involving judgments that may, in some instances, be finely balanced but that can only be determined by an independent appellate body. As well as being inequitable, it would be unjustifiable when the nature of a price control appeal

is actually appreciated. But more fundamentally, a simplistic 'losing party-pays' principle applied asymetrically would raise material concerns about the independence of the Competition Commission in resolving price control appeals. Specifically, the ability to recover costs only from the unsuccessful appellant would potentially distort the incentives and approach of the Competition Commission when issuing a determination.

1.5 Finally, we see no obvious justification for replacing the current legal test used to establish whether an individual has committed the criminal cartel offence under the Enterprise Act. The current legal test itself is not the reason for the relative dearth of prosecutions. More importantly, the reformulation of this test, as proposed by HM Government, will undermine legal certainty and potentially deter innovation.

2. Concurrency and sectoral regulators: telecoms

2.1 In examining the issue of whether sectoral regulators should retain their concurrent competition law enforcement powers, we recognise that experience of concurrency amongst industry stakeholders may well differ across markets. It may therefore be appropriate for HM Government to distinguish between different sectors rather than adopting a one-size fits all solution in respect of this issue.

2.2 In the specific case of telecommunications, we would strongly endorse the proposition of HM Government that Ofcom, as the sector-specific regulator, should continue to retain its ability to apply and enforce competition law. Moreover, Ofcom should continue to be the primary authority entrusted with the enforcement of competition law.

2.3 There are two important reasons underpinning this position:

(i) Ofcom is well placed to apply competition law because of the expertise that it has developed through the application of the *ex ante* harmonised pan-European sector-specific regulatory framework that is built upon competition law principles.

Before imposing any *ex ante* regulatory measures, Ofcom must apply well established competition law principles in defining relevant markets and identifying whether one or more undertakings is in a position of Significant Market Power (a concept that is equivalent to dominance in competition law).[1] Many of these market analyses involve the application of established decisional precedent of the European Commission and the European Courts in the field of competition law. The ex ante analyses conducted under the sector-specific regulatory framework will also necessitate the type of economic analysis and cost modelling that is frequently found in competition law cases.

[1] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002] OJ L 108/33, Article 15(1) & Article 16(4)

Moreover, Ofcom is required to satisfy itself that ex post competition law remedies it could impose would be insufficient to address the competition problem identified.[2]

(ii) Equally significantly, Ofcom (and its predecessor Oftel) through its role as sector-specific regulator has already developed an understanding of the industry, technological developments and the way in which competition operates in telecoms markets over more than 20 years.[3] The familiarity and knowledge that Ofcom has gleaned is likely to assist it in the application and enforcement of competition law.

2.4 None of the other concerns articulated by HM Government about the efficacy of the concurrency regime cast doubt over the argument that we advance above. The paucity of Competition Act investigations and decisions in industries subject to sector-specific regulatory frameworks over the past few years is, as the consultation document notes, often cited as evidence that the concurrency regime does not operate effectively. In the case of the telecommunications sector, it is worth noting that Ofcom's own records reveal that it has investigated twenty-three Competition Act cases over the past 8 years.[4] There is currently one case that is ongoing at the time of writing.[5] However, for completeness, we consider below whether the concerns highlighted by HM Government are relevant in the context of telecommunications.

2.5 HM Government suggests that the reasons for the relative lack of investigations conducted under the aegis of the Competition Act may be: (a) the lack of expertise in competition law on the part of sectoral regulators; and (b) sector specific regulatory frameworks.

2.6 What should be apparent from the above paragraphs is that the sector-specific regulatory framework governing the telecommunications sector is actually one of the reasons why Ofcom is well placed to apply and enforce competition law. This regulatory framework is based on competition law principles, which means that Ofcom must demonstrate – with reference to the precedent enshrined in competition law – where a market is not functioning effectively before prescribing regulatory action. The fear expressed by HM Government that the over-zealous application of sector-specific ex ante regulation will dampen innovation, rivalry and growth in markets is overstated and not in fact borne out in reality in relation to telecommunications.

2.7 Firstly, Ofcom is, pursuant to the provisions of the sector-specific regulatory framework, under a duty to keep markets under review and to remove ex ante

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[2] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002] OJ L 108/33, Recital 27 *"ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem."*

[3] Ofcom's predecessor, Oftel, also applied competition law principles in performing its role as a sector-specific regulator.

[4] http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/closed-competition-act-cases/?pageNum=1#in-this-section

[5] http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/open-competition-act-cases/

regulatory obligations where it finds that markets are competitive.[6] Thus the scope for ex ante regulation to be prolonged unnecessarily is limited. In this context, it is worth noting that the number of relevant telecommunications markets identified by the European Commission as being susceptible to ex ante regulation has fallen from seventeen (2003) to seven (2007).[7]

2.8 Nor is there any evidence that the EU sector-specific regulatory framework is in any way inhibiting competition (and innovation) in the UK. Both the European Commission and Ofcom which have both recently had cause to review the UK wholesale and retail mobile markets and found that they were characterised by vigorous competition.[8] Indeed, Ofcom has noted that across EU markets, profitability levels in the UK were amongst the lowest, reflecting the competitive nature of the mobile market.[9]

2.9 In light of the above points, we would have concerns about the introduction of a regime in which it was unclear to industry stakeholders about the identity of the body responsible for conducting a competition law investigation and deciding upon its outcome (as is suggested at paragraph 7.27). Such a regime would serve to create further confusion and uncertainty for industry stakeholders. Given the expertise and familiarity that Ofcom has developed in recent years, the benefits of introducing procedural changes to the current regime in respect of the telecommunications industry are far from obvious. We therefore urge HM Government to leave the current regulatory landscape – in which Ofcom is established as the primary authority responsible for competition law enforcement – unchanged.

2.10 To the extent that Ofcom were constrained in its resource or lacking in expertise in respect of a particular competition issue, the more proportionate approach would be to enable the CMA to provide input and/or make additional resource available as was necessary.

2.11 As noted above, Ofcom is obliged to consider whether its competition law enforcement tools are sufficient to address any competition law problems that might arise in a relevant market. The primacy of competition law is therefore already established in relation to the telecommunications sector. However, as a general principle, we endorse the principle that sector-specific regulators should be obliged, when reviewing markets, to consider the competition law powers at their disposal before moving in haste to adopt intrusive ex ante regulatory measures.

3. Regulatory appeals: telecoms price control cases

[6] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002] OJ L 108/33, Article 16(3). For example, in 2008 following a review of the wholesale broadband access market, Ofcom found that in a number of geographic areas BT was no longer in a position of market power and it was therefore appropriate to remove the previous regulatory obligations imposed. Ofcom, *Review of the wholesale broadband access markets*, 21 May 2008

[7] See Annex to Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation - C(2007) 5406,

[8] See Ofcom, *Mobile Evolution: Ofcom's Mobile Sector Assessment*, 17 December 2009; Case No. COMP/M.5640 *T-Mobile/Orange*

[9] See Ofcom, *Mobile Evolution: Ofcom's Mobile Sector Assessment*, 17 December 2009, paragraph 3.23; Ofcom, *Wholesale mobile voice call termination*, 15 March 2011, paragraph 2.5

3.1 We note that HM Government is considering transferring the activities of the Competition Commission relating to price control appeals in the telecommunications sector to the CMA. We would emphasise that it is critical to note the following in the context of price control appeals in the telecommunications sector:

(i) the pan-European Regulatory Framework requires Member States to ensure that appeals are heard by an appeal body with appropriate expertise;

(ii) The review of any case must take due account of the merits.[10]

3.2 The cumulative effect of these two obligations is that an appellate body hearing a price control case must be adequately equipped in terms of resource and expertise to be able to ensure that the original decision of the regulator is subject to profound and rigorous scrutiny.[11] Price control appeals are typically lengthy and involve consideration of highly complex and often finely balanced issues. HM Government must therefore ensure that the relevant section of the CMA would be capable of discharging the role currently undertaken by the Competition Commission were its functions to be transferred to the CMA.

3.3 Moreover, it is important to appreciate that the Competition Commission, in line with the obligations imposed by the EU regulatory framework, exercises an appellate role in reviewing the original decision of the regulator in respect of a price control. HM Government must ensure that the independent appellate role of the Competition Commission would be preserved in a scenario where its price control review function was transferred to what is essentially an enforcement agency (the CMA).

We suggest that additional elaboration in relation to these matters should be put forward by HM Government for industry consultation before any final decision is taken.

3.4 Finally, HM Government proposes the introduction of 'model processes' for price control appeals. It explicitly states that this proposal is not intended to address matters that are being considered in separate consultations. We are concerned that the practical effect of some of these proposals is to intrude upon separate consultations that are already examining these matters. This is most evident in respect of the proposal that the model process address the nature of a price control appeal (rehearing or review). This issue is inextricably linked to the ongoing consultation and debate undertaken by HM Government about the standard of review applicable in appeals lodged under the Communications Act.[12] As such, it should be considered in that context and is outside the scope of this consultation. However, for the avoidance of doubt, we emphasise again the importance of retaining the existing standard

[10] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002] OJ L 108/33, Article 4(1)

[11] In the last mobile call termination appeal, the Competition Commission expressed the view that it was required to *undertake "a rigorous and detailed examination of the price control matters subject to appeal."* Competition Commission, *Mobile phone wholesale voice termination charges*, Determination, 16 January 2009, paragraph1.31

[12] See BIS, *Implementing the revised EU electronic communications framework. Overall approach and consultation on specific issues*, 13 September 2010

of review in Communications Act appeals, and in particular where price control matters are concerned. It is critical for appellants wishing to challenge the level of a price control that the Competition Commission is able to undertake the type of forensic and detailed examination of the approach adopted by Ofcom in setting a price control.

4. Recovery of costs in telecoms price control appeals

4.1 Vodafone objects in principle to HM Government's proposal to amend the current procedural rules governing costs awards in price control appeals to enable the Competition Commission to recover its costs. The introduction of a simple 'losing-party-pays' principle (applied asymmetrically against unsuccessful appellants) is inappropriate in the context of appeals that involve the consideration of highly complex and technical issues. Most importantly, the introduction of such an asymmetric costs regime has the potential to compromise the impartiality and independence of the Competition Commission as an appellate body in price control matters. Putting this fundamental concern aside, it is also difficult to see how a rule that determined the level of the costs award according to the extent to which the appellant's grounds of appeal were successful would be applied in practice.

4.2 Price control appeals that are on the merits require the Competition Commission to examine the methodological framework, the assumptions and key inputs adopted by Ofcom to derive the level of the applicable price control. Appeals involving a review of the level of the price control originally mandated by Ofcom will be inherently complex and judgment in favour of one particular approach over another may be ultimately finely balanced. As the Competition Commission itself notes:

"The CC's regulatory functions are sometimes given insufficient attention. They are very important to the successful operation of sectoral regulation in the UK and if the CC were not here to perform them, some other new, untried and no doubt costly, mechanism would need to be developed. The CC provides a 'fresh pair of eyes', and a source of expertise and experience, for complex regulatory issues where regulators and the regulated companies cannot agree…"[13]

Quite so. It is therefore unlikely that the Competition Commission will be faced with frivolous or vexatious appeals unnecessarily tying up its resources. In such circumstances, it is difficult to see that a simple costs-follow-the-event type approach that is adopted in the context of commercial litigation is merited in price control appeals.

4.3 Moreover, it is important to appreciate that an error in the setting of a price control may have damaging consequences for consumer welfare. In this context, the role of the Competition Commission assumes particular importance. Whilst HM Government is eager to ensure that costs awards should not inhibit the ability of the regulator to undertake its duties, it is equally important that businesses should not by virtue of the costs regime be inhibited from bringing legal challenges in complex cases that require judgment from a body that has been established by Parliament precisely to handle such cases.

[13] Competition Commission, Annual Report and Accounts 2009-2010, p.6

4.4 However, what is particularly problematic in this case is that HM Government's proposed approach to costs will be applied asymmetrically so that costs can only be recovered by the Competition Commission from an unsuccessful appellant (and not from Ofcom in the event that it were found to have erred in its original decision)[14]. This approach creates a serious risk that the Competition Commission will be more incentivised to find against an appellant in order to recover its costs particularly in cases where a complex price control appeal consumes more resources. As such, the independence of the Competition Commission would be compromised. This is clearly a perverse outcome that would result in the UK regime contravening the basic principle (enshrined in the EU sector-specific regulatory framework) that an appellate body should be independent of the parties to litigation proceedings.[15]

4.5 Beyond these fundamental concerns about the administration of justice, just as a costs regime should not be seen to condone those parties who have engaged in vexatious litigation, it should equally not be an objective of a costs regime to afford protection to a regulator whose approach and conduct may have been patently flawed or lacking in the level of rigour expected in an ex ante price control review. And, whilst a costs regime might encourage private parties to consider carefully their decision to appeal, it should, in the same vein, also operate in a way that causes a regulator to be particularly rigorous before adopting a final decision in relation to a price control.

4.6 The rationale underpinning HM Government's approach to this issue appears to be the number of price control appeals consuming resource on the part of the Competition Commission. It is of course important to put this issue in context. Whilst there have been more price control appeals in recent years, the Competition Commission's records indicate that since the Communications Act 2003 came into force it has only been required to consider four price control appeals.[16] The Competition Commission's latest Annual Report for 2009-2010 reveals that, for the majority of the period, its resources were allocated to legal challenges, merger reviews and remedies in mergers and market reviews.[17]

4.7 We also note that HM Government puts forward a similar proposal in respect of the ability of the Competition Appeal Tribunal to recover costs from unsuccessful appellants (once again excluding the possibility for costs to be recovered from Ofcom). We consider that the concerns highlighted above in relation to price control appeals are equally applicable and would urge HM Government to exercise considerable caution and reflect thoroughly before proceeding further.

[14] The rationale for this approach is that HM Government considers that the ability of the Competition Commission to recover costs from Ofcom could have a "chilling effect" on its ability to perform its duties as regulator (paragraph 11.40).
[15] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services [2002] OJ L 108/33, Article 4(1) requires that the appeal body must be *"independent of the parties involved"*.
[16] http://www.competition-commission.org.uk/appeals/communications_act/completed_cases.htm
[17] Competition Commission, Annual Report and Accounts 2009-2010, p.11

5. Proposed changes to the cartel offence

5.1 Vodafone does not agree with the Government's proposals to remove the dishonesty element of the criminal cartel offence and to replace it with an alternative option based on concealment. As we explain below, HM Government has adduced no obvious or compelling justification for a course of action that will ultimately serve to undermine the legal certainty that is pivotal to the way in which businesses operate in the UK.

5.2 It was clear from the inception of the Enterprise Act that the Office of Fair Trading equated serious cartel activity with theft[18] and this parallel was emphatically echoed in the parliamentary debate where it was stated that *"theft on such a scale is wrong and must be dealt with in the same way in which any other theft is dealt with."*[19] Accordingly, the main driver for including the requirement of dishonesty in the cartel offence was to provide juries with a well-established test in theft cases and to signal that the offence is serious and should attract criminal sanctions.

5.3 Significant to the current debate is that it was never anticipated that there would be a large number of prosecutions. In 2002, a senior Director at the OFT put out an unambiguous message in this regard, stating: *"we will carefully select the cartels for criminal prosecutions, concentrating on the most serious ones. We expect there will be a relatively small number of prosecutions – but they will have significant deterrent effect. The first prosecutions will reach the courts in a few years."*[20]

5.4 This view was endorsed by HM Government at the time. The Under Secretary of State at the Department for Trade and Industry at the time indicated in the parliamentary debate that the Government's view of deterrence was not limited to successful prosecution, but rather to the scope for *possible* prosecution.

> *"The point is not about how many people we send to prison. We do not want to send people to prison for anything. However, if people break the law and the law states that a prison sentence is necessary, that is what they will receive. We would rather that people did not end up operating cartels, but it is important if they do that we send a message, both to the individual and to society, that it is unacceptable and a serious offence."*[21]

5.5 We therefore consider that dishonesty remains an entirely appropriate and integral part of the cartel offence. Dishonesty is a perfectly common – and according even to the OFT's Guidance a *"well understood"*[22] – concept in English criminal law. It is certainly better understood by those working in the criminal justice system than any of the Government's suggested alternatives

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[18] Key challenges in public enforcement: A speech to the British Institute of International and Comparative Law, Margaret Bloom - Director of Competition Enforcement, OFT 17 May 2002, p.9

[19] Mr Purchase, Hansard, House of Commons Standing Committee B, Tuesday 23 April 2002, Column 164

[20] Key challenges in public enforcement: A speech to the British Institute of International and Comparative Law, Margaret Bloom - Director of Competition Enforcement, OFT 17 May 2002

[21] Melanie Johnson MP, Hansard, House of Commons, Standing Committee B, Enterprise Bill, 23 April 2002, Column 169

[22] *The cartel offence: Guidance on the issue of no-action letters for individuals*, OFT Guideline 513, para.2.1, footnote 3

would be. Proving this element of the offence might well be challenging in some cases, but Vodafone would argue that this is a necessary part of the criminal prosecution process if the rights of defence of individuals are to be protected adequately.

5.6 As was stressed during the parliamentary debate: *"all the measures are in place to ensure that the man or woman accused of theft while engaged in the activity concerned has the benefit of doubt and the opportunity to defend themselves properly."*[23] It is for the prosecution team looking to secure a conviction to explain the nature of the cartel in a way which indicates to a lay jury that the behaviour of the individuals concerned was of a nature that they should have known that the ordinary person would consider their behaviour dishonest.

5.7 We do not consider, for example, that a jury would have had any problem in the recent Marine Hose cartel case, if it had gone to trial, concluding that those involved knew that what they were doing was dishonest, given the evidence that was available (including an FBI video). Whilst some cases may necessitate the discussion of economic evidence, it is not unfeasible for the prosecution to present this in such a fashion that it can be clearly understood by a jury. In a case like Marine Hose, such evidence is unlikely even to be considered by the jury as it is more likely to be relevant to mitigation than whether there was a cartel or dishonesty.

5.8 What is more, the Government's claim in the Consultation, based on the evidence of a University of East Anglia survey, that public attitudes to cartel activity are such that there is currently only moderate support for a criminal cartel offence defined around dishonesty is unconvincing. The observations of respondents to the survey do not necessarily lead to the conclusions drawn by the Government but in fact leave clear room for an alternative interpretation. The finding that six in ten people in Britain believe that price-fixing is dishonest[24] and the statement elsewhere in the report that *"the majority of Britons (73%) recognise the harmful effects of price fixing [and] recognise the need for such behaviour to be punished",*[25] would actually suggest that juries would be more ready to convict for an offence based on dishonesty than the Government has made out in the Consultation.

5.9 Vodafone would contend that there is in fact little evidence (and none in the consultation) to suggest that the concept of dishonesty is the fundamental cause of the low level of criminal prosecutions that have been made to date. The underlying reason for the limited flow of cases is more likely to reflect the fact that there have been a relatively small number of investigations of hard core cartel activity in the UK since the entry into force of the Enterprise Act. Apart from the most recent cases, these cases have largely resulted from conduct prior to June 2003 and so there is little to suggest that criminal sanctions should have been imposed on individuals in these cases. Although the collapse of the British Airways case was well publicised, this took place

[23] Mr Purchase, Hansard, House of Commons Standing Committee B, Tuesday 23 April 2002, Column 164

[24] Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain - Andreas Stephan, CCP Working Paper 07-12, May 2007, p.18

[25] Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain - Andreas Stephan, CCP Working Paper 07-12, May 2007, p.29

before the issue of dishonesty was tackled and was actually caused by procedural errors on the part of the OFT.

5.10 Accordingly, Vodafone considers that it is, in the absence of evidence to the contrary, incorrect (or at least premature) to conclude that dishonesty represents the major barrier to successful prosecution of the criminal cartel offence and that therefore this element of the offence ought to be reformed. The offence in its existing form needs more time to put down its roots and, with three criminal investigations currently underway before the OFT, there is a real prospect that it will establish itself fully in the coming years.

5.11 Vodafone also considers that the alternatives proposed are likely to create more problems and have a chilling effect on legitimate business activities. In particular, the suggestion that dishonesty should be replaced by a secrecy element (Options 3 and 4) is likely to create difficulties. It should be appreciated that secrecy may be one element underpinning a finding of dishonesty, but it should not be determinative in establishing that the cartel offence has been committed.

5.12 Indeed, there may a number of instances in which secrecy between the parties to an agreement is simply standard industry practice. Many initial discussions about collaborative arrangements between actual or potential competitors with a legitimate purpose are, as a matter of course, negotiated under non disclosure agreement. Some agreements can fall within come within the scope of Article 101(1) and potentially the reformulated cartel offence (because they might involve elements of price fixing or customer allocation). An example of such a collaboration might be joint bidding under a consortium arrangement. Such arrangements often create efficiencies and can be justified under Article 101(3). In fact, for major projects which might have an impact on a bidder's share price, it may be impossible to carry out such negotiations in the open. It would be unfortunate if the unintended consequence of HM Government's proposed course of action were that businesses were deterred from engaging in legitimate commercial activity that operates to the benefit of consumers.

13 June 2011

Wardhaugh, Professor M Bruce

BIS | Department for Business Innovation & Skills

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

Response form

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

	Small to Medium Enterprise
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	Interest Group
	Large Enterprise
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	Legal
X	Academic
	Other (please describe):

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

This response represents my personal views, and not those of Newcastle Law School, Newcastle University, or any other member of those organizations.

My response is attached below.

Consultation Questions

1. Why reform the competition regime?

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

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

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

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

Comments: No opinion

2. The UK Competition regime and the European context

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

Comments:

No opinion

3. A stronger markets regime

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

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

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

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

Comments:

No opinion

4. A stronger mergers regime

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

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

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

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

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

Comments:

No opinion

5. A stronger antitrust regime

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

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

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

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

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

Comments:

No opinion

6. The criminal cartel offence

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

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

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

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

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

Comments:

See attached comments

7. Concurrency and sector regulators

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

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

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

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

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

Comments:

No opinion

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

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

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

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

Comments:

No opinion

9. Scope, objectives and governance

This chapter sets out that the CMA should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA and proposes that the CMA will: have clear, and potentially

statutory, objectives to underpin prioritisation; be accountable to Parliament; and, have an appropriate governance structure for a single decision making body. We ask:

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

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

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

Comments: No opinion

10. Decision making

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

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

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

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

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

Comments: No opinion

11. Merger fees and cost recovery

Merger Fees

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

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

Recovering the cost of anti trust investigations

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

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

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

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

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

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

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

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

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

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

Recovery of CC costs in telecom price appeals

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

Recovery of CAT costs

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

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

Comments:

No opinion

12. Overseas information gateways

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

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

Comments:

No opinion

13. Questions on the impact assessment

Mergers

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

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

Anti-trust

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

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

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

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

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

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

Comments

: No opinion

The Department of Business Innovation and Skills consultation document *A Competition Regime for Growth: A Consultation on Options for Reform* (dated 16 March 2011) ("the Document") invites responses regarding its content. Please find below my response which focuses exclusively on the Criminal Cartel Offence (questions 11-13 in the document). This response is from draft chapter two of my PhD thesis, provisionally entitled, "Controlling Cartels: A Principled Approach to the Criminalization of Cartel Activity in Europe." I note that although I am a PhD student in law at Newcastle Law School, Newcastle University, and am engaged in research into the reform of competition law (and in particular the law surrounding hard-core cartel activity), the views contained in this response are mine alone. The views in this response **do not** express the views of Newcastle Law School, Newcastle University, or any other member of the staff or students of those institutions.

Although the Document seeks input as to the various options which the Government is considering for the offence, two logically prior questions also need to be addressed, and their responses considered by the government prior to such reform. These prior questions are:

1. Is there a need for the offence, either as defined in s 188 of the *Enterprise Act* or at all; and,
2. Is the present description of the offence as found in s 188 of the *Enterprise Act* adequate for purpose?

Need to reform the offence, and the Questions contained in the Document, suggest that the Government's view is an negative answer to question two. However, this presupposes an affirmative answer to question one.

At present, within some sectors of industry in the UK, there is a sentiment that there is no need for a cartel offence, and thus s 188 of the *Enterprise Act* should be scrapped and not replaced with any other legislation to control the activities proscribed in that legislation. Indeed, it has been mooted that in order to introduce and "sell" a more stringent merger-control regime to industry, this regime could be packaged with the elimination of individual criminal liability cartel offences. As there is a need for a cartel offence which imposes individual liability, such a package would be a mistake in my submission.

A. Definition of 'Hard-Core Cartel' Conduct and Its Harm

Hard-core cartel activity is best defined ostensively. In addition to the definition provided by the OCED in the Document (pp 62-3), there is the following definition provided by the International Competition Network:

> Further, in describing the typical types of hard core conduct, four categories of conduct are commonly identified across jurisdictions:
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> - **price fixing;**
> - **output restrictions;**
> - **market allocation; and**
> - **bid rigging.**
>
> In some jurisdictions, bid rigging and output restrictions are also sometimes regarded as subsets of price fixing and/or market allocation, as the impact is to affect pricing on bids or by reducing output or to assign or divide certain contracts or market share between competitors. Regardless of the specific categorization, the categories all have in common conduct whereby competitors fix an aspect of a free market.[1]

These definitions accord well with s 188 of the *Enterprise Act*, except that the Act includes the qualifying term "dishonestly."

Under standard micro-economic analysis, hard-core cartels and monopolies are subject to the same analysis, and are regarded as harmful for the following reasons:

1. Consumers pay more for their goods, i.e. the monopolist (and cartelist) appropriates some or all of the consumer surplus to itself;
2. Monopolists (and cartelists) create a deadweight loss to the economy;
3. In creating and protecting a monopoly (or a cartel) the monopolists or cartel participants engage in socially wasteful expenditures;[2]
4. The monopolist (and cartelist) are inefficient, stunting the development of new products and hindering the development of more efficient production processes; and,
5. The existence of monopolies (and cartels) exacerbates any existing X-inefficiency, thereby hindering efficient, productive and profitable growth for both a firm and the economy.

So called X-inefficiency was identified and described by the American economist Harvey Leibenstein as a form of managerial "slack."[3] It is the manifestation of a desire for a "quiet

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[1] International Competition Network, *Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties* (Luxembourg: Office for Official Publications of the European Communities, 2005) 10. Available at http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf

[2] Richard Posner, "The Social Cost of Monopolies and Regulation" (1975) 83 *Journal of Political Economy* 415.

[3] Harvey Leibenstein, "Allocative Efficiency vs. X-Inefficiency" (1966) 56 *American Economic Review* 392.

life," removed from competitive pressures. The difference in the interests of owners (shareholders) and management gives rise to this. On this point, one economist has recently noted:

> Shareholders care about profits, but managers care about their individual utility, determined by wage, career prospects, as well as the level of effort and time they have to put into the job. The manager might also care about profits (typically, the shareholders will write a contract where his remuneration increases with the firm's profits), but in general he will care about other things, too. As a result, when he takes decisions about technologies (or he has to take actions, which affect the firm's costs) he might not have the right incentives to adopt the most efficient ones (that is, those which maximize profits).[4]

In addition to these harms readily identified in the economic literature, there is another, less precisely definedharm. This is the harm done to the consumers' confidence in the market, which is reduced by the realization that goods and services which were thought to have been obtained under fair, competitive conditions, were not obtained under these conditions. Although these harms done by hard-core cartel activity are difficult to quantify; they nonetheless exist, and are said to cost the economy and the consumer billions of pounds per year. I will return to this point later.

B. The Need for an (Individual) Criminal Cartel Offence

1. Control of 'Hard-Core Cartel' Activity

Given the harms occasioned by hard core cartel activity, it is necessary to enact some means to prevent this activity. Such means can be directed to either or both of two foci: (1) the firm which e.g. "fixes" the prices and thereby benefits from that anti-competitive behaviour, and (2) the individual who acts on behalf of the firm. Activities can be deterred by establishing disincentives to their participation. The current UK anti-cartel regime directs its sanctions at both firms and individuals. It is precisely because the individually directed sanctions have appeared to be ineffective that the consultation document requests comments on a number of options for improving these individual sanctions.

(a) A Model Of Deterrence

Firm directed sanctions are essentially deterrent in nature. They seek to prevent certain conduct by the imposition of sanctions upon those caught engaging in the prohibited conduct. As firms are paradigms of rational, calculating, economic actors, insights from economics can assist us in predicting behaviour of such actors. In this world of rational economic agents (assuming the return from the activity remains constant) as a good or an activity becomes more expensive, fewer agents will buy that good or participate in that activity. One can thus discourage the purchase of a good or participating in an activity by raising the price of the good or activity.

In an influential article, Gary Becker[5] argues that crime is one such activity, and can thus be controlled by raising its price. If the price of criminal activity is sufficiently high, these activities will be eliminated. This is because, under this analysis, if the expected costs

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[4] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge: Cambridge University Press, 2004) 47.

[5] Gary S Becker, "Crime and Punishment: An Economic Approach" (1968) 76 *Journal of Political Economy* 169.

of the activity exceed its expected benefits, a rational economic actor will not engage in that activity. As applied to crime, the economically rational criminal will not offend if the expected costs of the crime exceed the expected gain, where the expected costs are the amount of the sanction (or penalty) multiplied by its probability of application.[6] The calculation is clearest when the gain from the offence is a pure monetary gain, and the sanction is expressed as a fine.[7] Cartel gains and penalties imposed on firms are of this nature.

For economic crimes committed by corporate actors, the assumptions underlying the calculation of a Beckerian fine and of economic rationality are not unrealistic. Unlike some crimes committed by individuals, say crimes of passion, this sort of corporate (criminal) activity is pursued for financial advantage. Becker's analysis is therefore appropriate in this case, and as such it has informed must of the recent discussion of economic crime.

Two general points need to be made regarding the Beckerian formula. First, assuming a risk neutral offender,[8] the same deterrent effect can be obtained by adjusting either (or both) components of the expected costs of the crime, i.e. the probability of the application of punishment or the amount of punishment. A 95% chance of paying a £1000 fine has the same expected cost as a 1% chance of paying a £95,000 fine; in both cases the expected cost is £950. The formula says nothing about an acceptable rate of either the probability of punishment or the appropriate level of sanction. Establishing these is a policy choice, which involves both economic and policy considerations.

The probability of imposing punishment can be adjusted upwards by increasing monitoring of citizens, with a commensurate increase in the fiscal costs of policing and/or a reduction in civil liberties.[9] Likewise, an extremely severe penalty can offset a low probability of imposition (perhaps arising from problems of detection). However, notwithstanding the deterrent effect of a large sentence (with low probabilities of imposition), the imposition of a severe sanction (even rarely) for matters which would otherwise be regarded as "trivial" raises normative concerns of proportionality between crime and punishment. These normative concerns gain an additional pragmatic dimension as administrators, judges and juries may choose to nullify laws which they view as imposing a disproportionate punishment.

Second, there is a need for a precise calculation of the Beckarian fine. If the expected cost is set too low, the result will be under-deterrence of unwanted activities. If it is set too high, there is a corresponding over-deterrence. Although it may seem counter intuitive to speak of over-deterring criminal acts, the Beckerian formula has application to regulation generally, and thus to the establishment of safety standards. While most criminal acts, by definition, have no social utility, those acts regulated by safety standards have some positive utility. Should over-deterrence result, socially use activity will be foregone. Accordingly, in considering non-criminal regulated acts, over-deterrence is a legitimate consideration. However, as hard core cartel activity has no social utility (and in this respect can be legitimately compared with murder) considerations of over-deterrence are not particularly relevant.

(b) Deterrence and Cartel Activity

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[6] Hence, if Fine> (1/[Prob(Detection)*Punishment]), a rational agent will not offend.

[7] Illegal parking provides a clear illustration of this approach. In determining whether to park illegally, all one need do is to come to an assessment of the probability of a traffic warden issuing a ticket, multiplying that by the cost of the ticket, and comparing the result with the cost of parking legally. One anecdote reports that the impetus behind Becker's work in this area was a decision whether or not to park legally when he was pressed for time.

[8] If individuals are risk adverse, a lower penalty is indicated. See A Mitchell Polinsky and Steven Shavell, "The Optimal Tradeoff between the Probability and Magnitude of Fines" (1979) 69 *American Economic Review* 880. However, as the focus of the present discussion is with corporate entities, the assumption of risk neutrality is appropriate.

[9] For instance, by making increased surveillance easier, increasing "stop and search" powers, relaxing exclusionary rules for improperly obtained evidence, etc.

When an authority imposes an "optimal" or "Beckerian" fine, that authority must have knowledge of, and apply, two variables, i e the probability of detection, and the gain to the "offender" from participation in the undesired activity.[10] Multiplying these two variables yields the lower bound of the optimal fine. However, as cartel activity is clandestine, any value obtained for either variable is necessarily imprecise.

In their study of the cartelization of Finnish industry between 1951 and 1990, Hyytinen, Steen and Toivanen succinctly state the problematic nature of these type of studies:

> Little is known of the prevalence of cartels and, consequently, the need for competition policy. A key reason for this state of affairs is that important statistics, such as the proportion of industries (markets) that have a cartel under an existing competition policy regime, or would have a cartel if there was no competition policy, are unknown. These statistics are unknown primarily because of a lack of tools to deal with a peculiar feature of cartel data: Most of the time, it is not known whether an industry has a cartel or not. The available data depend on 1) the prevalence of cartels, 2) the probability that cartels get exposed and 3) the probability that the cartels' (non)existence in the time periods prior to their exposure can be established.[11]

That study considered cartels during a period in time in which cartel activity was legal. In an environment where such activity is forbidden, these caveats take on greater significance.

(i) Probability of Cartel Detection

Recent studies of the probability of cartel detection indicate that a cartel has about a 13 to 17% chance of being discovered for each year that it is in operation. Coombe, Monnier and Legal's 2008 study estimates that in the EU a cartel has an annual probability of detection of between 12.9 and 13.3%.[12] This is consistent with Bryant and Eckhard's 1991 study [13] which concluded that in the US the probability that a cartel would be prosecuted in a given year would be between 13 and 17%. Although the two studies provide remarkably consistent numbers, they are nevertheless attempts to measure clandestine activity, and are thus constrained by that consideration.[14]

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[10] As there is a temporal aspect to the gain, the duration of cartel activity is thus an element of the gain.

[11] Ari Hyytinen, Frode Steen and Otto Toivanen, "Cartels Uncovered" Working Paper (OR 1105) Katholieke Universiteit Leuven, Department of Managerial Economics, Strategy and Innovation, Faculty of Business and Economics (11 March 2011), available at SSRN < http://ssrn.com/abstract=1793665 >. A similar view is voiced by Maarten Pieter Schinkel, "Effective Cartel Enforcement in Europe" Amsterdam Center for Law and Economics Working Paper No. 2006-14, available at SSRN <http: http://ssrn.com/paper=948641> at 10: "Since all the information we have about cartels is necessarily based on observations taken from specimens that were caught, the data suffers from a potentially serious sample bias. There may be a real danger that the majority of cartels that are uncovered are rather unsophisticated, whereas the smarter cartels succeed in hiding their tracks."

[12] Emmanuel Combe, Constance Monnier, and Renaud Legal, "Cartels: The Probability of Getting Caught in the European Union" Cahiers de Recherche PRISM-Sorbonne / CR-07-01-03 (March 2008).

[13] Peter G Bryant and E Woodrow Eckard, "Price Fixing: The Probability of Getting Caught" (1991) 73 *Review of Economics and Statistics* 531.

[14] Bryant and Eckard (ibid 531) admit: "The total population of active conspiracies can be partitioned into two subpopulations, one containing conspiracies which are eventually caught and another containing those which are not. Our sample is from the first subpopulation, and therefore our statistical inferences relate directly to that population only. No data exist regarding the second population. Nevertheless, one can extrapolate to the second some

(ii) Cartel Overcharges

The economic analysis of cartel overcharges is also imprecise; however, it does yield a consistent (but wide) range, namely that these overcharges are between 17 to 35%. In summarizing the empirical studies on cartel overcharges, Schinkel concludes:

> The majority of cartels prices within the 25 to 35% range of overcharges. The mean overcharge that the known modern international cartels for which overcharges were calculated managed to sustain is little over 28%, with a median slightly below that. Hence it is likely to be conservative to conclude that a representative cartel manages to make (annual) illegal profits of roughly 25% of total (annual) affected commerce.[15]

Analysing American data, Connor and Lande's 2005 study is consistent with Schinkel's analysis, and concludes:

> Our survey identified about 200 serious social-science studies of cartels which contained 674 observations of "average" overcharges. Our primary finding is that the median cartel overcharge for all types of cartels over all time periods has been 25%: 17-19% for domestic cartels and 30-33% for international cartels. Thus, in general, international cartels have been about 75% more effective in raising prices than domestic cartels. Because the United States has historically had by far the toughest system of anticartel sanctions, this could imply that these sanctions have been having significant effects. These cartel overcharges are skewed to the high side, pushing the mean overcharge for all types of cartels over all time periods to 49%. [16]

Combining those results summarized by Schinkel with the two above cited studies on the probability of cartel detection, one can conclude that a deterrent fine (for a particular year's activity) would need to range between (approximately) 145-270 per cent of the annual affected commerce.[17]

(iii) Cartel Duration

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information inferred regarding the first." It is, of course, the accuracy of this "extrapolation" which is central.

[15] Schinkel (n 11) 15. If fines are used to internalize the harm caused by such activity, these estimates of overcharges may well be too small to use to internalize all harm, particularly in uncompetitive downstream markets. See Leonardo J Bassow and Thomas W Ross "Measuring the True Harm From Price-Fixing to Both Direct and Indirect Purchasers" (2010) 57 *Journal of Industrial Economics* 895, 919 who conclude, "At a most basic level, our results point to the fact that simple overcharge estimates may be gross understatements of the true harm suffered by others as a result of cartel pricing. These are errors of the first order such that simple overcharges cannot in general even be thought of as 'rough approximations' of the true harm. Just understanding how far from the true harm the simple overcharge can be, as illustrated by the examples in our tables, could be helpful to enforcement agencies and courts (and settling parties) in determining appropriate fines and damage awards." Consequently, they argue that indirect purchasers should be able to recoup their losses.

[16] John M Connor and Robert H Lande, "How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines" (2005) 80 *Tulane Law Review* 513, 559, the authors' footnotes omitted.

[17] Assuming that the probability of detection ranges between 13-17% and overcharge of affected commerce is 25-35%, we obtain the lower bound of (100/17)*25=147% and (100/13)*35=269% as the upper bound.

The final element which the Beckarian formula must consider in assessing optimal fines for cartel activity is the duration of the cartel, as the damage is inflicted over a period of years, particularly with the most successful cartels. In a 2010 study analysing the duration of the110 cartel cases which resulted in sanctions by the European Commission between 1990 and 2008, De found:

> The longest lasting cartel in the dataset is the Belgium Architect Association which lived 36 years. The average mean duration of the cartels is 8.08 years where the median life is 6 and standard deviation is 6.32.[18]

This dataset comprised only the proven duration of the lives of the cartels, in 20 of the cases the suspected duration was 2.5 times greater than the duration proven.[19]

(iv) Implications for Cartel Deterrence

Based upon the above, assuming a mean cartel life of eight years and a constant rate of annual affected commerce, the deterrent fine (for the entire cartel activity) needs to be at least in the range of 1160-2160% of an average year's affected commerce, plus any sort of top up to account for interest and/or inflation. I also note that these figures are net of any harm which may result from the social loss of confidence in the market as an important social institution (if, indeed, that harm can be subject to any sort of accurate quantification).

2. Bankruptcy and the Consequences of "Optimally Deterrent Fines"

(a) Bankruptcy Considerations

For a firm which does not produce a diversified range of products, the consequences of an "optimal fine" would dire. As there would be no reason for such a firm to retain a reserve to cover such contingent liabilities,[20] the imposition of a fine of such a magnitude could well lead to the bankruptcy of an offending firm. Though one may shed no tears for those who actively participated in the cartel activity and lost their employment as a result of their firm's bankruptcy, such bankruptcies have wider consequences.

Some shareholders may have relished the super-competitive return brought on by the cartel profits; innocent shareholders may have lost a substantial investment. This loss would be compounded if such holdings represent part of pension and retirement funds, whose beneficiaries have little or no incentive to monitor the activities of each investment vehicle held by their pension plan (if indeed they were aware of the contents of their plan's portfolio). Likewise, with a forced exit from the market occasioned by insolvency, innocent employees lose their incomes, creditors similarly lose, there will be a loss of tax revenue, and—assuming the firm is a nontrivial employer—economic damage will be done to the community(-ies) in which it was located. But more significantly, the exit of a firm in an uncompetitive industry will lead to further concentration in the industry, thereby exacerbating the uncompetitive nature of the industry.[21]

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[18] Oindrila De, "Analysis of Cartel Duration: Evidence from EC Prosecuted Cartels" (2010) 17 *International Journal of the Economics of Business* 33, 44.

[19] ibid 45.

[20] Indeed to set aside such a charge would not only defeat the purpose of attempting to gain a super competitive rate of return which cartel activity provides; and in addition to requiring the cooperation of numerous individuals within the firm, such a charge may cause the "wrong" questions to be asked when the firm's financial statements are examined.

[21] On bankruptcy considerations in an anti-cartel regime, see Andreas Stephan, "The Bankruptcy Wildcard in Cartel Cases" [2006] *Journal of Business Law* 511.

There is a legal maximum to cartel fines. The EU caps its fines for infringements of Article 101 TFEU at ten per cent of "the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement."[22] A similar 10 per cent cap is found in UK law for infringements of the *Competition Act* 1998.[23]

Additionally, both the European Commission and American authorities recognize that bankruptcy is an unwelcome consequence of what would otherwise be an appropriate fine. The EU's Guidelines for setting fines specifically permit inability to pay to be taken into account to reduce fines for infringements of Articles 101 and 102 of the TFEU.[24] Fines have been reduced in a number of recent cases,[25] as it is apparently the Commission's policy not to put offending firms out of business.[26] Likewise, the U.S. Federal Sentencing Guidelines provide for similar treatment of organizations which are unable to pay.[27] Accordingly, antitrust fines are often reduced by American courts on the basis of inability to pay.[28]

The result is that this credible threat of bankruptcy (in a number of cases) sets an upper bound to the maximum fine that can be practically be imposed on a firm. Although there may be good *economic* reasons for bankrupting an offending firm (e.g. internalization of social costs to the greatest extent possible; that the firm was inefficient and that by exiting the market upon bankruptcy its resources will be put to more efficient use and/or a more efficient entity will enter the market to replace it), [29] *non-economic* considerations (such as employment) are also germane.[30]

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[22] Guidelines on setting fines (n 24), Article 32.

[23] Competition Act 1998 s 32 and Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) (as amended by the Competition Act 1998 (Determination of Turnover for Penalties)
(Amendment) Order 2004 (SI 2004/1259)).

[24] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003
(2006/C 210/02) [1996] OJ C210/2 (1 September 2006), Article 35.

[25] *See Bathroom Fittings* 23 June 2010, IP/10/790 (non-confidential version not yet available) in which three fines were reduced by 50% and two by 25% due to inability to pay, also *Electrical and Mechanical Carbon and Graphite Products* (C.36.490) [2002] OJ L100/1 (CEC) in which CEC had its fine reduced by 33% due to inability to pay (although this inability to pay was in part due to fines from other, contemporaneous, cartel activity).

[26] See the speech by Cecilio Madero Villarejo (Acting Deputy Director General, Directorate General for Competition, European Commission) at the Annual Conference on European Antitrust Law Academy of European Law (ERA) Brussels 3 March 2011, at 3: "These are serious infringements and fully deserved the over €3 billion [referring to the results of antitrust enforcement in 2010] in fines we levied. Of course, and as Mr. Almunia has repeatedly said, our aim is not to put companies out of business. This is why we have taken into account valid claims for inability to pay when calculating the fines. On 10 occasions, we reduced the fines to a level that the companies could afford to pay. But, as economic recovery picks-up, we foresee that such circumstances will be increasingly rare." Available at http://ec.europa.eu/competition/speeches/ text/sp2011_02_en.pdf .

[27] United States Sentencing Commission, *Guidelines Manual* (November 2010) §8C2.2, §8C3.3

[28] See Stephan, "Bankruptcy Wildcard" (n. 21) 529-30, who notes that in the US this reduction is often due to plea bargains.

[29] See Massimo Motta, "On Cartel Deterrence and Fines in the European Union" [2008] *European Competition Law Review* 209, who argues (at 217) that in the unlikely event that a firm will have to exit the market due to a cartel activity related fine (even capped at 10 per cent of the annual turnover), such an exit shows that such a firm was too inefficient to survive in an otherwise competitive market.

[30] We note that although competition is one economic goal of the TEU, that Treaty also has a social mandate which includes employment considerations. Also note that in the American context, the political fallout from a firm's bankruptcy resulting from a Sherman Act prosecution would be significant—one could reasonably expect politicians of all levels to lobby against the imposition of such crippling sanctions. Likewise, given the current economic climate in the

The ten per cent legal maximum, adjusted downward where bankruptcy may be a consideration, provides a limit to any fine, often precluding the imposition of an optimal fine. This limit thus results in a significant under deterrence of cartel behaviour, leading to a deterrence gap.

(b) The Existing Fine Regime as Under-Deterring

That the present fining policies significantly under deter is seen not only from the above theoretical discussion, but also in the prevalence of recidivism in both the EU[31] and internationally. Connor and Helmer's 2008 study[32] shows that between 1995 and 2005, 170 firms were repeat price fixers, of which 11 companies fixed prices between 10 and 26 times. The leading offenders were BASF, Total SA (including TotalFina, Elf and AutoFina), and Hoffman-LaRoche (26, 18 and 17 offences, respectively).

In a further 2010 study of international cartel recidivism, Connor notes:

> The mean number of cartels per recidivist is 4.0, but this number is highly negatively skewed. Most of the recidivists engaged in only two cartels and two is, of course, the minimum number. At the other extreme, 52 firms were members of seven or more cartels; 26 were in ten or more cartels; and six companies engaged in 20 or more cartels … . These top recidivists are primarily headquartered in the EU. The largest single number (eight of the 52) is French firms; indeed, three of the top six firms—each with at least 20 examples of recidivism—are French. The remaining European recidivists are mainly headquartered in Germany and other northern nations. The second largest block of leading recidivists is the seven companies from Japan and Korea. Only five U.S. companies are leading recidivists.[33]

In the American context of recidivism, it is worth noting that in the US, at the same time the Department of Justice was prosecuting Archer Daniels Midland for its involvement in price fixing of lysine, its executives were busy fixing the price of citric acid.

Recidivistic-like behaviour in the UK is not unknown. An examination of the OFT's cartel decisions does not show evidence of true recidivism, in the sense of one party entering into a new cartel after being fined for earlier activity. This data shows, however, that in the roofing industry, a number of firms repeatedly participated in bid-rigging and cover-biding in distinct geographic markets (north east England, west Midlands, west central Scotland, England and Scotland generally). It is likely that the distinct geographic markets that the OFT served as the reason why these matters were not consolidated into one case. At minimum, this is evidence that that industry is corrupt.

The British supermarket industry was involved in the price fixing of tobacco,[34] and three parties involved in that matter (Asda, Safeways—prior to its acquisition by Morrisons—and Sainsbury's) have subsequently admitted their involvement in the price fixing of dairy

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UK, bankrupting a firm (and inflicting the attendant economic harm on its stakeholders) would not be a politically appealing outcome to a competition investigation.

[31] On recidivism and the EU's fining policy, see, e.g. Damien Geradin and David Henry, "The EC Fining Policy for Violations of Competition Law: An Empirical of the Commission Decisional Practice and the Community Courts' Judgements" (2005) 1 *European Competition Law Journal* 401 at 447-8.

[32] John M Connor and C Gustav Helmers, "Statistics on Private International Cartels" The American Antitrust Institute AAI Working Paper No. 07-01 (10 January 2007) available at http://ssrn.com/abstract=1103610 .

[33] John M Connor, "Recidivism Revealed: Private International Cartels 1990- 2009" (2010) 6 *Competition Policy International* 101, 111.

[34] Case CE/2596-03: Tobacco, 15 April 2010

products. As this was done by way of an "early resolution,"[35] it may be argued that there was no finding or admission of guilt in the matter.[36] Additionally, as the time period for the two conspiracies overlapped, this is not recidivist behaviour in the true sense.

Likewise, one of undertakings involved in the replica football kits matter[37] (JJB Sports) was subsequently investigated for price fixing. Although the investigation against the firms has concluded (without bringing charges), the SFO's investigation against individuals is on-going.[38] Again, this may show that the individuals involved have not learned a lesson. This lack of true recidivism appearing in the UK data is potentially a result of a number of factors. These include the requirement that the major cartels be dealt with by the European Commission. Additionally, cartel investigations are time intensive, requiring four to six years. This and an approach which—due to the potential criminal nature of proceedings when individuals are involved—requires the authorities to be in possession of the most convincing evidence before a decision is made to go ahead may slow down the accumulation of data regarding the efficacy of an act which has been in force for just ten years.

The 2006 EU Fine Guidelines, though touted as being tougher and thus a greater deterrent,[39] appear not to have a significant effect on recidivist behaviour. In examining the 13 cartels (with 70 participants) fined under the 2006 Guidelines prior to July 2009 Connor finds that although the punishments under the new guidelines are five times what they would have been if calculated under the former (1998) guidelines,[40] recidivist behaviour nevertheless occurs. Indeed, Connor notes nine firms were identified by the Commission as repeat offenders; however, as he also notes, several firms clearly qualified as recidivists but were not treated as such for fining purposes.[41]

The effect of these fines is primarily disgorgement, as Connor notes:

> For the first time in antitrust history, I believe we are observing fines that regularly disgorge the monopoly profits accumulated by cartelists. Applying a formula to a sample of 70 defendants that had fines imposed under the new guidelines, I find that at least 24 and possibly as many as 34 of them displayed severity above 100 per cent. Three firms in Marine Hose ranged as high as 500 per cent to 650 per cent of affected sales—possible (but rare) examples of supra-deterrence.[42]

However, disgorgement alone is an ineffective deterrent. Disgorgement merely forces the return of the ill-gain, if the offender is caught.[43] It is trite to say that were the penalties under

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[35] OFT Press Release, "Lactalis McLelland agrees early resolution in dairy retail price initiatives investigation"
22/08, 15 February 2008 available at: http://www.oft.gov.uk/news-and-updates/press/2008/22-08

[36] In other words, the claim of unlikely truth) that "early resolution" was done to rapidly and cost-effectively end the matter.

[37] Price-fixing of Replica Football Kit (Case CP/0871/01) 1 August 2003.

[38] SFO Press Release, "Sports Direct plc and JJB Sports plc" 19 October 2010 available at http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/sports-direct-plc-and-jjb-sports-plc.aspx .

[39] Referring to the 2006 Guidelines, Alexander Italianer (Director General for Competition, European Commission) remarked, "We recognized that the level of our fines was clearly not deterrent beforehand, so we had to increase it in order to increase the deterrence." Roundtable Conference with Enforcement Officials, American Bar Association Section of Antitrust Law Spring Meeting, Washington D C (23 April 2010) quoted in John M. Connor "Has the European Commission Become More Severe in Punishing Cartels? Effects of the 2006 Guidelines" [2011] *European Competition Law Review* 27. (The quote is at 27.)

[40] Connor, ibid, 29-30 and 32.

[41] ibid 30, at which Connor remarks, "One wonders whether such a severe undercounting is wilful or simply the result of poor record-keeping by the Commission."

[42] ibid 31.

[43] Disgorgement alone will not deter. A (potential) thief will not be deterred from stealing an item if the sole penalty were the return of the item.

the 2006 regime effective deterrents, recidivism—and certainly recidivism of this degree—would not occur.

The fines, at least as meted out, while appearing substantial, do not have the desired effect of deterring collusive behaviour. They are simply too small. They appear to act merely as license fees, which may explain the amount of recidivistic behaviour observed. However, enhancing deterrence is not a simple matter of increasing the level of corporate fines, as shown by the previous discussion of maximum fines, concerns of bankruptcy and the anticompetitive effect that a firm exiting an already uncompetitive market. Further, an even larger have a fine would appear[44] excessive, and thus violate any notion of just punishment. In the EU where proportionality is a matter of community law, a substantial fine has the potential of being viewed as disproportionate and reduced on that ground.

3. Filling the "Deterrence Gap" and Individual Criminal Liability

Using Becker's formula to capture deterrence, one sees that increasing either (or both) of the penalty or the probability of detection enhances the effect of the proposed sanction. The penalty can be increased not only by increasing the fine levied upon the firm, but through other means as well. Furthermore, the probability of detection can be increased not merely through external means, i.e. investigative agencies detecting undesirable conduct; but also through internal means, i.e. establishing incentives for offending firms to confess and turn themselves (and others) in. Adverse publicity and other reputation diminishing measures are often regarded as a means of enhancing fines.[45] But while such negative publicity can serve as a sanction, its effect is uncertain. Additionally, where the collusion involves intermediate products (a frequent feature of major international cartels), or an entire (or almost the entire) industry,[46] it is not clear how such publicity can be an additional enhancement to other sanctions meted out.

Internal means of increasing the probability of detection can be augmented by destabilising the relationships of those involved in the cartel. These relationships involve not just the relationship among the various (corporate) members of a cartel, but also the agent-principal relationship of an employee (who may possibly be facilitating the cartel's activities) and the firm involved in the cartel. Amnesty programmes of the sort practiced in the US,[47] EU,[48] and UK[49] have the effect of breaking down the trust necessary to maintain the cooperation and coordination of firms' activities necessary to sustain collusive action. These programmes are reasonably effective in flushing out hard core cartel activity,[50] but could be supplemented with other means.

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[44] The key word here is "appearing." When a deterrent fine is analysed according to the Beckarian formula, this impression vanishes. Unfortunately, even if this formula is used, all that will be seen by the public and those involved in the political lobbying process will be the final amount. Indeed, if public opinion does not view price-fixing as a serious matter, a large amount will be seen as excessive.

[45] See e.g. Jonathan A Karpoff and John R Lott Jr, "The Reputational Penalty Firms Bear from Committing Criminal Fraud" (1993) 36 *Journal of Law and Economics* 757

[46] See e.g. Case COMP/39406 - Marine Hoses (participants accounted for almost 100% of the relevant market) and Case COMP/B/37.766 - Dutch Beer Market (participants accounted for over 90% of the relevant market)

[47] The US programme is well described by Donald C Klawiter, "US Corporate Leniency After the Blockbuster Cartels: Are We Entering a New Era?" in Claus-Dieter Ehlerman and Isabela Atanasiu (eds.) *European Competition Law Annual 2006: Enforcement of Prohibitions of Cartels* (Oxford: Hart, 2007) 389.

[48] Commission Notice on Immunity from fines and reduction of fines in cartel cases [1996] OJ C 298/17 (8 December 2006).

[49] Enterprise Act s 190(4).

[50] See for a discussion of the efficacy of such programmes, John M. Connor, "Cartel Amnesties Granted:

I suggest that individual criminal liability is the solution not only to increasing the probability of detection, but also to enhance the sanction variable in Becker's formula to provide an effective deterrent. Corporations do not sit around tables allocating markets or fixing prices, rather individuals do, on behalf of corporations. The imposition of individual criminal liability for such activities imparts an additional cost to those individuals participating in these activities.

Additionally, I further suggest that this criminal liability also includes incarceration, or at least the credible threat thereof. Pecuniary sanctions against an individual can be indemnified, either explicitly or through wage premiums to compensate for that risk.[51] Director disqualification[52] is perhaps a useful adjunct to a system of individual criminal liability. But on its own, it is an indeterminate sanction as its efficacy is dependent upon the particular circumstances of the director. To an individual nearing retirement (or able to afford retirement) such disqualification is less of a deterrent than to someone differently situated, and the potential for indemnification dilutes the deterrent effect of disqualification.

The personal nature of a prison sentence and that such a measure is not in practice[53] easily indemnified, entails that such a penalty is a qualitatively different sanction from any pecuniary sanction. It is precisely this qualitative difference which makes individual criminal liability an effective supplement to any system of corporate liability. As shown above, additional deterrence cannot be obtained by increasing fines on corporate entities above a certain threshold, due to insolvency concerns. Yet, even at or near this threshold level, fines alone insufficiently deter. Likewise, as indemnified personal sanctions merely add to level of the fine imposed on the firm, their deterrent effect is limited.

Focusing the sanction on those who actually engage in the collusive activity for the benefit of their employer, directs a sanction to the participants thereby focusing a part of the punishment on those who actively engaged in the illegal activity. As Stephen notes, in a regime in which the consequences of illegal activity are directed only at the firm, the firm bears the entire risk of its employees activities,[54] this is so even when the employees' action was contrary to the firm's express policies. Individual liability, in addition to any incremental deterrent effect it may have, also has the normative advantage of attributing responsibility to those who in fact were responsible for the misdeed.

In addition to the increased deterrent effect, thereby increasing the penalty variable of Becker's formula, individual criminal liability further destabilizes cartels, by exploiting the divergent interests in the principal-agent relationship of firm and employee. Where an individual is not subject to sanctions, there is every incentive for an individual to "go with the flow." There is no personal cost to doing so, and indeed there may be a cost to one's career and/or remuneration to breaking rank. On the other hand, if a cost to "going with the flow" is imposed, the firm's and employee's interests diverge. Faced with a dilemma of credible threat of incarceration versus being a corporate team player, it will be the rarest of employees who will not favour their own interests. This destabilizing effect thus enhances the

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Worldwide Whistleblowers" (Working Paper, 20 May 2009), available at < http://ssrn.com/abstract=1285469>

[51] On this problem, see Pamela H Bucy, "Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal" (1991) 24 *Indiana Law Review* 271.

[52] Enterprise Act 2002, s 204 amends the Company Directors Disqualification Act 1986 to provide for a maximum 15 year directors disqualification order for individual directors who have committed certain breaches of either the Competition Act 1988 or the TFEU Articles 101 and 102. See the Company Directors Disqualification Act 1986, s 9B and Richard Whish, *Competition Law* (Oxford: Oxford University Press; sixth edition, 2009) 422-3.

[53] In theory, a wage/risk premium could be paid to the corporate "vice president responsible for going to jail" (this fanciful title is not original to me). However, given the socio-economic group from which such an executive would likely be drawn, it is not clear how high this premium would be, or whether in fact such a premium would be accepted.

[54] Andreas Stephan, "See No Evil: Cartels and the Limits of Antitrust Compliance Programs," (2010) 31 *Company Lawyer* 231, 239.

probability of detection (and eventual successful prosecution—which is the goal of detection), as with the cooperation of individuals involved (albeit under an immunity arrangement) much of the evidence necessary to secure convictions can be more readily obtained.

Individual criminal liability has the practical advantage of being able to upwardly adjust the punishment and detection variables in a version of Becker's formula,[55] thereby enhancing the deterrent effect of anti-cartel measures which incorporates it. Additional individual liability serves as a "top up" to any liability imposed on the firm, thereby closing any deterrence gap which so-called sub-optimal fines have on organizations. Since, as noted above, an effective deterrent fine may well exceed 2000 per cent of the annual affected commerce, accordingly a firm which is ill diversified in its products may well be bankrupted by such a fine. As such a bankruptcy will likely impose costs upon innocent parties, political and social considerations tell against the imposition of such penalties, irrespective of any economic advantages or efficiencies which can be gained by the imposition of such fines. The gap necessitated by these non-economic considerations can be filled by individual liability.

Further, by exploiting the divergence of interests which pre-exist in the employee-firm relationship, individual criminal liability can be used to further destabilize cartels. A leniency programme in which the winner of the "race to the courthouse door" (or possibly more accurately, to the prosecutor's office's fax machine) receives complete immunity introduces distrust among those participating in a collusive organization. The distrust originates from the opposing interests among the participants when apprehension becomes more than a remote possibility. As similar distrust originates between an employee and the firm in similar circumstances, this addition of individual criminal liability adds a further dimension of instability to collusive arrangements. In addition to the corporate race for leniency, individuals will join in—racing not only against their own firms but also against other individuals representing their firms.

The above considerations show that individual criminal liability has little downside. It enhances deterrence. Accordingly, there is a need for the retention of the individual criminal cartel offence in any future reform of the UK's competition regime.

C. The Definition of the Prohibited Activity in s 188 of the *Enterprise Act*: Fit for Purpose?

The incorporation of "dishonesty" as a defining element of the cartel offence is at least one barrier to successful prosecutions under the *Enterprise Act*.[56] The Government has recognized this problem, and is rightfully considering the removal of this element. The Consultation Document provides four options for its replacement:

1. Prosecutorial guidelines;

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[55] The original Beckarian formula merely represents a cost-benefit analysis to the firm, weighing the expected costs from the activity against its expected gain. Once individual liability is incorporated into the system of deterrence, the formula becomes mathematically (but not intuitively) more complex. At minimum, the new formula would aggregate a number of individuals' own cost-benefit analyses into the formula, plus possibly—inter alia—additional variables to represent increase in the probability of detection due to increased instability resulting from the increased instability occasioned by individual liability. On this point, see also A Mitchell Polinsky & Steven Shavell, "Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?" (1993) 13 *International Review of Law and Economics* 239.

[56] Another barrier may be cultural. The cartel offence is criminal, and as such may require a prosecution team more versed in the culture of such prosecutions, notwithstanding that there is a significant regulatory and economic element to any such prosecution. Culturally, the criminal bar is different from other parts of the bar. It may well be the case that the lack of success in some prosecutions is in part due to this cultural difference.

2. A set of white listed agreements;

3. Replace with "secrecy"; or,

4. Redefine the offence so that agreements made openly are exempt.

The Consultation Paper notes that the Government is favouring option four. It is submitted, however, that even in spite of the Government's current preferences, neither of options three or four are appropriate. Option two is problematic; and of the four, option one is the most acceptable. I address the options in reverse order from their presentation in the Document.

1. Options Three and Four

Hard-core cartel activity is viewed as harmful precisely because of the effects which it has. These effects have been outlined earlier (in Part A of this response) and the harm done is the cost to consumers and the economy as a whole. These harms will persist even if the hard-core cartel activities are committed openly or not "secretly." The only difference will be that the consumer *may* be aware that the harm is being done. Options three and four mistakenly presume that the harm done by cartel activity consists in the clandestine nature of the conduct, and not the effect it may have. This presumption is contrary to the economic analysis of such behaviour, and is—in my submission—a mistake.

Additionally, were the offence defined to exempt open or non-secret agreements, there would presumably be a need to define the conditions for publicising such agreements, to draw them to the attention of those affected. Prima facie, how such a publicity (or disclosure) regime would work is not clear, nor is it likely that such a regime would draw the attention of *all* those affected to the agreements. Further, even if the consumer is a notified of the existence of agreement in a particular geographic market,[57] there may be nothing that the consumer can do to avoid the consequences of such activity. Suppose, for instance, the cement producers in a small region fix-price, allocate customers or rig bids, and do so openly. There is little that a consumer can do if they need that product. Indeed, were either option three or four adopted, and the situation described in the above hypothetical be thus legal, the new competition regime would likely exacerbate dissatisfaction with the market-place. In place of reducing the excesses of "Rip-off Britain," options three and four merely encourage such behaviour.

2. Option Two

Option two suggests the incorporation of a white listed set of exemptions into the offence. The difficulty with this is to determine the criteria of inclusion into such a "white list." Presumably the underlying criterion would be some sort of improvement in technical, economic or (possibly) social progress in which consumers obtain a fair share of the benefits. As such this presumptive "white list" would be based upon the criteria mentioned in TFEU Article 101 (3), and the Commission Regulations, Notices and Guidelines developed thereunder.

Three difficulties arise from such a proposal. First, economic analysis of the activities commonly regarded as hard-core cartel activities indicate that little, if any, positive economic value is obtained from the activities. If no such value is obtained, then a "white list" is either not needed (as it should not exist) or a result of successful lobbying from certain

[57] Clearly this market would have to be sufficiently small so as not to run afoul of the European prohibitions (in TFEU Article 101).

sectors to permit their activities which are beneficial only to that sector (and contrary to the consumer/public interest).

Second, if this economic data is incorrect, and there are social benefits which can be obtained from hard core cartel activity; then the white list must attempt to capture as completely as possible, those beneficial agreements. This is not without administrative and enforcement costs.[58] It is thus an issue of whether or not the social gains obtained by the activities permitted by the "white list" outweigh the costs of the development, administration and enforcement of such a list of exemptions.

Third, in order to completely capture all beneficial agreements, the list would need to include some generally inclusive clause, incorporating language like "...or similar agreements where the consumer obtains a fair share of the gain/surplus/etc." In determining whether or not a particular agreement (which does not otherwise appear on the white list) fits into such a generally inclusive clause, two decisions must be made, or otherwise put two sets of facts must be found. The surplus must be determined, along with the relative proportions obtained by the parties to the agreement and the consumers; and, these proportions must be compared, to determine if that amount obtained by the consumers is "fair."

Were the issue to come to a criminal trial, the jury—as finder of fact—would thus be called upon to evaluate complex economic evidence. I note the discussion in the consultation document (pp 62-5) which expresses a desire to remove the consideration of such evidence from the jury. Accordingly, should option two be adopted and the white list drafted with an eye to maximising the gain for the consumer, this will force this sort of complex evidence into the hands of juries when litigation ensues.

3. Option One

The advantage to option one is that it clearly specifies that certain agreements are never permissible, and are always illegal. In a very real way it mirrors the per se illegality approach to such agreements taken by the Americans under their *Sherman* and *Clayton Acts*.[59] The list of such prohibited agreements provides legal certainty, which has important considerations when viewed from the perspective of "the rule of law." Parties who are contemplating behaving in a certain way can compare their proposed behaviour with the statute book. This allows them to determine with a great deal of certainty whether or not their proposed actions are permitted. They need not hope that their interpretation of the economic data accords with the authorities' interpretation of the same data in order to avoid prosecution.[60]

Although the Document (p 67) notes that the removal of the dishonesty element from the offence and the introduction of prosecutorial guidelines may make prosecutions of the offense subject to challenge under Article 7 of the European Charter of Human Rights, this does not appear to be a telling criticism of the option. There is nothing unique to prosecutorial guidelines for criminal cartel offences which make those prosecutions more susceptible to ECHR claims. This concern is not an objection in criminalising other sorts of activity and promulgating guidelines for their prosecution, so why should it be a concern for Parliament with the cartel offence?

The more difficult problem with removing the element of dishonesty from the offence and replacing it with guidelines, is integrating it into European law as a whole. That is, designing the offence so that an investigation and (quasi-administrative) prosecution by the European Commission does not preclude a similar (criminal) prosecution by the UK authorities. This problem is not insolvable, as other jurisdictions have developed their

[58] The latter occurs in determining (and perhaps litigating) whether an agreement falls within a "white listed" exemption.
[59] *Sherman Act*, 15 USCA § 1-7; *Clayton Act* 15 USCA § 12-22, 19 USCA § 52-53.
[60] Or, alternatively, forego socially beneficial activity in the fear that such activity will be prohibited.

criminal regimes in a way which dovetails well with EU law. I note for instance, the success of the German (criminal) prohibition against bid-rigging.[61] Accordingly, should the government favour this first option—which I submit it should—an examination of other European jurisdictions' cartel control regimes should serve as the first guideposts for drafting a reformed UK competition regime.

Option one provides for legal certainty. It identifies those sorts of agreements which do harm to the economy, and prohibits them. It does not make the mistake of assuming the harm from hard-core cartel activities lies in their clandestine nature. And in the prosecution of such an offence, it would not require a jury to be confronted with complex and often contradictory economic evidence. Of the options considered, it is by far the most preferable.

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[61] See Christof Vollmer, "Experience with Criminal Law Sanctions for Competition Law Infringements in Germany," in Katalin J. Ceres, Maarten Pieter Schinkel and Floris O.W. Vogelaar (eds.) *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Cheltenham: Edward Elgar, 2006) 257, and Florian Wagner-von Papp, "What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany" in Caron Beaton-Wells and Ariel Ezrachi (eds.) Criminalising Cartels: Critical Studies of an International Regulatory Movement (Oxford: Hart, 2011) 157.

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Water UK

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

Response form

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

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

Water UK represents all statutory water and wastewater service supply organisations in England, Scotland, Wales and Northern Ireland. This response to the Department's consultation has been provided in draft form to all of Water UK's member companies and all have had the opportunity to comment on its content. The final version reflects comments made by members.

Responses have been provided to Sections 7 and 8 and to question 33 only.

Consultation Questions

1. Why reform the competition regime?

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

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

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

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

Comments:

2. The UK Competition regime and the European context

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

Comments:

3. A stronger markets regime

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

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

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

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

Comments:

4. A stronger mergers regime

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

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

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

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

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

Comments:

5. A stronger antitrust regime

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

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

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

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

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

Comments:

6. The criminal cartel offence

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

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

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

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

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

Comments:

7. Concurrency and sector regulators

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

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

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

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

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

Comments:

Q14: Water UK supports the concurrent application of these powers by Ofwat and the CMA while noting that this approach may not be as appropriate in sectors in which there is greater competition than in the water industry.

The case for concurrency in the sector rests on the circumstances of the water industry. For many purposes, water and sewerage customers have no choice of supplier and where competition does exist in the sector, this results from specific legislative intervention. Examples of areas where competition has been permitted include inset appointments and the laying of water mains. Ofwat as sectoral regulator supervises closely the activities of the water and sewerage companies across all their areas of activity and the transfer of competition powers to a future CMA would jeopardise the adoption of coherent policies for the industry. The risk would be that the application of competition powers without a detailed understanding of the circumstances of the water and sewerage industry could conflict with the regulatory objectives being pursued by Ofwat.

The long term nature of investments in the industry also militates in favour of concurrency as a short term application of competition law could prejudice long term objectives sought by Ofwat and the industry. While such objectives can be taken into account in Ofwat's regulatory activities it is less obvious how they could be recognised by a separate competition enforcement authority such as the CMA.

Q15 If concurrency is to be maintained, it is considered that Ofwat should be able to take advantage of the expertise of the CMA. Ofwat to date has had little experience of applying competition law so that it may not have the necessary cadre of staff who could with confidence apply competition law on their own. While there is a range of views within Water UK on the extent of responsibility to be undertaken by the CMA, there is nonetheless support for the CMA to provide staff and other resources to Ofwat to allow the latter to act in this most effective manner.

On the wider question of potentially obliging the sectoral regulators to use their competition powers in preference to regulatory powers, again, in the specific circumstances of the water sector this is considered to be undesirable. The regulated nature of competition within the water sector results from the legislative framework put in place for the sector and it is applied by Ofwat after carrying out a careful analysis of the individual circumstances. That framework is not easily reconcilable with one in which competition law principles are applied independently. This could lead to the "cherry picking" of markets where true competition was to be fostered, thus destroying a balanced regulatory approach to all of the markets in which the water and sewerage companies are active.

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

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

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

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

Comments:

Q17 At the moment, the CC is the "appeal body" for Ofwat's price control determinations, and licence modification proposals. At present, it carries out a full re-determination (i.e. it can consider all of the issues considered by Ofwat, and is not limited to areas of dispute between the parties).

By contrast, if Ofwat makes a determination that an undertaker has breached its licence or a statutory duty (and Ofwat imposes a financial penalty or makes an enforcement order), then **only** judicial review is available, and the venue is the (arguably inexpert) High Court. And if Ofwat makes a decision that an undertaker has breached the Competition Act 1998, appeal is to the (arguably expert) CAT and it is "on the merits" (i.e. CAT can consider whether the decision was correct, not merely whether it was take properly/lawfully).

The inconsistency between the various appeal routes and the differences in the ways that these issues are dealt with across regulated sectors suggest that a review of appeal processes would be beneficial, particularly if the CC is to become part of a new CMA body.

At present, price appeals are complete re-determinations of the original Ofwat findings. While the need for a "package" approach to pricing is understood, Water UK would question whether it would be possible for the appeal to be limited in cases where the subject matter is an element of cost resulting from the requirements of an external agency, such as investments required by the DWI to improve drinking water quality.

Q18 Water UK would support the development of model regulatory processes for future references/appeals.

9. Scope, objectives and governance

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

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

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

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

Comments:

10. Decision making

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

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

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

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

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

Comments:

11. Merger fees and cost recovery

Merger Fees

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

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

Recovering the cost of anti trust investigations

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

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

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

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

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

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

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

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

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

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

Recovery of CC costs in telecom price appeals

19. ***Q.32*** *Do you agree that telecoms appeal should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and*

Recovery of CAT costs

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

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

Comments: Water UK would not support the proposal to transfer the operating costs of the CAT to litigants regardless of whether additional roles are conferred on the CAT as a result of this current review.

The costs of such appeals are often significant but the only parties likely to be in a position to meet such cost awards are the water companies (or Ofwat, itself funded by the water companies) rather than their opponents, who are frequently smaller businesses than the water companies.

This risks increasing the prospect of unmeritorious claims being made, for example by smaller potential market entrants who would not have to face the prospect of paying for the CAT's own operating costs, but in the full knowledge that the water companies would, thus placing them/Ofwat at a significant disadvantage when defending claims.

It also seems unjust for the amount of recovery to be dependent in part on the operating costs of the tribunal in circumstances where the parties do not control these. This could potentially result in contributions in similar types of cases varying between one year and another depending on the court's running costs for the year in question.

12. Overseas information gateways

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

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

Comments:

13. Questions on the impact assessment

Mergers

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

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

Anti-trust

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

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

The Impact Assessment presents the likely costs and benefits and the associated risks of the policy options. In order to do this it is necessary to understand the costs and benefits of the current system and to make

assumptions. Further, the Impact Assessment seeks to show the extent to which the policy options meet the objectives.

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

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

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

Comments:

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REFORMING THE UK CARTEL OFFENCE: A RESPONSE TO *A COMPETITION REGIME FOR GROWTH: A CONSULTATION ON OPTIONS FOR REFORM*

Dr Peter Whelan*

A. Introduction

In March 2011, the Department for Business, Innovation and Skills published its consultation document *A Competition Regime for Growth: A Consultation on Options for Reform*.[1] The overall objective of the consultation in question is to ensure that the competition regime in the UK becomes even more effective at supporting economic growth.[2] Chapter 6 of the consultation document focuses on the UK Cartel Offence.[3] It acknowledges that the deterrent effect of the Cartel Offence has been weaker than what was intended:[4] there has only been one case which has led to convictions.[5] One of the identified reasons for this scarcity of convictions is the current definition of the offence, particularly its use of 'dishonesty'.[6] Consequently, the four different

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[1] See generally http://www.bis.gov.uk/Consultations/competition-regime-for-growth.

[2] Department for Business, Innovation and Skills, *A Competition Regime for Growth: A Consultation on Options for Reform*, March 2011 (hereafter 'BIS' or 'the consultation document'), [1.3].

[3] The UK Cartel Offence is contained in Section 188 of the Enterprise Act 2002. In brief, an individual commits an offence if he dishonestly makes or implements (or causes to be made or implemented) one of a number of specified cartel arrangements between at least two undertakings. The cartel arrangements is question include those relating price-fixing, market sharing, output restrictions and bid-rigging.

[4] BIS, *op. cit.*, [6.5].

[5] The 'Marine Hoses' case: *R v. Whittle, Allison and Brammar* [2008] EWCA Crim 2560.

[6] BIS, *op. cit.*, [6.6].

options for reform which are suggested in the consultation document all focus on potential changes to the current definition in the criminal offence.[7]

Having completed doctoral research in this area, the current author believes that the employment of personal criminal cartel sanctions can be justified in principle[8] and that their use in the UK should be encouraged[9] (subject to their respecting of legalities, such as the protection of the human rights of the accused[10]). The author also agrees that the deterrent effect of the UK Cartel Offence, as drafted, is not as strong as it could be and that change is required to the definition of the offence in order to rectify this situation.[11] The most sensible of the proposed options, to this author at least, is Option 4: 'removing the "dishonesty" element from the offence and defining the offence so that it does not include agreements made openly'.[12] This response to the consultation document will therefore present the case for the adoption of Option 4, highlighting in the process both the merits and the limitations of that particular proposal.

There are four substantive sections to this response: Sections B to E. Section B highlights the problems with the employment of the definitional element of 'dishonesty' in the UK Cartel Offence. Section C, by linking cartel activity to the concept of 'deception', explains the relevance of 'carving out' agreements made openly from a future definition of the Cartel Offence. Section D builds upon the findings in Sections B and C and sets out the merits of Option 4. Section E, by contrast, acknowledges and examines an important inherent limitation of Option 4. Finally, some concluding observations are offered.

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[7] See *ibid.*, [6.19]-[6.53].

[8] See generally P Whelan, 'The Criminalisation of European Antitrust Enforcement: Theoretical and Legal Challenges', PhD Thesis, University of Cambridge, December 2010, particularly Chapters 3 and 4.

[9] See, e.g.: P Whelan, 'Contemplating the Future: Personal Criminal Sanctions for Infringements of EC Competition Law' (2008) 19(2) King's Law Journal 364; and P Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) 4(1) Competition Law Review 7.

[10] See, e.g.: P Whelan, 'Criminal Cartel Enforcement in the European Union: Avoiding a Human Rights Trade-Off', in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement*, Hart Publishing, Oxford, 2011; and P Whelan, 'Protecting Human Rights in the Context of European Antitrust Criminalisation', in I Lianos and I Kokorris (eds), *The Reform of EC Competition Law: Towards an Optimal Enforcement System*, Kluwer International, Amsterdam, 2010.

[11] See P Whelan, 'Resisting the Long Arm of Criminal Antitrust Laws: *Norris v. US*' (2009) 72(2) Modern Law Review 272, 283.

[12] BIS, *op. cit.*, 61.

B. Acknowledging Some Common Ground: Removing the Definitional Element of 'Dishonesty'

It is clear that Option 4 involves two distinct requirements: (a) the removal of the definitional element of 'dishonesty';[13] and (b) the 'carve out' of cartel agreements made openly. Consequently, one cannot consider in full the merits of Option 4 without at least considering its impact on the existence of the definitional element of 'dishonesty'. It is submitted that there is little controversy in removing this particular definitional element. Indeed, its inclusion in the Cartel Offence has led to continual criticism by antitrust academics and practitioners, and all four options in the consultation document propose its removal. There is therefore little need for this author to attempt to add to the relevant literature. For the sake of completeness, however, this section will explain very briefly why removal of 'dishonesty' from the Cartel Offence is warranted.

MacCulloch argues that dishonesty was employed as an explicit element of the Cartel Offence for two main reasons: it helped to ensure compatibility with Article 101(3) TFEU, as well as to delimit the scope of the offence.[14] To these, another reason can be added: the desire to underline the wrongfulness of the cartelist's behaviour.[15] However, as noted in the consultation document,[16] the use of 'dishonesty' as a definitional element in a criminal antitrust offence is not

[13] The test for 'dishonesty' under UK criminal law is provided by the case of *R v. Ghosh* [1982] 2 All ER 689, 696. Accordingly, both objective and subjective analyses are required: the conduct must be (a) dishonest according to the standards of ordinary people and (b) known by the defendant to be dishonest according to those standards.

[14] A MacCulloch, 'Honesty, Morality and the Cartel Offence' (2007) 28(6) European Competition Law Review 355, 356.

[15] See, e.g., A Hammond and R Penrose, *The Proposed Criminalisation of Cartels in the UK — A Report prepared for the Office of Fair Trading by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM*, OFT 365, November 2001, [2.5]. On this issue, see C Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31(3) Melbourne University Law Review 675, 696 *et seq*. See also P Costello, 'Criminal Penalties for Serious Cartel Behaviour', Press Release from the Treasurer of Australia, 2 February 2005: 'dishonesty appropriately captures the genuinely criminal nature of serious cartel conduct'. *Cf.* B Fisse, 'Defining the Australian Cartel Offences: Disaster Recovery', Conference Paper, Competition Law Conference, Sydney, 24 May 2008, www.brentfisse.com/images/Fisse_Defining_the_Australian_Cartel_Offences_240608.pdf, 8.

[16] BIS, *op. cit.*, [6.11].

without its own significant problems,[17] including problems of legal certainty.[18] Importantly, the use of the definitional construct of 'dishonesty' engenders a problem of the 'chicken and egg' variety: one wishes to have criminal prosecutions in order to harden attitudes to cartel activity; but by arguing that cartel activity is dishonest (according to the standards of ordinary people), one in effect presupposes the existence of such hardened attitudes. Furthermore, it may be possible for defendants to advance dubious defences in the context of the analysis of dishonesty;[19] the accused cartelists may allege, for example, that they were acting to protect employment or that they were acting in the best interests of some other category of person, such as shareholders.[20] These problems were deemed to be so acute that the Australian authorities eventually decided to abandon the use of dishonesty in their (draft) criminal antitrust legislation.[21] It is submitted that the UK authorities should do likewise.

Indeed, there may be an even stronger case to do so in the UK than in Australia, due to the *de facto* impact of the ruling of the then House of Lords in *Norris*,[22] a case concerning the application of the common law offence of conspiracy to defraud (rather than the statutory Cartel Offence) to price-fixing. In essence, the Law Lords held that, even with the inevitable secrecy that it entails, price-fixing cannot amount to a dishonest practice in law prior to 20 June 2003 (the day the Cartel Offence entered into force) in the absence of 'aggravating features' such as positive deception, misrepresentation or violence.[23] While there is no *de jure* effect of the *Norris*

[17] See generally: B Fisse, 'The Cartel Offence: Dishonesty?' (2007) 35 Australian Business Law Review 235; A Halpin, 'The Test for Dishonesty' [1996] Criminal Law Review 283; C Harding and J Joshua, 'Breaking Up the Hard Core: The Prospects for the Proposed Cartel Offence' [2002] Criminal Law Review 933; J Joshua, 'D.O.A: Can the UK Cartel Offence be Resuscitated?', in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement*, Hart Publishing, Oxford, 2011; MacCulloch, *op. cit.*; and G Scanlan, 'Dishonesty in Corporate Offences: A Need for Reform?' (2002) 23 Company Lawyer 114.

[18] See Whelan (2010), *loc. cit.*, n.10, 169-170.

[19] See: Harding and Joshua, *op. cit.*, 938; and MacCulloch, *op. cit.*, 362.

[20] S Parkinson, 'The Cartel Offence under the Enterprise Act 2002' (2004) 25(6) Company Lawyer 187, 189.

[21] On this, see *Standing Committee on Economics Report on the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, Australian Senate, Canberra, February 2009, [3.14]-[3.18].

[22] *Norris v. Government of the United States of America and others* [2008] UKHL 16.

[23] *Ibid.*, [62].

judgment concerning the operation or otherwise of the Cartel Offence, it is nonetheless problematic for its successful operation; indeed, as explained by the author elsewhere:

> what happened on 20 June 2003? Did the entry into force of the Cartel Offence automatically establish that price-fixing is dishonest? And if so, how exactly did it do that? If not, then the judgment of the Lords may be persuasive enough authority to convince the Office of Fair Trading or the Serious Fraud Office not to go forward with a prosecution where 'aggravating features' do not exist. What's more, assuming that a prosecution for pure price-fixing were initiated under the Enterprise Act 2002, should the *Norris* judgment be presented to and explained to the jury? If so, it would be difficult to foresee a situation where the jury find price-fixing *per se* to be dishonest when five Law Lords have decided that prior to 20 June 2003 it could not have been so.[24]

This particular practical issue increases the attractiveness of removing the requirement to prove 'dishonesty' in order to secure criminal convictions for cartel activity. Indeed, as should be obvious from the above discussion, there is in fact a significant case in favour of the removal of the definitional element of 'dishonesty' from the UK Cartel Offence. The first requirement of Option 4, then, is not one which will engender substantial opposition.

C. Carving Out Agreements Made Openly: Linking the Cartel Offence to the Concept of 'Deception'

In order to support Option 4, it is insufficient to simply advocate the removal of the definitional element of 'dishonesty': the second requirement of Option 4 (namely, the 'carve out' of agreements made openly from the scope of the Cartel Offence) must also be rationalised. It is submitted that the second requirement can indeed be rationalised. There are three steps in this process of rationalisation.

First, the removal of the definitional element of 'dishonesty' introduces the possibility that the criminal offence in question does not necessarily cover immoral behaviour. If so, some (most obviously, those who espouse a retribution-based justification for criminal law) may argue that criminal punishment of such activity should not be permitted: applying the criminal law to

[24] Whelan, *loc. cit.*, n.11, 281-282.

morally-neutral/-ambiguous conduct is not only unjust but is also counterproductive, in that by unfairly labelling offenders as criminals, the moral authority of the law is undermined, resulting as a consequence in a weakening of the deterrent value of criminal sanctions.[25] As Sayre has noted, albeit a number of years ago now:

> [w]hen the law begins to permit convictions for serious offences of men who are morally innocent and free from fault, who may even be respected and useful members of the community, its restraining power becomes undermined. Once it becomes respectable to be convicted, the vitality of the criminal law has been sapped.[26]

Some even contend that applying the criminal sanction to morally-neutral conduct in fact 'decriminalises' the criminal law, and taken to its extreme either results in nullification or, more subtly, a changing of people's attitudes towards the meaning of criminality.[27] For them, the criminal law should be concerned solely with conduct which unequivocally attracts the moral opprobrium of society; it should in other words concentrate on 'traditional' crimes and not morally-neutral conduct.[28] They argue that, in the absence of such a restraint, the criminal law may begin to lose its legitimacy.[29]

Second, in order to overcome claims of 'overcriminalisation' and to ensure that legitimacy is not lost with the removal of the 'dishonesty' requirement, one can link cartel activity to the commission of some form of immoral behaviour. A prime candidate for such a form of immoral behaviour is the concept of 'deception'. 'Deception' occurs where a message is communicated with an intent to cause a person to believe something that is untrue.[30] It is not

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[25] S Green, 'Why It's a Crime to Tear a Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offences' (1997) 46 Emory Law Journal 1535, 1536.

[26] F Sayre, 'Public Welfare Offenses' (1933) 33 Columbia Law Review 55, 79-80.

[27] H Packer, *The Limits of the Criminal Sanction*, Oxford University Press, London, 1968, 359.

[28] G Richardson, A Ogus and P Burrows, *Policing Pollution: A Study of Regulation and Enforcement*, Clarendon Press, Oxford, 1982, 14-15.

[29] See: F Allen, 'The Morality of Means: Three Problems in Criminal Sanctions' (1981) 42 University of Pittsburgh Law Review 737, 738; S Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1963) 30 University of Chicago Law Review 423, 425-426; Packer, *op. cit.*, 359; and P Robinson, 'The Criminal-Civil Distinction and the Utility of Desert' (1996) 76 Boston University Law Review 202.

[30] See J Adler, 'Lying, Deceiving or Falsely Implicating' (1997) 94 Journal of Philosophy 435, 437.

very difficult to envisage how the definition of cartel activity is capable of fitting comfortably within this concept. Where the cartelist lies to its customer about the non-existence of a cartel, deception will be present: the cartelist aims to lead the customer to believe something that is not true. Admittedly, cases where cartelists provide statements such as 'no need to worry, our prices have not been determined by collusion' are likely to be rare indeed.[31] However, this is not necessarily a problem. Deception may also be present when no *express* statement is made on the absence or otherwise of cartel activity, as cartelists may be aware that customers may assume that, as a result of the cartelist's placing of his good on the market, the cartelist is lawfully engaged in normal competition with her competitors.[32] The argument here is that by placing his (cartelised) good on the market and saying nothing about his cartel activity (i.e., by not making the agreement openly), the cartelist aims in effect to imply (i.e., to communicate) that he has not actually engaged in such cartel activity. Lever and Pike have argued a similar point in relation to the UK common law offence of conspiracy to defraud (although, admittedly, they use the word 'dishonest' rather than 'deceptive'):

> in many situations today third parties who deal with undertakings that are in fact parties to cartel agreements will proceed on the *assumption* that they are dealing with undertakings that are lawfully engaged in normal competition with each other; and the cartelists will know that that is so and will, in effect, act in a dishonest … manner, if the existence of the cartel is kept secret.[33]

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[31] A possible exception to this may be where official statements concerning the absence of collusion when preparing tenders are provided in the context of securing government procurement contracts; see J Robinson, 'Safe for Now', Bird & Bird, 12 March 2008, www.twobirds.com/english/publications/articles/Safe_for_Now.cfm. Interestingly, in Germany, '[b]ids responding to public calls for tender, or to calls for tender addressed to at least two addresses, contain either an express or at least an implied representation that the bids are not rigged': F Wagner-von Papp, 'Criminal Antitrust Enforcement in Germany: "The Whole Point is Lost if You Keep It a Secret! Why Didn't You Tell the World, Eh?"', April 2010, http://ssrn.com/abstract=1584887, 5-6 (footnotes omitted).

[32] On the validity of this assumption, see Section E, *infra*.

[33] J Lever and J Pike, 'Cartel Agreements, Criminal Conspiracy and the Statutory "Cartel Offence": Parts I & II' (2005) 26(2) European Competition Law Review 90, 95. *Cf.* M Lester, 'Prosecuting Cartels for Conspiracy to Defraud' [2008] Competition Law Journal 135, 141-144; and P Massey, 'Criminalization and Leniency: Will the Combination Favourably Affect Cartel Stabilisation?', in K Cseres, M Schinkel and F Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, Edward Elgar Publishing, Cheltenham, 2006, 179.

This line of argument was accepted by the UK High Court when it ruled that cartel activity *per se*, that is without aggravating features such as express lies, was capable of amounting to a dishonest practice in law.[34] According to one commentator at least, this approach can be applied to the concept of 'deception' as much as to 'dishonesty':

> customers are *deceived* when purchasing goods or services, unaware that the price and supply of those goods and services were determined by collusion, rather than competition.[35]

In the absence of express lies on the part of the cartelist, then, it is the inherently secret nature of cartels which compounds the (false) assumption on behalf of customers concerning the existence of competition between cartelists and which facilitates the linking of cartel activity to the concept of 'deception'.

Third, and importantly, in order to link (criminal) cartel activity to the concept of 'deception', it is necessary to exclude from the scope of the criminal offence those agreements which are made openly: the existence or otherwise of customer awareness about the creation of a cartel agreement is a central inquiry when determining whether the formation of that cartel agreement constitutes deception on the part of the cartelist. Indeed, when customers are made aware of the existence of a cartel by the cartelist at, or prior to, the point of sale, one cannot (without more) claim that the cartelist was in fact deceptive concerning that particular cartel. This fact, then, rationalises the second requirement of Option 4: due to the desire to link cartel activity to a form of immoral behaviour (namely, deception) openness concerning the formative of the cartel becomes a crucial point of consideration.

D. Identifying the Merits of Option 4

From the above, it should be obvious that there are a number of merits to the adoption of Option 4. For a start, the problems associated with the definitional element of 'dishonesty' can be alleviated, if not avoided all together. It is less likely, for example, that dubious explanations for cartel activity will be advanced by defendants in the hope that they will convince a jury not to

[34] See *Norris v. Government of the United States of America and others* [2007] EWHC 71 (Admin), [66]-[67].

[35] P Costello, 'Criminal Penalties for Serious Cartel Behaviour', Press Release from the Treasurer of Australia, 2 February 2005, 1 (emphasis added).

find them 'dishonest' in entering into a cartel agreement. Furthermore, as juries will not have to consider directly whether cartel activity is indeed 'dishonest' according to the standards of ordinary people, they are less likely to consider for themselves the moral quality of cartel activity. The potential for subjective assessments of morality to cloud the deliberations of juries in cartel cases will therefore be reduced: a jury finding on any specific manifestation of moral wrongfulness is not actually required by a criminal cartel offence which operationalises Option 4. Thus, jury nullification, while not completely circumvented, is in fact less likely to occur. Moreover, the (problematic) judgment of the then House of Lords in *Norris* is no longer of direct relevance. Added to these merits is the fact that allegations of 'overcriminalisation' can be avoided by those who wish to justify the existence of criminal cartel sanctions: by employing Option 4, one links cartel activity to the concept of 'deception' (a concept for which a moral norm *already* exists), thereby ensuring that one does not create a cartel offence which is morally neutral. With such a link established in the cartel offence itself, the above-identified problems associated with 'overcriminalisation' become of less relevance to legislators and other stakeholders.

A number of, perhaps, less obvious merits can also be identified with the adoption of Option 4. First, while Option 4 links cartel activity to a moral norm (i.e., the moral norm against deception), there is no need to establish any personal gain on the behalf of the cartelist in order to do so. This would not necessarily be the case if one were to link cartel activity to other potentially relevant moral norms. The moral norm against cheating, for example, would require an 'unfair advantage' to be obtained by the cartelist himself.[36] Not requiring a personal gain for the individual cartelist in question is a welcome feature of Option 4, as gains to an individual cartelist (as opposed to the undertaking/firm for whom he works) may be difficult, if not impossible, to identify.[37]

Second, there would be no requirement to assess the economic effects of an agreement for a jury to find that a criminal cartel offence has been committed. Option 4 therefore avoids the presentation of complex economic evidence in a trial. By contrast, at present, due to the

[36] Cheating occurs where a natural or legal person has: (i) violated a fair, legitimate and fairly enforced rule, with (ii) the intent to 'obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship': S Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime*, Oxford University Press, 2006, 57.

[37] This fact is acknowledged in the consultation document; see BIS, *op. cit.*, [6.15].

existence of the definitional element of 'dishonesty' in the Cartel Offence, a prosecution under Section 188 of the Enterprise Act 2002 always leaves open the possibility of defendants presenting complex economic evidence to the jury: whether or not (the defendant believed that) the cartel agreement in question fulfilled the criteria of Article 101(3) TFEU may be a relevant consideration for the jury in determining whether the defendant was 'dishonest' in entering into such an agreement.

Third, Option 4, unlike Option 3 ('replacing the "dishonesty" element with a "secrecy" element'),[38] does not require the prosecution to prove that the cartel agreement was 'secret'; rather, it excludes from the scope of the Cartel Offence those agreements made openly. Consequently, the prosecution can avoid the difficulties with establishing that cartel activity was indeed secret. Furthermore, the UK authorities are relieved of the burden of establishing (whether in legislation or through case law), the exact content and meaning of any additional definitional element concerning 'secrecy'.

Finally, and importantly,[39] Option 4 reduces (or, at least, does not increase) the risk that the Cartel Offence would be categorised as a 'national competition law' for the purpose of Regulation 1/2003.[40] If the Cartel Offence were categorised as a 'national competition law', then those who seek to enforce Section 188 of the Enterprise Act 2002 would be subject to the requirements of Regulation 1/2003. Whether the Cartel Offence falls within the scope of Regulation 1/2003 is an important issue for two reasons: (a) it bears directly on the ability *per se* of the UK criminal courts (as opposed to the Office of Fair Trading) to enforce the Cartel Offence;[41] and (b) it bears directly on the ability of the UK authorities to investigate and

[38] BIS, *op. cit.*, 61.

[39] The consultation document itself acknowledges a number of times the desire of the UK Government to avoid a situation where the revised criminal offence would be deemed a 'national competition law' for the purposes of Regulation 1/2003; see, e.g., BIS, *op. cit.*, 61, [6.31] and [6.39].

[40] *Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty*, (2003) OJ L1/1.

[41] This was what was at issue in *IB v. The Queen* [2009] EWCA Crim 2575. It was argued in that particular case that Regulation 1/2003 prevents the UK courts from enforcing the Cartel Offence when the underlying cartel affects trade between Member States. The essential thrust of the argument was that the Crown Court is not a national competition authority designated under Article 35 of the Regulation; and that the combined effect of Articles 3, 5 and 35 of the Regulation is that only a designated national competition authority has the power to impose a fine or other penalty (*ibid.*, [19]). The Court of Appeal rejected this argument on two grounds. First, it held that the Cartel

prosecute a given cartel if there is a parallel EU-level investigation.[42] The reason that Option 4 reduces the risk that the Cartel Offence would be categorised as a 'national competition law' is that, as noted above, Option 4 ensures that cartel activity is linked to the concept of 'deception'. As a result, one can argue that by operationalising Option 4, one is in fact pursuing the objective of retribution (i.e., the punishment of those who have committed moral wrongs) rather than the objective of deterring anticompetitive behaviour. If such an argument were accepted, then one could further argue that Regulation 1/2003 should not apply to the revised Cartel Offence. In doing so, one would rely upon statements (admittedly, *obiter dicta*) from the House of Lords in *Norris*, as well as upon Recital 9 of Regulation 1/2003 itself. According to Lord Bingham, the punishment of immoral (anticompetitive) behaviour is conceptually distinct from the punishment of cartel activity for the purposes of enforcing competition rules:

> in a case involving dishonest misstatement in connection with price-fixing, it would be the punishment of the dishonesty not price-fixing which would be the 'objective' of the criminal [cartel] law.[43]

Following this line of argument, one could also claim that in enforcing a criminal cartel offence based upon Option 4, one is in fact punishing 'deception', as opposed to the mere conclusion of a price-fixing agreement. In other words, the objective of the criminal cartel offence which operationalises Option 4 is different to the objective of a 'competition law', which punishes anticompetitive behavior (irrespective of whether it is immoral) in order to protect competition. Recital 9 of Regulation 1/2003 provides that the Regulation itself does not apply where 'the national legislation pursues predominantly an objective different from that of protecting competition on the market'. If Option 4 creates a criminal cartel offence which predominantly

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Offence is outside of the scope of Regulation 1/2003 as it is not a 'national competition law' within the meaning of that piece of EU legislation: the Cartel Offence does not involve a decision whether a given agreement is valid or rendered invalid for infringement of Article 101 TFEU. Second, it was held that even if this were not so, there is nothing in Regulation 1/2003 that ensures that the enforcement of the Cartel Offence is within the exclusive competence of a designated competition authority.

[42] See Article 11(6) of Regulation 1/2003 ('the initiation by the [European] Commission of proceedings for the adoption of a decision under Chapter III [of Regulation1/2003] shall relieve the competition authorities of the Member States of their competence to apply Articles [101] and [102] of the Treaty').

[43] *Norris, loc. cit.*, n. 22, [51].

pursues a *retribution-based* objective, then one could further argue that, as a result of Recital 9, Regulation 1/2003 would not apply to the investigation and prosecution of such a criminal cartel offence. It is true that the UK Court of Appeal does not agree that 'the test for what is a "national competition law" is as broad as whether the law in question pursues the objective of preventing anti-competitive practices'.[44] Consequently, the above argument alone would be unlikely to convince that particular Court on the applicability or otherwise of Regulation 1/2003. However, it should be noted that the UK Supreme Court has not (yet) ruled on this issue and that a preliminary reference to the Court of Justice of the European Union remains a possibility. The point here is that the hand of those who wish to ensure that the revised Cartel Offence is not subject to Regulation 1/2003 is strengthened by adopting Option 4 (rather than Options 1 and 2, options which do not necessarily link cartel activity to deception[45]): an additional argument in their favour can be constructed, an argument which may find favour with a court higher up the judicial hierarchy than the UK Court of Appeal.

E. An Inherent Limitation of Option 4

As noted above, in the absence of express lies by the cartelist to his customers concerning the non-existence of the cartel, the linking of cartel activity to the concept of 'deception' requires one to establish that cartelists *actually believe* that customers assume the non-existence of collusion. This requirement is an inherent limitation of Option 4. However, while the limitation may be unavoidable, it does not necessarily follow that the limitation presents an unassailable hurdle for those who wish to link cartel activity to the concept of 'deception'. There are two reasons for this.

The first reason is that one could actually add an additional *mens rea* to the Cartel Offence to account for the inherent limitation: one could require the prosecution to prove that the alleged cartelist on trial did in fact believe that his customers assumed that he had not cartelised the market. Admittedly, however, such an additional element may be difficult to prove to the

[44] *IB v. The Queen*, *op. cit*, [35].

[45] To be clear, Option 3 can also be used to link cartel activity to the concept of 'deception'. As noted above, however, there are additional problems with Option 3, in particular issues of proof surrounding the definitional element of 'secrecy'.

requisite standard and thus may have a negative impact on the deterrence-based objective of the Cartel Offence: *ceteris paribus,* for a given amount of resources the antitrust authorities will achieve fewer successful prosecutions. Furthermore, by actually requiring a prosecutor to establish the existence of the cartelist's belief, such an approach may also undermine the above-mentioned proof-related advantage which Option 4 has over Option 3. In order to determine whether this would be so in practice, one would of course be required to compare the evidential difficulties associated with proving the cartelist's belief in the assumptions made by his customers with those associated with establishing secrecy on behalf of the cartelist.

The second reason why the inherent limitation of Option 4 is not detrimental to the objective of linking cartel activity to the concept of 'deception' is that a reasonable case can be constructed concerning the existence (at least in some instances) of the relevant belief of cartelists. It is true that, to this author at least, there is currently no empirical evidence available to demonstrate directly that cartelists do indeed believe that their customers make the assumption that collusion has not occurred. It is also true that there may be difficulties in actually obtaining reliable empirical evidence directly from potential cartelists, even if its anonymity is protected. However, in the face of this difficulty one could turn to the customers themselves. The point here is that if customers *do indeed* make the assumption concerning the non-existence of collusion, it may make it easier for one to take for granted that cartelists actually believe in the existence of the assumption. In short, if customers make such an assumption in fact, it becomes more likely that the cartelist will be aware of such an assumption; after all, it is likely that he will have some (direct/indirect) contact with his customers. Indeed, customers may reveal by their conduct that they are making the assumption. They may express gratitude to the cartelist for offering his 'best price' for the product, for example. Customer satisfaction surveys, if taken, may further imply the existence of the assumption (particularly, if customers are generally satisfied with price levels). If this indirect route to establishing the (general) beliefs of cartelists is acceptable in principle, the question that must be answered then is whether customers do indeed make the assumption concerning the non-existence of collusion. If they do, the inherent limitation of Option 4 becomes less problematic.

It is true that there is currently no empirical evidence available to demonstrate directly that consumers do indeed make the assumption that the sellers of goods/services have not colluded with their competitors. This is not to say, however, that the assertion that consumers

make such an assumption (and, therefore by extension, that cartelists are aware of it) cannot at present be supported by any persuasive arguments. In fact, there are two particular points that can be used to support that assertion; to the extent that they lend such support, Option 4 may overcome its inherent limitation.

First, it appears that a majority (60%) of UK citizens surveyed currently believe that cartel activity is 'dishonest'.[46] One could argue, perhaps, that such citizens find the practice 'dishonest' because they assume that sellers do not *as a matter of course* attempt to collude with their competitors. Cartelists may be 'dishonest' according to such citizens because, *inter alia*, they are acting in a manner that is inconsistent with (what those citizens perceive to be) accepted and legitimate business practice. Put differently, if such citizens assumed that *all* sellers actually engaged in cartel activity (as opposed to refraining from it), would they be as quick to label any given cartelist as 'dishonest'? The answer may well be 'no'. If so, citizens would at least be assuming, then, that *some* sellers are not engaging in cartel activity.

Second, the assumption against cartel activity can be transposed to a more general assumption made by customers: the assumption that, in the absence of evidence to the contrary, sellers in the market act according to the law. Here it must be remembered that cartel activity is indeed unlawful within the European Union under both national and EU law. Such an assumption could be conceptualised as the popular (rather than the legal) manifestation of the principle of the presumption of innocence. One could submit that if citizens value the legal manifestation of this principle — which is likely — they may well put it into practice in their daily dealings. If so, customers may assume that, until contradictory evidence is forthcoming, sellers adhere to the national and/or EU cartel law rules. This particular line of argument, however, requires the individuals making the assumption actually to be aware that price-fixing is unlawful under national and/or EU law, something that might not always be the case. Indeed, to the extent that such understanding does not exist, one will be prevented from arguing that the more general assumption (concerning adherence to the law) is active. The extent of the limitation of Option 4 concerning the assumptions made by customers can therefore be linked to the level

[46] See A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain', Centre for Competition Policy Working Paper 07, 12 May 2007, www.ccp.uea.ac.uk/public¢les/workingpapers/CCP07-12.pdf. This figure of 60% does not contradict the earlier point raised above about the 'chicken and egg' problem associated with 'dishonesty': the figure would need to be higher to establish a 'hardened attitude' to cartel activity.

of the relevant customers' competition law education. Ensuring an effective link between cartel activity and the concept of 'deception' therefore also requires efforts to educate potential customers in any given market.

F. Conclusion

This note responded to the current BIS consultation on the operation of the UK competition law regime. In particular, it focused on the operation of the UK Cartel Offence. It argued that Option 4 should be adopted by the UK authorities: they should remove the 'dishonesty' element from the offence and define the offence so that it does not include agreements made openly. In doing so, they would avoid the significant problems associated with the employment of the definitional element of 'dishonesty', while reaping the benefits of linking the prohibition of cartel activity to the moral norm against 'deception'. Importantly, the prosecuting authorities would not have to prove secrecy on behalf of cartelists and their hands may be strengthened in dealing with claims that the Cartel Offence is a 'national competition law' for the purposes of Regulation 1/2003. However, Option 4 is not without its limitations. In particular, its successful operation is limited to the extent that cartelists do not actually believe that their customers assume the non-existence of collusion in a given market. While survey data can help one to determine the existence or otherwise of such beliefs, they will be more likely to exist when customers actually make such an assumption. Furthermore, such an assumption is more likely to be made when customers are aware that cartel activity is an unlawful practice. The successful implementation of Option 4 therefore benefits from simultaneous efforts to educate all potential customers in the economy about the existence of the (civil/criminal) prohibition on cartel activity.

BIS | Department for Business Innovation & Skills

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

Response form

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

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	Large Enterprise
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X	Academic

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

Consultation Questions

1. Why reform the competition regime?

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

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

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

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

Comments: N/A

2. The UK Competition regime and the European context

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

Comments:
N/A

3. A stronger markets regime

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

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

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

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

Comments:
N/A

4. A stronger mergers regime

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

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

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

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

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

Comments:
N/A

5. A stronger antitrust regime

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

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

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

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

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

Comments: N/A

6. The criminal cartel offence

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

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

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

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

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

Comments:
I have responded to these questions in a separate document, which is attached to the same email as the one to which document was attached. The document is entitled 'Reforming the UK Cartel Offence: A Response to *A Competition Regime for Growth: A Consultation on Options for Reform*'

7. Concurrency and sector regulators

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

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

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

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

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

Comments:
N/A

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

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

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

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

Comments:
N/A

9. Scope, objectives and governance

This chapter sets out that the CMA should have a primary focus on competition. The Government is committed to maintaining the independence of a single CMA and proposes that the CMA will: have clear, and potentially

statutory, objectives to underpin prioritisation; be accountable to Parliament; and, have an appropriate governance structure for a single decision making body. We ask:

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

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

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

Comments: N/A

10. Decision making

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

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

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

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

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

Comments: N/A

11. Merger fees and cost recovery

Merger Fees

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

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

Recovering the cost of anti trust investigations

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

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

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

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

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

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

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

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

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

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

Recovery of CC costs in telecom price appeals

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

Recovery of CAT costs

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

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

Comments:
N/A

12. Overseas information gateways

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

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

Comments:
N/A

13. Questions on the impact assessment

Mergers

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

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

Anti-trust

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

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

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

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

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

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

Comments:
N/A

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A competition regime for growth

Introduction

Which? is an independent, not-for-profit consumer organisation with over 700,000 members and is the largest consumer organisation in Europe. Which? is independent of government and industry, and is funded through the sale of Which? consumer magazines, online services and books.

The competition and consumer protection regime forms a vital and intrinsic part of a modern and successful market economy. Consumers rely on markets being fair and open. Firms that deal fairly with consumers should be rewarded. On occasion, these markets fail and a robust regulatory response is necessary to restore confidence and enable redress: some firms do break the law and should be pursued for this.

The proposed reforms represent the most significant change to the competition and consumer enforcement regime since the Fair Trading Act 1973. To respond effectively to this consultation, it would have been preferred if the final details of the government's proposed reforms to consumer protection enforcement could have be considered alongside these proposals. We see the competition and consumer regimes as inextricably linked. We have been pleased to engage with officials during the process of developing the consumer landscape reforms. Unfortunately,

the consumer protection reforms have not been published at this date and we have responded to this public consultation as presented.

As a result, we have mainly responded to those issues unaffected by the interaction between competition and consumer enforcement. We have, however, set out our overall views on what the Competition and Markets Authority (CMA) should look like, which includes a consumer enforcement role.

In summary, we consider:

- Consumers would be significantly disadvantaged by proposals to make the CMA a 'pure' competition agency, regardless of the existence of any other separate body tasked with national enforcement of consumer protection law;
- In contrast, a regulator that is able to consider all aspects of a problem – albeit with a clear focus on competition – without making arbitrary distinctions between 'consumer' and 'competition' problems would provide an effective route for serious market failings to be addressed;
- A CMA with a clear duty to consider competition and consumer issues could work effectively alongside a strengthened Trading Standards, which takes consumer protection enforcement actions at a regional, national and international level;
- We consider that relatively few cases of genuine overlap between the CMA and other agencies will arise in practice, but where they do, the CMA should have the powers to fully resolve problems and should act as senior partner in making judgements about the allocation of cases based on an objective assessment of the nature of the issue, the abilities and duties of the relevant organisations and their available powers; and
- We are not opposed to the merger of the existing consumer and competition authorities. However, the government must recognise that consumers rely on these institutions to stop abusive practices by firms. Many of the proposed improvements to the regime appear achievable without the proposed merger. Any merger raises real transition risks, weakening competence and potentially undermining capability on existing and future enforcement. Which? expects the government to be certain that reform will not undermine the capability of the existing regime and that its anticipated benefits for consumers are readily achievable. Any weakening of the existing regime, despite its faults, will be a serious blow to consumers.

This response comprises two parts. Part I outlines Which?'s vision for an effective CMA, alongside some of the risks anticipated if this model is not adopted. Part II responds to the specific questions raised where we are able.

Part I – an effective Competition and Markets Authority

The government's proposals for a single CMA

The government's proposals are significant:

- A structural reform of two long-standing institutions, the Office of Fair Trading (OFT) and Competition Commission (CC), creating a single body (the CMA);
- Separation of enforcement powers between those issues labelled 'competition' and those labelled 'consumer protection' vested in two bodies, the CMA and some other body (with proposals indicating a combination of trading standards and citizens advice); and
- Reform of the processes and procedures by which competition enforcement, including anti-trust, mergers and market investigations, is undertaken.

The objectives of this reform are described as 'making the competition framework even more effective at supporting economic growth.'[1] It notes the importance of open and competitive markets and sets out three aims for the reform in respect of how competition issues are tackled:[2]

- Improve the robustness of decisions and strengthen the regime;
- Support the Competition Authorities in taking forward the right cases; and
- Improve speed and predictability for business.

It is proposed that separate bodies take over consumer functions currently undertaken by the OFT and Consumer Focus, including enforcement of consumer law, information, education and advocacy.

Which? considers that regardless of the final arrangements for a national consumer enforcement agency, significant risks arise from imposing an artificial distinction between 'consumer' and 'competition' issues for the CMA.

[1] Paragraph 1.3, *A competition regime for growth: a consultation on options for reform,* March 2011, BIS.

[2] Paragraph 1.8, *A competition regime for growth: a consultation on options for reform,* March 2011, BIS.

Which?'s vision for an effective CMA

On occasion, despite best efforts to empower consumers through information or other means, intervention in markets is required. The inequitable position faced by consumers individually (or even collectively) when dealing with larger firms often means that market processes cannot produce effective sanctions, i.e. bad business continues to thrive and fair dealing businesses are disadvantaged. As a result, consumers rely on an independent, well-resourced and effective public agency to intercede promptly to make markets work well.

Based on our long standing experience of dealing with markets that fail both consumers *and* fair dealing firms, Which? considers an effective CMA would meet the following standards:

- Focus investigations on the nature and cause of failings that harm consumers or prevent fair dealing firms from growing, therefore, able to address both supply and demand side issues;
- Acts promptly to assess and prioritise issues affecting participants of markets;
- Processes and investigations are transparent, withholding as little information as possible from the public domain and allowing certainty in respect of when or how investigations may be conducted;
- Has robust powers of investigation, to obtain evidence promptly and ensure speed of investigation;
- Decision making follows a clear framework, in particular when selecting priorities, finding breaches of law or imposing remedies, to ensure predictability and avoid confirmation bias of its approach before, during and after investigation;
- Has access to a full range of remedy powers affecting individual firms, markets and practices across markets to allow demand and supply side issues to be addressed robustly;
- Remedies aim to punish individual abuses, deter future abuses and facilitate redress;
- Remedies are reviewed or appraised after implementation to ensure they remain relevant, proportionate and effective;
- Decisions are made independently of political, business or other vested interest;
- Is accountable for its decisions, subject to the exercise of good administrative and public law; and
- Is sufficiently funded to tackle issues across markets and firms of all sizes.

Problems arising from separating consumer and competition powers

Markets comprise a complex dynamic of consumer confidence, supported by transparent and fair trading terms, alongside rivalry between firms to meet their customers' needs. Firms that serve

consumers well should thrive, while those that do not should respond to customers' need or ultimately fail. An effective CMA must therefore focus on the problems effecting markets: it must not be hindered by arbitrary distinctions between 'competition' and 'consumer' issues.

The reforms presented in the consultation appear to presuppose an efficient identification and allocation of 'consumer' and 'competition' issues between two or more public agencies at the early stages of any investigation. In practice, this is likely to raise a number of significant problems. In addition, the proposed split of responsibilities between multiple agencies simply reintroduces the administrative burdens to which the merger of the OFT / CC is addressed.

There are at least five co-ordination problems that arise directly from removing powers from the proposed CMA to consider and enforce consumer protection law alongside competition enforcement:

1. Insufficient expertise within a single agency to identify the character of problems as 'competition' or 'consumer' at an early stage of prioritisation or investigation to 'allocate' problems to the responsible agency (would a consumer lawyer recognise a competition problem?);
2. Confusion over jurisdiction with certain types of issues falling between separate agencies, making it difficult for third parties to submit complaints to the 'right' authority (such as Which?'s recent super complaint) with a risk that issues cannot be clearly identified as 'sufficiently' competition or consumer focussed for one or other agency to address within its priority framework (in particular if an agency has no duty to respond to complaints);
3. Complexity and burden of administration, with different powers and process between multiple agencies needing co-ordination, leading to risks of duplicate information requests to business;
4. Complexity in co-ordinating intervention in markets with different regulatory tools, leading to delay, duplication, conflict or failure in the implementation of remedies; and
5. Distorted incentives for separate agencies, especially for 'new' agencies, to intervene in markets (either intervening too much in its nascent period or not enough as it establishes capability)

In addition, the same reasons given by BIS for combining the OFT and CC reinforces the argument to retain an integrated consumer and competition agency:[3]

[3] Paragraph 1.10, *A competition regime for growth: a consultation on options for reform*, March 2011, BIS.

- Impetus to use powers and processes in the most flexible and dynamic way. For example, the CMA would be able to balance direct enforcement of consumer protection law alongside measures to make more effective and empowered consumers that helps drive competition;
- Enable more efficient and effective use of scarce resources; and
- Create a single powerful advocate for *effective and efficient markets* in the UK, Europe and internationally.

We have seen the detrimental consequences of not examining markets 'in the round' or relying on separate agencies that are often unable to take prompt or decisive action, thereby delaying investigation and remedy. The payment protection insurance case is illustrative of this and is described below. These co-ordination problems arise regardless of the existence of any other body solely dedicated to consumer protection and with or without an ability to take consumer protection enforcement actions at a national scale.

The government has recognised the inherent failure of separating consumer protection from competition in its proposed reforms of financial services regulation, by giving the Financial Conduct Authority (FCA) a specific focus on addressing competition and consumer enforcement.[4] In contrast, BIS' proposals appear diametrically opposed to the governments stated objectives elsewhere in the regulatory environment.

Given this, Which? considers that consumers and fair dealing firms will be significantly disadvantaged by proposals to make the CMA a 'pure' competition agency, regardless of the existence of any other separate body tasked with national enforcement of consumer protection law.

Below, we set out three case studies where the co-ordination problems above have arisen that illustrate the risks of separating consumer from competition enforcement functions.

Super complaint about payment surcharges

Which? has long been concerned with hidden charges, where consumers are caught-out by surprise charges when committing to a purchase. In March we submitted a super complaint to the OFT on the charges faced by consumers when paying by credit or debit card. Our complaint points to a number of cases where these charges mean that:

[4] Chapter 4 of *A new approach to financial regulation: building a stronger system*, February 2011, HMT (http://www.hm-treasury.gov.uk/d/consult_newfinancial_regulation170211.pdf)

- Consumers cannot achieve the price advertised, the actual price is only revealed at the end of the transaction;
- Consequently, consumers cannot easily compare products and face additional costs to search the market;
- The lack of price transparency and consumers' behavioural biases means that the surcharges that result often significantly exceed a reasonable measure of cost.

The complaint directly draws on the findings of the OFT's market study into price advertising.[5] This study considered how the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) may apply to price advertising. However, our complaint relates to both the harm to competition and direct exploitation of consumers in some cases.

The OFT is considering this complaint. At present it has a wide-range of tools available to address this issue, both competition and consumer-based. For example, the OFT can effectively combine and co-ordinate enforcement of CPRs with measures to agree changes to practices with firms for the purpose of making competition work or failing that referring markets for detailed investigation, review existing Orders relating to credit card surcharges originally put in place by the MMC or review the interpretation of EC sectoral regulations such as the Air Services Regulation or Payment Services Directive.

In this case, the prospects of a CMA that is only able to deal with 'competition' issues raises questions of:

- To whom would we make the complaint and would the complaint need to be presented in different ways depending upon the competence or responsibilities of the receiving agency?
- How would Which?, or the agency itself, separate the 'competition' issues from 'consumer protection' issues without affecting its ability to effectively remedy the problem?
- If a separate agency were to pursue the consumer protection issue, how is intervention in the market and disruption to firms to be minimised if multiple agencies are to investigate what amounts to the same problem and how will these agencies co-ordinate effectively?
- What happens if these agencies reach different conclusions over the need or nature of market interventions under their consumer or competition remits?

Under the current proposals, to separate consumer protection from competition enforcement, Which? would face significant uncertainty of how to proceed with complaints. More importantly, consumers face uncertainty of who and when effective action would be taken. Over 43,000

[5] http://www.oft.gov.uk/OFTwork/markets-work/completed/advertising-prices/.

individual consumers have pledged support for this super complaint. Each of these people expects the regulator to have the scope and powers to properly address their concerns.

Payment protection insurance

The market for payment protection insurance (PPI) has been found to be significantly harming consumers and has led to intervention by the CC and Financial Services Authority (FSA). However, the way in which the PPI case was handled is testament to the serious problems of separating responsibility for consumer and competition enforcement. Both the way in which the market operated and the sales practices for specific products needed significant reform: a combination of competition issues and consumer protection.

The resolution of the problems in PPI has taken a long time:

- Which? first raised concerns about the mis-selling of PPI in 1998.
- Citizens Advice made a super complaint on PPI in September 2005 to the OFT.
- The OFT launched a market study in April 2006
- A market investigation reference was made in February 2007
- The FSA initiated a review of sales practices in 2005, leading to enforcement action and measures to redress consumers

Following the CC investigation it imposed a number of remedies, for example banning the sale of PPI alongside credit products at point of sale. The banking industry lost an appeal against these remedies and the CC published its final remedies in July 2010, almost five years after the issue was raised by Citizens Advice.

However, throughout the competition investigation, banks continued to sell inappropriate PPI products. The FSA, with no competition remit, took action under its supervisory powers. First, it called on firms to take "urgent action" to ensure that their selling practices for PPI were compliant with regulations. Eventually the FSA took enforcement action, which failed to have the desired effect given the insignificant size of the financial penalty. At the start of 2009, the FSA eventually secured "agreement" from the industry to stop selling single premium PPI on personal loans. However, almost two years later, Lloyds TSB disclosed that it had yet to start its review of past sales. New rules to handle complaints were challenged by the British Bankers Association at judicial review. Although the appeal was rejected by the Court it led to further delays for consumers. Banks' have finally made provision for up to £6.6 billion of consumer compensation.

The lessons are clear:

- It is costly and time consuming to consumers and business to deal with two agencies over such a long period;
- Agencies find it difficult, or impossible, to effectively co-ordinate investigation or remedies resulting in a very long wait for consumers to see justice; and
- It took a significant amount of time to finally and fully address this market failure that harmed consumers and the process of competition for over a decade.

Which? considers that the piecemeal approach to responding to this harm arises directly from the FSA lacking responsibility for both consumer and competition issues. The government's proposed reforms for the Financial Conduct Authority state that "the Government recognises the important role of competition in delivering good outcomes for consumers" and "the Government wants to go further and make clear that, where appropriate, the FCA can and should take action in respect of competition more broadly."[6] It will no longer be solely a consumer protection agency.

The proposal to excise from the CMA any powers to address consumer protection issues raises a foreseeable risk of precisely the failings as arose in the case of PPI.

House building market study

There is a serious risk that certain types of issues, and subsequent reform, would never be taken up by agencies with separate and distinct roles for consumer protection or competition enforcement. The house building market study provides a clear illustration of this.

In 2007 the OFT launched an own initiative study into the house building sector with the stated aims of considering together competition and consumer concerns, investigating:

- how competition and the planning system affect the delivery of new homes; and
- homebuyers' levels of satisfaction with the new houses they purchase.[7]

The reason for suspecting competition problems was that the sector had been slow to respond to the decade of rising house prices by increasing the rate of home construction. The implicit assumption being that the industry were deliberately restricting supply to keep prices high and

[6] Page 63, *A new approach to financial regulation: building a stronger system*, February 2011, HM Treasury.

[7] *Home building - reasons for a market study*, June 2007, OFT.

rising. They were also responding to concerns raised in the Barker Review (2004) that had identified a number of quality problems in the industry. The idea of a code of practice was first raised in this review.

Within 6 months the OFT quickly established:

- No evidence of anti-competitive practices
- No evidence of land hoarding
- Significant evidence of quality problems with new homes.

The conclusion was that because people tend to be very focussed on price and location they are not inclined (and are also unable) to make assessments of quality. This results in a lack of competitive focus on quality leading to excessive snagging and other problems with issues such as plumbing or heating construction.

The key recommendation to address these quality issues was that the Barker recommendation for a Code of Practice should be taken forward. The OFT expressed its disappointment that in the four years since the publication of that report the industry had failed to put together a voluntary code. The Consumer Code for House Building came into effect on 1st April 2010.[8]

The key lessons of this study are:

- It is often far from clear, until well into a study and if possessing the relevant expertise, to determine if competition and / or consumer issues are at the heart of an observable market failure;
- An integrated agency was able to quickly focus its attention and resources on the relevant consumer protection issues;
- An integrated agency was able to develop a suitable, consumer-focussed, remedy to protect consumers and improve the operation of the new build housing market.

Which? considers that the BIS proposals would put in jeopardy the likelihood of such market interventions and seriously undermine the prospects of reaching a successful and speedy resolution.

[8] See http://www.oft.gov.uk/OFTwork/markets-work/completed/home1.

Collective redress

We are concerned that there is insufficient attention given to strengthening consumer collective redress, in particular for redress that arises from proven infringements of competition law. We believe that the current system has serious flaws that render it impracticable to use.

The Competition Act 1998 currently provides that a collective action can be brought by a designated body acting as the representative of victims of anti-competitive behaviour. Which? is the only body that has been appointed as a designated representative body to date. We used these powers for the first and only time in an attempt to secure compensation for consumers who had been affected by the price-fixing of certain football shirts by a number of parties, following a finding of a breach of competition law by the OFT. The experience we gained from bringing this case made it clear that reform is necessary to make this regime effective: redress should be on an opt-out rather than opt-in basis and it should be possible to distribute aggregated damages on a cy-pres basis should not all potential claimants participate in an action.

Indeed, the OFT itself recognised the need for procedural reform and noted that private actions have not been as effective as expected (see Private Actions in Competition Law; Effective Redress for Consumers and Business: Recommendations from the Office of Fair Trading (OFT 916, 26 November 2007).

In parallel to procedural reform, the competition authorities, in the course of reaching their decisions, can do significantly more to facilitate collective damages actions. First, regulators should do more to publish as much of the factual matrix as possible, and challenge the claim of confidentiality put forward by parties that have broken the law. Collective actions need a robust evidence base to proceed, and an infringement decision alone is not sufficient to guarantee a successful order for compensation. Second, regulators should produce estimates either for the financial harm to consumers, the levels of excessive prices or for the additional profit or other benefits obtained by parties arising from the anti-competitive behaviour. This would make the calculation of reasonable compensation significantly more achievable.

Additional measures could be taken, now that an opportunity to reform the competition regime has arisen. Firms that enter into settlement arrangements (or leniency) should be expected to offer compensation to consumers as part of a package of measures to bring an investigation to an early resolution. At present, consumers get no direct benefit from early resolution (other than ending abusive conduct or agreement). Reforms should be made such that, in future,

settlement would only be accepted where meaningful compensation for consumers is secured, to cover the direct financial loss arising from anti-competitive behaviour.

A great deal of work has been done to scope out an EU-wide collective redress system and we note that the European Commission is currently consulting on the principles that should apply to any general or sectoral cross-border collective redress regime. In this regard, the European Consumer Consultative Group (ECCG) has expressed the view that there is a clear and pressing need for a collective redress regime for competition law infringements to guarantee that victims of unlawful anti-competitive business practices are properly compensated.[9] While this is encouraging, it remains to be seen when and what proposals will be forthcoming as a result of this consultation, and any initiative that does arise will relate to cross-border cases only. Therefore, a separate and additional initiative is needed to ensure that the UK regime is fit for purpose to obtain compensation for when competition law has been infringed.

Part II – response to specific consultation questions

Which? considers that the outcomes of any reform – to structure or process – must:

- Preserve an effective market investigation reference mechanism, which is a unique and important power available to make UK markets work;
- Preserve and strengthen the investigation and decision making process currently used in second phase merger and market investigations, with the use of external, expert Commissioners to offer guidance to an investigation and act as ultimate decision makers;
- Ensure that the CMA is accountable and responsive to stakeholders, in particular consumers who rely upon an independent and robust competition enforcement regime to take prompt action against business practices that individual consumers are powerless to prevent;
- Ensure that existing cases and enforcement is not jeopardised from the transition risks created by the government's decision to merge the OFT and CC.

We have responded to the specific questions raised below where we are able.

[9] http://ec.europa.eu/consumers/empowerment/docs/ECCG_opinion_on_actions_for_damages_18112010.pdf

Why reform the competition regime?

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

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

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

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

Which? is not opposed to the merger of the OFT and CC *per se* and we are supportive of improvements to the effectiveness of the competition regime.[10] As such, Which? considers that the proposed objectives for reform are perfectly laudable. It is not however clear why the proposed merger is the most proportionate and cost effective measure to address the problems identified with the current competition regime. The government should be clear that these reforms will achieve measurable improvements to the competition regime for the benefit of consumers: existing cases and enforcement must not be jeopardised and future capability for effective enforcement by the CMA must be delivered. Any weakening of the existing regime, despite its faults, will be a serious blow to consumers.

The current institutional and decision making arrangements have been in place for decades. They have been subject to incremental refinement in the light of experience and, often, as a result of appeals relating to the process of case handling. The regime has therefore evolved in light of this experience.

[10] It is notable, however, that a number of regimes across the world are combining consumer and competition enforcement functions, must recently with the Dutch competition and consumer authorities.

The government is proposing a significant and very complex set of institutional reforms and changes to the legal test and practices of anti-trust, mergers or market investigations, many of which could be tackled without precipitating structural change. For example, the basis on which mergers are assessed or how anti-trust cases are investigated or prosecuted is independent of structural change. The government must recognise that consumers rely on these institutions to stop abusive practices by firms. These changes cannot be implemented without cost: transition risks can weaken competence and potentially undermine capability on existing and future enforcement. The government must be clear that the final outcomes from these reforms will justify such radical and rapid reform and existing casework will not be undermined.

We note that of the three objectives listed there is a tension, or risk, of conflict between robust decisions and greater speed and predictability for business. It is a challenging balancing act to ensure that decisions are robust – therefore procedurally fair to firms under investigation and resulting in the 'correct' decisions – while increasing the speed of the process. Clearly the business community desire greater speed and predictability of cases. As does the consumer community, or public bodies purchasing services from markets and which benefit from robust enforcement to deter bid-rigging for example. Speed and predictability would minimise disruption to business life and make the competition implications of commercial decisions easier to judge. However, this same community will likely be dismayed if the cases taken fail, in particular if they are the victim of anti-competitive conduct and infringements are not found or are rejected on appeal. If the three objectives listed suggest a hierarchy, then we would support a focus of robustness (i.e. quality of decision making) over pure 'output' of case volume.

A stronger markets regime

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

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

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

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

Which? considers that the markets regime is perhaps the most significant element of the UK competition regime: it offers a unique way of improving the overall effectiveness of markets even where individual firms are not infringing competition law. It is vital that any reforms preserve and strengthen this regime. Our comments follow.

Modernising the markets regime

1) Investigations across markets

We agree with BIS that the scope of some issues is difficult to limit to specific or narrow markets. Our recent super complaint into surcharges for payment method is a good example of a problem that is encountered across many markets, and for which a wider scope would have been useful. In this case, the problems arise in any market where consumers wish to pay by plastic card.

However, in practice there is little to prevent a 'horizontal' study of the type envisaged under the current regime, however, the extent that effective remedies can be developed seems very limited to the exact circumstances of the markets affected. The actual harm to consumers, from the same practice but in different markets, may very well differ. This suggests that

remedies would need to be proportionate across multiple situations and may be very difficult to formulate effectively.

In conclusion, we agree that this type of horizontal investigation is attractive but are not clear on the number of circumstances where it may really be appropriate and whether it could lead to meaningful remedy. For example, existing MIR powers are limited to the conduct or structure of a market and the firms and consumers within it, unless modified CMA findings on horizontal practices would likely require follow-up action by government to implement remedies (risking delay and uncertainty).

2) Super complaint powers for SME bodies

Which? considers super complaint powers a powerful tool, if used appropriately, to bring to the attention of the competition authorities or sectoral regulators evidence of systemic market failures. The government needs to define a clear test for SMEs that would apply this power. This test should do two things. First, ensure that ultimately final consumers benefit from competition, therefore complaints that would lead to an increase in SME market power at the expense of consumers or other firms should be rejected. Second, the test should distinguish between those market features that are prejudicial to SMEs' ability to compete for final consumers that are 'artificial' or otherwise 'imposed' upon them and those features that arise as a function of their size and scale vis-à-vis larger businesses. For example, it would be a clear failure of an SME super complaint regime if the CMA had to deal with a substantial volume of complaints relating to the economies of scale and buying power of larger firms in the absence of evidence of harm to long-term competitiveness (such as found in the Groceries case) or detrimental impact on final consumers.[11]

Streamlining the markets regime

3) Reducing timescales and 'Phase I' market studies

Which? considers that the markets regime should be modified to:

- introduce an explicit requirement at the early stage of an initial complaint for the CMA to assess whether a reference is suitable, and if so to make such a reference promptly, with a statutory limit of 4 – 6 weeks (analogous to the mergers regime) to make this decision

[11] Groceries Market Investigations, Competition Commission, April 2008 (http://www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm).

- a statutory limit should be imposed on the implementation of remedies following a detailed market investigation, of perhaps no more that 6 months from final conclusions with allowances for disruptions to the timetable, such as appeals

In practice, the CMA should:

- quickly identify candidate markets at the earliest stages of an issue or complaint arising with the CMA
- promptly, that is without delay, refer those markets where detailed investigation is necessary and the strength of remedies available at market investigation stage is appropriate
- conduct the enquiry thoroughly and with care to, if necessary, devise effective remedies
- impose remedies promptly, with a view to rapidly address the competitive harm identified and revisit those remedies to

A reduced timescale for market enquiries would address concerns that the process takes too long from start to finish. However, as BIS appears to recognise, the investigation is only part of process. Many cases take too long to reach the Competition Commission. The remedies phase of a CC inquiry itself also takes too long, losing the urgency that a statutory deadline imposes. Reducing the timescale for the investigation itself risks undermining its integrity and thoroughness. We would prefer a best endeavour to meet 18 months, but with 24 months remaining as standard. However, the preceding referral process should be more tightly controlled and the following remedy period subject to a statutory timetable.

We agree that too few references have been made, and that the delay to making a reference (usually as a market study has preceded a reference) is harmful to consumers and fair dealing firms. It is not, at present, a 'formal' requirement that a market study is undertaken prior to a reference.[12] The proposed introduction of a formal phase I study, prior to a reference, is therefore a significant change. The decision to introduce an additional hurdle to the reference process should be reconsidered, as the existing safeguards in section 131 appear sufficient to ensure references are a proportionate response to concerns that markets are failing. Formalising market studies as a form of phase I review for MIR risks introducing further delay than is necessary (even if subject to statutory deadlines), the very thing that business and consumers have complained about.

[12] We are concerned that BIS has mis-understood the process of law in relation to market studies. Contrary to the consultation, there is no requirement that the OFT conduct a 'phase I market study' prior to referral of an issue to the Competition Commission under section 131 of the Enterprise Act 2002. A 'two-stage' process is referred to explicitly in paragraph 3.6 of BIS' consultation for example, which we believe contrary to the requirements (if not the practice) of the current markets regime.

At present, the OFT must meet the legal test to make a reference. It has set out its own principles of when a reference will be made, which include:

- it would not be more appropriate to deal with the competition issues identified by applying CA98 or using other powers available to the OFT or, where appropriate, to sectoral regulators;
- it would not be more appropriate to address the problem identified by means of undertakings in lieu of a reference ;
- the scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response to it; and
- there is a reasonable chance that appropriate remedies will be available.

It is unnecessary to either formalise market studies as a pre-requisite to market investigations ('phase I') or to add additional information gather powers. Market studies are not an enforcement tool, but rather a method of advocacy or collecting market intelligence. Where the OFT is considering a reference it already has investigation powers, as set out in section 174 of the Enterprise Act 2002. We believe, as noted above, that a duty to consider if a reference is suitable, within a statutory timetable, would be a better method to ensure the right cases are investigated promptly. The decision to make a reference can then be made in light of the existing test in s131.

4) Remedies in markets investigations

The consultation proposes a number of reforms to existing remedy powers, specifically to enable monitoring of proposed remedies by an independent third party, enabling better information to be published without linking to price information and to allow remedies to be reviewed to ensure they operate as intended (paragraphs 3.29 – 3.36). These appear to be very positive developments. At present, more effort goes into demonstrating a market failing than in developing proportionate but effective remedies. Any effective enforcement regime must be able to 'road test' remedies and to revise remedies once implemented to ensure they address the problems identified.

A stronger mergers regime

This chapter sets out that there is scope for improving the merger regime by addressing the disadvantages of the current voluntary notification regime and streamlining the process. The Government is seeking views on: (1) options to address the disadvantages of the current

voluntary notification regime; (2) measures to streamline the regime by reducing timescales and strengthening information gathering powers; (3) introduction of an exemption from merger control for transactions involving small businesses under either a mandatory or voluntary notification regime. We ask:

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

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

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

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

The purpose of the merger regime is to protect competition on markets, and ultimately consumers. Prevention is better than cure. Which? has engaged, from time to time, with the mergers process.

We are concerned that proposals to further tighten the timescales of phase I investigations will undermine the ability of third parties to engage effectively with the process. Instead, we urge greater transparency to phase 1. First, merging firms should be required to produce a 'form CO', similar to the EC regime, which describes its main market activities, its view on market definition, its position on the market and the nature of the merger or concentration.[13] Second, a short-form of this document should be published to enable third parties to understand fully the scope and nature of any proposed merger. This would facilitate third parties engaging effectively in the merger process.

A stronger antitrust regime

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

[13] See EC guidelines for form CO: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:133:0001:0039:EN:PDF

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

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

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

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

Which? are generally supportive of measures to improve the robustness and speed of decision making but we have no firm views on the proposed reforms. We do however, ask BIS to consider the following issues.

Which? find it challenging to engage effectively in the anti-trust process. We think this is not unusual for smaller organisations (e.g. SMEs) or charities. Therefore, any measures to support third parties to raise concerns with infringement of competition law and fully participate in the process would be welcome. We believe that greater transparency over case selection is possible, with more active review of the prioritisation grounds and a clear administrative public decision made for why a case is or is not being pursued. Additionally, as set out above, decisions made under anti-trust enforcement (by the CMA or Court) should also actively support follow-on collective redress actions by representative groups.

The quality of decisions, and time taken, for anti-trust is clearly a concern. Unlike the merger or markets regime there is at present no process to internally scrutinise – by independent persons – the conduct of an investigation and the conclusions being drawn on the available evidence. This risks 'group think' or confirmation bias, in addition to a reluctance on the part of officials to reject a theory of harm on which a significant amount of time and effort has already been committed. This may be addressed through the proposed prosecutorial model or a system of 'phase II' style commissioners could add additional support by testing the progress, evidence and rationale for ongoing anti-trust investigations, introduced at a suitable stage of the investigation (e.g. as a statement of objections is being prepared).

The proposals in chapter 5 suggest very few changes to the appeal process: either grounds for appeal, burden or standard of proof and scope of appeal (on the merits or judicial review). As BIS will appreciate, the current regime of anti-trust enforcement is a product of over a decade

of judgements by the Competition Appeal Tribunal (CAT), setting the standards expected of the OFT in making decisions and setting penalties. To a great extent, this body of case law influences the scope and depth of investigations, materially influencing the type of evidence gathered and the analysis undertaken. This has a direct bearing on the robustness of cases and time taken to reach a decision or hear an appeal. Whatever changes are made to the processes for the investigation of anti-trust cases, a review of the balance of requirements and consistency underlying the CAT's judgements is necessary to ensure they reflect the objectives set out in the BIS paper while preserving procedural fairness and access to justice.

Concurrency and sector regulators

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

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

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

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

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

Which? is very concerned that sectoral regulators have been either unable or unwilling to apply anti-trust and market investigation powers. Some problems can only be effectively dealt with on an arms-length basis by an agency that has a broad range of structural remedies, and is not encumbered by having or maintaining an ongoing relationship with firms in a specific market.

We consider that regulators should continue to hold concurrent competition powers, including MIR, and be subject to the changes to practice and process that apply to the CMA but with the following amendments:

- Where proposals for exercise of sectoral regulatory powers are considered, reasons should be given and published by the Regulator as to why, for the case in hand, this route was selected over and above anti-trust or MIR powers; and
- Sectoral regulators should be subject to an annual independent review of when and how they have applied their powers to enforce competition law (including MIR) covering lessons learnt and making recommendations for future practice. This review to be published promptly.

These measures allow sectoral regulators autonomy to apply the right tools to the job as, importantly, many economic regulators will continue to have both a consumer and competition enforcement role. Cases that parties consider can best be tackled by competition powers can be raised with the relevant regulator, who will be responsible for ensuring it made a reasoned, balanced, proportionate and public decision of whether sectoral or competition powers are appropriate.

Scope, objectives and governance

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

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

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

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

We have set out in detail in part I of this response our views on the objectives and focus of the CMA.

Decision making

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

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

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

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

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

Chapter 10 deals mainly with those problems that arise as a consequence of merging the OFT and CC. It is difficult for us to form a view on a preferred approach given the complexity of the reforms, which are changing both the institutional structure of the enforcement agencies and the basis on which investigations would be handled. However, as we note above, consumers rely upon effective enforcement of existing and future cases. These arrangements are therefore vital to minimise the transition risks arising from this merger. The government must be confident it will not jeopardise existing enforcement capability now or in the future.

BIS notes that the key considerations for the decision making structure is robustness of decision making and speed. It notes that speed is 'a critical success measure of the project that a single CMA is able to delver faster decisions-making.' As we note above, there is a conflict between these stated objectives. We prefer that robustness should take priority over speed.

We also support the list of objectives in paragraph 10.6 relating to the outcomes of the regime. Regardless of the final decision-making arrangements, it is imperative that the CMA maintains independent and impartial decision making, which is a hallmark of the existing regime. We also

support the use of panels of independent experts, not closely attached to the administrative structure of the CMA, that become familiar with the evidence, guide the direction of investigations and make decisions independently of the decision to refer or open an investigation. As noted above, anti-trust cases may also benefit from a similar regime.

Comments from Ian Forrester regarding the processes by which competition law cases are handled in the UK

1. It may be useful to begin by recording my experience. I have practised European law in Brussels since 1972, specialising in the fields of competition, technical regulation, sport, international trade and human rights. Among the clients I have acted for are the BBC, Canon, the European Commission, GSK, Halcor, the Liberal Democrat Party, Microsoft, Nintendo, Pfizer, the Scottish Football Association, Titan Cement, Toshiba, Toyota and UEFA. I have had experience of competition matters in the UK, Belgium, Canada, France, Greece, Italy, Japan, Lithuania, Portugal and the United States, as well as before the European Commission in Brussels and the European Courts in Luxembourg. I have appeared as an advocate before the three EU Courts in Luxembourg, the EFTA Court, the House of Lords, the Hellenic Competition Commission, the High Court and Divisional Court in London, the Court of Session and the High Court of Justiciary in Edinburgh, and the European Court of Human Rights in Strasbourg. I hold the title of Honorary Professor, LLD *honoris causa*, and was appointed QC in 1988.

2. I have written extensively on the subject of procedure and due process in competition matters. Recent articles include:

   - *Due Process in EC competition cases: a distinguished institution with flawed procedures* 2009 E.L.Rev. 817

   - *A Bush in Need of Pruning: the Luxuriant Growth of 'Light Judicial Review',* European Competition Law Annual 2009: Evaluation of evidence and its judicial review in competition cases, Claus-Dieter Ehlermann and Mel Marquis (eds.), Hart Publishing, Oxford and Portland (2010)

   - *A challenge for Europe's judges – the review of fines in competition cases* 2011 E.L.Rev 185

3. In any enforcement system there will be a tension between efficiency and perfection. If there are too many procedural opportunities for delay and appellate review, effective enforcement may be paralysed. The Indian experience is one example where an excess of procedural opportunity has slowed down normal enforcement. On the other hand, if the process is too hasty, too ready to convict, and insufficiently prudent in checking the real facts, arbitrary, unpersuasive or imprudent results can flow. A further adverse consequence is that those "convicted" pursuant to weak procedures may blame the procedures rather than considering whether their conduct was imprudent or unlawful.

4. I suggest that there is no world-wide gold standard for best procedures with respect to the interpretation, elaboration of new principles, determination of major mergers, enforcement and punishment under the competition rules. There is currently a wide range of procedural arrangements by which competition laws are enforced around the world. Belgium, France, Germany, Greece, Japan, Korea and the USA enforce their competition rules according to significantly different processes. No single model predominates. Indeed, a number of practitioners would consider that the European Commission, one of the authorities with the strongest intellectual reputation, has one of the weakest procedural structures.

5. I have written about these weaknesses at length in the articles cited above, and the European Courts in Luxembourg are seized of several appeals relating to those questions. The law may advance either via these appeals, because of the ECHR, or otherwise. But regardless of whether the European Commission's procedures would be found to pass muster under the complex case law of the European Court of Human Rights, it is plain that if a European competition agency were to be set up today, a different model would be adopted: a new European competition agency would not share the flawed structure of the European Commission. The Directorate General for Competition deserves a better set of rules to match its eminence as an enforcer and antitrust innovator. The functions of investigator, prosecutor and decision-maker are important. They are not identical; and they are not compatible. Vertically integrating them is dangerous and, I argue, in breach of the European Convention of Human Rights. I have argued that there are three adjoining problems:

   - Attribution of inconsistent functions, since the duties of investigator, prosecutor, trier-of-fact and punisher are intrinsically too different to be assigned to the same team.

   - Absence of anything that an ordinary lawyer would call a hearing; no hearing in the presence of a decision-maker; no rigorous testing of the evidence by confrontation of the witnesses.

   - Political decisions, in that inappropriate lobbying is not impossible. Political appointees have no business deciding on guilt or innocence.

6. Competition agencies have a number of different activities. One activity is to look at a market place to see whether it is functioning, and what may be done to improve it. Such surveys can be burdensome and expensive, but can produce valuable insights as to the proper enforcement of competition law. In my experience, the UK model is superior to that of the European Commission. The Competition Commission has the task of making a uniquely global review of a marketplace. It is thorough, well-organised, neutral, painstaking and gives the impression of being unpolitical. Another important job to conduct in-depth economic inquiries into markets for the purpose of merger control.

7. These activities are very different from the duty of the Office of Fair Trading: receiving a complaint, investigating and deciding whether a complaint seems well-founded, either in the context of an agreement or unilateral conduct. This prosecutorial function is evidently different again to the resolving of disputes before the CAT.

8. I respectfully caution against assuming that gathering functions together under one umbrella will necessarily bring improvements in performance or in reputation. It is true that the UK civil service in general has a very strong tradition which can transcend institutional weaknesses. But it is also true that the Competition Commission in particular has acquired a commendable reputation for scholarly independence. That is a valuable asset.

9. It should not be assumed that bringing everyone under one roof is necessarily the best option for UK competition law. Separateness may have a functional advantage when it comes to drawing conclusions, and doing a job well and manifestly in independence.

10. There may have been a time when calls for "no change" were a coded plea for immunity from the law. Those days are gone. We want competition law to work well. The

Respectfully submitted,

Ian S. Forrester, QC, LLD
Honorary Professor, Glasgow University,
White & Case LLP, Brussels

Wong, Dr Stanley

"A Competition Regime for Growth: A Consultation on Options for Reform"
Comment on Chapter 4: "A Stronger Merger Regime"

Stanley Wong[1], 13 June 2011

Introduction

1. On 16th March 2011, the UK government launched a consultation on strengthening the competition law regime entitled "A Competition Regime for Growth: A Consultation on Options for Reform," Department of Business, Innovation and Skills (the "Consultation"). The Consultation seeks, *inter alia*, comment about altering the present merger review system including whether the UK should adopt a mandatory merger notification system.

2. In this regard, the Consultation asks the following questions about altering the merger regime, as Questions 5, 6 and 7 (Consultation, p. 34):

> *Q.5 The Government seeks your views on the proposals set out in this Chapter for strengthening the mergers regime, in particular*
> - *the arguments for and against the options;*
> - *the costs and benefits of the options, supported by evidence where possible.*
>
> *Q.6 The Government seeks views on which approach to notification would best tackle the disadvantages of the current voluntary regime?*
>
> *Q. 7 The Government welcomes further ideas on streamlining the mergers regime.*

These questions are addressed together in this note given the perspective being adopted.

3. The reason to adopt a merger control regime is to give effect to the competition policy goal of controlling any conduct which is anticompetitive. From this perspective, competition laws are enacted to control both unilateral conduct and bilateral conduct. Generally, unilateral conduct laws, e.g. Article 102 TFEU, are designed to control conduct which abuses a dominant position. Bilateral conduct laws fall into two categories. Firstly, there are laws, e.g. Article 101 TFEU, to control joint conduct between independent businesses that reduces incentives to compete such as agreements on price, output, markets, customers. Secondly, there are laws to control joint conduct in the form of

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mergers or acquisitions through which transactions, independent businesses are being integrated: see, e.g. Council Regulation (EC) No. 130/2004, 'EU Merger Regulation').

Overview of Merger Control Systems

4. The object of a merger control system is to prohibit mergers (and acquisitions) that are likely to be anticompetitive, that is, fall below some standard such as a substantial lessening of competition in a market.

5. Typically merger control system is made up of two components. Firstly, an obligation is imposed on parties to certain specified transactions to make a notification filing to the competition agency. Further, the transaction may not be completed until the agency issues a clearance decision or the specified waiting period has expired without any action taken by the agency to prohibit the completion of the transaction.

6. Secondly, a typical merger control system adopts a substantive test that is used to review a proposed merger transaction to determine whether or not the transaction should be allowed to be completed. A frequently adopted test is that of substantial lessening of competition in a market.

7. A common feature of merger control systems is to link the two components. For example, under the EU merger control system, a merger transaction may not be reviewed under the substantive test of significant impediment to effective competition ("SIEC") of the EU Merger Regulation unless the transaction is notifiable under the Regulation.

8. In other systems, notably that of the U.S. and Canada, a merger, whether or not it is notifiable, may be reviewed under an assessment standard of substantial lessening of competition.

Mandatory Notification for the UK?

9. In considering whether to adopt a mandatory merger notification system, the UK Government is trying to reconcile the objective of not imposing on business the burden of requiring a notification filing to be made of all merger transactions and the objective of not allowing potentially anticompetitive merger transactions, even small ones, be excluded from review under the applicable substantive test.

10. However, the two objectives are not reconcilable if the jurisdiction to review a merger depends on whether or not it is notifiable. Typically, mandatory notification system includes a definition of whether a transaction is notifiable with the specification of financial thresholds that must be met before notification filing is required. The most commonly used metrics for financial thresholds are turnover of the acquirer, target or both, value of assets of the target, acquirer or both, and value of assets being acquired. The setting of the levels

of such metrics would determine the number of merger transactions that must be notified and thus, the extent of the burden on the business community as a whole.

11. Unfortunately these metrics are not good indicators of whether a proposed merger transaction is more or less likely to be anticompetitive. For example, the size of the turnover of the acquirer, the target or both is not an indicator of whether a proposed transaction is more or less likely to be anticompetitive. Thus, a proposed transaction which is not notifiable because it falls below the specified turnover level for notification is not less likely to be anticompetitive.

12. Under the present UK merger laws, the jurisdiction for a merger transaction to be referred by the OFT to the Commission is the existence of a 'relevant merger situation' (and as well competition concerns). The term 'relevant merger situation' is defined to be either (a) the turnover of the target is over GBP 70 million (the 'turnover test') or, (b) the transaction would result in the creation or enhancement of at least a 25 per cent share of the market (the 'share of supply test'). Unless the transaction meets one of the two tests, the Competition Commission may not review a merger transaction. Since a merger which involves a target with a turnover of less than GBP 70 million may be reviewable if at least a 25 per cent market share is involved, the Competition Commission may and has reviewed so-called 'small' merger transactions: see, Consultation, para. 4.41.

13. The UK is considering the adoption of a mandatory merger regime to ensure that anticompetitive mergers are subject to review and to provide for a more effective remedial relief if the merger is considered to be anticompetitive. At the same time, there is an expressed desire that small merger transactions should not be subject to mandatory notification on the ground that parties to small transactions should not be subject to the burden of making a notification filing.

14. The present system is often referred to as a voluntary notification system. The simple reason why merging parties would make a voluntary filing is to obtain certainty as to whether or not the transaction would be challenged. Given the costs associated with making a (voluntary) notification filing, it is unlikely that parties to a small merger transaction would want to incur the costs of doing so.

Benefit of Mandatory Notification

15. The benefit of mandatory merger notification includes the following. Firstly, assuming the criteria for notification are objective, business would have certainty as to whether there is an obligation to notify a proposed merger transaction.

16. Secondly, mandatory notification of a proposed merger transaction would facilitate the remedial options and their effectiveness if it is found to be anticompetitive.

17. The benefits from a mandatory regime would be diminished if mandatory notification

is not required of a *proposed* merger transaction. In particular, the benefit of remedial effectiveness would be lost if merging parties may fulfill the mandatory notification requirement after completion.

18. Thirdly, by adopting a mandatory merger notification regime, the United Kingdom would follow the predominant international practice.

Conditions for Mandatory Notification

19. It is essential that objective criteria be used to establish the conditions that a transaction must be satisfied before it is notifiable. This would provide certainty to business assuming penalties may be imposed for a failure to make a mandatory notification.

20. The Consultation considers as a starting point for a mandatory regime whether to use the jurisdictional test of 'relevant merger situation'.

21. As noted by the Consultation (para. 4.25), the 'share of supply test' of the present regime may not be appropriate because it is subjective. In complex merger transactions, a central dispute between enforcement agencies and merging parties is often the definition of the relevant market(s). It would be harsh to impose penalties for a failure to make a mandatory notification if a subjective criterion such as share of supply test is used.

Cost of Mandatory Notification

22. There is no doubt that a mandatory notification regime would impose additional costs and burden on business as well as the enforcement agency. The Government would have to make decision on the acceptable level of additional costs and burden.

23. In this regard, the question can be approached by considering what resources will be made available to the enforcement agency to operate a merger regime that is of the highest international standard. How many mergers can the agency process? How many of them would raise concerns and move to a full investigation? How many mergers would be prohibited?

24. By setting metrics such as turnover, the Government can thereby determine the size of mergers that should be notified. As noted above, the size of a merger such as the turnover involved does not correlate to the potential of it being anticompetitive. In other words, setting the level of turnover for notification is arbitrary from the perspective of the impact of a merger on competition. Setting the level of turnover and other metrics should be done having regard to the costs and burden to be imposed on business and the enforcement agency.

De-couple Notification Requirement from Jurisdiction to Review Merger Transaction

25. As noted above, the size of the turnover or the value of assets involved is not an indicator of whether a merger is or is not likely to be anticompetitive.

26. The solution to resolving the conflict between reducing the burden to business by not requiring all merger transactions to be notified and ensuring that anticompetitive mergers are reviewed and prohibited regardless of the size of the turnover or assets involved is to not link a requirement for merger notification to jurisdiction to review a merger on the grounds whether it is or is likely to be anticompetitive.

27. This can be accomplished by setting the threshold levels for mandatory notification having regard to the number of mergers that the government wish the agency to review. While any set of threshold levels are arbitrary, the concern that the threshold levels are too high and thereby allowing mergers below the thresholds to escape review can be addressed by providing the agency with the powers to review and challenge any merger whether or not the merger is notifiable, i.e., meet the notification thresholds. Whether the agency would challenge a merger would be a matter of discretion having regard to the resources available and the significance of the merger. This would be no different than with respect to alleged violations of the UK or EU competition laws against anticompetitive agreements or an abuse of a dominant position.

28. In setting the appropriate thresholds for notification, consideration should be given to the resources that would be available to the enforcement agency to review merger notifications. Other things being equal, a lower set of thresholds would impose a greater burden on the agency.

29. De-coupling mandatory notification from jurisdiction to review potentially anticompetitive merger would allow UK to continue to review a merger transaction whether or not a change of control would result. As noted by the Consultation (paras. 4.35 - 4.36), the acquisition of a minority shareholding may give a company the ability to influence the affairs of the target. In this regard, it should be noted that under the EU Merger Regulation, a minority shareholding that does not result in a change of control cannot be challenged: see, Case T-411/07 *Aer Lingus Group v. Commission*, Judgment of 6 July 2010. This is a weakness in the EU merger regime which is shared by all systems that limit the jurisdiction to review a merger to those that are notifiable.

30. To address the concern that giving an agency the power to challenge any merger whether or not it is notifiable would lead to greater uncertainty, the power could be constrained by only allowing the agency to challenge a merger within a specified period, e.g. three years, after a merger has been (substantially) completed for those mergers that have not been notified. For notified mergers, consideration should be given to prohibit the agency from challenging a merger it has cleared (unless there was material misleading information provided by the merging parties).

31. If such a power were given to the agency, it is likely that a merger which is not notifiable may come to the attention of the agency through independent discovery by the agency, through information provided by non-parties or through a 'voluntary' notification by the merging parties who are concerned that there is a possibility that the agency may consider the transaction to be anticompetitive.

32. In sum, the solution to the conflict between reducing the burden on business and reviewing and prohibiting mergers that are anticompetitive may be to adopt a mandatory notification system with financial thresholds being set having regard to the burden to business and to the agency coupled with a standalone power of an agency to review and challenge any merger transaction, whether notifiable or not, within three years after its substantial completion.

"Options for a jurisdictional threshold" (Consultation, paras. 4.27-4.30)

33. The discussion about the options are unclear as to whether it is being proposed that UK would have a merger regime that de-couples notification from jurisdiction to review a merger.

34. In the comment about Option 1, it appears that the jurisdiction to review a merger is limited to those that are notifiable.

35. With Option 2, it is being proposed that in addition to mergers that are notifiable, that is, meet the thresholds, the enforcement agency would be given the power to initiate investigations of mergers that fall below the financial thresholds (turnover test) but would meet the share of supply test, that is, involve over 25 percent of the relevant market. Again, one would question whether the power to review a non-notifiable merger should be limited to transactions involving at least 25 percent of the relevant market.

Small Merger Exemption (Consultation, paras. 4.40-4.42)

36. The Consolidation raises for consideration whether small mergers should be exempt from merger review at all.

37. From the perspective of competition policy, it should be asked whether if small mergers are exempt from notification, small businesses that are involved in cartel activity or abuse of dominance should similarly be exempted.

38. An appropriate policy response would be leave it to the enforcement agency to decide as a matter of case prioritisation whether to challenge a small merger or small businesses involved in cartels or engage in an abuse of a dominant position. This can be done on a case by case basis.

Phase 1 and Phase 2

39. Under the present system, a merger is referred by OFT to the Competition Commission if there is a relevant merger situation and there is a likelihood that the merger would result in a substantial lessening of competition. The review by the OFT is considered to be a Phase 1 review while that by the Competition Commission is a Phase 2 review.

40. With a single enforcement agency, the distinction between Phase 1and Phase 2 needs to be re-considered. Moving to Phase 2 should not be considered to a dramatic event but rather a decision by an agency to undertake an in-depth review of material issues that it cannot resolve during the preliminary review (Phase 1).

41. In most merger notification regimes, there is a preliminary review (Phase 1), typically of 30 days, during which the agency can decide to clear the merger or move to an in-depth review (Phase 2). The question to be considered is whether the agency can send a notified merger to an in-depth review if the agency is unable to clear the merger in Phase 1. If the agency can only go into a Phase 2 review if it has concerns during a preliminary review (Phase 1), the agency would be under tremendous pressure to decide either it has no concerns and clear the merger or to decide that it has concerns and move to an in-depth review.

42. If the agency is to have a jurisdiction to review a non-notifiable and non-notified merger, what should be the applicable time limits? Assuming the agency would only look at a non-notifiable and non-notified merger that it believes raises concerns, it may be applicable to apply the Phase 2 time schedule to such mergers.

Deadlines for Review of Notified Mergers (paras. 4.43-4.47 and 4.51-52)

43. It is the prevailing international practice to conduct a preliminary review (Phase 1) within 30 days after the notification is complete. This is being proposed: para. 4.45.

44. The Consultation proposes to have a 24 week time limit, subject to extensions, for Phase 2 and a 12 week period for (Phase 2) remedies. This proposal would result in a time limit of at least 36 weeks for a Phase 2 review. This seems to be on the longer side by international standards for those regimes that have statutory limits.

45. It is preferable to have a shorter statutory limit with the power to extend (i.e. stop the clock) under specific criteria such as the failure of the merging parties to provide requested information in a timely manner.

46. The Consultation asks whether the agency can consider remedies during a Phase 2 review before it has decided that there is a substantial lessening of competition. It raises the concern that there may be perverse incentives to settle the case before the statutory

time limit ends. At present, the OFT during its review (Phase 1) is able to accept undertakings to address its concerns. If this is considered legitimate, then the same logic would seem to apply to accepting resolution of a Phase 2 review through the adoption of remedies before the agency has reached a conclusion on whether or not there is a substantial lessening of competition.

47. Merger review is an *ex ante* exercise and therefore it is inherently challenging: the agency may be wrong in its prediction of the future. Similarly for the merging parties, they are urging the agency to adopt their view (prediction) of the future. Both sides are therefore face similar risks that their respective view of the future may be wrong. In the circumstances and given the importance of finality in merger review, it should not be contrary to public policy for resolution before a decision is made by the agency on whether or not there is a substantial lessening of competition. As noted above, it should be possible for resolution to take place through remedies (or undertakings) at any stage of the merger review.

48. Furthermore, experienced legal advisors would have identified possible concerns that could be raised by the agency and would discussed with their clients the type of remedies or undertakings that may be acceptable to resolve such concerns.

49. From this perspective, resolution during Phase 1 or Phase 2 should be made available.

Summary: Elements of Proposal

50. The approach advocated in this note can be summarised as including the following key elements:

a. de-coupling jurisdiction to review a potentially anti-competitive proposed merger transaction from a requirement to make a mandatory notification,
b. mandatory notification of proposed merger transactions that satisfy certain conditions including certain financial thresholds,
c. conditions for mandatory notification should be set having regard on the burden to be imposed on business and the burden on the enforcement agency,
d. provision for voluntary notification of proposed merger transactions which do not satisfy the conditions for mandatory notification,
e. fees should payable only for mandatory or voluntary merger notification filing (and not for review by enforcement agency of a merger transaction that is non-notifiable and not-notified),
f. prohibition on closing a notified proposed merger transaction pending completion of Phase 1 (30 working days plus extensions),
g. jurisdiction to challenge any merger, notified or not, which lessens competition substantially,

h. right of enforcement agency to apply to Competition Appeal Tribunal (or court) for interim measures with respect to notified merger transactions, such as an order to require hold-separate pending completion of Phase 2 review and with respect to non-notified merger transactions,

i. limitation period (e.g. 3 years) on challenging a completed merger transaction (unless there was a failure to make a mandatory notification),

j. Phase 1 and Phase 2 should be part of a continuum in a merger review process,

k. the agency should be empowered to accept remedies or undertakings at any stage of the merger review process.

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"A Competition Regime for Growth: A Consultation on Options for Reform"
Comment on Chapter 10: "Decision-making"

Dr Stanley Wong[1], 13 June 2011

Introduction

1. On 16th March 2011, the UK Government launched a consultation on strengthening the competition law regime entitled "A Competition Regime for Growth: A Consultation on Options for Reform," Department of Business, Innovation and Skills (the "Consultation"). The Consultation seeks, *inter alia*, comment about the intention of the Government to create a singe Competition and Markets Authority (CMA).

2. In this regard, the Consultation asks the following questions about various options for the creation of a single CMA, Questions 22, 23 and 24 (Consultation, p. 96):

> *Q.22 The Government seeks your views on the models outlined in this chapter, in particular:*
> - *the arguments for and against the options;*
> - *the costs and benefits of the regime and to business, supported by evidence where possible.*
>
> *Q.23 The Government also seeks views on the appropriate composition of the decision-making bodies set out in this chapter, and in particular what the appropriate mix of full-time and part-time members is and the role of the executive?*
>
> *Q. 24 The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process that is compatible with ECHR requirements.*

These questions are addressed together in this note given the perspective being adopted.

3. Given the commitment by the Government to create a single CMA, the Consultation identifies a number of principles that would guide the Government in designing the appropriate decision-making structure for the single CMA. The following are the two key principles:

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[1] Dr Stanley Wong is a barrister and solicitor (Canada: Ontario and British Columbia) and is a non-practising solicitor of England and Wales. The comments contained in this submission are solely those of the author and do not and are not intended to represent or to reflect the views of organisations with which the author is or has been associated. Contact: StanWong@stanleywongglobal.com

a. robustness in decision-making, making the right decisions;
b. speed in delivering faster decision-making.

4. The Consultation notes that each of these principles "requires that the decisions of the single CMA are taken fairly and based on a rigorous factual and economic assessment that can stand up to judicial scrutiny" (Consultation, para. 10.5).

5. Judicial scrutiny would include compliance with Article 6 of the European Convention on Human Rights (Consultation, Ch. 5, paras. 5.19-5.21; Appendix 1, paras. 82-87).

6. Under the present regime, for market inquiries and mergers, there is a two-stage decision-making process. The OFT has carriage of the initial stage (Phase 1) and upon completion of its investigation decides whether there are sufficient grounds to refer the case to the Competition Commission for a decision on the merits including the appropriate remedies. A referral decision by the OFT and a merits decision (including remedies decision) of the CC are subject to review by the Competition Appeal Tribunal on judicial review principles.

7. By way of contrast, for antitrust cases (that is, Chapter 1 or Article 101 and Chapter II or Article 102 TFEU), the OFT is entirely responsible from investigation to decision-making and the imposition of remedies. The decision of the OFT on infringement (liability) or remedies is, however, subject to review by the CAT as an appeal on the merits.

8. Notwithstanding the differences in decision-making structures between markets and mergers on the on hand and antitrust cases on the other, there is merit in the suggestion that the single CMA should adopt, where possible, a similar decision-making structure across all areas.

Confirmation Bias

9. The Consultation throughout often refers to the need to design a regime that avoids 'confirmation bias'.

10. According to the Consultation, a two-stage decision-making such as the present mergers regime guards against confirmation bias which is identified as "the risk of the initial set of decision-makers having an interest in having their original concerns about mergers and markets confirmed in the eventual decision" (Consultation, para. 10.16; see, also, para. 10.33).

11. While there is some risk of confirmation bias in a two-phase merger regime if a Phase 1 case team is part of the Phase 2 case team, this is not a serious risk. Firstly, the evidence available for Phase I is necessarily less than that would be available after a full investigation in Phase 2. Secondly, the decision in Phase 1 is different from that in Phase II. At the end of Phase 1, the decision is whether there sufficient grounds (concerns) to

refer the case for a fuller investigation under Phase 2. As such, a Phase 1 is not a decision on the merits, such decision being reserved to Phase 2.

12. A far more serious risk of confirmation bias arises where the investigation team is also the de facto decision-maker. This is the core of the current criticism about the decision-making process of the European Commission with respect to competition cases. It is argued that the DG Competition case team is the de facto decision-maker notwithstanding it is the College of Commissioners who formally makes the decision and the existence of internal reviews of draft decisions. Decisions in competition cases are based on findings of facts, inferences of facts and application of legal and economic principles to the facts and inferences of facts. Given the complexity of competition cases, thousands of facts and thousands of inferences of facts are involved. Under the present system, the review of a Commission decision by the General Court is not a full merits appeal but on a basis akin to the standard of judicial review in common law jurisdictions, affording the Commission a wide 'margin of appreciation'. While the Court of Justice of the European Union has not as yet addressed this criticism of the decision-making process, the UK Government should take full cognisance of the issues raised by this criticism in designing the single CMA.

13. The UK Government should place itself in a position to be able to respond to the notion of confirmation bias which arises where the investigatory team is part of the decision-making team.

14. There two options that are available to address confirmation bias. Firstly, one option is to have an independent adjudicative body, which is separate from the CMA, to make the decision on the merits. The second option is have an internal adjudicative body/panel which is part of the CMA. This body/panel would be purely adjudicative and is not involved in any way in the investigation. In other words, the internal body/panel would hear and decide the case presented by the investigative team under the direction of the executive. These options are in essence the two approaches identified in the Consultation: Appendix 1, paras. 82-87.

Guiding Framework for decision-making structure

15. The Consultation presents a framework for considering alternative decision-making structures: Consultation, Figure 10.1, p. 100.

16. Among the possibilities that emerge from considering various combination of attributes under the Guiding Framework are proposals to have different case teams for Phase 1 and Phase 2 in mergers (and markets?) or have different executives make Phase 1 and Phase 2 decisions. There is a risk that having different parts of the organisation review the work of other parts would create tensions and rivalries especially where staff is available to serve on a Phase 1 or Phase 2 team depending on the case or where an executive would be a Phase 1 or Phase 2 decision-maker depending on the case.

17. An important objective in creating a single CMA should be to not create structures which would promote rivalry and tensions among personnel (staff or executive) at the same level.

18. The following comments on the base case for each of mergers and antitrust.

Mergers

19. The base case (Consultation, paras. 10.28-10.29) contemplates preserving a two-phase approach under which decisions in Phase 1 would be made by one or more executives and decisions in Phase 2 would be made a panel of part-time members who would be involved in investigation and decision.

20. The Consultation considers several variants to the base model:

a. Phase 1 and Phase 2 decisions made by different senior executives;
b. decision in Phase 2 by a panel which is purely adjudicative;
c. investigation at Phase 2 would include case team of Phase 1 with decisions made by a panel who also engages in the investigation and with an enhanced role for executives.

21. While these are some of the many possible variants, consideration should be given to having a mergers regime where:

a. Phase 1 should be seen as a preliminary investigation to determine whether there is sufficient grounds for a fuller investigation under Phase 2;
b. In other words, Phase 1 decision is fundamentally different from a Phase 2 decision and the totality of the evidence and analysis available in Phase 2 would not have been available in Phase 1;
c. An executive could be given the power to make a decision in Phase 1 to clear the merger or to remit to Phase 2;
d. The Phase 2 investigation would build on the investigation and analysis conducted in Phase 1;
e. There is minimal risk or harm from any confirmation bias by having the Phase 1 team continue as the Phase 2 team, possibly with additional staff since the decision on the merits is made by an adjudicative panel;
f. The Phase 2 decision on the merits would be made by a panel with a pure adjudicative function;
g. The case team directed by an executive would participate in both phases;
h. There is less risk of confirmation bias by the case team or the executive involved since the decision on the merits would be made by the adjudicative panel.

22. The regime described in the previous paragraph develops the suggestion at para.

86 of Appendix 1 which suggests that it is possible to develop a form of 'internal tribunal' that would meet the requirements of Article 6, ECHR and allows the continuation of a standard of judicial review for mergers decisions reviewed by the CAT.

23. The above approach can be applied to the markets cases.

Antitrust options

24. The approach suggested above can, in principle, be applied to antitrust cases since having an independent adjudicator for decision on the merits or having an internal adjudicative panel would appear to satisfy with the requirements of Article 6, ECHR.

Conclusions

25. Moving to an adjudicative approach either with an independent adjudicative panel or an internal adjudicative panel would allow the Government to limit review by courts solely on judicial review principles rather than on full merits appeal principles. This would facilitate the achievement of one of the objectives of the Consultation, namely, to have robust decisions made faster but also to meet the requirements of the ECHR.

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