

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

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

Date: 13 June 2011

Dear Sirs,

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

The Competition law Sub-Committee of the Law Society of Scotland welcomes the opportunity to consider and respond to the above consultation.

The Sub-Committee note that a response has been submitted by the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law, and endorse the opinions and comments contained therin.

However, it is further noted, that the response as submitted by the JWP, does not consider the criminal cartel offence, as discussed in **Part 6** of the consultation document, from a Scottish perspective. The Sub- Committee therefore wishes to put forward the following comments in respect of this.

The criminal law of Scotland, even when based on a UK statute is, except if and in so far as an EHCR (or EU) issue arises, entirely distinct from that of England. The discussion in Chapter 6 is confined to English authority, including the case of Ghosh. The requirement of "dishonesty" was always anomalous. The true distinction should have been between concealed activity and activity conducted in daylight. . If the benefits of criminalisation are still considered to outweigh the complications they cause for leniency programmes (UK and EU) then 'dishonesty' should be abandoned in favour of 'active concealment'.

There is no mention in the Paper of the Memorandum of Understanding between the Office of Fair Trading (OFT) and the National Casework Division (NCD), Crown Office, Scotland June 2009 OFT 546. This MoU attempts to reconcile the exigencies of leniency programmes with the unfettered exclusive prosecution power of the Lord Advocate. The paper contains a statement (paragraph 6.23) that could not be delivered in Scotland. An equivalent issue exists in France relative to prosecutions under article L-420-6 of the Commercial Code. In a Communiqué of 17 April 2007 the Conseil announced (paragraph 47) that a decision to grant leniency would be a legitimate



reason for it to refrain from delivering a report to the Procureur. The functional equivalent in Scotland would be for the Lord Advocate to announce that he would never prosecute anyone for the cartel offence without having first received a report from the OFT (or its successor) and then only if he saw fit to proceed.

it is unfortunate that in Chapter 5 the expression “prosecutorial model” is used to conflate the administrative penalty processes under EU law and the Competition Act 1998 with the criminal processes under the Enterprise Act and in the USA. It is true that an administrative penalty process does require respect for the rights of the defence (paragraph 5.20 re ECHR article.6) but it does not follow that both processes should be lumped together in all respects. In particular the Lord Advocate has no role in an administrative penalty procedure but does have exclusive power of prosecution (and, at present, leniency) in a criminal procedure. There should be a clear rule that a grant of leniency should exclude any possibility not only of prosecution (properly so called) but also of extradition.

If you have any questions in relation to this, then please contact me directly.

Yours faithfully

Brian Simpson
Law Reform
DD: 0131 476 8184
E: briansimpson@lawscot.org.uk

Leaver, Sir Jeremy QC

THE RT HON JOHN REDWOOD MP



HOUSE OF COMMONS
LONDON SW1A 0AA

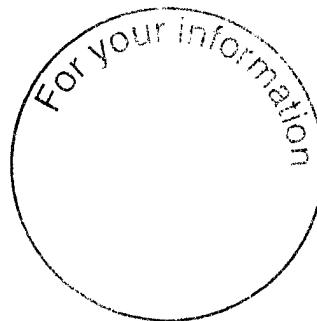
Competition

DAVEY

CCP

BEP/lews

The Rt Hon Dr Vincent Cable MP
Secretary of State
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET



9 June 2011

25/6/2

Dear Vince

I have been sent a copy of Sir Jeremy Lever's short article, setting out his views on the proposed merger of the Office for Fair Trading (OFT) and the Competition Commission.

I have been asked to respond to these points and I would be grateful for your Department's reply.

Yours ever

A handwritten signature in black ink, appearing to read "John Redwood".

Articles

Fusion of the OFT and the CC: Ask for the Evidence

Sir Jeremy Lever QC¹

There is a certain irony in the fact that it is a Conservative-led administration that is currently proposing a significant change in the administration of UK competition law that is regarded by many experienced competition lawyers and administrators as being at best unnecessary and at worst undesirable. I make that comment because, from the early 1980s onwards, Conservative administrations were entirely unreceptive to the frequently expressed views of competition lawyers that the UK's old régime of competition law had outworn its utility and urgently required reform. I clearly remember Mr Francis Maude as a Minister at the then Department of Trade and Industry indicating at a competition law conference in the late 1980s that the government had no intention whatsoever to make any substantial reforms of UK competition law, notwithstanding the criticism that British businessmen could not sensibly be expected to work within two separate and different systems of competition law – our idiosyncratic national system of competition law based largely on the restrictive trade practices legislation, to which bits had been added, and a Monopolies and Mergers Commission which was governed by legislation that was outside mainstream competition law anywhere. Thus, it can be seen that, if competition lawyers today disfavour the present government's proposal to merge the Office of Fair Trading (OFT) and the Competition Commission (CC), it is not because, as a breed, their inclination is to cling to the system with which they are familiar.

Indeed, in preparation for a discussion group held in January of this year at All Souls College, Oxford under the aegis of the Department for Business, Innovation and Skills, I approached the government's proposal with an open mind. Since the proposal formed part of a projected bonfire of quangos, I initially supposed that it was motivated by a desire to reduce public expenditure – a desire which, in current circumstances, any economically literate observer should be entirely sympathetic.

However, even though not properly informed on the topic, I quickly came to the conclusion that merger of the two organisations would almost certainly involve significant up-front costs and my suspicion was, and remains, that it would actually have a negative net present value. I have not seen any discounted cash flow projections for the proposed merger, though one would hope that such projections have been prepared. But since cost-saving has been disclaimed as a rationale for the proposal, we can now be sure at least that it cannot be supported on such a basis. And if reasonable and prudent estimates do produce a negative net present value, the need to be confident that there

¹ Sir Jeremy Lever, KCMG, QC; Monckton Chambers, Gray's Inn and Senior Dean, All Souls College, Oxford.

would be other real public benefits is even greater than it would otherwise be.

I then asked myself whether the proposal overcame the generally wise test: If it ain't broke, don't fix it. It is said that Lord Mandelson, when Secretary of State for Business, Innovation and Skills, declined to promote the proposal and, if so, the remainder of this article explains why I think that on this occasion he was right.

In that connection, I recall the words of a wise German Jewish academic who, having escaped from Nazi Germany before the Second World War, returned to German academic life when the War ended. A principle with which he sought to inculcate his students was: *ask for the evidence*. And that is what I now do, especially since, as every lawyer knows, the burden of proof rests on the person who advances a proposition rather than the person who seeks to refute it needing to prove a negative.

The first piece of evidence for which I ask is evidence that the OFT or the CC has *taken* a decision which ought not to have been taken and which would not have been taken if the two organisations had been merged. I know of no such decision.

Secondly, has either the OFT or the CC *failed* to take a decision which ought to have been taken and which would have been taken if the two organisations had been merged?

Thirdly, would either or both of the bodies operate in a better way if they were merged? For reasons already explained, one can rule out cost-reduction *per se* as a consequence of creating a single Competition and Markets Authority. And while I do not subscribe to the view that all is for the best in the best of all possible worlds, I see no reason to suppose that demerits of the OFT's recent operation would be removed as a result of the OFT/CC merger. Improvement is possible but a merger of the two institutions is not a necessary or even a likely condition for its attainment. In this connection I do not overlook the suggestion that mergers between undertakings could be more swiftly dealt with by a single competition authority than under the present system in which problematic mergers between undertakings are referred by the OFT to the CC.

My own view is that a merger between the OFT and the CC cannot be justified on such a basis. In the first place references by the OFT to the CC of problematic mergers between undertakings are relatively rare: seven mergers were referred to the CC between April 2009 and March 2010. Secondly, evidence suggests that the parties to such mergers feel more confident with the detailed examination being undertaken by a court or tribunal that is independent of the OFT which is understandably perceived by them as having a role more akin to that of a prosecutor. Thirdly, for reasons mentioned below, in the case of at least some mergers between undertakings, the decision on the merits must be taken by a court or tribunal and could not be taken by an administrative body such as a single competition authority would necessarily be.

Fourthly, what, if any weight should be given to the contention that a merger of the OFT and the CC would result in the creation of a 'Mr UK Competition Law' – an undisputed supremo who could exercise a greater and more beneficial influence than can the Chairman or Chief Executive of the OFT or the Chairman of the CC? This is the 'single brand' argument and, somewhat surprisingly, given the division of competences between the US Department of Justice, the US Federal Trade Commission and the Attorneys General of the US States, is advanced most vigorously by knowledgeable and well-

meaning US observers. I myself remain unpersuaded by the ‘single brand’ argument, though one would certainly need to consider very carefully any well-informed and reasoned statement that UK participation in the European Competition Network is materially prejudiced by the absence of a single UK competition authority. To date, I have seen no such statement.

Those who espouse the creation of such an authority in place of the OFT and the CC also need to address a number of serious *technical questions*.

First, any decision that an undertaking has effected what constitutes, under the Enterprise Act 2002, a ‘relevant merger situation’ should divest itself of assets *must* in my view be taken by a court or tribunal if the decision is to conform to the requirements of Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. It would, to my mind, be highly anomalous for ‘mergers’ that *might* result in a divestiture order to be subject to a different control régime from mergers where the possibility of a divestiture order can be excluded from the start. And even if only cases of potential divestiture orders were subject to a ‘court or tribunal’ régime, what court or tribunal should be entrusted with the necessary competence? It would be scarcely practicable to retain a vestigial Competition Commission for that purpose alone and there is no other natural candidate to fulfil the role.

Secondly, a similar question arises in relation to what are currently appeals to the CC from decisions by the ‘regulators’ such as OFGEM and OFWAT under sector-specific regulatory legislation. While I can see the *possible* merit of creating a single regulatory authority with specialist ‘divisions’ having responsibility for different economic areas but sharing a number of services relevant to, and used by them all, I can see no sense in transferring such appeals to a new single competition authority unless the new authority is going to ‘contain’ something that would look very like the present CC. And here too, there may well be scope for arguments under the ECtHR¹⁰ & Human Rights Convention¹¹. What is I believe certain is that the current resources and procedures of the Competition Appeal Tribunal could not reasonably be expected to replace the CC for this purpose.

Thirdly, if the OFT and the CC were merged, what would happen to market investigation references (MIRs)? I happen to think that they can be very useful – in fact, that they should be more widely used – but I know that some people regard MIRs as an anomaly that should be abolished and would regard a merger between the OFT and the CC as a good occasion to bury them. But buried they would have to be if the OFT and the CC were merged: it would, I believe, be incompatible with the rule of law to entrust to a government department such as the OFT now is and such as the new single competition authority would surely be, the power not only to take the initiative in investigating cases of, in effect, ‘market failure’ but then the power to take quasi-legislative measures to remedy such failure. It is true that such measures by a single competition authority could, with permission, be challenged on judicial review. But in an area that undoubtedly involves a substantial margin of appreciation of ‘complex economic assessments’ (to use a phrase beloved by the EU institutions), the High Court of Justice and the Court of Session could not hope to provide a satisfactory substitute for independent investigation and decision such as the CC is well-equipped to provide.

If the government persists in its present proposal, I expect that technicians will find ways of getting round the technical problems to which I have drawn attention, though I cannot at present see how such solutions will be as satisfactory as the present tried and established system which is very well-regarded internationally. But that brings me back to my earlier point: If it ain't broke, don't fix it. And if that does not cause the government to think again, could we please see the evidence.

Response by Linklaters LLP to the BIS Consultation ‘A Competition Regime for Growth: A Consultation on Options for Reform’

1. Why reform the competition regime?

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

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

These are entirely desirable objectives for the Government even though it is considering reform of a competition regime that is already highly rated. We consider that other factors to be taken into account when judging the scale of the reforms and the shape that they should take are: (i) the importance placed by business on a second-stage review that is, and can be seen as, (substantially) independent of first-stage review for markets and merger cases; and the fact that (ii) any newly configured system will also have a considerable bedding-down phase where robustness, case selection, speed and predictability will not have attained the optimum that the system may be capable of. Hence, there will be considerable short term disruption before any benefits are obtained and that assumes that sufficient ‘independence’ can be achieved of any phase two from any phase one decision. It should not be overlooked that the nature of the Government’s objective is such, that an assessment of whether they have been achieved or not, necessarily will require a considerable number of cases to be dealt with.

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

The current UK regime is already well-regarded and the concerns that exist are broadly, that:

- (i) the Office of Fair Trading (“OFT”) does not always take the right cases, sufficient cases do not come through to decision to clarify the law/policy and those decisions could be taken more quickly;
- (ii) the Competition Commission (“CC”) could take decisions more quickly; and
- (iii) there is significant duplication, in mergers and markets cases, as between phase one (OFT) and phase two (CC) stages.

We consider that concerns (i) and (ii) (the number of and speed with which decisions are taken) could be addressed successfully by timetabling improvements, together with more effective leadership and management. We consider that concern (iii) (duplication) may simply be the price to pay for independence, although there may be practical steps which would lessen time taken and duplication, but nevertheless maintain the confidence of its users. If this is indeed right, a merger of the OFT and CC would not be necessary, since timetabling, management and leadership measures can effectively address the majority of the concerns. Moreover, since the CC has no role in relation to Competition Act cases, a merger will not necessarily, in itself, aid attainment of the Government’s objectives in that regard.

However, if a merger is desirable for other reasons, it would be necessary to ensure that the reformed process does not remove the independence of the phase two investigation. It is also crucial that the quality and robustness of the second stage process and final decision is not weakened, notwithstanding that it may have been speeded up.

A merger risks a *perception* of a lack of independent investigating of second-stage cases and risks, therefore, the credibility of second-phase decisions. Because the success or not of the reforms can only be judged after a significant number of decisions have been taken, any such perception (at the outset) will take time to address, impeding an effective bedding-down process. In addition, there might be an *actual* significant loss of independence, where decisions are heavily influenced, or taken, by a relatively small group of employees of the same organisation. The risk of “group think” and “confirmation bias” is evident. Accordingly, appropriate mechanisms will need to be in place, for example, to ensure that evidence that undermines the existence of a problem found at phase one is given as much weight at phase two as supporting evidence, in order to ensure a clear break between initial fact finding and final decision.

2. A stronger markets regime

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

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

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

As a general comment, while there may be a need to speed up the time taken for CC investigations, we do not believe that the markets regime requires radical change. In particular, we do not think that the low number of market investigation references suggests that the markets regime is under-utilised. On the contrary, given the lengthy and burdensome nature of a reference, this may indicate that market distortions are being addressed more rapidly and efficiently through the market study tool.

Enabling investigations into practices across markets

We are not aware of any evidence that there has been a need for ‘horizontal’ investigations. Furthermore, there should at least be evidence of market power to extend an investigation across markets; and we see real difficulties in establishing such market power across multiple, and potentially unrelated, markets.

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

We are aware of the additional costs and resources required to establish the Independent Commission on Banking because the CC was unable to take into account broader public interest issues. However, this was an exceptional inquiry in exceptional circumstances, and we doubt that this will become necessary on a frequent basis. That said, provided there are sufficient checks and balances around the identification of appropriate and clearly identified public interest issues, we have no significant concerns in this respect.

Extend the super-complaint system to SME bodies

We have significant concerns about this proposal, which we believe would unnecessarily distort case prioritisation. In particular:

- The competition regime must deliver benefits to consumers. While this is ensured by protecting the process of competition, it is not served by protecting any individual competitor, large, medium or small. Indeed, where the competitor is inefficient, protecting it may produce adverse effects for consumers.
- Thus, while giving consumer bodies special status to launch a “super-complaint” is consistent with the policy objectives of competition law, giving such status also to SME bodies is not.
- Unlike consumer bodies, SME bodies may be motivated by commercial and competitor interests that, at best, are not consistent with the consumer interest and, at worst, are adverse to the consumer interest.
- The super-complaint system already distorts the OFT’s prioritisation process, taking priority over and possibly displacing other investigations that may have greater merit and which may have greater potential to deliver consumer benefits. It should therefore be extended only with great caution.
- SMEs already have the same ability as other organisations to make a complaint to the OFT, without the distortions created by a super-complaint. In addition, they are free to ask consumer bodies to lodge a super-complaint based on their concerns. Indeed, if they are not able to convince a consumer body to do so, that may suggest that their complaint is without merit or is not ultimately in the interests of consumers.

Streamlining the markets regime

We agree that the length of time taken to process cases through the markets regime is a major concern for business, and we therefore support the proposals to reduce the timeframe from 24 to 18 months, subject to extensions in appropriately justified cases.

We agree that the CMA should have statutory information gathering powers for phase one studies. This introduces greater certainty for business, and indeed provides them with greater protection as regards disclosure of confidential information and avoiding waiver of privilege.

We certainly see the benefits in principle of statutory time limits (e.g. 6 months) for phase one studies. Further, any statutory time limit should apply to all phase one studies, subject to the CMA retaining the flexibility to extend the study if there is a reasonable prospect of thereby avoiding a reference. Perhaps it may be possible to consider the introduction of an “extension or undertakings in lieu of reference” regime.

Statutory definitions and thresholds

We support the introduction of a statutory threshold for initiation of a market study. We believe an objective test is necessary to avoid the perception of arbitrary behaviour and to enable the CMA to resist potential political influence and public pressure, given the burden that a market study places on business. Although the substance of the test would be the same as that for a phase two reference, the statutory threshold for initiation of a phase one market study could borrow the threshold for a preliminary investigation which existed under section 3 of the Competition Act 1980. In other words, the test for a phase one study could be drafted along the following lines:

“if it appears to the CMA that any feature, or combination of features, of a market in the United Kingdom for goods or services may prevent, restrict or distort competition in

connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom".

This is a lower threshold than the "reasonable grounds for suspecting that" threshold for a phase two reference and would reduce the risk of long and drawn-out initial assessments of the market by the CMA in deciding whether to initiate a phase one market study.

Antitrust enforcement

Market studies and investigations should not be used as a "fishing expedition" for antitrust infringement. While they may lead to the identification of possible infringements, which are investigated under the antitrust regime, these tools must be kept completely separate. The market regime has a much lower threshold for intervention – there is no need for reasonable grounds for suspicion of individual infringement. Investigation of any infringement should therefore be subject only to the antitrust regime, with all the checks and balances it entails. For this reason, we are opposed to any extension of the markets regime to make it more similar to the EU sector inquiry regime.

Institutional issues

We are concerned that the creation of a single CMA risks distorting the incentives to initiate market investigations. Under the current system, the OFT has no incentive to initiate market investigations, e.g. to create work for itself and/or to "justify its own existence". Indeed, if anything, it has an incentive to demonstrate that it can resolve issues speedily through the use of a lighter, less interventionist market study. That appears to us, given the substantial burden of a market investigation, an appropriate balance of incentives. While the CC may not be happy that it has under-utilised resources, resource utilisation should not be the driver of which, and how many, markets are investigated. It is conceivable that the CMA's incentives to initiate market investigations could be perceived to include considerations such as full utilisation of resources, response to political or public pressure or to enhance its reputation for aggressive enforcement, rather than the merits of an individual market. Accordingly, if there is to be a single authority, we would recommend the introduction of checks and balances (which currently arise from the split responsibilities of OFT and CC) to give confidence that the correct incentives are taken into account.

3. A stronger mergers regime

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

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

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 concerns identified by the consultation paper are not sufficient to warrant a wholesale revision of the current voluntary notification regime

As a general comment, the current UK merger control system works well. Although the voluntary system is somewhat unusual in world terms, it has proven to be effective: it allows for flexibility for both the OFT and business, it is held in high regard internationally and generally results in analysis that is of a quality that is higher than in many other

jurisdictions. In our view, there is no need to introduce either a mandatory, or a hybrid mandatory, merger control system.

The consultation paper identifies two potential drawbacks in relation to the voluntary system. The first of these is that some anticompetitive mergers escape review. However, the consultation paper itself observes that this is not a serious failing of the current regime, particularly given the lack of third party complaints and improvements in the OFT's merger intelligence function.¹ We agree with this conclusion.

The second drawback is that the investigation of a high proportion of completed cases can hinder the effectiveness of the competition framework since such cases can be difficult to undo and appropriate remedies can be difficult to apply. We note that in the past five years, 21 of 40 cases referred to the CC were completed cases and 9 of these were then cleared unconditionally. Therefore on average it appears that around 2 cases (at most) per year may potentially give rise to these concerns.

In our view this does not amount to such a major drawback of the current merger regime that radical changes are required. Furthermore, it may be that clarification of the powers under Schedule 8 of the Enterprise Act 2002 would assist with the issue. Schedule 8 contains extensive powers which are currently underutilised and these might be more susceptible to use, if they were more clearly specified.

More generally, the consultation paper observes that BIS is interested in improving the speed of the current regime. We agree that some speeding up would be welcome, in particular with regard to the remedies process. However, we consider that a shorter phase 1 process which requires extensive pre-notification may lead to a reduction of certainty for businesses without necessarily leading to an overall speeding up of the entire process.

We note that the BIS proposals do not envisage reducing the UK phase 2 period. This is despite the fact that the review period (with a 24 week statutory time limit and an unlimited time frame for finalisation of remedies) is typically slower than the EU phase 2 review period (90-125 working days).

The proposed mandatory notification regime is unnecessary

We do not support the introduction of mandatory notification. The imposition of a mandatory regime seems highly disproportionate, particularly given that of the two drawbacks to the current regime identified by the consultation paper, neither appears to give rise to extensive serious consequences.

In order to comply with ICN "best practice" guidelines, a mandatory notification regime must have notification thresholds that are based on objectively quantifiable criteria.² Self-evidently, a mandatory regime cannot catch all mergers unless thresholds are set at very low levels. There are two key issues arising from the very low thresholds proposed in the consultation paper:³

- significant resources would likely be spent on bureaucracy as a consequence of "no-issues" cases triggering a filing under the mandatory filing thresholds; and

¹ See further paragraph 4.4 of the consultation paper.

² See further paragraph 4.23 of the consultation paper.

³ Paragraph 4.27 of the consultation paper indicates a turnover threshold for the target of £5 million, and a worldwide turnover threshold for the acquirer of £10 million.

- it raises resourcing implications for the CMA because the work of the CMA may become primarily administrative rather than substantive (raising questions as to whether the CMA would be able to attract high calibre staff).

In addition, even if the mandatory regime provided for a “short form” pathway to reduce the resources involved in relation to “simple” cases, in our experience, such an approach could still involve significant resources on the part of businesses and the CMA in order to assess the applicability of the “short form” approach to their particular case. For example, we have been involved in EU short form cases which involve several weeks of pre-notification – such as those in which there is little precedent as to market definition and therefore whether the 15% threshold for a short Form CO is breached.

In light of the foregoing, our strong view is that the introduction of a mandatory regime is unnecessary. However, if mandatory notification is introduced (despite the drawbacks set out above) we consider that a non-suspensory regime is preferable.

The proposed hybrid notification regime would create more problems than it solves

The proposed hybrid regime would catch all large cases (i.e. those that trigger the target turnover threshold of £70 million) on a mandatory basis, despite the fact that most would not result in a substantial lessening of competition (because of an absence of significantly overlapping activities). Currently, such cases are (rightly) not notified and not called in by the OFT. At the same time, small completed deals (i.e. those BIS has identified as potentially concerning now) would remain subject to a voluntary regime.

Consequently, we consider that the hybrid mandatory notification regime would be more burdensome on business than the regime currently in place, but without any clear benefit.

A further question arises as to how a regime under which the CMA would have the ability to review all mergers, except for those exempted by the small merger exemption could work harmoniously with the imposition of merger fees. At present, it is clear that mergers which do not hit the share of supply test (or turnover test) are outside the regime and thus no merger review fee can ever be payable. This certainty would be lost under this proposal, because the CMA could call in any deal and then charge a merger fee. If the CMA were consistently to call in cases without an obvious competition issue, businesses would be likely to consider the regime to be a ‘back door’ way of imposing a business tax than as a serious and substantive review process.

Consideration of proposals to improve the voluntary notification regime

(i) Proposal to strengthen interim measures under the voluntary notification regime

We consider that the existing interim measures under the voluntary notification regime are adequate and effective.

Given that a voluntary notification regime is inherently permissive and relies on the assumption that most mergers are benign in competition terms, the two proposed options contradict the principles of the regime.

Firstly, the automatic imposition of a statutory restriction on further integration as soon as a CMA inquiry into a completed merger commences is contrary to the principles underlying the voluntary notification regime in that it goes as far as possible to put impediments in the way of completion, without explicitly preventing it. Such a blanket restriction would catch cases that might not otherwise result in interim undertakings being required, and may have the following unintended consequences:

- potentially, fewer benign cases may complete because the vendor is likely to insist that competition risk is allocated to the purchaser (and the prospect or costs of hold separate undertakings may be unacceptable to the purchaser);
- potentially, fewer completed cases may be voluntarily notified, thus putting more pressure on the CMA's market intelligence unit; and / or
- parties may be discouraged from notifying completed cases early on and may take hasty (and not necessarily optimal) steps to integrate.

Secondly, extending the powers of the CMA to prevent pre-emptive action by requiring the reversal of actions already taken (notwithstanding the existence of any contractual obligations on the part of the merged entity) is also contrary to the principles underlying the voluntary notification regime. Such sweeping power would be extremely intrusive and would also create unfairness for third parties. Indeed, we note that under the Enterprise Act and its predecessor (the Fair Trading Act) the automatic bar on share dealing that is triggered on a reference to the CC does not apply where existing contractual obligations exist.

Finally, if financial penalties are to be introduced for integration measures taken in breach of hold separate obligations, we consider that:

- such penalties should not be capable of being applied unless there is a finding of a substantial lessening of competition and the breach interferes with the ability of the CMA to address that SLC;
- the CMA should consult widely on interim measures and issue very clear guidance in relation to what is considered a breach, and also how penalties will be assessed;
- the fines need to be proportionate (with the appropriate appeal mechanism in place);
- the proposed maximum level of up to 10% of turnover appears disproportionate; and
- the CMA needs to be open to prompt discussions with parties seeking clarity around whether a breach is likely to occur, and also to the prospect of giving prompt derogations where necessary. This will add to the bureaucracy and time demands on the CMA.

(ii) Jurisdictional threshold

We consider that replacing the current jurisdiction of the share of supply test and turnover test with the ability for the CMA to review all mergers (except for those eligible for the small merger exemption) would result in increased uncertainty for business. It could also lead to an increased number of notifications which would, again, lead to increased demand on resources. It would also not be clear how filing fees would be charged under such a regime. As indicated above, if filing fees are required for each merger that the CMA decides to review, the regime may be perceived as a revenue-generating mechanism.

(iii) Proposal to extend information gathering powers

Although the OFT currently has the power to stop the administrative and statutory clock to incentivise the merger parties to submit information, it lacks the power to impose a penalty. In contrast, at phase 2, the CC has the power to both stop the clock and issue penalties if the main parties and third parties do not provide information.

If the single CMA were given extended information powers at phase 1, it is proposed that these would need to be accompanied by stop the clock powers (if the main parties did not comply) as well as powers to impose a penalty if the main parties or third parties did not comply. This would be broadly consistent with the position under Article 14 of the EU Merger Regulation which provides that the European Commission may impose a fine on the main parties, undertakings or associations of undertakings for supplying incorrect or misleading information, or failing to supply information within the time limit. We do not see an objection to this proposal provided that there is a system in place to ensure that these powers are not used disproportionately. Such a system might include guidance as to the circumstances in which the CMA might exercise this power and clearly there would need to be an appropriate appeal mechanism.

(iv) Decision-making structure for merger cases

In the context of a single CMA, in the interests of independence and transparency, it will be important to retain a panel as the final decision-maker. For this reason, we do not consider the decision-making structure set out in Figure 10.4 of the consultation paper to be appropriate because it involves less independence and transparency than the current decision-making structure.

(v) Extensions of time

Potentially, if the existing timescales (as discussed above) continue to be relied upon, more rigour and robustness could be introduced into the system by requiring that the decision to extend the phase two process by 8 weeks be made not by the decision maker (ie the panel), but instead by a higher authority (such as the Supervisory Board). This would enable parties to have greater confidence that more time is, in fact, required, as the decision has been made by people who are independent of the decision making process itself.

4. A stronger antitrust regime

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

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

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.

Current issues in antitrust enforcement

The National Audit Office (“NAO”) has considered the efficiency of the OFT’s decision making procedures in a number of reports. In March 2010, the NAO noted that a “*perception persists amongst Regulators and the OFT that the UK enforcement system, including the likelihood of appeal, is an onerous process compared with the use of other powers*”⁴. The NAO also noted that “*the decision process itself is often lengthy; and following a decision, most Competition Act investigations are subsequently appealed. There is a risk that the length and uncertainty of the outcome, of the enforcement process*

⁴ National Audit Office Review of the UK’s Competition Landscape, March 2010, paragraph 3.8.

*in its entirety may reduce the appetite of the authorities for using their competition enforcement powers*⁵.

We agree that there is a need to enhance the efficiency of the current administrative approach to antitrust enforcement by the OFT, as provided for under the Competition Act 1998. The OFT in its guidance on antitrust investigation procedures⁶ has introduced certain measures aimed at streamlining its procedures, so as to improve case delivery. Procedurally, however, the current regime remains cumbersome whereby the OFT acts as investigator, prosecutor and adjudicator.

(i) Number of cases

We agree that overall, relatively few decisions have been taken. While comparisons to other EU Member States may not be apposite, it appears that the UK makes fewer decisions than other large EU Member States and even than some of the smaller Member States. In addition to the modest number of Chapter I decisions adopted by the OFT, there has been an even more limited number of Chapter II investigations. Administrative priorities are generally cited as the main reason for this.

Although the number of cases pursued by the OFT is not necessarily an indication of a failure of competition policy, it is arguable that the OFT is dis-incentivised from using its antitrust powers given the availability of less onerous consumer and/or regulatory powers. In addition, the concurrent powers of sectoral regulators also appear to have exacerbated the difficulties for the OFT in bringing antitrust enforcement action.

It is arguable that the scope of the OFT's responsibilities can lead to diversion of resources to areas where procedural burden and external oversight are lighter, particularly in respect of market studies. In the context of antitrust enforcement, the possibility of the imposition of significant financial penalties and/or the pursuit of criminal proceedings require adequate due process safeguards to be in place. Robust antitrust enforcement requires the agency to be conferred with a clear mandate focused on this and with appropriate targets to reflect this focus. It also requires sufficient staff with extensive experience of antitrust enforcement and competition litigation.

(ii) Length of cases

We also agree that there has been a considerable length of time before a decision has been adopted following the commencement of an investigation. These delays appear to have arisen principally at the administrative stage of the investigation, as opposed to the appeal stage before the Competition Appeal Tribunal ("CAT").

It would appear that a contributing factor impacting upon the length of time that it takes the OFT to conduct an investigation is the inherent bias associated with an integrated investigative and decision making process. Under the current administrative process, the OFT must be, at the time of issuing the decision, "minded to take a decision" while also retaining an "open mind" in the subsequent adjudication phase.

A further issue is the lack of significant involvement by an experienced decision maker in the process at an early stage.

Combining a cumbersome administrative process (particularly in the context of resource limitation, both financial and in terms of the necessary specialist staff and infrastructure to

⁵ *Ibid*, paragraph 10.

⁶ "A guide to the OFT's investigations procedures in competition cases", March 2011 (OFT 1263).

support an integrated process) with a judicial procedure, means that the current system is not working as efficiently or effectively as it might.

Delays arising from the administrative process appear to be twofold. First, there would appear to be too many “iterations” of the facts before a decision is adopted, for example the Statement of Objections, Supplementary Statement of Objections, written and oral representations. Secondly, delays also appear to have arisen as a result of difficulties in collecting evidence, particularly witness evidence (discussed below); and also identifying a theory of harm so that the focus of the investigation is clear (as appeared to be one of the principal difficulties arising in the *Tobacco* case).

Where the OFT’s case appears to rely primarily on fact, the process of gathering and testing evidence (especially witness evidence) appears to be flawed. Witnesses are interviewed and re-interviewed by the OFT and not cross-examined prior to the OFT adopting a decision, meaning that witness evidence may only be tested once the case is before the CAT. Where the OFT uses its power to compel a person to provide information under interview, the interviewee will typically only seek to provide “useful” evidence to the OFT.

The inherent difficulty associated with the OFT’s process of gathering and testing evidence was most recently highlighted by the CAT in the *Construction Cases*⁷. In these cases the CAT stated that it did not consider that material contained in transcripts of interview, even if reviewed and attested, was a satisfactory means of evidencing alleged infringements particularly where important facts were in dispute. The CAT further commented that it was one thing to use a transcript of interview as evidence of relevant admissions by the interviewee, but it was quite another to attempt to use it as evidence against a third party. This of course, is not the first time such a criticism has been raised by the CAT. The probative value of witness evidence gathered by the OFT in the context of cartel enforcement was previously raised in the *Toys and Games* cases.

Delays in bringing antitrust cases may also be due to resource limitation, either because of a lack of appropriately skilled staff working on an investigation; or sufficient IT systems and support staff to assist in the efficient conduct of the investigation. An antitrust investigation necessarily requires input at an early stage from senior team members and experienced lawyers so that proceedings may be discontinued or prepared for adjudication as soon as practicable. The management structure of the Executive should be aimed at facilitating case delivery.

Options

(i) Option 1 - retain and enhance existing procedures

We consider option 1, whereby the OFT’s current procedures are retained and enhanced with the right to a full merits review by the CAT, to be workable in the context of the overall reform of the competition regime, provided also that sufficient senior staff are available for these cases.

As a specialist tribunal, the CAT has demonstrated itself to be efficient and thorough in conducting full merits appeals. We regard the administrative appeal process as essential to preserving the right to a fair hearing, provided for under Article 6 of the European

⁷ *Durkan Holdings Ltd v. OFT* [2011] CAT 6 paragraphs 108-110; *GMI Constructions Holdings plc v OFT* [2011] CAT 12 paragraphs 74-76; *AH Willis & Sons v OFT* [2011] CAT 13 paragraphs 66-68 and *North Midland Construction plc v OFT* [2011] CAT 14 paragraphs 32-34.

Convention on Human Rights ("ECHR"). Further, given the significant adverse consequences of competition law infringements, not only in respect of the financial penalties imposed on the companies concerned but also possible director disqualification orders and/or criminal cartel enforcement, it is essential that the facts in each alleged infringement are capable of ultimately being determined by an expert and impartial tribunal.

However, certain limitations would remain. Retaining the existing model based on the EU investigatory process does not overcome the fundamental dichotomy arising from an integrated investigative/decision making process. Under common law, questions of fact, evidence and proof are paramount and must be robustly tested by an independent arbitrator of fact and law (for example the CAT). Retaining the current system, which is based on the EU model, assumes that there are no inherent flaws under such a model.

It should be borne in mind that the benefit of experience does not necessarily lead to improved efficiency in the management of investigations. Whilst it could be argued that investigations will not take as long to complete as was the case when, following the introduction of the Competition Act 1998, the regime was in its infancy, some of the OFT's current and recent cases have nonetheless taken years to complete (for example, *Construction, Tobacco and Dairy*).

Ultimately, we regard this option as preferable to option 2, whilst not representing as fundamental a change as option 3. This option would enable the CMA to continue to make incremental improvements reflecting enforcement experience. The proposed procedural improvements would result in greater transparency in respect of the identity and role of the decision maker, allowing for more active participation in the assessment of the evidence prior to making a decision. There would also be minimal costs associated with this option, save those associated with developing additional policy.

(ii) Option 2: develop a new administrative approach

We regard the proposals set out in option 2 as fundamentally flawed. It is not apparent how the proposals would improve antitrust enforcement. Rather than enhancing antitrust enforcement, the proposals may give rise to even fewer, less rigorous and slower decisions. It is arguable that this model would do little more than imitate the "prosecutorial model", substituting the CAT for a less robust forum in the form of the Internal Tribunal. Alternatively, if the Internal Tribunal were to be made more robust (in the form of conducting a merits review) then this would only appear to give rise to an additional stage of review or appeal.

The proposals set out under option 2 are likely to further extend the length of the administrative procedure, where significant delays currently occur. Moreover, reducing the CAT process would not address one of the Government's principal concerns, namely that antitrust cases take too long.

It is also not clear that "judicial review" will reduce the scope of appeal to the CAT. On the assumption that the reference to "judicial review" is a reference to the process of the EU General Court, the standard of review before the General Court permits, in principle, an appeal on facts⁸. Appeals to the General Court, in practice, do not generally involve a "trial" of facts, because of the civil law approach to procedure and fact-finding (e.g. no disclosure or no/limited oral evidence and cross examination) rather than not being permitted in

⁸ Even in cases of complex economic appraisal, the General Court is required to verify "whether the facts have been accurately stated" by the Commission (see paragraph 5.41 Consultation Document).

principle. It would appear unlikely that the CAT would be permitted to refuse disclosure or witness evidence, even if it were minded to do so.

If appeals to the CAT were only on the basis of fact then the outcome of an investigation is likely to be less robust and ultimately less just. Appeals on fact to the CAT would also likely extend the time taken to conduct the investigation, due to the scope for remittals back to the CMA.

It is also questionable whether the constitution of an “Internal Tribunal” would be compliant with Article 6 of the ECHR. The proposals contained in the consultation paper are very opaque as to how an Internal Tribunal would be constituted. The case law cited in the consultation paper applies to prisons and hospitals and may not have more general application. It is unclear how the relationship/reporting lines between the Tribunal Members and Supervisory and Executive Board would operate. There would arguably also be less protection of the rights of the defence, due to the dilution of the CAT’s powers of review and also the ambiguity which may arise in respect of the role of the Internal Tribunal. It is unclear whether the Tribunal hearings would be open to the public so as to satisfy the requirements of Article 6 ECHR.

With regard to the variant contained in option 2, it is not obvious that such panels would be advantageous unless they could ensure that cases progress more rapidly than they do presently. Further, if an “investigatory panel” were substituted for the Internal Tribunal, and the same administrative process were followed as in the case of a Phase 2 merger or market investigation, there would be no adversarial process for fact finding in cases concerning past conduct giving rise to the possibility of fines; (a process different from mergers and market investigations) and the question of Article 6 ECHR compatibility would also arise. Under such a system, additional safeguards would be required in order to ensure full respect of the rights of defence⁹.

(iii) Option 3: a prosecutorial system

A prosecutorial system would be a viable alternative to the current administrative model. A prosecutorial form of antitrust enforcement has a number of benefits. It removes the adjudicative function from the CMA thereby ensuring the independence of the decision and is likely to give rise to more robust outcomes.

Under this model the CMA would be required to gather evidence rigorously for presentation at trial before the CAT. It would also avoid the issue of the probative value of evidence where it has been gathered by the CMA and relied upon as part of its administrative process. Evidence gathered by the CMA and also the defendant would be tested only once before the CAT. Oral evidence would also be heard and tested sooner, avoiding the problems associated with recalling events which were alleged to have taken place several years earlier. Significantly, where a case proceeded to trial, full Article 6 rights would be available to the defendants.

From a procedural perspective, a prosecutorial approach is arguably also better able to deal with issues associated with confidentiality and the management of multi-party cases. It is also likely to reduce the time it takes to bring a case against a defendant for an alleged infringement.

However, adopting such a model would require significant amendments to current antitrust law and process. Indeed, the CMA would need, on the one hand, to have staff skilled in

⁹ See *Sports Direct International Plc v. Competition Commission* [2009] CAT 32, paragraph 58.

administrative processes to cover markets and mergers and, on the other hand, would require the staff with the appropriate skills in prosecutorial functions to cover antitrust investigations.

From a defendant's perspective, a prosecutorial model may result in onerous trials in those cases which are not settled, increasing the involvement of lawyers and also costs and disruption to the business. The costs associated with a prosecutorial model may be perceived to be an issue for SMEs unduly placing them under pressure to settle an investigation rather than proceed to trial. Conversely, costs may be awarded to a successful defendant while costs are not available in the administrative procedure.

There is a risk that the CMA would bring fewer cases if it perceives prosecution to be difficult and requiring a significant allocation of resources, which may make such a radical change to the current system of enforcement unattractive.

It is worth noting that whilst the US model is perceived to be quite successful and in particular has resulted in a significant number of plea bargains, it is a mature system and it should not be assumed that similar outcomes would be observed in the UK, especially in the early stages of any new regime.

Timetable for enforcement

The introduction of administrative timetables is desirable but statutory timetables would be difficult, not least given the need to ensure adequate rights of defence for companies under investigation. If administrative timetables are introduced they need to put sufficient – but realistic – pressure on the CMA if they are to be beneficial. If statutory timetables were to be introduced it seems likely that they would have to be generous given the due process issues. If so, they might offer little benefit in terms of achieving faster case decisions.

Private Actions

The consultation paper does not put forward any specific proposals in respect of private enforcement action. As section 16 of the Enterprise Act 2002 has not yet been implemented it is not possible to comment on whether such a power has been effective in facilitating damages actions based on competition law.

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

We are not aware of any empirical evidence to suggest parties who are the subject of an investigation under the Competition Act 1998 or the Enterprise Act 2002 systematically fail to co-operate during the course of an OFT investigation. In our experience the OFT has, in the main, been reasonable in its approach to establishing deadlines and addressees generally use reasonable endeavours to ensure that they comply with OFT requests. We consider that if the proposal contained in the consultation paper is adopted, there must be adequate due process safeguards under the relevant legislation. Where fines are directly imposed by the CMA, there ought to be a right of appeal to the CAT.

5. The criminal cartel offence

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

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

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

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

The consultation paper lists a number of possible options for reforming the criminal cartel offence, predicated on the assumption that the offence as currently drafted does not work.

Specifically, the Government states that the requirement to prove “dishonesty” makes the offence harder to prosecute and puts the United Kingdom at odds with developing international best practice on how to define a hard core cartel offence.

We consider these proposals for reform to be premature. The current system is as yet untested and should be allowed to bed down further. In particular, very few cases have been brought and a greater body of evidence would be required before overhauling the existing regime. Moreover, neither of the two prosecutions that have been brought since the offence was enacted supports a conclusion that the element of dishonesty prevented a successful prosecution of the offence. We note that the OFT commenced three criminal investigations in 2010 and it will be interesting to see how those cases develop.

In particular, it would be important to observe how a jury would react in an actual case, once directed by a judge. The “dishonesty” element has been used in other contexts, from the offence of conspiracy to defraud to cases under the Fraud Act 2006, and it has long been established that the test set out in the *Ghosh* case is sufficiently certain for the purposes of establishing whether a person has acted dishonestly. It is not clear why this should not be the case in relation to the criminal cartel offence, particularly when most hard-core cartel cases include elements of covert activity from which dishonesty can be inferred.

Most significantly, the removal of the dishonesty element would risk blurring the distinction between criminal and civil conduct. The offence would become one of strict liability, dependent not on the offender’s intentions but on the consequences - however unintended - of that person’s actions. Far from being easier to bring a prosecution, this could become more complicated, focussing on the consequences of the cartel arrangement and involving economic analysis which juries may find hard to comprehend. In short, this change would significantly reduce legal certainty for potential defendants, and make it more difficult for companies and advisors alike to navigate the system.

6. Concurrency and sector regulators

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

We agree that sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA.

The consultation paper highlights how rarely Competition Act 1998 cases are decided (only two antitrust decisions), and MIRs are made (only two) in the regulated sectors and notes that commentators have suggested that this is a weakness in the competition regime.

Although it is true there have been fewer infringement decisions and MIRs in relation to the regulated sectors than originally anticipated it is not clear to us that use of sector regulation powers to achieve outcomes that could have been achieved through the use of competition legislation is necessarily a bad thing. It is reasonable for the regulators to focus on getting the right outcome in their particular sectors and for the benefit of consumers rather than

aiming to create sufficient competition law cases to serve as precedents in future investigations.

In the consultation paper, the Government considers that the lack of use of antitrust and MIR powers might be caused by the duty regulators have to use their sectoral powers or by the fact they have other, possibly easier, tools to resolve competition issues in their sectors or by their lack of depth of skills and resources. Furthermore, there may be particular disincentives for regulators to make MIRs to the CC.

It is true that there has been a perception in the past that regulatory outcomes have been preferred by the regulator over antitrust ones because the latter involves appeal on the merits by the CAT and the former "only" judicial review. Such considerations may underpin the reasons for the choice of enforcement tool and a preference for application of regulatory powers. The lack of effective appeals over regulatory decisions (that is, improvements to a "judicial review only" system) is a separate problem and ought to be addressed by regulatory reform to ensure that the ability to appeal a decision on the merits is not a reason for choice of tool. Accordingly, there may have been fewer antitrust precedents or MIRs than might have otherwise been the case.

It is also the case that some of the actions that have then been pursued have displayed delay and inefficiency as a result of poor/inexperienced agencies. We note in this respect the examples of the general slowness of processes operated by Ofwat, the need for a supplementary Statement of Objections process in the National Grid meters case and in that same case, the very high initial fine which was subsequently (significantly) reduced on appeal. These examples lend support to criticisms that antitrust and MIR powers are not used by sectoral regulators due to inexperience and disorganisation.

Despite this we consider the regime of concurrency should be maintained.

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

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

We do not agree that measures should be introduced to require use of antitrust powers (or MIRs) if other routes are better suited for regulatory action. We believe that in appropriate cases the utility sectors will require and should pursue "pure" competition law enforcement or might benefit from an MIR. The sector regulators ought to be the agencies most well placed to initiate such action and it is hard to argue with the proposition that the competition laws ought to be a part of the regulators' armoury. We are left, however, with the question of the initiation and then conduct of such cases.

In this context it is worth noting that, like the utility regulators, even the record of the OFT is imperfect. Consequently we can see the argument that there may be an advantage in the UK developing a "centre of excellence and experience" in the pursuit of antitrust cases with the CMA having more of a role in the conduct of cases in order to benefit from the learning effects of dealing with more cases. We therefore see merit in the sector regulator having the ability to require the CMA to act but the CMA having the central pool of "prosecutorial" resource.

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

It has been said that it may be that the regulators have shied from this because of the risk of conflict with their own past decisions or fear of criticism. The criticism of, for example, Ofwat and Ofgem by Parliamentary Select Committees in the past means that they are not immune from criticism, but that is by a body which cannot itself effect change - unlike the CC. There is also the apparent oddity that whilst the framework for the introduction of competition into the domestic gas markets (and by analogy electricity) followed a detailed MMC investigation under the then applicable statutory regime (the Fair Trading Act), the framework for competition for water has largely been developed by Ofwat (with reference to the non statutory Cave Review) in a less accountable or reviewable way.

Accordingly, there is a case for the regime to allow for MIRs (perhaps with a public interest remit defined by reference to the existing relevant statutory duties of the relevant regulator) to be instigated by the CMA in the absence of action by the regulator. An alternative that may be consistent with the possible policy of regular reviews of regulators' remits would be to provide in legislation for MIRs or public interest reviews to be conducted every 10 or so years in order to provide for the review of the markets and their regulation as a whole.

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

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

If the CMA is to be the body responsible for considering regulatory reference and appeals currently heard by the CC, first and foremost, the CMA must have the stature, independence and provide the quality of the CC currently.

In this context we note also that the system of licence modification references to the CC under the various utility statutes subjects regulatory action to a public interest test having regard to all the regulators' statutory duties rather than an exclusively competition, or competition plus efficiencies test, under the MIR regime. That seems to us sensible having regard to the essential nature of the services in question.

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.

We agree with the creation of core model regulatory processes although we suggest that there should be a bias towards the processes providing for a "rehearing", at least where the issue is novel or relates to the formulation of new rules or revenue/cost trade-offs (most obviously price controls); and that "review" should be confined to those cases where the process relates to the determination of licence/regulatory compliance or whether the pre-defined requirements for regulatory action are met.

We take this view because we believe that it has been a fundamental and well understood principle behind UK utility regulation (and one of importance to those who have invested/financed it) that there be due process and that the regulators should be able to be held fully to account. We believe reliance on a review-driven appeal process in relation to price controls and the determination of new rules and licence conditions (as compared to compliance with the existing rules) would undermine that confidence and increase the perception of regulatory risk.

8. Scope, objectives, governance

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.

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.

The Government's objectives for the reform of the regime: greater robustness, efficiency and predictability of decision-making and better case selection are not, in themselves, capable of direct statutory formulation. Moreover, in many ways the current regime is well regarded amongst international comparisons. There must, therefore, be a risk that setting statutory objectives could impact on the nature of the role of the CMA in terms of its ability to choose cases, review markets and direct resources, which may not be desirable in the longer term. Moreover, the overall shape of CMA objectives can only be finally decided in the light of the Government's related consultation on consumer enforcement. Our preference would be for the CMA to have a principal focus on competition enforcement, whilst recognising the necessary inter-connectedness of the competition and consumer regimes.

We take the position that the new legislation should not be too prescriptive and should leave the CMA the discretion and flexibility to evolve its management objectives and structures, subject to appropriate safeguards. Given the fact that it will take some years to establish sufficient case law and procedures for a proper assessment of whether the Government's objectives have been met, it may be prudent to provide for, say, 5-yearly reviews.

We would otherwise only make general observations:

- (i) There would be some merit in the CMA adhering, as far as possible, to usual UK corporate governance rules. That would help the CMA to be understood by the business community.

Mergers/Markets

- (ii) It is important to achieve an independent phase two process (a particular merit of the CC) and merely having a different decision maker employed by the CMA will not maintain that benefit.

- (iii) To maintain that benefit requires the CMA to be able to call upon sufficient well-qualified panel members clearly recognised as independent. These panel members need to devote sufficient time to CMA cases but if they are substantially full-time employees they may lack the necessary independence/credibility for the role.
- (iv) Any perception that part-time members do not actively manage cases is best dealt with by appropriate recruitment, management and leadership.
- (v) Consistent with preserving the independence of the phase two panel and process, it may nevertheless be possible to appoint some of the phase one staff and potentially second/appoint others with relevant expertise. Such arrangements could bring continuity and insight to complex cases with benefits for efficiency and robust decisions. However, despite attractions, independence must be closely guarded in the CMA structure.

Antitrust and cartels

- (vi) We consider that cartels should either be investigated under an enhanced version of the current model (i.e. on an administrative basis with appeal to the CAT), or under a prosecutorial system, whereby the CAT is the decision maker at first instance in relation to the alleged infringement and any associated penalties. We discuss the relative merits of these approaches elsewhere in this response.
- (vii) We have heard it argued that a prosecutorial approach would necessarily reduce future policy development by the CMA. However, it is not clear to us that, assuming Parliament gives the prosecuting authority a policy role on competition enforcement, the CAT (or another Court) would seek to usurp that role. The authority would be able to determine policies, issue guidance and select the cases it wishes to bring and overall priorities. It would also be able to argue in front of the CAT that its approach on cases is consistent with its announced policy.

9. Merger fees and cost recovery

Merger Fees

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?

Under a mandatory regime, the revenue from merger fees would increase due to the higher number of notifications, but the cost of review would also increase. The imposition of a flat fee across all mergers is clearly not proportionate. However, differentiating between mergers on the basis of turnover also may not be proportionate. This is because turnover-based mandatory notification means that very large “no-issues” cases would require the payment of higher merger fees, even though the resources involved in analysing such cases would be less than the resources involved in smaller, more problematic cases. It may therefore be preferable to impose a different filing fee for “short form” and “full form” merger notifications, if a mandatory regime is introduced.

Recovering the cost of antitrust investigations

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

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

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

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

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

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

We are not in favour of the Government's proposal to recover antitrust costs. The administrative cost associated with bringing an investigation should be borne by the Treasury as part of the cost of the administration of justice, save for egregious cases where the courts could be directed to order recovery.

It would be also be complex to work out how costs should be appropriately and fairly quantified and (as partly reflected by the questions above) there would be a number of difficult issues including in relation to: different treatment of cases involving immunity, leniency, early settlement; apportionment of costs amongst the parties; what to do if a case is partly pursued and partly dropped; whether costs are increased if a supplementary statement of objections is issued (even though this might have to be issued because the CMA has not articulated the case fully first time around) etc.

Finally, the Government's proposal raises difficult questions in relation to the equal treatment of smaller vis-à-vis bigger companies. The costs of the CMA in cases involving complex legal and factual issues will be higher than for simpler cases, but will not necessarily be linked to the size of the company involved. Thus the system could entail subjecting smaller companies to a higher burden proportionately than larger companies – but equally if the recovery amount were based on size of company rather than complexity, this could be unfair vis-à-vis large companies involved in simpler cases.

Both as a matter of policy and practice, therefore, we do not consider that this proposal would be appropriate.

Recovery of CAT costs

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

In line with the approach set out with respect to question 31 above, we consider that the cost of cases heard in the CAT should be shouldered by the Treasury as part of the costs involved in the administration of justice. We note that introducing cost recovery for court costs would constitute a departure from the current regime for the English courts, where litigants may face their costs being taxed but are not subject to cost orders covering the courts' operation. We are concerned that introducing cost orders would act as a

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disincentive to litigants, and constitute a denial of justice for parties aiming to exercise their key right of appeal.

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21 June 2011

MacCulloch, Angus

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

Response form

Name Angus MacCulloch

Organisation (if applicable) Lancaster University Law School

Address _____

Lancaster University

Lancaster

LA1 4BA

Return completed forms to:

Duncan Lawson

Department for Business Innovation and Skills

3rd Floor, Orchard 2

1 Victoria Street

Westminster

SW1H 0ET

Telephone: **0207 215 5465**

Fax: **0207 215 0480**

email: cma@bis.gsi.gov.uk

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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

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:

One of the key distinctions between a criminal cartel offence and the majority of administratively enforced competition law is that it occupies a very different ‘space’ than other competition enforcement. The criminal trial is inherently a ‘moral space’ where guilt and innocence are established, and the guilty are punished because of their wrongdoing. The rationale within competition law regarding criminalisation comes from the conviction that increased individual deterrence would increase the effectiveness of enforcement regimes in the battle against cartels. This is essentially a ‘forward looking’ or utilitarian conception of the law.

Criminal law tends not to have that focus - it is often ‘backward looking’ in that it seeks to justify what is criminal on the basis that the behaviour is wrong according to a societal view of justice. Behaviour will be challenged if it deserves moral opprobrium and/or clearly causes societal harm. It is this fundamental disconnect, between the traditions of competition enforcement and the traditions of the criminal law, which lies at the heart of difficulty the UK’s cartel offence has faced since its introduction.

My response to the Options put forward in the consultation seeks to suggest that the cartel offence should be rebalanced in manner which takes into account that ‘backward looking’ tradition. The cartel offence must clearly signal why the behaviour set out in the offence is criminal in that it deserves a

level of moral opprobrium which justifies harsh punishment; such as imprisonment. If the offence does not clearly set that out it risks being seen as a mere ‘lame duck’ technical offence and it will fail to become a real deterrent to damaging cartel behaviour.

Question 12 – The Removal of the ‘Dishonesty’ Element

Before dealing with the Options in Question 11 it is useful to deal with the problematic requirement to prove dishonesty. I perceive the dishonesty element in the current offence to fulfil two roles: i) to deal with the rare cartel-type agreements which benefit from the exception in Art 101(3); and, ii) to exclude from the offence individuals who unknowingly ‘implement’ a cartel arrangement and focus the offence on those who actively played a role in the cartel. Both of those functions are still of importance and the simple removal of dishonesty from the offence will require the introduction of other mechanisms to deal with these issues.

There is a clear desire within a section of the legal Community for the removal of the dishonesty element as it is seen as being unnecessary, as it is not central to the rationale for criminalising cartels, and problematic, in that it makes prosecutions difficult. I accept that the dishonesty element has been problematic and there are good arguments that it is not necessary for a cartel offence. However, I would strongly argue that its mere removal does not solve the problem. The cartel offence, assuming the other wording remains as is, without the dishonesty element would be overly broad and would catch much behaviour which would not be perceived as criminal. That would simply be replacing one problem with a potentially more significant one. Essentially therefore the dishonesty element is not required within the cartel offence, but its mere removal without other amendment of the offence would be highly problematic.

Question 11 – The Options

(1) removing the dishonesty element and introducing prosecutorial guidance

This replicates the approach adopted in Australia to limit the breadth of their cartel offence. I am nervous of leaving important questions of what is, and what is not, a criminal offence to administrative discretion. It would be much clearer for the business community, and for juries in prospective trials, if the offence itself set out what behaviour in a cartel arrangement results in criminal liability. There are very few arguments in favour of a lack of clarity in relation to the scope of the criminal law.

This would also result in a ‘competition advocacy’ problem. The British public are still relatively unaware of the dangers of cartel behaviour and the benefits of strenuous enforcement. A very general offence with a high degree of discretion will make the task of convincing the public why cartel activity is so serious all the more difficult.

(2) removing the ‘dishonesty’ element and defining the offence so that it does not include a set of ‘white listed’ agreements

This approach fails to address the central problem of the current offence and the problem identified in Option 1 – it fails to identify the behaviour that makes cartel activity criminal. In this option the opposite approach is taken – the offence is left very broad and legitimate behaviour is excluded. Previous uses of a ‘white list’ approach under Art 101(3) have now been abandoned, being replaced by a ‘black list’. I argue that the same approach is even more important in the criminal law. It is vital the offence sets out on its face the behaviour that can result in criminal sanction. The business community and the public must be made aware of what the most serious offences in competitive markets are.

Another risk associated with this approach is its focus on the nature of an agreement - arguments centring on where an agreement fits within the ‘white list’ run the risk of introducing complex economic evidence into the trial process.

(3) replacing the ‘dishonesty’ element of the offence with a ‘secrecy’ element

This is the Option which deals most effectively with my central concern. It attempts to set out why some individuals within some cartel-type arrangements deserve punishment under the criminal law – and yet others do not.

Undertakings that participate in cartels cause damage to the market and are punished under the EU and UK administrative regimes. This conception of the offence would seek to punish the individuals who play a key role in those unlawful organisations when they seek to disguise or maintain the secrecy of that arrangement from both its victims and the authorities. This conception has the benefit of setting out that only those individuals who have actively attempted to hide their unlawful activity from the public and the authorities are worthy of a higher level of moral opprobrium than others who have not.

My main reservation with regard to the ‘secrecy’ option is not one of proof; as problems of proof can be overcome. Rather it stems from an underlying issue which is illustrated by the problems with the distinction between active and passive secrecy. It is certainly arguable that a ‘secrecy’ element within the offence would not, or should not, catch passive secrecy (as, simply put, there is no duty to inform the wider world about your business arrangements). This is a problem that stems from the fact that this option uses ‘secrecy’ as a proxy to indicate what the law sees as the ‘wrongful’ in relation to an individual’s behaviour within a cartel. I would argue that a ‘secrecy’ element goes some way to describe one element of the wrongful behaviour within a cartel, but it does not act as an effective proxy for all that we see as wrongful within a cartel. In that way it is only a partial solution. Cases of passive secrecy indicate the gap which would be excluded from the offence under such a conception.

Given the choice between an under-inclusive and over-inclusive conception of the cartel offence my strong preference would be the clarity of the under-inclusive solution; however, a better long term solution would be to find a proxy which better reflects society's view of the wrongful nature of hard-core cartel behaviour.

(4) removing the 'dishonesty' element and defining the offence so that it does not include agreements made openly

This Option is essentially the reverse of Option 3 and therefore fails to address my concern that the law should set out on its face what behaviour will lead to criminal sanction. A board offence with a specific defence does not deal with that concern. While this is better than the white list approach in Option 2 it still leaves the business community and the public unaware of the key elements of a serious offence.

Question 13 - further ideas to improve the criminal cartel offence

In this response I will confine my comments to the design of the offence itself. My other writings on cartel criminalisation are widely available and discuss many other issues.

Rather than only looking at the 4 options in the consultation I would argue that BIS should consider another potential option for changing the scope of the cartel offence. As I noted in the discussion of Option 3 the 'secrecy' element is a partial proxy for what is intrinsically wrongful in an individual's cartel activity. A better proxy may be available. If the offence clearly defines what it considers to be the wrong and which it seeks to challenge it benefits the business community, in that they know where liability lies, and the prosecuting authority, in that they can better identify suitable cases for investigation and prosecution. Several commentators have suggested conceptions which lie at the heart of the wrongdoing seen in cartels and I would like to suggest two that might be suitable to become part of the cartel offence in that they would narrow the *actus reus* of the offence and only catch the truly problematic behaviour central to a cartel.

The most convincing conceptions that I suggest for consideration are 'subversion of competition' or 'subversion of the competitive process'. Both of these go to the fact the activity of the individual runs contrary to the expectations of a free and fair competition on the market. It is the fact that these individuals 'subvert' that process that is the wrong we seek to punish. The conception in Option 3 is narrower than subversion of competition as it would only punish the attempt to hide or disguise that cheating or subversion. This wider conception would seek to challenge behaviour in which the cartelists, actively or passively, sought to create the impression of free competition when in reality the process was not one of competition at all. This test would remain open textured but that is a necessity given that cartel behaviour can take a very wide variety of forms.

It is not suggested that this narrowing of the offence would make it easier to

secure convictions – the intention is to make it clearer why the behaviour is considered to be contrary to societal expectations and make it clear what the prosecution needs to prove in order to secure a conviction. I argue that this would be the best solution to improve the design of the UK cartel offence.

Angus MacCulloch
Senior Lecturer, Lancaster University Law School.
a.macculloch@lancaster.ac.uk
01524 594996

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Maclay Murray & Spens LLP

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

Maclay Murray & Spens LLP

Response

13 June 2011

- 1. A SINGLE COMPETITION AND MARKETS AUTHORITY (“CMA”)**
- 1.1 MMS welcomes the opportunity to comment on the Government’s proposal to merge the competition functions of the Office of Fair Trading and the Competition Commission “A Competition Regime for Growth: A Consultation on Options for Reform” (the ‘Consultation’).
- 1.2 MMS comments below on selected issues arising from the Consultation on which it has a particular view, and has provided its responses below to the questions posed. The comments in this response are based in part on MMS’ experience of working with clients, the Office of Fair Trading (“OFT”) and the Competition Commission (the “CC”) over the last few years. MMS has not responded to questions where it has no particular comment to make on a given point.
- 1.3 In summary:
 - MMS considers that creating a single competition authority will be a costly restructuring process and one which may not result in any significant improvement.
 - Reforms to the market regime, such as proposals to reduce timescales may jeopardise sound decision-making and impede the parties' right to respond. Other timescales that have been proposed risk becoming ineffective unless appropriate safeguards are introduced to deal with complex cases.
 - MMS disagrees with the proposal to introduce a mandatory notification scheme and is in favour of retaining the current voluntary notification scheme.
 - Three options for reforming the antitrust regime have been presented. MMS believes that option 3 - the prosecutorial approach - is the most efficient option, providing that the ability to appeal from the CAT to the Court of Appeal or Court of Session is retained.
 - MMS is not in favour of removing the “dishonesty” element of the criminal cartel offence.
 - MMS does not see any reason for making changes to sectoral regulation powers.
- 1.4 The Consultation cites the following reasons behind the proposals:
 - to reduce unnecessary duplication and complexity to businesses subject to the regime;
 - to reduce the length of time it takes to reach a final decision; and
 - to increase the number of market investigation references and improve the disjointed working between Phase 1 and Phase 2.
- 1.5 However, there are alternative ways of addressing these issues and achieving desired cost saving, which do not require the creation of a single merged body and which are not explored in the Consultation.

- 1.6 Barriers to communication and cooperation can arise within organisations, especially large organisations, and the underlying assumption of the proposal, namely that creating a single organisation will remove barriers to communication and to speedy processes, is not necessarily true.
- 1.7 Management structures in the two organisations also are complex. Creating an enlarged organisation with more diverse responsibilities than either of its predecessors may require an even more complicated management structure. OFCOM provides a very good example of how combining organisations with relatively flat management structures can lead to the need for a management structure which is very hierarchical, as a result of which:
- cost savings anticipated from mergers are not achieved, because salaries increase at each level of hierarchy, reaching some of the highest levels in public service; and
 - decision making can seem, to those regulated by the authority, and to its staff, to be remote.
- 1.8 The proposed restructuring is potentially costly and MMS is concerned that there is no analysis in the Consultation of the costs and benefits of the proposals, as compared with the cost of making no change, or of making the existing organisations work better together without restructuring.
- 1.9 In conclusion, MMS is on balance against the creation of a single combined authority. Although other jurisdictions have successfully implemented a single competition authority as part of their competition regime, it does not necessarily follow from this that the current system would be improved by following suit. The current UK system would not necessarily be improved by merging the institutions and the advantages of retaining the current system outweigh any cost savings.

2. MERGER OF OFT AND CC

- 2.1 Although reforms to improve the OFT and CC's current arrangements are to be welcomed, MMS does not believe that merging the two authorities into one single competition authority will result in overall benefits for the reasons set out below. The separation of the OFT and the CC is a key feature of the current regime and the CC's importance lies in its independent analysis of difficult cases. The CC's role is to take a fresh look at the facts and to form its own view. Therefore, impartiality and independence are paramount. It would be particularly difficult to preserve the benefits of the separate institutions in a single combined Competition and Markets Authority ("CMA").

3. THE MARKETS REGIME

Enabling investigations into practices across markets

- 3.1 The Consultation sets out that practices in several markets could be dealt with under one reference. This is an objective which would, indeed, appear to have benefits in certain circumstances. However, it would work only where the analysis is transferable between markets. In some instances, the current regime struggles to understand the nuances arising within the same market so this could be exacerbated if the reference was made across multiple markets. It is true that barriers to entry, below cost selling etc will exist in various markets, but they do not always present the same issues and should not be dealt with by a broad brush approach – there are distinct dangers in doing so. However, if the reference is relatively narrow in

scope, this may not be a serious concern; it will depend on the individual circumstances.

Enabling the CMA to provide independent reports to Government

- 3.2 Inviting a single competition authority to consider public interest issues should be treated with much caution. The proposed power could be used as a policy implementation tool at the expense of efficiency and may be of concern to businesses.

Streamlining the Markets Regime

Reducing timescales

- 3.3 The Consultation proposes a reduction in timescales in the following cases:

Reduce statutory timescales for Phase 2 MIRs from 24 months to 18 months

- 3.4 MMS welcomes proposals designed to ease the burden on businesses subject to an MIR, but has concerns that a reduced statutory timetable would, in fact, be counter-productive and may jeopardise sound decision-making. The rights of parties subject to an MIR may also be put at risk. The current market investigation into Local Bus Services illustrates potential issues. The CC piloted new streamlined procedures in this investigation and undertook to publish its findings within 18 months, rather than 24 months. However, it has been unable to adhere to its original administrative timetable and published its provisional findings 7 months later than anticipated.
- 3.5 Had these timescales been statutory, either the CC would have been unable to conclude its investigation or the parties' right to respond to provisional findings and possible remedies would have been severely impeded. Neither outcome is satisfactory. A more streamlined approach at the outset which avoids duplication between Phase 1 and Phase 2 may mean that a reduced timetable is achievable in future investigations. However, this more streamlined approach could possibly be at the expense of Phase 2 being truly independent. The appropriate balance between reducing timescales and protecting standards of decision-making and the rights of the parties being investigated would appear possible to attain by retaining the current statutory timetable, continuing to improve internal processes and seeking to work to tighter internal (but not statutory) timetables.

To introduce statutory timescales for: Phase 1 Market Studies

- 3.6 This proposal would be beneficial for businesses in that it would reduce the uncertainty associated with a Market Study. However, given the OFT's intention to consult parties within 6 months of launching a Market Study if it is considering making a market investigation reference,¹ there is perhaps not the same need to introduce a statutory timescale for Phase 1 Market Studies as there would have been absent such a change.
- 3.7 Under Section 154 of the Enterprise Act 2002, the OFT can accept undertakings from parties where it considers it has the power to make a market investigation reference and would otherwise intend to make one.² The introduction of a statutory timescale potentially undermines the ability of the OFT to accept voluntary

¹ http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft519.pdf

² Undertakings in lieu of a reference have been accepted in two cases: *Postal Franking Machines* (June 2005) and *BT* (September 2005)

undertakings due to the lengthy implementation process. In an effort to save time and meet timescales, the authorities may be less inclined to consider undertakings as a viable option. Furthermore, where undertakings are considered as an option, the process may be hurried without full consideration given to the potential consequences.

Implementing remedies following a Phase 2 MIR

- 3.8 Care should be taken in considering implementing a statutory timescale for the implementation of remedies. Various complex issues will be under consideration at the remedies phase and there may be different needs for various local markets within the reference area. The CC usually has to work with a number of different parties to determine the most appropriate remedy which will involve lengthy periods of consultation. It may also involve recommendations to Government to implement legislation. For example, the consultation on and implementation of remedies in the Groceries market investigation took almost 3 years. To implement statutory timescales may result in rushed and poorly thought through remedies that do not sufficiently address the issues.

Introducing formal information gathering powers at Phase 1

- 3.9 There are benefits to be gained by strengthening the information gathering processes during a Phase 1 Market Study. However, appropriate measures must be put in place to ensure all information requests are relevant to the investigation. Safeguards should also be put in place to ensure that information requests are not duplicated in the event that a market investigation reference is made.

Increasing certainty and reducing burdens

- 3.10 MMS welcomes increased certainty and reduced burdens for business but notes that the creation of a single competition authority is not a prerequisite for the introduction of these tools.

Introducing statutory definitions and thresholds

- 3.11 In general, MMS would welcome the introduction of an objective test which would need to be met before the OFT could impose the costs of a market study on business. Under Section 131 of the Enterprise Act, the OFT may make a market investigation reference to the CC where it has ‘reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK’. Such a threshold could instead be introduced for the initiation of a market study. The threshold for making a market investigation reference would then need to be more stringent, perhaps more in line with the process for referring mergers to the CC. However, MMS does recognise that too specific a threshold could introduce an unnecessary artificial constraint on the authority’s freedom to investigate problems.

Improving interaction between Market Investigation References and Antitrust Enforcement

- 3.12 MMS is concerned that the introduction of antitrust enforcement powers to the markets regime would considerably change the nature of the role the authority carries out in such an investigation also affect the dynamics of such inquiries and the attitude of affected parties to them. This proposal requires further detailed investigation to consider fully the impact of such a change and the potential

interference with the Article 6 ECHR rights of businesses. See also MMS' comments on Chapter 10.

MMS Further Miscellaneous Views

- 3.13 The current regime allows parties 21 days to respond to provisional findings. The proposed revised market investigation guidelines out for consultation do not amend this timescale. However, the Better Regulation Executive has produced a Code of Practice on consultations which sets out guidelines for consultation and provides for a period of 12 weeks for consultation subject to overriding statutory requirements. The Code applies to formal, public, written consultation exercises launched by central Government Departments and other public sector organisations that have signed up to it. Whilst the OFT has signed up to the Code, the CC has not. The CC is bound by timescales in the Enterprise Act or procedures the Act that oblige it to meet the overall timescale, currently 2 years. Although 12 weeks may not be necessary for consulting on provisional findings in market investigations, the proposals to streamline the markets regime should consider this Code of Practice in implementing any changes to timetables and should also bear in mind that 21 days is not always a sufficient amount of time to adequately consider and respond to extensive provisional findings.

4. THE MERGER REGIME

- 4.1 MMS is firmly of the view that the Government should not undertake a major reform of the existing merger regime unless the case for change is compelling. In MMS' view, the evidence upon which the case for reform is made is far from convincing, since it is based upon the views of a limited number of practitioners. MMS would submit that a thorough cost benefit analysis should be carried out to assess whether the costs which will be imposed on business by reform of the regime are justified by the benefits to the consumer.
- 4.2 The Consultation identifies two specific drawbacks to the current voluntary notification regime:
- (i) the risk that some anti-competitive mergers escape scrutiny; and
 - (ii) the investigation of a large proportion of completed cases, which in turn makes it difficult to apply appropriate remedies in the event that they are found to be anti-competitive.
- 4.3 In relation to the first drawback, the Consultation states that while some anti-competitive mergers escape scrutiny, "*the average size of these mergers is generally smaller and the lack of third party complaints indicates that this does not represent a serious failing in the current regime.*" Therefore, the case for adopting a mandatory notification system appears to be based on the view that a large proportion of mergers referred to the CC are completed mergers, which makes it difficult to apply appropriate remedies. MMS believes that while such mergers account for a significant proportion of merger references to the CC, the actual number of such references is small. Accordingly, MMS submits that any shortcomings in the current voluntary regime, which the Government has not adequately quantified, do not justify moving to a mandatory regime, which will impose a greater burden and cost on business.

A Mandatory Notification System

- 4.4 MMS firmly disagrees with the proposal to adopt a mandatory notification system and considers that this would impose a disproportionate and unnecessary regulatory burden on business, in order to deal with shortcomings in the current voluntary regime with respect to a limited number of mergers and which can be addressed appropriately by less intrusive means. A mandatory regime would have a number of other serious disadvantages:
- It would increase the administrative burden on the CMA. MMS considers that a mandatory system is unrealistic in light of the budgetary constraints of a combined competition authority.
 - It would increase the regulatory burden and costs to businesses, and would also be likely to increase delay for the majority of transactions which fall outside the threshold because such transactions may still be caught by the 'share of supply' test. While the Consultation does suggest having a short form notification process, there are a number of alternative options which would improve the current voluntary regime but which have not been considered in the Consultation, for example having a minimum publication requirement, or requiring merging parties to issue a press release - such options would be low cost and reduce regulatory burden on parties.
 - Unless additional funding was to be made available to the CMA, these extra costs would have to be funded by an increase in merger fees, or allocating resource from the CMA's other areas of responsibility, which would clearly be undesirable.
- 4.5 If a mandatory regime was to be adopted, the proposed thresholds contained in the Consultation are far too low. They would result in a massive increase in the number of mergers being notified, would have a chilling effect on mergers which cause no competition concerns, and would increase the administrative burden on business and the CMA with little or no discernible benefit.
- 4.6 If a mandatory regime was to be adopted, MMS considers a simple turnover test, which is most commonly used worldwide, would be the most appropriate test. The "share of supply" test is less appropriate as it introduces substantial discretion, does not equate to a market share on a relevant market and does not provide the degree of certainty required in a mandatory regime.
- Hybrid Mandatory Notification**
- 4.7 This system would involve mandatory notification of mergers meeting the current turnover threshold. The CMA would also retain jurisdiction over mergers which fall below the turnover threshold but which satisfy the share of supply test. While this would limit the number of mergers that would have to be notified, the existing voluntary regime would be retained for the small/mid-sized market, imposing the costs of self-assessment of mergers on those smaller businesses. MMS considers that this would fail to address the perceived shortcomings in the current regime.
- 4.8 MMS favours retaining the current voluntary notification system. MMS believes that the existing voluntary notification regime is broadly satisfactory and should not be changed.

Strengthened Interim Measures

- 4.9 In relation to interim measures, the Government states, “*...the negotiation of hold separate undertakings can take some considerable time.*” In MMS’ experience, hold separate undertakings can be negotiated reasonably swiftly. The OFT has tightened up its internal process considerably since the *Stericycle* case.
- 4.10 A distinct issue is that the OFT’s template undertakings do give businesses genuine doubt in some cases as to what activities can be undertaken. In MMS’ experience, the OFT and CC have been reasonably pragmatic in discussing areas of doubt, although some streamlining of this process could be undertaken.
- 4.11 The Consultation proposes two options to strengthen interim measures. The first option is to introduce a statutory restriction on further integration which would apply automatically as soon as the CMA commences an inquiry into a completed merger. MMS considers such a blanket restriction would be disproportionate since hold separate undertakings are likely to be inappropriate in many cases. If parties deliberately delay the negotiation of hold separate undertakings, the OFT currently has power to make interim orders and MMS considers this is an appropriate safeguard.
- 4.12 The second option proposed by the Consultation is to clarify the powers of the CMA to prevent pre-emptive action, including at Phase 1. MMS is not against this proposal, providing that the powers are clear and proportionate.

Penalties

- 4.13 MMS does not oppose the proposal to introduce penalties for integration in breach of hold separate undertakings. MMS considers clear guidance would need to be provided in relation to the assessment of such penalties. This is related to the point that businesses do require clarity as to which activities are covered by undertakings and which fall outside.

Small Merger Exemption

- 4.14 MMS agrees that it is appropriate to carve out an exemption for small mergers should a mandatory regime be adopted. Small mergers should not be subject to the costs and regulatory burden of the merger review process. However, MMS would be concerned by if this was introduced at the expense of the current rules on “markets of insufficient importance” (a “de minimis”). These rules have a valuable role in ensuring attention is focused on mergers which have a significant impact on the market concerned. Just because the purchaser is not a small business does not mean that the merger can be assumed to have such an impact. These rules could work in tandem with an exemption for small businesses.

Information Powers

- 4.15 MMS does not oppose enhanced information-gathering powers, as long as these do not result in any unnecessary duplication of information, thus increasing the burden on businesses.

5. THE ANTITRUST REGIME

Option 1: Retain and enhance OFT’s existing procedures

- 5.1 MMS considers that enhancing the OFT's existing procedures would be a reasonable approach. MMS notes that the OFT has only recently introduced changes intended to streamline its existing procedures. These changes are welcome, but it is unfortunate that there is unlikely to be time to assess the effectiveness of these changes before further reforms are introduced. MMS considers this option may not be the most efficient proposal for changing decision making in the antitrust regime.

Option 2: Develop a new administrative approach

- 5.2 MMS considers this option would be the least effective approach. MMS believes that it is vital to retain the option for a full appeal on the merits to an independent body. The option for a full appeal on the merits is preferable to the proposed "judicial review" process in that it fully protects the rights of the defence. Notwithstanding the fact that members of the internal tribunal would be independently appointed, MMS considers that such a tribunal could not of its nature be fully independent from the CMA in the same way as the CAT currently is.

Option 3: Prosecutorial approach

- 5.3 MMS considers the most efficient proposal for changing decision making in the antitrust regime would be the prosecutorial system, which would create a very robust legal process, rendering a large part of the current administrative process unnecessary. However, if this option is to be followed the ability to appeal from the CAT to the Court of Appeal or Court of Session should be retained.

Additional changes to antitrust and investigative and enforcement powers

- 5.4 MMS questions whether statutory timetables would contribute to the efficiency of antitrust investigations. Given the potential variation in scope and complexity between different investigations, it will be difficult to establish a fair one size fits all timetable and any scope for variation in the timescale is likely to introduce a degree of uncertainty which could encourage procedural challenges.
- 5.5 In relation to the proposals on private actions, MMS would welcome the opportunity to comment once the Government has developed proposals on the matters under consideration.

6. THE CRIMINAL CARTEL OFFENCE

- 6.1 Although there has only been one successful prosecution under the current legislation, MMS considers that the "dishonesty" element should be retained. MMS does not consider that the current benchmark has been in place long enough for it to be truly tested.
- 6.2 The Government appears to be measuring the success of the "dishonesty" element by the number of prosecutions. It remains appropriate to differentiate in law between the civil wrong and the cartel offence so that only the most serious (dishonest) conduct may give rise to criminal prosecution.

7. CONCURRENCY AND SECTOR REGULATORS

- 7.1 An underlying concern of the Consultation is that "*the relative paucity of antitrust cases and MIRs in regulated sectors is...a particular weakness in the regime*". MMS find this a surprising and counter-intuitive concern and note that the Consultation states that "*competition cases often require specialist teams of lawyers*,

economists, accountants and experienced investigators. Extensive resources are required to prosecute antitrust cases not least because of the adversarial nature of the enforcement process, which often involves large and well-resourced investigations". These are observations with which MMS agrees, on the basis of MMS' experience of working with regulators and from discussing the matter with members of MMS' team who have worked in regulators.

- 7.2 The regulators with which MMS is most familiar are Ofgem, which has concurrency, and Postcomm which does not. Common points which MMS has observed in both organisations are that they are resource constrained, and they are under pressure to deal with issues as quickly as possible. MMS considers that these factors, rather than a lack of expertise or "critical mass" in competition law, are integral in the choice between Competition Act and sectoral powers, where regulators have concurrency.
- 7.3 Competition law is only one of the matters for which sectoral regulators have responsibility. Licence conditions typically include consumer protection and quality of service obligations. Sectoral regulators build up a body of expertise in the use of their licensing (and equivalent) functions which can brought into play and enable them to act quickly if anti-competitive activity that also contravenes a licence obligation comes to their notice. This expertise and a less burdensome appeal procedure can make sectoral action the more economic choice, when there is the option of using either sectoral or Competition Act powers.
- 7.4 MMS considers that the function of sectoral regulators is to regulate effectively and economically. If an effective outcome which is desirable from a competition law perspective can be achieved more economically and more quickly by the use of sectoral powers, sectoral regulators should not be criticised for making that choice.
- 7.5 This is particularly true at a time when public expenditure is under pressure. MMS considers that there is another reason why concern over use of sectoral powers when competition law powers might have been used is misplaced. Where a sectoral regulator is dealing with a competition issue using sectoral powers it will have to act consistently with competition law. To act in any other way would be irrational and open to challenge. Decisions taken using sectoral powers therefore can contribute to the body of competition case law. An interesting example is provided by Postcomm's consideration of possible margin squeeze by Royal Mail when it introduced its Mailsort Light tariff. As Postcomm does not have concurrency faced the choice of either referring the matter to the OFT or using its licensing powers. Following discussion with the OFT, Postcomm conducted an investigation into the possibility of a licence contravention by Royal Mail. In the tests and analysis which Postcomm applied for the purpose of deciding whether there was a licence contravention Postcomm drew extensively on competition law precedent and its reports contribute to that body of precedent.
- 7.6 Moreover, the approach of the Consultation is parochially UK-centric. To say that there have been only two examples of use of competition law by sectoral regulators in the UK, and that in consequence the body of competition case law is less extensive than it might be, overlooks the fact that the competition case law is increasingly international. The body of competition case law includes all the anti-trust case law of the European Court of Justice, the decisions and notices issued by the European Commission and the judgments obtained in the application of the very similar anti-trust rules that apply in other EU jurisdictions. There is no precedent void that needs to be filled: an M-Lex or equivalent subscription produces a dozen notifications of new cases every day.

- 7.7 This is not to say that MMS considers that improvements cannot be made in current arrangements. Improved coordination is always possible but MMS would caution against trying to do too much. “*Giving the CMA a bigger role in the regulated sectors*” involves a coordination cost. For “*the CMA to act as a proactive central resource for the sector regulators*” there would need to be some sort of management function for that resource. There also would be administrative overheads to ensure that the cost of this central resource can be properly charged back to the different bodies of licensees who fund the offices of the sectoral regulators.
- 7.8 MMS’ understanding of the rationale for the original decision to give sector regulators competition law powers is that they have expertise in their sectors which enables them to scope problems and identify conduct which needs to be investigated more quickly than would be possible by any other body. For the same reasons they ought to be able to undertake investigations more quickly and cost effectively.
- 7.9 Additionally conduct which offends competition law prohibitions may also offend licence or other regulatory obligations. For example mis-selling of energy services may be both a contravention of consumer protection conditions in a licence and an abuse of dominance. It makes sense for the decision as to which powers are the most appropriate to use to lie with one body, because the decision can be taken more quickly and without institutional rivalry.
- 7.10 These points are not mentioned in the rationale in the Consultation, which concentrates on the fact that competition law powers have not been widely used. But they seem to us to be valid. MMS sees no reason why sector regulators should not maintain their Competition Act and Enterprise Act powers and MMS thinks that they should be maintained.

Strengthening the primacy of competition law over sectoral regulation

- 7.11 MMS sees no reason for making any changes. MMS considers that the Government’s aim should be effective and efficient regulation and that giving primacy to competition law to a greater extent than it is already given primacy could make regulation less effective and efficient, because of the potential additional costs recognised in the Consultation. If such a change is made, the regulators must be adequately funded.

The CMA to act as a central proactive resource

- 7.12 The OFT, through its many publications on the application of competition law, is already a proactive driver of consistent application of competition law. The European Commission, in its decisions and notices, and the European Court, in its judgments, are equally pro-active. For the reasons set out above (co-ordination and management costs) MMS has doubts about the value of this proposal.

Giving the CMA a bigger role in the regulated sectors

- 7.13 MMS struggles to see real value in these proposals. The ENA model has a cost and can slow down decision making. Where there are resource constraints in one body and another has resources staff can be seconded. MMS does not accept that “*more competition cases*” necessarily results in more benefits to consumers and the wider economy than more regulatory cases and no case is made in the Consultation that the Concurrency Regulations are seriously defective. Application of better regulation principles would suggest that BIS should be aiming to reduce the complexity of regulation, but this suggestion seems to do the opposite.

- 7.14 MMS considers that effort should be put into making existing arrangements work as effectively as possible and that it is not right to assume that increasing the use of competition law powers rather than sectoral powers is necessarily an improvement.

8. SCOPE, OBJECTIVES AND GOVERNANCE

Objectives

- 8.1 In relation to the scope of a CMA and whether it should have a primary focus on competition, MMS considers that the starting point for this should be the review of consumer functions which is described from paragraph 9.21. If the combined body is to continue to have the general consumer law responsibilities of the OFT, then a competition duty will not be sufficiently wide. If these functions are hived off and the CMA has only competition responsibilities, then its duties may be focussed on promoting and, as far as possible, maximising the effectiveness of competition.

Proposed governance structure

- 8.2 MMS agrees that any new CMA ought to have governance arrangements which deliver durable independence. MMS does not see amalgamation of OFT and the CC as enhancing regulatory independence.
- 8.3 MMS notes the proposal in paragraph 9.31 for almost all consumer enforcement cases to be undertaken within the Trading Standards network. MMS has no objection to this in principle but MMS would note that, to be effective, it needs to be adequately resourced. MMS considers that the OFT's role in relation to the co-ordination of this work needs to be preserved: consumer protection issues can span the boundaries of different teams of Trading Standards Officers and good co-ordination may be vital to the successful elimination of business practices that are detrimental to consumers
- 8.4 MMS' preference is for the aims and functions of any statutory authority to be set out in primary legislation. Putting these matters on the face of primary legislation makes them readily accessible and it ensures that they are very well thought through and can be thoroughly debated before they are introduced. For something as important as competition policy this seems to us to be vital.
- 8.5 The corporate governance arrangements of the Competition Commission are complex, with members (appointed by the Secretary of State to serve on panels, or under utility legislation, or to serve on the Council), a Council (comprising the Chairman, deputy chairmen, persons appointed by the Secretary of State as Council members, other persons appointed by the Secretary of State and the Secretary) and panels. The OFT has a simpler structure but quite a different one, reflecting its different responsibilities. There is clearly a risk that a combined body could have corporate arrangements which are even more complex than those of the Competition Commission. Complex arrangements tend to be costly arrangements.

9. OVERSEAS INFORMATION GATEWAYS

- 9.1 The restrictions on disclosure of information under the Enterprise Act 2002 recognise that the competition authorities have in their possession information which is private and is likely to be commercially sensitive and which was obtained under compulsive powers. The Act therefore imposes a prohibition on disclosure, except in carefully prescribed circumstances, which is backed by a very serious criminal sanction, an unlimited fine and up to two years' imprisonment, when conviction is on indictment. MMS thinks that this is the right approach. However,

arrangements with other regulators, which are currently rather opaque, should be made more transparent.

- 9.2 The Consultation notes that the power to disclose information to overseas authorities under Section 243 does not extend to disclosure of information obtained during mergers and markets investigations and asks for views on how well the arrangements are working and if there is a case for change.
- 9.3 MMS is aware of no reason to change the current arrangements and the fact that the Government is unable to particularise any difficulties in the Consultation suggests that there is no case for change. MMS is concerned at the suggestion that “*to promote reciprocity between overseas regulators*” should be seen as a sufficient a reason for change. This seems to go against what MMS considers should be a fundamental principle of good regulation, namely that regulation and regulatory organisations exist to serve the communities in which the persons they regulate conduct their business; regulation and regulatory organisations do not exist to be served.
- 9.4 There may be an argument that reciprocity can improve the effectiveness of regulation, but that argument needs to be made and supported by evidence. It is an argument that is not made, and is not implicit, in the Consultation as drafted. This suggests that cosy regulatory reciprocity alone may be seen as a sufficient reason to pass private and commercially sensitive information around an ever growing group of overseas regulators and their staff, some of whom may be subject to much weaker sanctions against onward disclosure that apply in the UK. In MMS’ view this is a wholly insufficient reason: much more is needed to justify changing the overseas information gateway and absent a much better justification (which MMS does not have) the gateway should not be altered.

Merger Streamlining Group

Reply to the Attention of
Direct Line
Email Address
Our File No.
Date

A. Neil Campbell; J. William Rowley QC
416.865.7025; 416.865.7008
neil.campbell@mcmillan.ca; wrowley@20essexst.com
0069459
June 13, 2011

Via Email to CMA@BIS.GSI.Gov.UK; Original by Mail

Mr. Duncan Lawson
Department for Business, Innovation and Skills
3 Floor, Orchard 2
1 Victoria Street
London
SW1H OET
United Kingdom

Dear Mr. Lawson:

Re: Consultation on Options for Reform of the Competition Regime

We are writing on behalf of the Merger Streamlining Group (MSG), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.¹ The MSG understands from the consultation document, “A Competition Regime for Growth: A Consultation on Options for Reform”, published by the Department for Business, Innovation and Skills, that the UK Government is considering significant amendments to the British competition law regime. The purpose of this letter is to provide comments on the merger control proposals in chapter 4 of the Consultation Paper (*i.e.* questions 5-7 of the consultation) and to indicate the interest of the MSG in having an opportunity to comment on any draft amendments once they become available for review.

The Work of the Merger Streamlining Group

The cornerstone of the MSG’s activity has been to work with competition agencies and governments to help implement international best practices in merger control. The MSG has focused on the recommendations of the International Competition Network (of which both the Competition Commission and The Office of Fair Trading are members, and

¹ The current members of the MSG include Bombardier, Chevron, Danaher, GE, Oracle, Procter & Gamble, SAB Miller, Siemens, and United Technologies.

John Fingleton of the OFT is currently the Chair).² Several of the members of the Group are associated with the ICN as Non-Governmental Advisors (NGA's). The Group's work projects have included two major surveys on compliance with the Recommended Practices for Merger Notification Procedures, as well as submissions to the US Antitrust Modernization Commission, the European Commission, the Korean Fair Trade Commission, the Japanese Fair Trade Commission, the Indian Government, the Chinese Legislative Affairs Office and others to promote reform consistent with the ICN Recommended Practices.³

Voluntary versus Mandatory Review Regimes

The Group believes that there are substantial benefits to preserving a voluntary notification system. The vast majority of mergers notified under mandatory notification regimes, even with well-designed notification thresholds, do not raise competition concerns. A voluntary notification regime relieves parties to non-problematic mergers from the time and cost burdens of unnecessary filings. Equally important, it allows the agencies to focus their resources on transactions (or other non-merger matters) that raise genuine competition concerns rather than reviews of many transactions which do not. Keeping a voluntary system will serve the goals of the Government's reform efforts by furthering the ability of the proposed new Competition and Markets Authority (CMA) to devote personnel and resources to high impact transactions and limiting the burdens imposed on business.

We understand that the Government is considering two options to address perceived disadvantages of the existing voluntary notification regime: (i) retaining the voluntary structure but strengthening the interim measures available to the CMA; or (ii) introducing a mandatory notification regime. The Group strongly urges that the voluntary regime be maintained and that the system be modified in certain respects to mitigate any concerns regarding the difficulty of addressing problematic transactions that have been completed prior to coming to the attention of the CMA.

Strengthening Interim Measures

If the voluntary notification regime is retained, we understand that the Government is considering two potential options to address concerns about the difficulties involved in reviewing completed mergers: (i) introducing a statutory restriction on further integration that would apply automatically as soon as the CMA commences an inquiry into a completed merger; or (ii) granting the CMA the power, during a Phase I investigation, to suspend all integration steps pending negotiation of tailored hold separate undertakings. We understand that, in connection with the second option, the Government is considering clarifying the range of measures available to the CMA at Phase I, which would include the ability to

² The Recommended Practices are available online at:
<http://www.internationalcompetitionnetwork.org/index.php/en/publication/294>.

³ A summary of the Group's work to date is available on-line at:
<http://mcmillan.ca/PracticeArea.aspx?ParlID=b6bdc2a3-d34f-4535-b884-17a54f1391e9>

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 merger entity.

The Group is concerned that an automatic bar to further integration, or a unilateral power for the agency to impose prohibitions and mandatory orders related to integration, would be unfair and burdensome given the potential serious business and financial consequences to the affected parties. While restrictions on integration may help to ensure that adequate remedies are available if a transaction proves to be anti-competitive, such restrictions may also impose significant costs and disruption on a business and delay the realization of any efficiencies or other benefits resulting from a transaction.

To ensure procedural fairness, the Group believes that it would be important to provide for reasonable notice to merging parties, and an opportunity to respond, prior to a prohibition on further integration or any orders to reverse prior actions. In addition, the Group would suggest that, as with any form of injunctive relief involving significant consequences to the affected parties, an expeditious right of appeal should be available. The notice and opportunity to respond safeguard, and the provision of a right to appeal, would ensure that the CMA's interest in the availability of potential remedies is implemented in a manner that respects fairness and due process.

Alternative Approaches

The Group would also suggest the consideration of alternative approaches to address this issue. The CMA could be authorized, where it becomes aware of a transaction through pre-filing communications with merger parties⁴ (or potentially other sources), to have the parties suspend closing for a brief period of time (e.g. 15 days) so that the CMA could determine whether to require the parties to submit a merger notification.⁵ In the event that the CMA were to require a merger notification, the parties would be prohibited from closing the transaction for an additional time period following notification (e.g. 30 days) to enable the CMA and the parties to address whether there is a need for further interim measures. If the CMA did not require the parties to submit a merger notification, the parties would be free to close their transaction and take steps to integrate the combined businesses but subject to the risk of post-closing proceedings that currently exists.

Another means of strengthening the existing voluntary merger notification process would be to enhance opportunities for consultations with the CMA prior to notification. The ICN recognizes that it is generally advantageous to both agencies and merging parties to clarify legal and factual issues related to the notification of proposed transactions at an early stage. Recommended Practice V-C states that “[C]ompetition agencies should provide for the

⁴ The Group suggests that any voluntary or required notice to the CMA involve minimal burden on the parties. A letter to the CMA containing the very basic General Information in Part One of the current notification form should suffice to provide the CMA with adequate notice of the transaction.

⁵ If the Government were to require that the parties submit a notice to the CMA prior to closing the transaction, it should exclude situations in which the transaction involves the acquisition of assets or entities with no or little turnover in the UK. This would be consistent with the “small merger exemption” concept discussed in the Consultation Paper.

possibility of pre-notification guidance to parties on the notifiability of the transaction and the content of the intended notification.” Parties are more likely to consult with agencies prior to notification where agencies are also willing to engage in robust discussions about proposed transactions and, as a result, provide parties with a degree of certainty regarding whether a transaction is likely to warrant in-depth review. Such consultations are beneficial to parties and to agencies as a mechanism for screening out non-problematic transactions and as a means of encouraging more parties to bring transactions to the attention of the agency at an early stage.

Finally, the Group notes that the CMA could be given the ability to address transactions of potential concern under a voluntary regime by lowering or eliminating the jurisdictional threshold (while maintaining the four month window in which to initiate reviews of completed transactions). With respect to the £70 million turnover threshold, the Group recognizes the Government’s concern regarding the possibility of missing potentially problematic smaller transactions and would note that, in some other jurisdictions including the United States and Canada, competition agencies have jurisdiction to review any non-notifiable transactions that raise competition concerns. With respect to the share of supply threshold, the Group believes that thresholds based on shares of supply or market shares introduce unnecessary uncertainty into review processes: such criteria are not objectively quantifiable and may be the subject of dispute between the CMA and merging parties. Such a threshold would not be ICN-compliant in a mandatory notification regime (see below) and the Group suggests that it would also be desirable to remove the share of supply jurisdictional threshold if the voluntary regime is continued.⁶

Mandatory Notification Regime

If the Government decides to adopt a mandatory notification regime, the Group would emphasize the importance of compliance with the ICN’s “Nexus to Reviewing Jurisdiction” Recommended Practice. It states that “jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned” (Recommended Practice I-A). This is further clarified to mean that:

- (i) Merger notification thresholds should incorporate appropriate standards of materiality as to the level of “local nexus” required for merger notification (Recommended Practice I-B); and
- (ii) Determination of a transaction’s nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory (Recommended Practice I-C).

We understand that the Government is considering adopting either a full mandatory notification regime or a hybrid mandatory notification regime. The consultation

⁶ The Group would instead suggest that the CMA consider incorporating in its substantive guidance the market share levels below which transactions are unlikely to give rise to competition concerns.

document suggests that, in a full mandatory notification regime, notification would be required where the turnover of the target in the UK exceeds £5 million and the worldwide turnover of the acquirer exceeds £10 million.

The Group is concerned that the thresholds proposed for a full mandatory notification regime are *much too low* to be material given the size of the United Kingdom's economy (as required by Recommended Practice I-B), and would require companies to notify transactions that would not have a foreseeable impact on competitive conditions in the UK. Merger notification thresholds in ICN-compliant jurisdictions are often in the range of £35 million and upwards (including in a variety of jurisdictions that have much smaller economies than the UK).⁷

The requirement to notify transactions that are unlikely to have a material competitive impact in the UK would result in unproductive activity both for the CMA and for parties to international merger transactions. The Group understands the theoretical interest in having the power to review any potentially problematic merger, but believes that the small benefits from doing so need to be considered in the context of the substantial costs (public and private) of the large number of unproblematic transactions that would be subject to review. Thus, the MSG would encourage the Government, if it adopts a mandatory merger notification regime, to incorporate a higher threshold for merger notifications to ensure that the UK will assert jurisdiction over only those transactions that involve significant commerce in the UK.

Hybrid Mandatory / Voluntary Regime

A "hybrid" mandatory notification regime may provide greater flexibility for achieving the objective of focusing resources on those transactions that involve significant commerce in the UK. The consultation document suggests that, in a hybrid mandatory notification regime, notification would be required where the value of the UK target's turnover exceeds £70 million and that the CMA would retain the ability to initiate investigations and take action where appropriate for mergers that fall below the turnover threshold but are caught by the share of supply test.

⁷ For example:

- (i) Belgium requires notification where a combined Belgian turnover threshold is exceeded, **and** each of at least two parties has turnover in Belgium in excess of €40 million (£35 million);
- (ii) Canada requires notification where the parties have assets in Canada, or turnover in/from/into Canada, in excess of C\$400 million (£251 million), **and** the target has assets in Canada, or turnover in/from Canada, in excess of C\$73 million (£46 million);
- (iii) China requires notification where combined worldwide or Chinese turnover thresholds are exceeded, **and** each of at least two parties has turnover in China in excess of 400 million renmibi (£38 million);
- (iv) France requires notification where a combined worldwide turnover threshold is exceeded **and** each of at least two parties has turnover in France in excess of €50 million (£43 million); and
- (v) Japan requires notification where one party has Japanese turnover in excess of ¥20 billion (£150 million) **and** the target or other party to the transaction has turnover in Japan in excess of ¥5 billion (£37 million).

ICN Recommended Practice I-C provides that determination of a transaction's nexus to the jurisdiction should be based on the activities of at least two parties to the transaction in the local territory and/or based on the activities of the target business in the local territory. While the proposed £70 million turnover threshold for a hybrid mandatory notification regime meets the requirement (since it is based on the target's turnover in the UK), the Group would encourage the Government to consider adopting a second threshold based on the activities of a second party to the transaction in the UK. The proposed £70 million threshold would require that transactions be notified even if the acquirer had no activities in the UK, and, therefore, the parties had no competitive overlap in the UK. Such transactions would very rarely give rise to "potential competition" concerns warranting a review: any theory of competitive harm would have to arise from an expectation that the transaction would prevent the acquirer's entry into the UK *and* that there were barriers to entry by parties other than the acquirer. This scenario is uncommon and, as such, the notification of transactions involving a single party in the UK are likely to impose unnecessary burdens both on the CMA and on parties to international transactions.

The Importance of Clear, Objective Standards for Mandatory Notification

Any mandatory filing requirement should be based on a clear standard setting forth the type of transaction that will be considered a "merger" and, therefore, require a filing. As the Consultation Paper recognizes, the current "cease to be distinct" standard is too imprecise and should be replaced by a requirement of the acquisition of control of the target or the acquisition of decisive influence over the target. Such an approach would be consistent with ICN Recommended Practice II-A which states that "[n]otification thresholds should be clear and understandable."

The Group supports the statement in the Consultation Paper that, if a mandatory or hybrid regime is adopted, the Government will not include a notification threshold based on market shares or a share of supply test. Such an approach would be consistent with ICN Recommended Practice II-B, which states that "Notification thresholds should be based on objectively quantifiable criteria."

Timelines

We understand that, under the current merger review regime, where a merger notice is submitted, the OFT has 20 working days to consider the merger, and that this period can be extended by 10 working days. Where no merger notice is submitted, the only statutory time limit on the OFT's Phase I review is the 4 month post-closing deadline for referral by the OFT to the CC. The Consultation Paper proposes introducing a Phase I time limit of 30 working days for a mandatory regime or 40 working days for a voluntary regime.

The Group supports the introduction of time limits that conform to ICN Recommended Practices IV-C and IV-D, which state that initial waiting periods in suspensive jurisdictions and initial merger reviews in non-suspensive jurisdictions should expire or be completed within a specified period following notification, and that any extended waiting periods or reviews should expire or be completed within a determinable time frame. However, the first phase time limit recommended by the ICN is 6 weeks (see the Commentary reproduced

below), and the Group therefore encourages the Government to apply a 30-working day time limit for voluntary as well as mandatory reviews.

The Consultation Paper indicates that the Government is not inclined to reduce the 24-week time limit (which can be extended once by up to a maximum of 8 weeks) on Phase II reviews and is considering introducing an additional 12-week time limit on remedies implementation between the publication of the final report and the CMA either making an order or accepting undertakings (which could be extended by up to 6 weeks).

The total time limit (including extensions and remedies implementation) of up to 50 weeks, or eleven and a half months, for Phase II reviews, particularly in combination with the 6 or 8 week time limit for Phase I reviews, is substantially longer than the time limit in many ICN-compliant jurisdictions. The Commentary to Recommended Practice IV-C states that:

To facilitate coordinated reviews and clearances, jurisdictions should seek convergence of their waiting periods within the time frames commonly used by competition agencies internationally. Thus, initial waiting periods should expire in six weeks or less, and extended, or “Phase II” reviews should be completed or capable of completion within *six months or less following the submission of the initial notification(s)*. [emphasis added]

The Group would encourage the Government to reduce this time limit to conform to the ICN Recommended Practices and to align with the timeframes in other ICN-compliant jurisdictions. Such an approach would further the Government’s stated goal of streamlining the UK competition regime.

Information Gathering Powers

The Consultation Paper discusses the possibility of extending the powers to obtain information from the merging parties and third parties in Phase I of a merger review. We understand that currently the OFT lacks the ability to impose a penalty during Phase I review, but is able to “stop the clock” in order to seek to incentivise merging parties to submit information.

The Consultation Paper suggests that one benefit of extending information powers to Phase I reviews would be that it might, in certain circumstances, reduce the likelihood of a merger being referred to Phase II if the increased information enabled the CMA to clear the transaction. The Group believes that formal information gathering powers are not necessary to achieve this objective: parties to mergers are normally very aware of opportunities to voluntarily provide an agency with sufficient information to complete a review during the initial review period in order to help avoid second stage reviews.

ICN Recommended Practice V-B states that “initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.” The Commentary to this Recommended Practice suggests that one way to provide flexibility in the initial review is discretionary supplementation (*i.e.* to limit the initial information requirements, but to provide

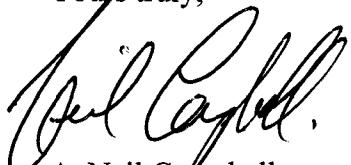
agency staff the discretion to seek additional information during the initial review period). The Commentary also provides, however, that, whatever mechanism is used to provide flexibility, “competition agencies should seek to limit the information sought from parties to transactions that do not appear to present material competitive concerns” and that

[c]ompetition agencies that use discretionary supplementation should consider providing guidance on the types of information (e.g., business reports and plans, transaction documents, customer lists) that they commonly request for the purpose of determining whether a transaction presents material competitive concerns.

The Group would suggest that the information gathering process at Phase I should be relatively limited: at this stage, the CMA would be determining whether a transaction raises competition concerns that warrant a Phase II investigation rather than engaging in a comprehensive review of a transaction that has been identified as potentially problematic. If the Government does extend the CMA’s information gathering powers during Phase I reviews, the Group would suggest that the CMA provide guidance a limited set of additional information that will be typically sought during a Phase I review.

The Group appreciates the opportunity to provide these comments. London has a unique role as a hub for international business including investment and M&A transactions, and the Group believes that the implementation of international best practices for merger control is important in supporting this role. As the Government proceeds with its consideration of changes to the merger control regime, the Group would be interested in reviewing and providing comments on proposed amendments. We would also be pleased to discuss these issues in more detail if that would be useful before or after any amendments are developed.

Yours truly,



A. Neil Campbell



J. William Rowley QC

Copy to: Members of the Merger Streamlining Group
Sorcha O’Carroll, McMillan LLP

National Federation of Retail Newsagents

NFRN

'Representing Leading News & Convenience Retailers'

13th June 2011

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

Dear Mr Lawson

RESPONSE TO: CONSULTATION ON OPTIONS FOR REFORM, A COMPETITION REGIME FOR GROWTH

The National Federation of Retail Newsagents (NFRN) is an Employers' Association that represents approximately 16,000 independent retail newsagent members across the British Islands and the island of Ireland, as well as providing a voice within Government for more than 30,000 independent retail newsagents in this sector.

To put our response to the above consultation into context, it may be useful to comment a little about the newspaper and magazine industry that may help to explain why the Competition Authorities, and a robust competition regime, is of great importance to the micro retail businesses that we represent.

This is because of the unique nature of the newspaper and magazine industry that features just 8 national newspaper publishing groups, 4 dominant magazine distributors and two territorial monopolies at the wholesale level between Smiths News (SN) and Menzies Distribution (MD) that includes Absolute Territory Projection (ATP).

Whilst News International undertakes its own direct delivery to retail, or even consumers in some areas (DTR) or (DTC) the vast majority of newspapers and magazines are distributed to retailers via SN or MD, through a system of post-code-based exclusive contracts. In most cases the post-code territories are combined to form huge areas where only either SN or MD is present, and for the whole of Scotland the only newspaper and magazine wholesaler is MD.

Throughout the UK, retailers of newspapers and magazines have no choice as to who supplies them* and if they wish to sell these products they must accept supply from the wholesaler appointed by the publishers to cover their area, and they must comply with the wholesaler's non-negotiable and draconian terms and conditions of business.

(* Whilst magazine "passive selling" arrangements apply in the news industry, meaning that where magazine supply contracts are split between more than one wholesaler in a territory, retailers can request to consolidate all of their magazine supply on one wholesaler. This means that retailers can (theoretically) save having to pay more than one carriage charge to more than one wholesaler. In practice, however, the number of territories that have split wholesale supply are, nowadays, very few, meaning that only a small number of retailers (circa 1%) have been able to benefit from passive selling arrangements. To some degree this has been further curtailed by the fact that "passive selling" does not apply to newspapers, meaning that unless retailers can consolidate all of their supply on one wholesaler, thus eliminating a second carriage charge, then it is not worth the candle).

Newspapers and Magazines have a price printed at source, which, although ostensibly a recommended retail price, the OFT accepts that, in reality, it is a fixed price. It is the publisher that dictates the terms and margins that both wholesalers and retailers receive, and retailers must pay a non-negotiated carriage charge to the wholesaler as a condition of receiving supplies.

The combined effect of these market conditions have, from a retailer perspective, been likened to an "Iron Triangle" in which the retailer has no effective control over the selling price of newspapers and magazines, no ability to determine the profit margin on the goods he sells, no choice of supplier, no input into the terms and conditions of supply, little control over the product and quantities of titles supplied, inadequate redress against poor service or service failure and no option but to pay a monopoly rent (carriage charge) which has the effect of reducing the publisher-granted margin to a marginal level of profitability.

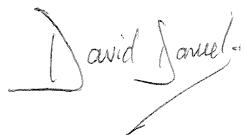
It is not difficult to see that the opportunities for publishers, distributors and wholesalers to abuse and exploit retailers at the bottom end of the news industry food chain, are many.

In recent investigations, however, the OFT has not only allowed these extraordinary arrangements to continue – citing "time sensitivity" for exempting Absolute Territorial Protection in exclusive newspaper supply arrangements and imposing no adequate solution for magazine distribution monopoly – it has also seen fit to repeal, without replacement, a news industry Code of Practice for new retail entrants that has replaced a fair, universal criteria for new entrant supply, with a wholesaler determined post-code lottery where now new entrant retailers are treated differently depending on which wholesaler they are required to take supply from.

We note from its last review of the news industry the OFT did not give a "clean bill of health" and said that it would consider a further review in two years' time (September

2011) subject to its prioritisation principles. We hope that undertaking will be maintained, notwithstanding the proposed merger between the OFT and CC and, given the complex monopoly nature of the news industry, we hope this is one industry that the new Competition and Markets Authority (CMA) will keep under constant review.

We welcome the opportunity to comment on the proposed merger between the OFT and the Competition Commission and our detailed response is attached.

A handwritten signature in black ink, appearing to read "David Daniel".

David Daniel
TRADE RELATIONS MANAGER

Executive Summary

The NFRN fully supports the proposition that the merger will strengthen the robustness of decisions and strengthen the competition regime.

We are less supportive of the proposition, however, that sole focus should be given on high impact cases if, in this, BIS means cases that attract multi £m fines and large headlines, whilst ignoring or paying less attention to the concerns of SMEs in complex supply chains where market structures thwart effective competition resulting in adverse impacts on consumers.

Further, whilst we agree that investigations should be undertaken speedily, in order to allow business to carry on with businesses, this should not mean sacrificing the Competition Authority's ability to thoroughly investigate issues on the grounds of complexity.

The NFRN fully supports the proposal to give supercomplainant status to SME bodies. SME's frequently find themselves in the position of interim consumer and at the foot of their respective industry food chain. Yet it is at SME level where the vast majority of consumer interface takes place, nowhere more so than in the retail sector.

How markets work to support SME's often determines how SME's are able to give good quality service and supply goods at reasonable prices to the ultimate consumer. However, in the past, calls for support to, and Regulatory Intervention by, the Competition Authorities has largely gone unheeded, amongst wildly optimistic and often inaccurate assumptions that producers and distributors will look after their own supply chain SME and micro retailers.

Granting supercomplainant status to SME bodies is, therefore, a very welcome development which in time, we hope will lead to more effective and competitive markets that will more fairly share the bounties of success across supply chain components and, especially, consumers.

RESPONSE

For the sake of brevity, our response is limited to those points where we feel the need to make comment and, for ease of reference, we show the page and paragraph number to which our comments refer:

Page 14, paragraph 1.09

We feel strongly that the CMA should have the statutory duty to keep key sectors under review. This particularly applies to sectors like the news industry where previous investigations have identified competition concerns but have granted derogations for certain reasons. This is to ensure that the derogations remain valid and that other market features eliminate exploitation of supply chain components and promote efficiency and benefit to consumers.

Page 14, paragraph 1.09

We warmly welcome the proposal to strengthen the voice of small business by extending the super-complainant powers to SME bodies.

P 19, paragraph 3.2

The NFRN has, for some time, been concerned by the two-phase nature of market studies, which, by definition, is more in-depth at phase two (Competition Commission) than it is at phase one (OFT).

This is particular relevant in the news industry that is characterised by complex monopoly structures, exclusive territory contracts, unique market conditions (including fixed prices), a “push” rather than “pull” supply chain, a virtual absence of competition at the wholesale level, and supply chain effects of such intricate interwoven complexity, that a full understanding of the competitive/public interest aspects can only be truly achieved through an in-depth market investigation of the industry in its entirety. (See page 93, paragraph 9.29)

As the NFRN has found to its cost, despite overwhelming evidence, through lack of in-depth investigation, the current regime can too readily dismiss referrals for market investigation that are wholly justified, whilst producing Opinions or recommendations that are inappropriate and ineffective, or even leaving vulnerable sectors of a market in a worse position than they were before the phase 1 investigation was undertaken.

If a more robust CMA results in better decision making over market investigations then the NFRN is fully supportive.

For the reasons given at paragraphs 4 and 5 of the Executive Summary and in the preceding paragraph, the NFRN shares the concern that market studies and investigations to date have been insufficiently focused on structural deficiencies.

In the case of the news industry, where “time sensitivity” of newspaper distribution was used by the OFT to justify exclusive distribution arrangements at the wholesale level, the OFT did nothing to address the exploitation of retailers that is plainly inherent in a system of distribution where retailers have no choice of supplier, and where service to consumers is adversely affected. Despite the NFRN making proposals for a fully workable and legally underpinned Industry Code of Practice that would have maintained the desirable aspects of distribution efficiency, whilst eliminating exploitation and being pro consumer, as the OFT decided to exercise its discretion not to make a referral to the CC, so too was the opportunity to accept the proposed Code of Practice dismissed as undertakings in lieu of a referral under Section 131 of EA02.

The NFRN can certainly empathise with the final two bullets on page 21 where, on the one hand the news industry was under investigation by the OFT for almost 6 years from December 2003¹ until the Autumn of 2009 – before deciding not to make a referral to the CC – and we would also strongly support the suggestion that the markets regime may be being underutilised.

¹ In December 2003 the then DTI called for a meeting with all parts of the news industry to advise that the Government was planning to repeal the Vertical Agreements (Exclusion) Order that would then bring news industry supply chain agreements under the scrutiny of the Competition Act 1998. All parts of the news industry held discussions during January and February 2004 to see if an alternative proposal could be offered. Those discussions, however, concluded in disagreement. The retail side wanted a legally underpinned Code of Practice that would eliminate current experiences of exploitation and promote high quality service to consumers, whereas publishers and wholesalers decided to seek a Block Exemption under Section 6 of CA98. The OFT advised in February 2005 that the Block Exemption application was denied and in May of that year produced a consultation document on News and Magazine Distribution, OFT 450. This caused such a furore across the industry that the new incoming DGFT at the time decided to issue a revised Opinion for consultation in May 2006 (OFT 851, 31st May 2006). Concurrently, the OFT decided to undertake a review of the 1994 National Newspapers Code of Practice in England and Wales. A third strand was added to the OFT’s investigations in December 2006 when, believing that neither the OFT’s work on the written Opinion, nor its revision of the Code of Practice, would address its concerns, the NFRN applied for a full-market investigation under EA02 S.131. The NFRN added the caveat that in finding in favour of a case for referral to the OFT, it hoped the OFT would seek undertakings in lieu of a referral, allowing for a comprehensive and legally underpinned revised industry Code of Practice to be developed. A 4th element to the OFT’s investigations was added in April 2009 when the NFRN raised a formal complaint at the apparent collective action of several newspaper publishers and magazine distributors to withdraw contracts from Dawson News Ltd, subsequently forcing that wholesaler into liquidation and leaving two territorial wholesale monopolies between Smiths News and Menzies Distribution. The OFT published the outcomes of its 3 way reviews, together with its reply to the NFRN’s complaint in September 2009.

Page 22, paragraph 3.6

For the reasons given at page 19, paragraph 3.2, the NFRN strongly disagrees with the proposal to maintain a 2 phase process for markets since we can see no benefit in it. This does not mean that every investigation necessarily requires full in-depth investigation but a single phase regime will promote consistency and allow the CMA the flexibility to investigate markets and issues to whatever depth it feels is appropriate to identify concerns and appropriate remedies.

If the 2 phase system is retained, then it becomes more difficult to identify tangible benefits from this merger proposal, other than the possible saving of office costs at Salisbury Square. Certainly, it is difficult to see where businesses would see any benefit either in terms of timely resolution or, in having to potentially duplicate evidence in a two-phase inquiry.

The NFRN, however, fully supports the retention of the Competition Appeal Tribunal (CAT) which it considers to be a necessary safeguard in allowing appeals against the decisions of a single CMA body.

Page 22, paragraph 3.8

The NFRN fully supports the proposals to give the CMA extended powers to carry out investigations across markets, in particular when the CMA feels that its flexibility to carry out an in-depth investigation may be hampered or restricted without such powers.

In our own industry, for example, where newspapers and magazines are the principal market, it might be difficult to undertake a full in-depth investigation without making some connection with the Direct Marketing sector and Advertising sector, both of which form part of the revenue stream for publishers and have knock-on impacts for the rest of the supply chain.

Page 23, paragraph 3.10

The NFRN supports the proposal that the CMA should provide independent reports to Government on public interest issues, thereby making the most comprehensive use of its investigative expertise.

Page 24, paragraph 3.14

The NFRN welcomes and fully supports the proposals to extend super-complainant status to SME bodies.

Page 24, paragraph 3.17

As previously mentioned, at page 21, paragraph 3.5 and footnote 1, the news industry has already experienced an extremely elongated phase 1 investigation between the then DTI announcing its proposals to reveal the Vertical Agreements (Exclusion Order) in

December 2003, the OFT announcing its rejection of a Block Exemption application in February 2005, the OFT consulting on the first of two draft Opinions from May 2005, the OFT investigating a request for a Market Investigation Referral in December 2006, the OFT investigating a complaint regarding alleged collective action against Dawson News Ltd in April 2009, and the OFT publishing its outcomes in September 2009.

By any standards, that is an extremely long time to keep an industry under scrutiny, involving uncertainty, massive amounts of work and huge costs for the parties involved and resulting in huge frustration for at least half of the industry, in the light of the OFT's final decisions, which have done nothing that effectively resolves any of the key issues or competition concerns, and, in removing a workable and fair-to-all Code of Practice, without replacement, the OFT has effectively left the independent retail sector in the news industry, who interface and provide the service to consumers, worse off than they were before.

In view of the above, the NFRN welcomes the proposals that would add statutory time limits to investigations, so long as this does not undermine the rigour and robustness of the regime, nor, in cases of exceptional complexity, prevent an extension to time scales when absolutely necessary.

Page 26, paragraph 3.21.

For the reasons given at page 19, paragraph 3.2 and page 22, paragraph 3.6, the NFRN does not support the proposition of maintaining a system of two-phase investigations. By definition, phase 1 investigations are likely to be limited both in time and robustness, which can lead to the referral of difficult or complex cases being denied, that, with more in-depth investigation, would warrant referral. The NFRN believes that a single tier of investigation would allow the CMA more flexibility to investigate cases, probing as deeply as it feels necessary to determine whether a full investigation should proceed.

Page 27, paragraph 3.25

Subject to understanding the details, the NFRN welcomes the proposals to introduce statutory definitions and thresholds to market studies, which adds clarity and certainty for business and reduces the use of subjective discretion in decisions. The NFRN stresses however, that it would not support this proposal if the definitions and thresholds for market studies are set so high that only the highest profile cases are likely to be referred for investigation. See our comments at paragraph 2 of the Executive Summary.

Page 27, paragraph 3.27

The NFRN fully supports the proposal to improve the interaction between Market Investigation Referrals and Antitrust enforcement that would extend the CMA's powers to investigate breaches of the Competition Act 1998 and Articles 101 and 102. We see this as being essential to the robustness of market investigations.

Page 28, paragraph 3.31

The NFRN strongly supports the proposal to amend Schedule 8 to EA02 to enable the Competition Authorities to appoint and remunerate an independent 3rd party to monitor and/or implement remedies. As part of its request to the OFT for a Market Investigation Referral (MIR) in December 2006 (see footnote 1) the NFRN suggested that an alternative to a MIR under EA02 S 131, would be for the OFT to seek undertakings in lieu. The NFRN suggested that a fully comprehensive and legally underpinned Code of Practice for newspaper and magazine distribution, overseen by an independent Ombudsman, could ensure that consumers could continue to benefit from the speedy distribution of newspapers and magazines (in a market that otherwise lacked competition) whilst ensuring that retailers at the bottom of the news industry food chain were not exploited through monopoly arrangements.

What BIS proposes here appears to be entirely consistent with our own thinking.

Page 29, paragraph 3.36

The NFRN believes the proposal to revise the threshold for review of remedies needs careful consideration. From our experience, we believe a lack of in-depth review, and too great a reliance on unsubstantiated assurances from certain parties, and non-evidence-based assumptions, led the OFT to repeal the National Newspapers Code of Practice in England and Wales, which has resulted in a worse situation than existed under the Code.

For instance, the OFT felt that in deciding to recommend to the Secretary of State the repeal (without replacement) of the 1994 National Newspapers Code of Practice in England and Wales, the OFT asserted that a Minimum Entry Level requirement was no longer required because wholesalers were now receiving sufficient income from carriage charges that it would warrant supplying a new applicant without a MEL requirement. In reality, what has happened by removing the Code is that Smiths News (SN) and Menzies Distribution (MD) and News International Distribution Ltd (NIDL) (where it delivers its own titles direct to retailers (DTR)), has applied their own new, and different conditions, for new entrants, meaning it is now a post-code lottery in terms of how one new retail entrant is treated versus another. This is viewed as a retrograde step that does not promote fair competition, particular where territories adjoin, and competing retailers can find themselves having different conditions of supply applied to them with no choice in the matter whatsoever.

Page 30, Paragraph 3.39

The NFRN fully supports the proposal not to consult on decisions when the CMA decides not to make a Market Investigation Referral in circumstances where none of the parties involved are seeking a MIR. However, where one or more parties is seeking an MIR, we believe it is essential to consult when the decision is not to make a referral. In these circumstances, we believe it can only contribute to good decision making if the CMA makes clear its reasoning and rationale for not making an MIR upon which interested

parties can comment should they feel that the decision not to refer has been derived out of an omission or misinterpretation of key facts or based on wrongly made assumptions.

Page 32, Paragraph 4

We have no comments to make on the reform of the mergers regime, nor on the proposed exemption of SMEs, as this little or no impact on our members.

Page 45, Paragraph 5

As the NFRN's interest primarily relates to market structures that fall within the scope of the Enterprise Act 2002, rather than Antitrust breaches under Chapters 1 or 2 of the Competition Act 1998, our only comment in this section refers to the issue of appeals and the Options for an Internal Tribunal or continuance with the Competition Appeal Tribunal (CAT). On balance the NFRN prefers the latter.

Page 61, Paragraph 6

We have no comments on this section.

Page 72, Paragraph 7

We have no comments on this section.

Page 82, Paragraph 8.

Other than our comments at Page 22, paragraph 3.6, where we support the retention of the Competition Appeals Tribunal (CAT) we have no other comments to make on this section.

Page 86, Paragraph 9

From our own experience (see Page 21, paragraph 3.5 and footnote 1), we were hugely disappointed and frustrated that, after a protracted quartet of concurrent investigations, overall covering a period of 6 years, (1. Written Opinion), (2. Review of the National Newspapers Code of Practice in England and Wales), (3. Response to a request for a Market Investigation Referral (MIR) to the Competition Commission), (4. Formal Complaint concerning the concerted withdrawal of contracts from Dawson News) that the outcomes and decisions of the OFT were wholly unhelpful:

1. Written Opinion

The OFT decided that the exclusive distribution arrangements for magazines were not justified, and required "passive selling" arrangements to be introduced. The OFT, however, supported exclusive distribution arrangements for national newspapers on the grounds of time sensitivity. This decision did not appear to take fully into account the fact that (in the vast majority of cases) newspapers and

magazines are handled by the same wholesalers and distributed together on the same vehicles. The only potential benefit to retailers from this new arrangement was to consolidate split supplies from two or more wholesalers into one, thereby saving multiple carriage charges and simplifying administration. By making different judgements, however, for newspapers and magazines, only a small number of retailers have benefited from “passive selling” arrangements, since newspaper publishers steadfastly refuse retailers the right to move newspaper supplies to a more convenient wholesaler, even if they are the only newspaper title whose contract is out of step with the remainder.

In reality, in terms of giving independent retailers a choice of wholesaler, or allowing them to negotiate conditions of supply with an alternate wholesaler that might offer preferential arrangements, the OFT’s Written Opinion has been next to worthless.

2. Review of National Newspapers Code of Practice in England and Wales

Whilst we accept that the 1994 Code of Practice was due for reform (since it effectively supported exclusive distribution arrangements that were no longer sustainable after the repeal of the Vertical Agreements (Exclusion Order) in 2006, there were, nonetheless, some beneficial features of the Code that resulted in equal and fair treatment of new entrant retailers.

The OFT advised that the Minimum Entry Requirements of the Code were no longer necessary since wholesalers were contractually obliged by publishers to supply all new retail entrants. Moreover, the scale of carriage charges over time had risen to such an extent that new entrants would be economic for wholesalers to supply without having to impose a Minimum Entry Level (MEL).

In reality, wholesalers appear to have totally disregarded these findings since they have each, individually, devised their own new and different minimum financial value for new accounts, which, instead of applying a universal and competitively fair formula for new entrants, has now introduced a post-code lottery, where competing new retailers on the fringe of wholesale territories have different new entrant conditions applied to them.

The NFRN strongly recommended, and provided details of, a proposed new Code of Practice that would have addressed the legal concerns of its predecessor whilst retaining the pro competitive benefits of the previous Code.

The OFT ignored this proposal.

3. In December 2006, recognising that both the OFT’s work on the Written Opinion and the review of the 1994 Code of Practice was so limited in scope that neither could do anything to address the myriad structural and competitive problems of the news industry, the NFRN made a formal request to the OFT that

it make a Market Investigation Referral (MIR) to the Competition Commission, citing 8 issues in total that might form the OFT's investigation.

The OFT chose to examine 6 out of the 8 issues proposed by the NFRN and found that 3 of them warranted a referral to the CC. However, after taking into account the combined effects of the 3 issues that warranted a referral, the OFT concluded that this constituted a 4th justification.

Despite this, however, the OFT exercised its discretion NOT to make a referral to the CC. The OFT argued that the changes it anticipated from its Written Opinion and removal of the Newspapers Code would generate a degree of flux within the industry, such that the CC would find it difficult to gather sufficient evidence from which to undertake an investigation.

The OFT's rationale of "flux" being the reason for not making a referral was not understood, since, by that time all newspaper publishers and magazine distributors had already commenced new 5 year contracts with Smiths News or Menzies Distribution, and, other some minor operational adjustments whilst Smiths and Menzies absorbed the business of former Dawson News, the industry was already embarked on one of the most stable periods in its history, an ideal environment for investigation.

4. Formal Complaint Concerning the Withdrawal of Contracts with Dawson News

As mentioned above, the NFRN was concerned that passive selling arrangements would provide few opportunities for retailers to choose their magazine supplier, and the removal of one of the three remaining multiple wholesale companies from the industry, would render the decision on passive selling virtually worthless, since there would be so few areas remaining where wholesale territories interjoin, that nothing more than a handful of retailers could benefit from this facility.

Moreover, out of the 3 multiple wholesale companies (Smiths News, Menzies Distribution and Dawson News) retailers had always found Dawson News the better wholesaler to deal with.

It was, therefore, with some alarm that we heard news that publishers and wholesalers were withdrawing contracts from Dawson News, and even those with extensive contract periods still to run, withdrew their support from the company, forcing it into liquidation.

Concerned at the apparent concerted action of publishers and distributors to force Dawson News out of the market, increasing significantly and unhealthily the already high market shares of Smiths News and Menzies Distribution, the NFRN made a formal complaint to the OFT. However, consistent, with all the previous submissions from the NFRN, the OFT decided not to investigate.

Whilst we accept that a Competition Authority has, at one end, a duty to prevent Cartel activity and anti-competitive behaviour, and at the other, to promote the interests of consumers, it seems that hitherto the OFT has been less adept at preventing exploitation of those within, and especially at the foot of, vertical supply chains, failing to recognise the impact of such exploitation on consumers.

In terms of our response to paragraph 9.1, Q. 19 and Q. 20 we fully support the proposal that the CMA's objectives should be embedded in statute, so long as this does not eliminate flexibility or the CMA's ability to investigate certain cases.

We also fully support the proposal that the CMA's objectives should have a clear competition focus. We would very strongly add, however, that in Market Structure cases that have competition concerns, much more use should be made of legally underpinned Codes of Practice, enforced by an independent regulator/ombudsman, as undertakings in lieu of a Market Investigation Referral under EA 02 S. 131.

Whilst, clearly, the CMA has a duty to stamp out cartel behaviour and anti competitive activity, market structure investigations are more likely to have good and bad elements to them which, on the one hand might cause competition concerns, but on the other deliver potential benefits for consumers. In such cases, it might be considered appropriate not to deny the consumer benefits, but, in "turning a blind eye" to the competition concerns, it is easy to overlook the adverse impact this might have on the supply chain structure, in particular those at the foot of the food chain.

Legally underpinned and Independently enforced Codes of Practice, as undertakings in lieu of a MIR can be far more flexible than statutory decisions, and are more capable of achieving market environments that retain all the consumer benefits within a supply chain, whilst eliminating the opportunity for the supply chain's more powerful elements to exploit the weaker ones.

We have no comment on Q 21.

Page 87, paragraph 9.2

In defining the scope of the Authority we would expand the phrase "innovation and consumer welfare" to include "the fair internal workings within industries". As BIS will be well aware, for instance, there has been long-standing disquiet about how grocery suppliers are treated by the major supermarkets whose demands, superficially, may appear to be driven by consumer benefit, but in reality are focused on the supermarket's profit to the detriment of the supplier. Ultimately, this is also to the detriment of consumers if suppliers are forced to exit the market and consumers are left with less choice. This analogy is equally relevant in the news industry, where the complaints against exploitation of micro retailers by publishers and wholesalers has largely gone

unheeded by the OFT, a consequence of which is that the service micro news retailers are able to provide to consumers is adversely affected.

Page 88, Paragraph 9.5

The NFRN would certainly advocate that the complex monopoly that describes the newspaper and magazine market in the UK is one that should be subject to continuing review by the CMA. Widespread consumer access to newspapers and magazines is an important feature of any democratic society and we do not believe that this should be left entirely in the hands of a few highly powerful individuals with international business interests.

For that reason, we would encourage the widest possible interpretation of the phrase “economically important market”, or, better still, change the wording to “critically important market” to give the CMA the flexibility to broaden its priorities as it considers necessary in the wider public interest.

Page 89, Paragraph 9.16

As in our comments at Page 19, paragraph 3.2, the NFRN does not favour a two-stage investigation regime for market investigations.

Page 93, paragraph 9.29

The NFRN notes the comment that *the CMA may be in a position to determine whether the market under review is affected by competition problems only towards the end of the study.....* This gives rise to our views expressed at page 19, paragraph 3.2 in which we do not favour the proposed two-stage review process, since this may fail to identify markets that are in need of more in-depth investigation.

Page 98, paragraph 10.16

The NFRN notes some potential inconsistency with the proposed filter process at stage 1 of a 2 stage decision making process and the OFT’s comments at page 93, paragraph 9.29, in which it highlights that competition problems within markets may only come to light at the latter stages of an in-depth investigation. This again tends to support the NFRN’s view at page 19, paragraph 3.2 that a two-stage investigative process may be ineffective since, in complex cases, it can lead to referrals that merit in-depth investigation being rejected at phase 1.

Given the complex monopoly nature of the newspaper and magazine industry, that features exclusive wholesale arrangements that include Absolute Territory Protection (ATP), creates two territorial monopoly supply situations that provides no choice of supplier for news retailers, allows publishers to fix consumer prices as well as determine the margin that wholesalers and retailers receive, allows monopoly wholesalers unfettered dominance on the market, including the ability to impose draconian terms of supply and exploit captive retailers via a monopoly rent that subsidises routes to market and

consumer prices, allows distributors and publishers to eliminate a wholesaler from the market through concerted withdrawal of contracts; the NFRN has some difficulty in understanding how, in such overwhelming circumstances, the OFT could decide to exercise its discretion not to make a market investigation referral to the Competition Commission, or, as the NFRN proposed, to offer undertakings in lieu of a referral that would allow the news industry to draw up a legally underpinned Code of Practice, that could retain the beneficial aspects of the news industry supply chain that ensures timely delivery of newspapers to consumers, whilst eliminating the worst aspects of retailer exploitation.

Page 99, paragraph 10.19

The NFRN is disappointed to see that a single stage decision-making structure is not included amongst the suggested list of alternatives. However, from the NFRN's perspective a single stage process could have distinct advantages in terms of clarity for business and eliminating the need to duplicate evidence, whilst providing the CMA with a streamlined and consistent approach to investigations that has the merit of flexibility, allowing the CMA to investigate cases to whatever depth it feels is appropriate to determine whether there are competition problems that merit more in-depth investigation, or provide clearance where this does not appear to be the case.

The CAT would provide the appropriate forum for Appeal against such decisions.

Page 122, paragraph 11.50

To achieve consistency with the practice of merger control legislation (Page 112, paragraph 11.8), and to prevent Small and Medium Sized Enterprises from being excluded from appellant action on the grounds of cost, the NFRN proposes that SME's be exempt from CAT costs when taking cases to appeal.

Page 122, Paragraph 12

The NFRN has no comment to make on this section.

National Grid

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

Paul Whittaker
UK Director of Regulation
paul.whittaker@uk.ngrid.com
Direct tel +44 (0)1926 653190
Direct fax +44 (0)1926 656520

www.nationalgrid.com

10th June 2011

Dear Mr Lawson

A Competition Regime for Growth: Consultation on Options for Reform

Thank you for the opportunity to respond to your consultation on the options for reform of the UK competition regime.

National Grid owns and operates the high voltage electricity transmission system in England and Wales and, as Great Britain System Operator (GBSO), we operate the Scottish high voltage transmission system. National Grid also owns and operates the gas transmission system throughout Great Britain and through our low pressure gas distribution business we distribute gas in the heart of England to approximately eleven million offices, schools and homes. In addition National Grid owns and operates significant electricity and gas assets in the north east US.

In the UK, our primary duties under the Electricity and Gas Acts are to develop and maintain efficient networks and also facilitate competition in the generation and supply of electricity and the supply of gas. Our activities include the residual balancing in close to real time of the electricity and gas markets.

Through our subsidiaries, National Grid also owns and maintains around 20 million domestic and commercial meters, the electricity Inter-connector between England and France, and a Liquid Natural Gas importation terminal at the Isle of Grain.

National Grid is almost uniquely placed to comment on the existing regime relating to abuse of dominance being only one of two companies which has been found by a UK competition authority to have abused a dominant position. We have drawn on that experience in commenting on the proposals. Whilst there were aspects of Ofgem's investigation and the subsequent proceedings that worked well, there were others which we believe were unduly onerous and which themselves may have had a greater chilling effect on competition than any action taken by National Grid. We will expand on this in our more detailed response in the appendix.

An aspect of the competition regime which causes particular concern to large companies is the uncertainty of what constitutes an abuse of dominance. In our own case it is clear that even the Court of Appeal struggled with this Pill LJ saying "*it is not self-evident that the arrangements made with the gas suppliers crossed the line into abuse,*" and the final judgments of the courts left us still unclear as to precisely what National Grid can and cannot legitimately do. Again this can have a stifling effect on competition and in particular deter large companies from pursuing innovative ways of doing business. This, however, is not within the scope of the consultation but we raise it as a matter of importance.

A theme of the consultation is the suggestion that a change in regime might facilitate the pursuit of more anti-trust cases. Again we will expand on this in the Appendix but would suggest that it is not altogether surprising that there are few abuse of dominance cases since most companies do endeavour to comply with the law.

We have not responded to all questions in the consultation, since we do not have strong views on all of them. I hope you find our comments helpful. If you would like to discuss any aspect of our response please call Janet Bidwell on 01926 655377.

Yours sincerely

[By e-mail]

**Paul Whittaker
UK Director of Regulation**

APPENDIX

Chapter 1

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.

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

National Grid supports the aim of improving the robustness of decisions, ensuring that the "right" cases are taken forward and in particular improving speed and predictability for businesses.

Paragraph 1.7 refers to the relatively small number of cases and precedents leading to a reduction in the deterrent effect of the prohibitions. We agree that a body of clear and robust case law is important not least in providing certainty for businesses, though cases should only be pursued because there is genuinely believed to have been a breach, not because there is an ambition to increase the body of case law.

We doubt also whether a simple numerical increase in cases will have any significant deterrent effect since most companies are aware of their obligations under competition law and most companies do seek to abide by the law. Indeed, they put substantial efforts and deploy significant resources, through compliance procedures and training and the deployment of internal and external competition law advisers to avoid breaching competition law. Also, through industry organisations such as the In-House Competition Lawyers Association, they seek to share best practice in order to avoid breaches occurring. The severe consequences of a competition law breach themselves act as an effective deterrent. Indeed, the onerous, lengthy and expensive requirements of dealing with an investigation act as a double incentive to avoid even the suggestion of a breach. We note that in our own metering case more infringement decisions would have been unlikely to have any deterrent effect, since, as both the CAT and the Court of Appeal found, National Grid had discussed the offending contracts in detail with Ofgem before they were implemented and Ofgem had not at that time objected to them. The uncertainty caused by the judgment has, however, had the effect of reducing National Grid's willingness to respond to changes in the market or introduce innovative solutions since we cannot know in advance whether what is proposed is in breach of the Chapter II prohibition. This tends to promote stagnation rather than competition.

We support the aims set out in paragraph 1.8 in particular the need to support speed and predictability for business. From a process point of view, speed and relevance of responses to enquiries from competition authorities could be greatly improved if the competition authority were prepared to be more open about what their concerns really are. As an example, in the metering case the nature of Ofgem's concerns was unclear prior to the issue of their first statement of objections, which, following our response was largely withdrawn. Almost a year later a second statement of objections was issued which relied on a misinterpretation of information and again almost 6 months later they restated their case in what was effectively a third statement of objections. Up to 18 months could have been saved in the 5 year process, had Ofgem been more open about what they were trying to prove and to discuss their allegations before issue of the statements of objection.

In terms of taking the "right" cases forwards it is our view that this is more likely to be achieved if competition matters are dealt with by a single CMA rather than Regulators. We agree that a single CMA will enhance predictability and consistency (paragraph 1.11) but only if the CMA makes all decisions in relation to markets and anti-trust. We deal further with this in our response to Chapter 7.

We note that the Government is mindful of the need to ensure that competition decisions are high quality, transparent and robust (paragraph 1.12) – we believe that they must also be subject to full review by the courts.

Chapter 3

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.

National Grid agrees that market investigation is an important part of the UK competition regime and that there are likely to be benefits in giving the CMA powers to carry out “horizontal” investigations of practices that affect more than one market. It may be that a slavish adherence to promotion of competition in one small market could have the perverse effect of reducing competition in a more important market. We note that the current structure of the metering market means that the roll out of smart meters will be largely controlled by electricity and gas suppliers who have an interest in barriers to customers switching supplier. By installing smart meters that are not compatible with those of other suppliers they will be able to increase the cost of customer switching. Effective competition in the electricity and gas supply market is far more valuable to consumers than that in the metering market: the cost of metering makes up a very small part of the cost of gas supply to a consumer.

In relation to limiting the duty to consult (paragraph 3.40) whilst this may save costs it does open the possibility that important information could be missed. However, it ought to be possible to address this risk by sufficient publication of a proposed decision not to refer.

Chapter 4

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.

National Grid does not have strong views on the proposed changes and would not anticipate being seriously affected by a duty to refer a proposed merger.

Chapter 5

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 5.59 and the costs and benefits of these.

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

National Grid considers that Option 3, a “prosecutorial” approach is likely to be the best method of improving the quality and speed of decisions (see below). Option 1, retaining and enhancing the OFT’s existing procedures, is the next best option provided (if concurrent powers are to be retained) sector regulators also adopt improvements. Paragraph 5.23 says that that would be optional for regulators but with no explanation of why. The OFT is far more experienced in competition matters than sectoral regulators and far more likely to be in a position to identify and apply best practice. Improvements applied by the OFT already (paragraph 5.24) are generally positive and would have improved the process had Ofgem followed them in their metering investigation. Early discussion with the target company concerning the allegations would also help to streamline and speed up the process.

We consider that Option 2 (administrative approach) should not be followed. These are cases with potentially vast fines through the imposition of quasi-criminal penalties and multi-billion pound consequences. Judicial review of an administrative decision is not an adequate remedy for matters that can have such far-reaching consequences. We can see no advantages in the creation of an Internal Tribunal (paragraph 5.31): we note the government’s view that substantial independence of decision-makers would guard against confirmation bias but do not believe that this is supported by the evidence. The decision-makers would be part of the CMA, working with the investigating officers on some matters and (paragraph 5.33 final bullet) may be involved in investigating and prosecuting other cases. They will thus have the mindset of an investigator and prosecutor with the consequent risk that they cannot be truly independent.

The suggestion that parties should be able to put their case to actual decision-makers (paragraph 5.40) would be an improvement on the current system, where parties have no access to the decision-maker, but not sufficient to guard against confirmation bias.

We note the comparison with the procedures of the European Commission: we do not consider that that is a model which necessarily provides for adequate independence of decision makers and should not automatically be followed. At least if this option were to be adopted the right of a full-merits appeal to the CAT should be retained.

Option 3 has the advantage that it takes a step out of the current process (and hence should be faster) whilst ensuring that the decision is taken by a body which is truly independent and has had no part in the investigation or prosecution. In addition the CAT could set the timetable for prosecution binding both the CMA and the defendant which again can speed up the process. Under the current system the OFT or sector regulator is not bound to complete any steps within a specified period, whilst the party under investigation can be required to respond within unrealistic timescales.

In terms of guidance that businesses can receive this is already quite limited. Whilst it might be expected that a competition authority which gives guidance will (subject to full disclosure having been given) stand by its guidance, in the metering case the CAT found that National Grid had provided full

disclosure and that Ofgem had changed their mind. Clearly, as the decisions of the CAT and the Court of Appeal demonstrate, a regulator can change its mind, but this is not conducive to certainty within an industry. Guidance given could be taken into account by the CAT in deciding the level of any penalty.

The time taken to conclude a competition investigation is in itself detrimental to competition. Indeed, experience shows that cases are often very long drawn out and irrelevant to the market by the time they are concluded. Ofgem's metering investigation started just as alternative providers were beginning to get a foothold in the market and becoming confident in the service that they could provide. The gas suppliers, who alone could decide who should provide their metering services and how, did not (largely) appoint new meter providers during the course of the investigation leading to stagnation for 5 years.

In paragraph 5.55 the government suggests that financial penalties could be imposed for parties that do not comply with the requirements in a regulator's questions. Is there in fact any evidence that companies generally do not comply with requirements? In the absence of such evidence this seems an unnecessary additional burden. In addition it provides scope for introducing further delay into the process since companies which believe that they have complied will take steps to challenge the imposition of fines. Note also there is currently no equality of arms here: a competition authority can take as long as it likes to frame a request, but can (and does) impose deadlines that are very difficult to meet. Companies should not be penalised if they are unable to provide a full response where an unreasonable deadline has been imposed: nor should they be penalised if they have answered a question in good faith but, due to the way that the regulator's question is framed, have not in fact provided the information that the competition authority wants.

Chapter 6

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.

Q12. Do you agree that the “dishonesty” element of the criminal cartel offence should be removed?

Q13. The Government welcomes further ideas to improve the criminal cartel offence.

National Grid does not have strong views on proposed changes to the criminal cartel offence.

Chapter 7

Q14. Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?

Q15. The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:

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

Q16. The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.

In the consultation the government clearly favours retaining concurrent powers. National Grid notes that the arguments made in favour of retention tend to support its removal and that the disadvantages cited of removing concurrency are easily overcome.

Paragraph 7.4 points out that Regulators currently have a choice of using their regulatory or competition powers. Without concurrent powers that choice would remain but the regulator would need to persuade the CMA that the CMA should use its competition powers. If the CMA proposed of its own volition to prosecute a regulated company it should have a duty to consult the relevant Regulator before starting proceedings.

The “mindset” of parties exercising regulatory powers is quite different to that of authorities engaged in competition enforcement and, as stated in paragraph 7.5, “*the mandate and approach of competition authorities is quite different from those of sector regulators*”. The former requires an *ex-ante* consideration of what could happen with a sceptical assumption that without regulation the regulated company will not act in the best interests of consumers. The latter requires an independent *ex-post* assessment of a market and the effect of certain actions on that market. Thus it is difficult for a regulator to approach a competition matter with the requisite degree of independence. Furthermore, competition assessment involves more of a “set piece” analysis of a specific issue, than a more general oversight of a particular market.

Concern that insufficient competition cases are brought against regulated companies (at least in the energy sector) does not take account of the fact that many potential competition risks are foreshadowed by Licences and hence the regulated company has a dual obligation not to infringe its Licence or competition law. This tends to mean that a competition breach is less likely to occur in a regulated company which means that Regulators have little opportunity to develop their expertise in the prosecution of competition breaches. National Grid believes that such prosecution will be better carried out by the CMA which will have much greater experience and hence expertise in competition matters. Sector regulators can provide support to the CMA in understanding their sector if necessary.

Whilst we do not share the government’s view that “*the comparative lack of activity in the regulated sector seems surprising*” if that is their view the obvious and simplest remedy is to remove Regulator’s concurrent powers and pass the duty of investigating competition matters to the expert CMA. The implication in paragraph 7.8 that there is a detriment in the “speedier” resolution through use of regulatory tools is startling. It is surely in the interests of everyone, regulated companies, their customers and consumers that perceived problems are dealt with in the quickest way possible.

We also do not understand the implication in paragraph 7.9 that there is a detriment in executives of regulated companies preferring the certainty of regulation to the uncertainty of competition. Regulated companies are by their nature companies which can have a profound effect on a wide range of people and of UK plc. As such it is vital that they should be able to ascertain quickly whether their actions are legitimate. As demonstrated by the metering case competition law provides less certainty than regulation (it is still not clear following the Decision of Ofgem and judgments of both the CAT and the Court of Appeal what National Grid is legitimately able to do) and can be very slow potentially leading to stagnation in a market whilst the investigation takes place.

The matters set out in paragraph 7.11 are all good reasons why competition powers should be taken away from Regulators. We agree that the possibility of a MIR is an important tool, and indeed believed that this would have been a more appropriate route in the metering case since it would have dealt with certain conditions in NGG’s licence which we believe themselves have the potential to distort competition in metering. However, we agree that the potential for criticism of a regulator in a MIR means that regulators are unlikely to choose this route, which again is a good reason for taking that power away from them.

Whilst we firmly believe that competition matters will be better dealt with by the CMA, removing the Regulator’s decision-making role (paragraph 7.14) would be a step in the right direction.

The perceived disadvantages of removing concurrency set out in paragraphs 7.15 and 7.16 would easily be dealt with by placing on the CMA a duty to consult the regulator: we do not believe that such a duty need be complex.

Paragraph 7.23 assumes that competition is necessarily better than regulation. National Grid does not agree. In industries such as the one in which we operate regulation applies simply because

transmission of energy is a natural monopoly and a single provider is the most efficient way of providing an essential service within the UK. There are minor aspects of our business which may be competitive and properly managed by competition law, but these tend to be areas which could easily be understood by a non-specialist regulator and hence there is no advantage in concurrency.

In paragraph 7.24 it is recognised that sector regulators may lack incentives and capacity to prosecute competition breaches. Rather than sharing of resources as proposed is not the most efficient method of dealing with this simply to pass the duty to the CMA rather than a complex sharing arrangement? All the arguments for improving the sharing of resources set out in paragraph 7.27 would be better managed by passing the duty to the CMA.

The proposal in paragraph 7.29 that the CMA would take over a case if better placed than the regulator to manage it is better than the current situation but would not be necessary at all if concurrency were removed.

Paragraph 7.34 appears to be a duplication of the Regulator's work and hence probably inefficient. However, it would provide a check on the Regulator who, as mentioned above, may not want a market investigation which could be interpreted as a failure of its regime.

Chapter 8

Q17. Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?

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.

Clearly a body with some expertise is required to hear regulatory references/appeals and we agree in general with the points raised in paragraph 8.7. There are, however, some additional skills required and we suggest that a body of experts drawn from members of the CMA should be developed who can be called on to deal with such appeals. Building regulatory appeals into the career structure of CMA members so that involvement in such appeals is seen as important will assist in ensuring that appropriate expertise is developed and maintained.

In relation to Qu 18, creating model regulatory processes, National Grid believes this will be helpful provided that the processes are fit for purpose. Note also that the regime for gas and electricity is about to change as a result of the EU Third Package of Energy legislation and any changes will need to take account of these EU requirements. There is, however, a risk in seeking a "one size fits all" approach: not only will there be a risk of not following EU requirements, but also a risk of undermining the quite proper rights of regulated entities to seek to appeal decisions of regulators. Regulated entities need certainty and stability in the regulatory regimes governing them and clear and effective appeal process is central to this, not only in its own right, but also to ensure "disciplined" decision making by regulatory authorities. Changes to the regime which might undermine this will be seen among other things as creating increased regulatory risk for regulated companies and make it more difficult and expensive for them to raise the finances they need. Given the scale of investment required in Great Britain's network infrastructure over the next 10-15 years this could have a significant impact on consumers' bills and the chances of the government achieving its policy goals.

A possible model process is described in paragraph 8.12. National Grid has no real objection to this model, provided appellants' rights of appeal are not undermined by the approach.

Chapter 9

Q19. The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.

Q20. The Government seeks your views on whether the CMA should have a clear principal competition focus.

Q21. The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.

National Grid has no strong views on the objectives and structure of the CMA, save that we believe that a “primary duty to promote competition” should be caveated by a requirement to consider whether the objective of promoting competition in one narrow market might have the perverse effect of impeding competition in a more important market.

Chapter 10

Q22. 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.

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 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 have set out our views on the options for antitrust cases in our response to Chapter 5 and explained why National Grid believes that an administrative approach in such cases is inappropriate. It is our view that the process would be improved by adopting a more prosecutorial approach with the CMA (or sector regulators if they retain their current powers) prosecuting cases before the CAT.

We agree that any change should not be at the expense of quality of decision-making in the overall regime or the overall time taken to conclude a case (Paragraph 10.21) and note that any change should also not be at the expense of justice.

In respect of the composition of the decision-making body the quality and relevance of decisions could perhaps be enhanced by greater involvement of individuals tasked on a regular basis with applying the law in practice. This might be people with a regulatory or legal background in commerce and industry and as such they would be more likely to be available on a part-time basis.

Chapter 11

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.

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?

Q32. Do you agree that telecoms should be treated in the same way as other regulatory 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, our response should provide reasons supported by evidence where appropriate.

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.

In principle National Grid does not object to a proposal that costs of an investigation be recovered from an infringing party provided this is a reciprocal arrangement and that the costs claimed have been reasonably and properly incurred. Companies should not be expected to pay costs incurred unnecessarily through the competition authority's failure to act competently and expeditiously. It should be noted also that the costs of responding to such investigations tend to be very high for the company under investigation and consideration should be given to a reciprocal arrangement whereby companies found not to have infringed competition law could seek some at least of their costs.

In respect of the CAT recovering its costs this would be a fundamental change in the way that courts are funded and should not be done without consideration by Parliament. We would be concerned that such a proposal could deter parties from properly pursuing cases before it, but permitting the CAT discretion to waive a claim for costs could reduce this risk. The CAT would, however, have a financial interest in that decision so there would need to be very clear guidelines as to the circumstances in which it should waive its claim and both the competition authority and the alleged infringer should be at risk of paying such costs. There will otherwise be a perverse incentive on the CAT to find in favour of the competition authority. It would also be appropriate to give the CAT discretion in some circumstances to claim costs from the "winning" party if actions of that party had contributed to unnecessary costs being incurred.

Norton Rose

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

Response to the Department for Business Innovation & Skills submitted by Norton Rose LLP

Norton Rose LLP ("Norton Rose") thanks the Department for Business Innovation & Skills (the "Department") for the opportunity to comment on the Government's public consultation in relation to the options for the reform of the UK competition regime.

The points raised by Norton Rose represent our views on the proposed options for reforming the UK competition regime, based on our experience advising clients on UK competition law issues, and are not made on behalf of particular clients it represents.

Norton Rose is an international law firm with experience of advising on competition law issues through its offices based in the UK, mainland Europe, Asia, Africa, Australia and North America. As an initial point we would note that the UK regime is generally seen as a global leader in the competition law community and is to be commended for that. However, there remains scope for improvement in several key areas - most notably antitrust enforcement where there are real concerns with the current regime. In this context, we think the proposed reform of the existing system is timely, but we would suggest caution is exercised as regards making wholesale changes to a system which in many respects is an example for others internationally.

In this paper, we address the following possible areas of reform:

- 1 The market investigations regime
 - 2 The merger regime
 - 3 The antitrust regime
 - 4 The criminal cartel offence
 - 5 Concurrency and the sector regulators; and
 - 6 Merger fees and cost recovery
-

1 The market investigations regime

- 1.1 We are broadly supportive of the proposals to amend the market investigations regime and have the following specific comments.

Cross-market investigations

- 1.2 This is a sensible approach in principle, provided that the practices identified across markets are ones which are not only superficially similar but genuinely appear to give rise to common competition issues across the relevant markets. However, there is a concern that investigations covering multiple markets and multiple parties will be unduly onerous and unwieldy - and contrary to the Government's intention - lead to longer investigations and less robust outcomes. If this approach is to be pursued, great care will be needed to ensure that multi-market investigations are sufficiently carefully scoped as to be achievable, and that there is no incentive to pursue multi-market

investigations simply in order to satisfy the relevant legal thresholds for initiating Phase 1 and Phase 2 reviews.

CMA reporting on public interest issues

- 1.3 One of the strengths of the UK competition regime is that it is able to focus objectively on purely competition law issues, and not allow its thinking to be muddled by more political “public interest” considerations. However, provided the relevant public interest issues are framed sufficiently precisely - as with the mergers regime - we would support this change in relation to market investigations since the CMA will have the relevant investigative expertise and it would bring the markets regime into line with that for mergers.

SME super-complaints

- 1.4 We support this provided that it is designed in a way which prevents spurious competitor complaints to attack larger companies.

Procedural streamlining and increasing certainty

- 1.5 We support reduced timescales for Phase 2 investigations and the introduction of timescales for Phase 1 in all cases. In our experience, the uncertainty of protracted investigations is of itself a significant burden on business. We also support the other suggestions to formalise the market study regime at Phase 1 by introducing information-gathering powers and statutory definitions and initiation thresholds, given that the lack of prescription in this area currently is something of an anomaly in the system and the resulting clarity and efficiency should be welcome to business. Finally, as regards fast-tracked referrals to Phase 2, we have some concerns that this will undermine the current checks and balances of the current two-phase system, but would support its being provided as an option where the parties which are subject to investigation agree to it.

Remedies

- 1.6 All of the proposals aimed at making the remedies regime in mergers and market investigations more proportionate and effective are in our view to be welcomed as ultimately to the benefit of the parties under investigation as well as protecting effective competition. The proposed amendments to Schedule 8 should provide greater options for effectively targeted remedial outcomes. We also support the proposals for streamlining the process for review of remedies. In particular, in merger cases the “change of circumstances” threshold can act as unnecessary double regulatory barrier where a new transaction constrained by the remedies would in any case be subject to a fresh merger control review. We also support as helpful procedural improvements the clarification of CMA powers in cases on remittal from the CAT and the removal of the duty to consult on not making a Phase 2 market investigation reference except in respect of persons who had expressly asked the reference to be made.

2 The merger regime

- 2.1 The consultation paper effectively sets out three main options for the future of the UK merger regime:
- **Option 1** - a move to a full mandatory regime
 - **Option 2** - a hybrid mandatory regime
 - **Option 3** - continuing with the voluntary regime, with some procedural improvements

- 2.2 The advantages and disadvantages, cost and benefits of each option are discussed below.

Option 1

- 2.3 Paragraph 4.3 of the consultation paper explains that the main concerns prompting the suggested introduction of a mandatory system are:
- first, the possibility of mergers escaping review by the competition authorities entirely; and,
 - second, the problem of “unscrambling eggs” in the case of completed mergers that are later found to have resulted in a substantial lessening of competition.
- 2.4 As regards the first issue, we believe the situation has moved on from that described in the 2007 Deloitte report referred to in paragraph 4.4 of the consultation paper. Now, the combination of the increased work of the OFT's merger intelligence unit and the possibility for third parties to complain about transactions to the OFT means that we would be surprised if the number of potentially problematic mergers escaping scrutiny by the competition authorities was as significant as suggested by the 2007 Deloitte report. Rather, in our experience the working assumption tends to be that most, if not all, significant mergers will come to the OFT's attention via one route or another.
- 2.5 As regards the second issue, it would be helpful to have more evidence of this problem in practice in order to assess its magnitude. Clearly there have been some cases where the issue of unscrambling eggs has proved problematic, but these appear relatively rare. The consultation paper does not identify those problematic cases, but mentions that since 2004/5, 14 of 25 cases in which a substantial lessening of competition was ultimately identified were completed transactions¹. However, this figure does not get to the heart of the issue - which is how many of those transactions actually created significant problems in terms of designing appropriate remedies?
- 2.6 In fact, divestment remedies may not have been appropriate in all of those cases and divestments in some of the remaining cases may have been relatively straightforward - especially where assisted by hold separate undertakings. Thus of the 14 cases - roughly two per year - it is likely that only a small proportion created significant difficulties in unscrambling eggs.
- 2.7 In order to evaluate the seriousness of this concern, therefore, it would be more useful to know the number of completed mergers in recent years where a substantial lessening of competition was identified and the competition authorities either could not or had great difficulty in achieving a suitable remedy because of the integration of the businesses. If this concern is to be a main driver for change to the system, it would also be helpful to see evidence of the costs involved in recent years in handling difficult divestment cases, and in particular further consideration of whether the problems could have been avoided or minimised by more extensive hold separate powers.
- 2.8 In fact, our view is that the more obvious advantage of Option 1 is that it offers simplicity and certainty for business. A mandatory system requires straightforward, “bright line” tests for notification (because of the possibility of penalties for failing to notify). In most cases, therefore, the question of whether a notification to the competition authorities is required should be relatively straightforward to answer, and the parties can plan accordingly. This simplicity could even create overall savings in regulatory cost for business as a whole, despite more notifications being made, if the process involved in each notification became less complex (both in terms of the analysis required to assess whether a notification should be made and the notification process itself).

¹

Paragraph 4.5.

- 2.9 However, there are significant caveats to this potentially positive assessment.
- 2.10 The main potential drawback of a mandatory system is that it would require notification of all qualifying transactions, regardless of their potential effect on competition, and thus potentially generate a large volume of no-issue notifications. Preparing these notifications could involve significant costs for business, in terms of management time as well as adviser fees. Processing the no-issue notifications would also take up the scarce resources of the CMA on administrative rather than substantive work. The particular concern is that these additional costs and resources are likely to be largely focussed on transactions which raise no or few competition issues - because transactions raising significant competition issues would quite likely have been notified anyway under the voluntary regime.
- 2.11 If a mandatory regime is to be pursued, therefore, it is important that it is designed in such a way as to balance the need to review mergers that could realistically present a significant competition concern against the cost of bringing in for review a large volume of smaller transactions. The need for clear, certain jurisdictional tests in a mandatory regime means the competition authorities simply cannot achieve the flexibility of a voluntary regime (which currently allows the OFT to call in small mergers under the share of supply test). Under a mandatory regime, it must be recognised that there is an element of compromise: objective thresholds need to be set at a workable level which will not catch the smallest mergers - and this may have to be regardless of the effect on competition of those small transactions.
- 2.12 Option 1 as currently presented envisages turnover thresholds for mandatory notification of UK turnover of £5 million for the target and worldwide turnover of £10 million for the acquirer. These thresholds are the same as those envisaged for the *de minimis* exemption under Options 2 or 3, effectively meaning that under the new mandatory system all transactions that are not *de minimis* would require mandatory notification.
- 2.13 This approach would appear to cast an unusually wide net over UK transactions in comparison with other jurisdictions. By way of comparison:
- under the French regime, for notification to be required, two parties to the transaction must each have turnover in France of more than €50 million and combined worldwide turnover of more than €150 million;
 - in Germany, notification is required if the parties to the transaction have combined worldwide turnover of more than €500 million, and one party has turnover in Germany of more than €25 million with another party having turnover of at least €5 million.
- 2.14 These tests seek to establish both (i) a minimum size for the parties involved in the transaction; and (ii) some likely impact on the national market (because at least two parties to the transaction have material activities there). The UK tests would catch all but the smallest acquirers, and would not address the likely effect on the national market at all.
- 2.15 The proposed thresholds are, therefore, too low and do not achieve the required balance described above - they err on the side of catching too many transactions and imposing too large a burden on business and the new CMA. If the thresholds are to be relatively low there should at least be some sort of counterweight, such as a requirement for both parties to achieve more than minimal turnover in the same market, so as to weed out from the process those mergers which really have no potential anti-competitive effect.
- 2.16 If the mandatory option is to be pursued the thresholds will require further consideration to determine a more appropriate level. If the thresholds are set at a relatively low level, it would become even more important to have a very straightforward procedural

regime, with some sort of fast track or simplified procedure for transactions that clearly raise no competition issues, to minimise the additional burden for business.

Option 2

- 2.17 Our questions about the hybrid regime revolve around whether it really addresses any of the concerns that the consultation paper outlines as supporting a potential move to a mandatory system. Our initial view is that this appears unlikely.
- 2.18 For smaller transactions, the voluntary regime will remain as it is. This means that, below the mandatory notification thresholds, Option 2 will not do any more to address the concerns outlined in paragraph 4.3 of the consultation paper - to ensure that all relevant mergers are reviewed, or to address the issues regarding completed mergers.
- 2.19 Our second concern is that, as outlined above, the benefit of a mandatory regime rather than a voluntary system is simplicity and clarity. However, effectively running two parallel regimes - one for larger and one for smaller transactions - would seem to add to, rather than remove complexity from the system.
- 2.20 For these reasons we do not regard Option 2 as particularly attractive.

Option 3

- 2.21 Although not described as such in the consultation paper, Option 3 appears to be the existing voluntary regime with additional measures designed to address some of the concerns mentioned above.
- 2.22 In terms of the costs and benefits of the voluntary regime, a clear benefit is the flexibility it provides to business - allowing the parties to decide between themselves how to approach any competition issues that may arise from a transaction (and who, effectively, should take the risk of dealing with those issues). This can be important, for example, in competitive bidding situations, where it may allow a bidder falling within UK jurisdiction to proceed with its bid without waiting for competition clearance.
- 2.23 However, that flexibility also brings with it some lack of predictability which can actually increase the costs of the system. Complex analysis may be required to assess whether the OFT has jurisdiction under the share of supply test or whether there is material influence as a result of a transaction, and further whether any substantive issues arise such that a notification might be advisable. This process can create additional costs for the parties and any measures that could be taken to reduce these complexities would be welcomed.
- 2.24 As regards the additional measures that could be put in place to improve the voluntary notification system, our view is that it is important that hold separate undertakings should be individually tailored to allow for the circumstances of the transaction. The current "one-size-fits-all" approach can be too blunt an instrument, preventing useful and efficient integration from taking place (and thereby potentially thwarting one of the benefits of the voluntary system).
- 2.25 We would therefore recommend keeping a degree of flexibility in the hold separate provisions, and prefer the option under which the CMA could, in appropriate cases, trigger a restriction on integration for a short period only, pending negotiation of individually tailored undertakings.
- 2.26 There is also a proposal in the consultation paper (paragraph 4.38) to remove the jurisdictional thresholds in the voluntary notification regime, with the intention that this should avoid the complex issue of analysing whether the share of supply test is met in a particular case. We would not recommend this approach. While the share of supply test is complex to apply and has drawbacks, it does at least provide a useful focus for the analysis that needs to take place in order to decide whether there are grounds to

notify a particular transaction to the OFT. This focus offers a degree (albeit limited) of certainty for the parties involved.

Conclusion

- 2.27 Our view overall on the arguments for and against the three options is that, while there are significant potential benefits that could be generated by an efficient and carefully designed mandatory system (Option 1), the proposals as outlined do not guarantee those benefits. With further consideration of the jurisdictional thresholds and an appropriate simplified procedure for no- or few-issue transactions, a mandatory system could offer advantages in terms of simplicity and certainty that may improve on the existing voluntary regime. However, designing such a mandatory system would require considerable further work and there is no guarantee that the perfect balance could be struck between review of potentially anti-competitive transactions and the burden to business of mandatory notifications. For this reason, on balance, we prefer that the CMA keeps and attempts to improve the current voluntary system, at least in the first instance.
- 2.28 We agree with changes to the current hold separate procedure, both in allowing the CMA to trigger a statutory restriction on integration for a short initial period, and also in encouraging individually tailored undertakings relevant to the transaction in question. We would not welcome the removal of the jurisdictional tests in the voluntary regime.

Further ideas on streamlining the mergers regime

- 2.29 The consultation paper contains a number of suggestions for streamlining the mergers regime. We have commented below only on those suggestions where we have a relatively strong view on the likely advantages or disadvantages of the proposal.

Small merger exemption

- 2.30 We would welcome a clearly defined small merger exemption based on the turnover of the parties to the transaction. The existing exception to the duty to refer for *de minimis* markets can be difficult to apply in practice, because it requires the parties to assess the turnover of the entire relevant market - a question which may depend on information that is not publicly available about the turnover of the parties' competitors.
- 2.31 Further, the exception also contains a significant element of discretion for the OFT in terms of weighing up the potential costs and benefits of a reference to decide whether a reference is proportionate. Given the nature of these small transactions, however, the parties are usually not well placed to expend resources on a detailed analysis of the relevant market and the costs and benefits that may arise from the transaction in order to be able to predict the OFT's approach - in fact, that is the very detailed analysis that a *de minimis* exception seems designed to avoid. It appears more proportionate to have a clearly defined exemption for small transactions that is easy to apply, as the proposed Small Merger exemption would be.

Statutory timescales

- 2.32 We recognise that more use of statutory timescales in merger control might give added certainty for business, but we note that the OFT has generally been disciplined in reviewing mergers within the non-statutory periods for Phase 1 review. In addition, there is some benefit to not having binding Phase 1 timelines in that this provides potential flexibility in necessary cases to extend Phase 1 by a few days in order to finalise issues arising at the last moment that would otherwise necessitate referral to Phase 2 if they could not be resolved within a statutory timeframe.

Phase 1 - information gathering and “stop the clock” powers

- 2.33 As above, there are some advantages to giving the OFT/CMA flexibility to manage issues arising late within a Phase 1 investigation so as to avoid having to refer to Phase 2. However, there is a significant concern that use of “stop the clock” powers in Phase 1 gives the authority power to effectively extend Phase 1 at its own volition and removes the certainty business has that Phase 1 reviews will be conducted within the non-statutory timeframe as currently applied by the OFT.
- 2.34 It should be noted the UK 40 working day Phase 1 review is significantly longer than Phase 1 in most jurisdictions (including at EU level and in the US where Phase 1 review is effectively one month), and granting the CMA the power to “stop the clock” would create great uncertainty and difficulty for parties in planning transaction timelines. Those jurisdictions where “stop the clock” powers do exist in Phase 1 (for example, Ireland and South Africa) are a concern in international transactions where there cannot be certainty - even in the absence of competition issues - that a transaction will be cleared by a specific date. We note in this respect that competition clearance is not a bar to completion in the UK, but also that a change to a mandatory notification and suspensory system is under consideration, and that in any event completion ahead of clearance is not commercially viable in many merger situations.
- 2.35 The key point underlying the “stop the clock” proposal is that the OFT is concerned it has inadequate powers to gather information in Phase 1. In this respect we would point out the following:
- (a) the OFT has longer for a Phase 1 review than most competition authorities;
 - (b) the OFT has the “sanction” of a referral to Phase 2 if it does not receive appropriate information from the parties;
 - (c) there is a strong incentive for parties to a merger to respond to information requests in any event given they will wish to secure a Phase 1 clearance for their transaction (indeed the transaction may be conditional on Phase 1 clearance); and
 - (d) the concern in our experience arises more from the overly detailed and/or broadly-targeted nature of OFT information requests than a failure of parties to respond. Such OFT requests often require data in a form in which it is not held, or in order to facilitate application of a complex economic model which is inappropriate or unrealistic within an initial Phase 1 review. In this context, our view is that the introduction of stronger information gathering powers and in particular the ability for the CMA to “stop the clock” in Phase 1 would be a harmful development for the UK merger control system.

Phase 2 - “stopping the clock”

- 2.36 Paragraph 4.50 of the consultation paper sets out a proposal for the CMA to be able to “stop the clock” for a short initial period in anticipated mergers that are reviewed for a Phase 2 investigation, in order for the parties to review their position and consider amendments to the transaction or abandoning it altogether.
- 2.37 Given the very heavy burden that is placed on the parties in the earliest stages of an investigation by the Competition Commission under the current regime, we would regard this as a sensible proposal. In order to comply with initial requests for information, parties often have to prepare and provide large volumes of material in the first few weeks of a Competition Commission investigation. This considerable effort may be wasted if the transaction is later significantly altered or does not proceed. A short window to consider alternatives would seem to be a helpful solution to avoid this problem.

Phase 2 - early remedies

- 2.38 Given the extremely onerous nature of Phase 2 investigations - particularly for smaller businesses - the possibility of parties offering remedies earlier in the process to reduce this burden appears attractive in the first instance. The concern is how this would work in practice, and whether the most onerous part of Phase 2 - the initial information gathering - can be short cut in order to consider remedies. For this option to work, in our view such remedies would need to be offered immediately after the Phase 1 reference (as the BIS proposal suggests). This would require parties being given a statutory period of, say, two weeks from a reference to offer Phase 2 remedies in order that the Phase 2 review may start on the basis of such remedies being offered rather than launching direct into the very onerous process of information gathering.

3 The antitrust regime

- 3.1 The Government's starting point is that "antitrust cases take too long, and result in too few decisions, thus having less deterrent effect on anti-competitive activity than they should". We agree that investigations under the Competition Act prohibitions have taken too long in recent years and this may have damaged the reputation of the regime from both a practitioner perspective and the perspective of business. Striking examples are the ongoing *Dairy* investigation which related to conduct in 2001-2003; the *Tobacco* case which is now on appeal in relation to behaviour occurring in 2000-2002; and the *British Airways/Virgin Atlantic* case which has still not reached a decision despite British Airways agreeing a settlement in August 2007.
- 3.2 There is also a concern that the time spent in bringing cases through to decision is self-defeating as witnesses and parties (including leniency applicants) necessarily become disengaged from the process in the course of such delays. We recognise that recent efforts by the OFT to address this (for example the relatively quick progress to decision in the *Reckitt Benckiser* and *Motor Insurance* cases), but agree that the Government is right to highlight this as a policy concern.
- 3.3 In seeking to address the shortcomings of the current antitrust regime, three options are set out in the consultation paper, each of which presents potential improvements and potential drawbacks. However, the consultation paper does not address a number of features which, in our experience of investigations under the Competition Act prohibitions, contribute in large part to the delay and uncertainty inherent in the current system. In particular, several Competition Act investigations in recent years have:
- (a) focused unduly on behaviour which is novel and at the limits of the scope of the prohibitions, rather than concentrating on clearly anti-competitive behaviour ("pushing the envelope" of the "object" infringement category in particular);
 - (b) focused on "high impact" cases involving household names despite there not being sufficient evidence to lead to quick decisions, rather than seeking to pursue the "low-hanging fruit" where less high profile companies may have been involved, but where the evidence of an infringement may have been stronger;
 - (c) spent a disproportionate amount of time on "access to file" issues - an area where the need for procedural reform is vital and has been recognised by the OFT (in particular through creating "confidentiality rings" etc); and
 - (d) featured inadequate resource to push cases through quickly, and such high turnover of staff on investigations that there has been significant loss of continuity and a confirmation bias concern as staff inherit the views recorded by predecessors rather than properly analysing the evidence afresh.
- 3.4 In respect of the points above, we note that the need for the resource issue to be addressed in the context of this review is fundamental. Reorganisation without addressing the underlying resource constraint is unlikely to achieve Government's aim

of more and faster Competition Act decisions. While we acknowledge that justifying increased resource to the CMA in the current climate is difficult, the logic of Government's view that a strong competition regime will engender growth and economic recovery, and the OFT's calculations that its actions have led to economic benefits far in excess of its costs, suggest that additional resource would be revenue-generating investment for the taxpayer². It is our view, that regardless of the model of antitrust enforcement adopted, a well resourced competition authority is likely to produce better outcomes.

- 3.5 A further core observation in relation to the antitrust regime proposals is that these appear to focus primarily on improving due process and confidence in the Competition Act regime rather than ensuring more and faster decisions *per se*. It appears to us that there is a fundamental conflict between the desire for greater deterrence through more and faster decisions, and a desire to increase confidence in the regime though improved due process and transparency, i.e. ensuring justice is not just done but seen to be done. While the former would appear to point to less rigorous examination and streamlined processes, the latter would require more detailed scrutiny and opportunity for parties to make representations on the cases against them.
- 3.6 Our view is that the Government should have in mind as a priority in these reforms the need for confidence in the system - the current position of almost all OFT decisions going to appeal at the CAT (potentially because parties feel that it is only at this stage that they get a fair hearing), and the defeats for the OFT before the CAT (for example in the recent Construction cases) suggest that this is an area in need of reform. The hope must be that a more robust system in terms of process will encourage the CMA to pursue cases which are more clearly anticompetitive and thus to increase the throughput of cases and hence overall deterrence. But such changes will take time, and any significant change to the regime will take time to bed-in and may lead to further unforeseen complications.
- 3.7 Having made these initial comments, we now turn to the three options proposed by the Government.

Option 1

- 3.8 Option 1 would effectively maintain the *status quo* but proposes streamlining the OFT's existing procedures. While the proposed improvements are to be welcomed - such as the commitment to greater transparency and greater clarity on investigation timetables - they do not appear sufficient overall to tackle the problems with the current system. In particular, proposals:
 - to establish a team to test ways to speed up the process;
 - to narrow the scope of investigations;
 - to put in place a more sophisticated information gathering process;
 - to set more robust enforcement deadlines;
 - to allow early resolution in appropriate cases; and
 - to improve internal case-team efficiency generally

do not seem radical enough to address the problems with the current procedure.

²

See OFT Annual Plans for details of estimates of economic benefit of OFT interventions in comparison to operating costs. Fines imposed by the OFT for anticompetitive behaviour are also returned to the public purse and thus mean the OFT has been directly revenue-generating in recent years. The OFT's publication this month of a report on the financial benefit of its decision in the *Napp Pharmaceuticals* case is further evidence that the investment in competition enforcement leads to net economic benefit.

- 3.9 Among the problems identified as underlying the rationale for reform is that there are too few cases. Though the paucity of cases may not be ideal with regard to the system's intended deterrent effect, we do not think the fact that there are too few cases should be viewed as a problem *per se*. Our view is that the burden of the current system and the complexity of the cases pursued are among the reasons for this and as such the Government's priority when assessing the current regime should rather be on the quality of the procedure in case investigations.
- 3.10 Thus, with the focus on improving quality of procedure, the time taken by the enforcement process must be addressed by the reform. In particular, change must be made with regard to the lack of clear deadlines and timeframes (this is discussed further below). Similarly, given the importance of ensuring due process and that business is protected by Article 6 of the European Convention on Human Rights ("ECHR"), transparency must be a key focus with this reform. To ensure an efficient system of tackling anticompetitive behaviour, it must have the confidence of the parties who engage with it, as well as the wider business community, if its decisions are to have the required deterrent effect.
- 3.11 In this context, our view is that Option 1 represents more of the same and fails to take the opportunity presented to change a system which has lost, or is at least in danger of losing, business and practitioner confidence.
- 3.12 The fact that the vast majority of antitrust cases currently go on to full merits appeal at the CAT means the current administrative model (with the OFT is the primary decision maker as well as the investigator and the prosecutor) is to an extent combined with the prosecutorial approach (as there is a full merits review at the CAT), and the duration of investigations increased as a consequence. While certain streamlining of the investigative procedure is to be welcomed (in particular as regards access to file where the number of documents involved in cartel cases can mean a process lasting years and at huge costs to both the OFT and business), this should be part of, but not the whole reform. What this reform should seek to do is ensure a more thorough consideration of the evidence and hearing of the parties' views pre-decision to ensure parties' need for appeal to the CAT is reduced and reliability of decisions is increased. We do not think the reforms suggested under Option 1 are sufficient to lead to such a fundamental change of approach.

Option 2

- 3.13 Option 2 proposes to create an internal tribunal or "panel" in the newly-formed CMA. This tribunal it appears to us would be best constituted by former members of the Competition Commission - i.e. experts with the authority, objectivity and independence to question the case teams' view and to give greater credence to arguments by the parties than is currently the case.
- 3.14 An independent tribunal would operate so that views of the competition authority and business are argued at an earlier stage than is currently the case - i.e. there would be a "merits" hearing within the CMA with the internal tribunal then being the decision maker, rather than the case team. This option has several attractions:
- (a) It suggests parties could have greater confidence in a full and open hearing than under the current procedure;
 - (b) It would require the case team to put their case to the test and persuade the decision maker in an open forum - publication of submissions made by the case team and the parties, as well as the tribunal's decision would give the process even greater transparency and accountability;
 - (c) The rigour of this process might encourage more focussed pursuit of cases by the CMA case teams, and concentration on cases where the evidence is stronger and the theory of harm more apparent.

- 3.15 However, there are also concerns with this approach:
- (a) The fact that the internal tribunal would be part of the same authority as the case team is always going to lead to a concern of bias in its decisions. Indeed, there may well be indirect (as well as possibly direct) pressure on members of the tribunal to take decisions in support of their case team colleagues, and more widely to further the reputation of the CMA. In this respect, we note the proposed safeguards, but our concern that these are inadequate - or at least will be seen to be inadequate - remains;
 - (b) In this context, our experience of hearings at the European Commission is that these do not fulfil the role envisaged by the internal tribunal and there is a significant concern that these do not meet the necessary standards for an independent decision maker;
 - (c) The suggestion that the appeal to the CAT following a decision by the tribunal would be limited to judicial review grounds is therefore a key concern with this approach, and we would suggest that a full merits appeal to the CAT be retained. If the internal tribunal system proves successful and CAT decisions consistently uphold those taken by the tribunal, the incentive of parties to appeal to the CAT will be reduced³;
 - (d) A further concern with the internal tribunal is that it would not be able to properly consider complex economic evidence. We disagree and submit that if an internal tribunal is to be used, the internal hearing and submissions of evidence beforehand need to be structured in such a way that there is proper consideration of all the evidence - including economic evidence - such that the tribunal is able to reach an authoritative decision (in this respect we believe an internal panel may be better placed to fully assess the totality of evidence than the CAT under a full prosecutorial model).
- 3.16 Ultimately, our main objection to Option 2 relates to the insufficient appearance of independence. Currently, Article 6 ECHR's requirement of an independent and impartial tribunal is met only by virtue of a full merits appeal to the entirely independent CAT. To replace this full merits hearing with a merits hearing before an internal tribunal within the same body that investigates and adjudicates would cast doubt over whether the appearance of independence remains intact. It is thus fundamental that the full merits appeal to the CAT remains, and it will then be incumbent on the internal tribunal to make robust decisions such that these are not consistently overturned or diluted on appeal to the CAT.
- 3.17 Subject to this condition, we believe Option 2 is an attractive option, and one which could lead to both more robust decisions, and ultimately more rapid decisions, although these changes may take some time to bed-in. We would advise against different procedures for Chapter 1 and Chapter 2 cases as has been suggested, and would recommend that trying to keep the procedure as clear and simple as possible for all investigations will have a positive effect in terms of business engagement. The Competition Commission's practice of publication of administrative timetables is a good example in this respect (although we acknowledge the incentive for cartelists to cooperate with meeting timetables is less than for parties in merger and market investigations).
- Option 3***
- 3.18 Option 3 proposes the adoption of a prosecutorial approach so that the new CMA would investigate cases and prosecute them before the CAT which would be the decision-maker and impose any penalties.

³ The incentive for parties to appeal to the CAT currently is strong precisely because of the frequency with which it has significantly reduced - or even overturned - the penalties imposed by the OFT.

- 3.19 The advantage of this option is the complete separation of investigator and decision-maker, and we think this would go a long way to restoring the credibility of the regime in the eyes of those who have been investigated, and for the wider business community as it would more clearly ensure that justice is not only done but seen to be done.
- 3.20 The discipline of having to prosecute cases would also mean the CMA was more likely to focus on cases with clearer theories of harm and where the chance of successful prosecution is higher. In our view, a regime which consistently and successfully prosecutes obviously anti-competitive behaviour will achieve a greater deterrent effect than one which seeks to prosecute less obviously anti-competitive behaviour and novel infringements with mixed results. However, this should not be a disincentive to the CMA pursuing novel cases in areas where there is a real competition concern - the issue here would be of it not being afraid to lose cases before the CAT, and (as alluded to above) of it having the resource to be prepared to commit to these more novel prosecutions.
- 3.21 A further advantage of the prosecutorial model would be involvement of the competition bar in assisting in preparing prosecutions at an earlier stage in investigations. The addition of this expert input may lead to faster processing of cases and better selection of cases which are likely to lead to successful prosecution. The Article 6 ECHR concern would also not arise with the CAT as the decision-maker, although we would advocate a full merits right of appeal to the Court of Appeal from the CAT (as would exist in other civil cases with appeals from High Court decisions).
- 3.22 However, despite the positive points above, we do have certain reservations about a move to a fully prosecutorial system:
- (a) One of the concerns is that the CAT might be presented with a large amount of documentary evidence. In modern cartel cases where evidence can run to perhaps many thousands of documents, and where complex economic arguments and analysis may be crucial, this could lead to concerns of the burden on the CAT being too great to be supported by the current institution. Whether this issue of volume of work could be addressed by expanding the CAT (and perhaps involving current Competition Commission members in this exercise) should be considered.
 - (b) A second concern is the impact a prosecutorial model would have on the duration of cases. Even under the current regime, scheduling of a significant appeal hearing can take over a year (as for example has been the case with the Tobacco appeals). With the increased volume of work that having the CAT as initial decision-maker may bring, this delay is likely to increase significantly without substantial further CAT resource.
 - (c) A related consideration is whether the move to a prosecutorial system in itself would be efficient or would lead to more drawn out preparation of cases by the CMA - and potentially significantly increased public costs from the greater involvement of counsel pre-decision. There would be an equivalent increase in costs for businesses which would be required to involve counsel to represent them before the CAT. This would be a significant burden particularly for smaller businesses and may lead to inappropriate incentives to settle cases driven by fear of legal costs rather than belief that actual anticompetitive behaviour has occurred.
- 3.23 We believe the detail of the various proposals will be critical to their success, but on balance Option 2 combined with retention of a full merits appeal to the CAT is likely to prove the most practicable way to improve the current regime without overburdening businesses or the system to the degree that a full prosecutorial model may do.

Further issues raised in the consultation paper

- 3.24 In addition to the key question of reform of the current administrative model, the consultation paper raises certain other issues.
- 3.25 Of these by far the most important in our view is the suggestion that timetables be introduced in antitrust enforcement. The current legal position is unclear as to whether there is any limitation period beyond which the OFT cannot investigate historic conduct, with the OFT's view being that it has the power to look at behaviour going back as far as the introduction of its Competition Act powers in 2000. We do not believe this is a healthy position and feel that aligning the Competition Act regime with the Limitation Act 1980 as applied in tort cases (i.e. six years from the end of the relevant anticompetitive behaviour or awareness of this behaviour). The key question here is what action the CMA would have to take within the six year period - sending a questionnaire to a party or otherwise notifying them that they are under investigation; issuing a statement of objections, or even a final decision (under the administrative model); or (should the prosecutorial model be adopted) taking an action to the CAT for decision.
- 3.26 Given that the Government has recognised the concern with the length of antitrust investigations, we believe that the introduction of statutory timetables for Competition Act investigations will create a discipline within the CMA that should result in increased throughput of cases. The CMA has the power to impose significant penalties for failure to provide information within given timelines, and these could be amended to follow the Competition Commission (and European Commission) powers allowing daily financial penalties in the context of investigations subject to statutory timescales. We would hope that statutory timetables would also encourage the CMA to focus on core evidence and expedite interviews and other information gathering rather than allow such processes to drag out⁴. In this respect (and as noted above) reform of "access to file" in Competition Act cases is crucial to prevent these procedures distracting the CMA from focussing on its investigations.
- 3.27 In the context of making administrative or statutory timetables workable in antitrust investigations, we agree that amendments to the offences under the Competition Act and Enterprise Act for non-compliance with an investigation would be appropriate. In our experience, the threat of sanction for non-compliance with deadlines that are currently available to the Competition Commission and to the European Commission (i.e. daily fines) are more effective than the criminal powers currently available to the OFT but which to date have never been used. For such sanctions to be effective the burden on the authority in applying them has to relatively small, such that they can be brought to bear quickly without distracting from the main investigation or requiring significant additional resource.

4 The criminal cartel offence

- 4.1 The consultation paper proposes the removal of the "dishonesty" element from the criminal cartel offence. Four options for achieving this are put forward, with the Government favouring Option 4 - to remove "dishonesty" and amend the offence so that it does not include agreements made openly.
- 4.2 We do not believe that the case for removing the "dishonesty" element of the criminal cartel offence has been made out.
- 4.3 We therefore do not support any of the four options for change set out in the consultation paper - in our view, the *status quo* should remain in the absence of compelling evidence that the current wording of the provision is unworkable.

⁴

An example in one case we are working on currently is an individual being required to provide a fourth interview to the OFT some four years after they were first interviewed despite having already provided a detailed witness statement in relation to conduct spanning a period five to nine years ago.

Absence of justification for policy change

- 4.4 It is by no means clear that there is any real justification or need for a change to the current wording of the cartel offence at this time. The consultation paper indicates that the rationale for removing “dishonesty” is to make it easier for the OFT/CMA to bring successful prosecutions. There is a concern that the deterrent effect of the offence is weakened because there have been so few cases, and that the dishonesty element is *one of the reasons “that has been suggested”* - although it is not clear by whom - for the small number of cases⁵. The case advanced for removing dishonesty therefore appears to be two propositions: (i) that the limited number of cases has weakened the deterrent effect of the cartel offence and (ii) that it is too difficult to prove dishonesty and that this is to blame for the limited number of cases to date. We do not believe that either of these propositions is, in fact, established by the evidence.
- 4.5 As the consultation paper acknowledges, the purpose of the cartel offence is to provide an additional deterrent to involvement in hard-core cartels by targeting the individuals that are responsible for the business’s involvement. In our experience, the prospect of prosecution for the offence has achieved this purpose by encouraging a greater appreciation of individual responsibility for competition compliance within businesses. The prospect of personal criminal liability, with the attendant risk of fines and imprisonment in particular, is something that resonates with senior management.
- 4.6 We note that the OFT has to date only taken forward two criminal prosecutions⁶. Additional cases would certainly strengthen the public’s perception of the OFT’s determination and capability to go after individuals. However, we do not believe that the fact that the OFT has, to date, only taken two cases to trial (one of which resulted in custodial sentences for the three individuals concerned) has eroded the deterrent value of the cartel offence. It would be a different matter if the OFT had taken a number of prosecutions and failed to achieve convictions from a jury - but this is simply not the case. In addition, it is striking that it is not claimed that there have been cases where the dishonesty requirement has deterred the OFT from taking prosecutions.
- 4.7 In reality, the relative inactivity of the OFT in relation to the offence probably reflects a number of factors, for example the lack of obvious hard-core cartel cases in recent years, the granting of no action letters under its leniency program and the fact that other cases are still in the pipeline⁷. The OFT’s limited experience and/or internal capacity in this area may also be a factor, but such concerns should be addressed through increased resources rather than by lowering the bar for conviction.
- 4.8 There is, as far as we are aware, no evidence that the “dishonesty” element makes the prosecution of the offence unattainable. The consultation paper refers to “criticism” of the *Ghosh*⁸ standard that has “persisted and intensified”⁹ but this is not explained and it ignores the fact that dishonesty is a well understood element of a number of other white collar crimes such as fraud¹⁰.
- 4.9 Rather, in stating the case for change, the consultation paper re-assesses the dishonesty requirement against the three aims for its inclusion in the original formulation of the offence and concludes that there are four problems. In our view, these supposed problems are more apparent than real:
- **Ensuring the offence does not apply to agreements that would be lawful under the civil antitrust prohibitions:** The consultation paper suggests that

⁵ Consultation paper, paragraph 6.6.

⁶ The prosecutions in respect of the marine hoses cartel and the abandoned prosecutions against the alleged surcharge price fixing arrangement between British Airways and Virgin Atlantic.

⁷ For example, we note that the OFT website lists three ongoing criminal investigations - concerning commercial vehicle manufacturers, the automotive sector and the agricultural sector.

⁸ *R v Ghosh* [1982] QB 1053; [1982] 2 All ER 689.

⁹ See consultation paper, paragraph 6.14.

¹⁰ See, for example, the offences set out in the Fraud Act 2006, sections 2 to 4.

the dishonesty element introduces a “*significant lack of certainty*” in terms of the categories of agreements captured by the offence, “*especially for business and their executives*”¹¹. No evidence of this uncertainty is provided, nor any examples of business executives stating that they struggle to understand how involvement in hardcore cartel activity is dishonest or that they have difficulty in understanding what dishonest behaviour means more generally. In our view, business people readily understand what is meant by “dishonesty” and most will have awareness that involvement in hardcore cartel activity would be regarded as dishonest.

- **Reducing the likelihood that conviction would depend on judgments taken on detailed economic evidence:** The consultation paper suggests that this objective has been undermined because the courts in the pre-trial rulings in the *British Airways/Virgin Atlantic* criminal case recognised that the defendants might adduce economic evidence to contend that they were not dishonest because they believed their actions did not have detrimental effects on consumers. We do not agree that this means that trials would have resulted in the jury being asked to deliberate on a detailed economic analysis for and against whether dishonesty was present - evidence of economic effects might conceivably be relevant to an argument by a defendant that an ordinary and honest person would not regard activity as dishonest, but this does not mean conviction requires a jury to evaluate the economic effects (positives and negatives) of the activity in question. The question for the jury will remain focused on the perception of the conduct as dishonest (on both an objective and subjective basis, as set out under the *Ghosh test*¹²), not the economic effects of that behaviour.
- **Providing juries with a test that is recognised and which signals the seriousness of the offence:** The first problem stated under this aim is that there is “*only moderate support*” for a criminal cartel offence defined around dishonesty and that juries may not therefore be ready to make convictions. This conclusion appears to be based solely on a single study published in 2007 by the University of East Anglia, and the finding that only six out of ten of the people interviewed believed that price fixing is dishonest. A survey of the views of “people in the street” does not provide evidence of how a jury will apply the legal test of dishonesty, as directed by the court, to the facts of a particular case. As a second problem, the consultation paper suggests that proving dishonesty in cartel cases may be particularly difficult because the individuals involved may not be clearly motivated by personal gain. We think this concern is overstated, which may be implicit in the acknowledgement that this concern “*is yet to be properly tested*”- it does not follow that the absence of evidence of direct, personal benefit would render engagement in cartel activity as not being dishonest.

4.10 We do not therefore accept that dishonesty is too difficult to prove.

Divergence from the approach taken in other jurisdictions

4.11 We note also that the consultation paper states that Government’s consideration of changing the offence provision is in the context of the UK’s approach in this area diverging from the approach taken in the United States, Australia and Canada, where “dishonesty” is not a part of the comparable criminal offence. We would not have thought that the fact of divergence from comparators in these countries is a sufficient reason for change in the UK, and expect that the differences will in many respects reflect policy decisions made in the context of different legal systems and traditions. For example, none of the countries stated will have to contend with the problem created by Regulation 1/2003, which requires that the criminal offence must be

¹¹ Consultation paper, paragraph 6.12.

¹² See consultation paper, paragraph 6.7.

sufficiently distinguishable from the civil prohibition to be applied where the European Commission has opened a civil investigation.

Objection to the removal of dishonesty

- 4.12 There is a more fundamental objection to the removal of the dishonesty requirement - it would create a strict liability offence that would be satisfied where a person had entered into or implemented an arrangement that falls within the list in section 188(2) of the Enterprise Act 2002. This would remove the *mens rea* element of the offence altogether and make it entirely satisfied by the nature of the arrangement rather than the defendant's state of mind. The effect would be the loss of the distinction between the criminal offence and civil prohibition as it applies to hard-core infringements. More importantly, it would strip out the moral element that demonstrates the particular reprehensibility of engaging in hard-core cartel conduct in the knowledge that what they were doing was wrong, and that society regarded it as wrong. In our view, this would remove the essence of conception of the cartel offence, which was to target immoral engagement in the worst kind of anti-competitive conduct with serious criminal sanctions.
- 4.13 It must be remembered that the offence carries the possibility of a lengthy custodial sentence (of up to five years) and/or a significant fine. A requirement that the prosecution present evidence to demonstrate an awareness of the dishonest nature of involvement in an infringement is not therefore out of step with the seriousness of the consequences that can follow.

Views on the four options

- 4.14 None of the four options outlined under consideration would provide an improvement to the current wording of the offence provision. Each of the options would either create new problems or would not achieve the benefits outlined in the consultation paper. Many of these drawbacks - such as removing the distinction between the civil law prohibitions and the criminal offence - are identified in the consultation paper itself, so for the most part we restrict our comments to additional issues that arise:
- **Option 1 - removing “dishonesty” and introducing prosecutorial guidance:** Contrary to the claim that this would provide “much greater clarity for business”, we believe this would result in less certainty than applies at present. Guidance is just that - it would not be binding on prosecutors, but merely a set of criteria to which they would have regard. Thus business could not be sure whether or not particular activity would be prosecuted even if that activity matched a situation described in the guidance. More importantly, making prosecution subject to prosecutorial guidance would send a strange message - the offence would be broadened to say that all hard-core cartel activity is a criminal offence, but only a subset is likely to be subject to sanction by prosecution. This would be a difficult to present in corporate compliance messages and undermine the deterrence objective. This is completely different from the law saying that certain types of hard-core activity constitute a criminal offence and should expect to be prosecuted, subject to evidence. Prosecutorial guidance also raises difficult questions about by whom it would be drafted and how and when it might be revised - business would be uncomfortable with the OFT or CMA being given free rein to determine and revise the guidance outside of Parliament’s supervision. This would add to uncertainty and, as identified in the consultation paper, raise issues under Article 7 ECHR.
 - **Option 2 - removing “dishonesty” and including a white list:** This option would raise the same problems as Option 1 in terms of uncertainty, in particular because of the intention that the list would be revised from time to time to be consistent with “emerging law and policy”. More fundamentally, it suffers from the intractable problem that the offence would be more likely to be regarded as national competition law, and therefore be rendered unusable by virtue of

Regulation 1/2003 in circumstances where the European Commission had opened a civil investigation. The deterrence effect of the offence would therefore be significantly weakened in the context of pan-European infringements.

- **Option 3 - replacing “dishonesty” with “secrecy”:** This option is perhaps the least objectionable of the four put forward. In particular, it carries the least risk of losing the distinction between the civil and criminal prohibitions. However, we do not believe it is preferable to the current wording of the offence for a number of reasons.
 - (i) First, it is difficult to conceive how the secrecy element would be applied. Would it be the fact of secrecy that would trigger the offence, or an intention on the part of the individual concerned that it should remain secret? If it were the former, then the determination for the court would be whether anyone outside the cartel knew of its existence. The evidential focus would be therefore on the knowledge of third parties, rather than the defendant’s appreciation that the activity was morally reprehensible. If, in contrast, intention towards secrecy was the focus, then this would have the perverse consequence that an individual that did not intend to conceal - and took no action to conceal - an infringement, would not have committed the offence.
 - (ii) Second, and more fundamentally, defining the offence by reference to secrecy makes the offence one of keeping an infringement secret (whether by luck, coincidence or the result of active concealing steps), rather than engaging in anti-competitive conduct that is deliberate and contrary to acceptable business practice. This risks sending a message that the mere act of secrecy is the most abhorrent element, when in reality secrecy generally will be a consequence of knowledge that the activity is dishonest.
- **Option 4 - removing “dishonesty” and excluding agreements made openly:** This option is impractical and unrealistic. It ignores the fact that commercial agreements are generally subject to obligations of confidentiality, to protect commercial terms from disclosure to competitors and to customers. A requirement to publish agreements would cut across this basic tenet of business conduct. It also raises uncertainties about the extent of disclosure that would be required and the need for defences for innocent omissions - for example, how could a business be sure that it had notified all of its customers? How much detail would need to be provided - the mere fact of the arrangement, or a full justification of its beneficial effects? In terms of possible defences, would an honest failure to notify provide an excuse and, if so, would this be any easier to prove than dishonesty in the current wording? We suspect that these questions would raise significantly greater uncertainties than are claimed to apply to the dishonesty element.

Conclusion on the cartel offence provision

- 4.15 To summarise our views on this section:
- We do not agree that the dishonesty element of criminal cartel offence should be removed, and we do not support any of Options 1 to 4.
 - Any changes to the offence should only be considered when there is clear evidence that the dishonesty element is an impediment to prosecutions being secured, for example that juries are unwilling or unable to convict individuals that have directed hard-core cartel activity. We are not aware of any such evidence either in the consultation paper or elsewhere.

- A decision to make it much easier to prosecute the offence by making it a strict liability offence requires asking a different policy question, which is whether all individuals involved in cartel activity should be open to prosecution for a criminal offence regardless of a jury's view of the conduct and the person's own belief at the time. However, any consideration of options that would have this effect must be weighed seriously against the requirement under EU law to distinguish criminal provisions from the comparable civil prohibition and the seriousness of the sanctions that apply to convicted individuals, which includes imprisonment.

5 Concurrency and the sector regulators

- 5.1 We agree with the Government's view that the sector regulators should retain their concurrent competition law and market investigation powers, even though this makes the UK competition law regime unique in the EU.
- 5.2 We consider that providing the sector regulators with a possibility to either use their *ex-ante* regulatory powers under the special regulatory regime applicable to the industry in question, or their *ex-post* competition law powers to regulate their respective sectors, provides for a more effective and efficient regulation of the different regulated sectors in increasingly competitive markets. This is on the grounds that:
- (a) The sector regulators have the relevant industry expertise;
 - (b) Regulated companies will only need to deal with one regulatory body with one set of objectives and approaches;
 - (c) One regulatory body has a complete overview of the market conditions of the sector in question, which would encourage an integrated application of regulatory and competition law powers in the sector in question;
 - (d) There will be no need for a complex interface between the sector regulators' duties and powers on the one hand and the CMA's duties and powers on the other; and
 - (e) Crucially, considering that it is intended (increasingly) to open up the regulated sectors to competition and to move away from regulation, it is important to provide the sector regulators with the necessary competition law powers. If the sector regulators were to have no competition law powers, they would continue to rely on their *ex ante* regulatory powers to regulate the sectors in question, which would be likely to hinder the development of effective competition in the sector.
- 5.3 Provided there is to be effective and efficient co-operation between the sector regulators and the CMA (see paragraphs 5.6 and 5.7 below), we do not foresee the concurrent application of competition law to have any negative impact on the consistent application of competition law across the different regulated sectors and non-regulated industries.
- Encouragement to use competition law powers***
- 5.4 We consider that the sector regulators should be strongly encouraged to use their competition law powers in preference to their regulatory powers where possible and appropriate. It may be that a statutory obligation preventing the regulator in question from taking regulatory action, if it considers that the most appropriate way of proceeding is under its competition law powers - as is currently applicable to Ofgem, Ofcom or ORR - is the most efficient and practical way to achieve this.
- 5.5 Such a statutory obligation should be supplemented by a common set of guidelines for the sector regulators as to when competition law powers may be appropriately used.

Such guidelines would, in our opinion, increase the regulators' understanding of the suitability of competition law rather than regulation to resolve certain issues, which - as set out above - should be encouraged in markets increasingly open to competition. A common set of guidelines would also increase a consistency of approach between the different sector regulators. The guidelines would align the regulators' approach with that of the CMA and encourage the regulators both to have regard to precedents established outside their respective regulated sectors and to establish precedents themselves.

Effective and efficient mechanism for concurrency to work in practice

- 5.6 Finally, in order to establish an effective and efficient mechanism for the concurrent application of competition law and to avoid an inconsistent application of competition law across the different regulated sectors and non-regulated industries, we consider that the way in which concurrency currently works in practice should be improved.
- 5.7 To this end, we support the Government's suggestions to establish the CMA to act as pro-active central resource and to give the CMA a bigger role in the concurrent application of competition law based on the role of the European Commission in the European Competition Network:
 - (a) Establishing the CMA as a pro-active central source of expertise would, in our view, set up an efficient system of resource-sharing by way of the CMA acting as advisor to the different regulators and seconding CMA staff where needed or desirable. We believe that such a system would lead to an increasingly consistent application of competition law across the industries and would deal with any possible capacity constraints (and consequent possible unwillingness) on the part of the sector regulators to take on resource-intensive competition law cases.

If there were to be a legislative change to permit joint sector regulator/CMA competition law investigations, it would obviously be necessary for there to be clear provisions as to which regulatory body would be responsible for taking the final decision so as to avoid uncertainty for business.

- (a) We think that giving the CMA a case-allocation and oversight role in the concurrent application of competition law, akin to the European Commission's role in the European Competition Network, would greatly assist and improve the efficiency and effectiveness of the application of the concurrency regime.

We envisage that in this role, the CMA would be notified by the sector regulators prior to any opening or closing of a competition law case; that the CMA and sector regulators would agree at an early stage to transfer cases between themselves; and that there would be ongoing communication and exchange of information between the CMA and regulators in relation to progress of a competition law case.

The CMA would be able to take over the running of an ongoing competition law case, if it was considered "best placed" to act on the case or if there were concerns about regulator's (proposed) approach to the case. We agree with the Government's proposal that the CMA might be better placed to act on a competition law case where either: (i) there are resource constraints on a sector regulator which cannot be alleviated by the secondment of CMA staff; (ii) the CMA has demonstrably greater expertise or experience; (iii) the case gives rise to novel features or wider strategic implications; or (iv) there is a need to adopt a decision to develop competition policy.

6 Merger fees and cost recovery

Merger fees

- 6.1 We do not think that any of the options for increasing merger fees set out in paragraphs 11.7 to 11.15 of the consultation paper can be justified. We consider the scale of the proposed fees, under any of the options, to be excessive, disproportionate and unduly burdensome on legitimate transactional activity.
- 6.2 We would make three points of principle.
- 6.3 First, UK merger control fees are already extremely high, such that any increase would be excessive, and would bring the UK system wholly out of line with merger control fees in comparable jurisdictions in modern developed economies.
- 6.4 Many merger control jurisdictions - including, importantly, the EU Merger Regulation regime - make no charge at all. Even in those countries which do impose charges, the charges are significantly lower than current UK merger control fees, let alone any of the options proposed in this consultation. This is apparent from the evidence on the position in other comparable jurisdictions in the Appendix - Merger fees in other jurisdictions.
- 6.5 The second point is that having merger fees this high, while there is no fee whatever for notifications to the European Commission, has the perverse effect that larger businesses (which are more likely to exceed the turnover thresholds giving rise to EU jurisdiction) pay no filing fee whatever, while smaller British businesses (subject to national UK merger control jurisdiction, rather than the EU Merger Regulation) pay substantial - and, under these proposals, substantially increased - merger fees. The regulatory burden thus falls primarily on smaller businesses. It is hard to see how this is consistent with the Government's policy of protecting and encouraging SMEs in the United Kingdom.
- 6.6 A third point on the consultation paper's proposals for merger fees is that it is hard to see, as a matter of principle, why there should be full cost recovery - in other words, why merging parties should pay the cost of merger activity being policed with a view to preventing losses of competition in UK markets.
- 6.7 Merger control is not solely, or even primarily, in the interests of the merging parties. It is in the public interest generally: the UK economy as a whole, and all of us in society (not least in our roles as consumers), benefit from the legislature's policy of requiring competition authorities to scrutinise mergers for their effects on competition in the UK. It is no more appropriate that merging parties should pay for this than it would be appropriate that the cost of policing the roads (e.g. for speeding and other motoring offences) should be borne solely by motorists, or that the cost of trading standards investigations should be borne only by shop owners.

Costs of antitrust investigations

- 6.8 We consider it wholly inappropriate, and as far as we can see without precedent, that businesses being investigated by the competition authorities for alleged infringements of the competition law prohibitions, should have to pay the cost of that investigation if they are ultimately found to be in breach (in addition to the due penalties for which they are liable in respect of the infringement).
- 6.9 It seems to us that this would introduce all sorts of distorting, and perverse, incentives which are not congruent with the proper administration of justice. For example:
- (a) It creates an incentive for an accused party with a good defence (or even merely a reasonable defence) to settle a case rather than properly defending itself

through the due process of an OFT (or CMA) investigation, because fighting on imposes additional cost. Not only is this unfair on the party concerned; in addition, it has the effect that the outcome of the case is less likely to be a just or fair reflection of the merits (i.e. was the accused party guilty or not?), but rather a reflection of an economic calculus which is barely relevant to the merits of the case.

- (b) Even if a business does decide to fight on, the fees will create an incentive to do so in a more muted way, and to refrain from making points which require the competition authority to engage in significant work (e.g. providing economic evidence), even where those points may be perfectly legitimate. Again, this is unfair and contrary to justice.
 - (c) Linked to this, the accused parties most likely to settle rather than fight on, are those which can least afford a prolonged investigation - i.e. smaller businesses - while only those with the "deeper pockets" will be prepared to defend themselves. This is manifestly unfair. It is also hard to reconcile with the Government's policy of protecting the interests of SMEs.
 - (d) Imposing costs, and creating a deterrent to the accused fighting on, will also make the competition authority more cavalier about being willing to "try its luck" by bringing cases that are not necessarily watertight or strong, but in which the authority is likely to prevail because the cost of fighting it is too heavy for the accused party. There is already a problem with antitrust investigations being unfairly weighted against the accused - this is the problem that the proposals in Chapter 5 of the consultation paper are designed to address - and imposing costs on defendants who fight on would exacerbate the problem, whereas the Government is committed to remedying it.
 - (e) Indeed, creating an incentive to settle, rather than fight on, would lead to another difficulty that the Government is committed to resolving. It is widely felt that settling cases, rather than letting them run to a full decision, has the undesirable consequence that there is less of a body of decisional precedent - which in turn creates uncertainty for both business and the authorities, while in many ways weakening the deterrent effect of the prohibitions.
- 6.10 But quite apart from these practical considerations, there is an overriding consideration of justice. It is, quite simply, wrong that an accused should have to pay the cost of an investigation instigated by an authority. (This is different from the loser paying the cost of a CAT appeal, which the appellant has chosen to instigate.) Nothing like it exists in analogous situations. In criminal law, an accused does not pay the cost of the police investigation. Elsewhere in the world of business regulation, an accused company under financial services law does not pay the cost of the FSA investigation. This proposal is wholly out of line with norms of justice: it is rather like a hanged man having to pay for the rope.

We would of course be happy to discuss any of our comments with the Department at its convenience if that would be of assistance.

APPENDIX

Merger notification (or filing) fees in other jurisdictions

This appendix sets out the merger notification (or filing) fees in a number of comparable jurisdictions - together with a list of those jurisdictions which charge no merger notification fee at all. Approximate equivalent values in UK £ are given in parentheses.

JURISDICTION	MANDATORY OR VOLUNTARY NOTIFICATION SYSTEM	MERGER NOTIFICATION FEE
Canada	Mandatory notification	C\$50,000 (£32,000)
Germany	Mandatory notification	<ul style="list-style-type: none"> • In cases of average importance, €25,000 (£22,000) • In cases of minor importance with insignificant effect on German market, €3,000-€15,000 (£2,600 - £13,200) <p>In addition to fees, costs for external consultants can be recovered from the merging parties</p>
Greece	Mandatory notification	<ul style="list-style-type: none"> • Pre-merger: €1,050 (£925) • Post-merger: €300 (£265)
Republic of Ireland	Mandatory notification	€8,000 (£7,050)
Italy	Mandatory notification	Fixed at 1.2 per cent of the value of the transaction and is a minimum of €3,000 (£2,600) and maximum of €60,000 (£54,000)
Portugal	Mandatory notification	<ul style="list-style-type: none"> • €7,500 (£6,600) where the combined turnover is less than €150m (£132m) • €15,000 (£13,200) where the combined turnover is between €150m (£132m) and €300m (£264m) • €25,000 (£22,000) where the combined turnover is more than €300m (£264m)
Spain	Mandatory notification	<ul style="list-style-type: none"> • €3,000 (£2,600) if the Spanish turnover of all the companies involved in the transaction is less than €240m (£210m) • €6,200 (£5,460) if the Spanish turnover of all the companies involved in the transaction is between €240m (£210m) and €480m (£420m) • €12,400 (£10,900) if the Spanish turnover of all the companies involved in the transaction is between €480m (£420m) and €3

JURISDICTION	MANDATORY OR VOLUNTARY NOTIFICATION SYSTEM	MERGER NOTIFICATION FEE
		<p>billion (£2.6 billion)</p> <ul style="list-style-type: none"> • €24,800 (£22,000) if the Spanish turnover of all the companies involved in the transaction is more than €3bn plus an additional €6,000 (£5,200) for each 3bn exceeding the turnover up to maximum of €62,000 (£54,500). <p>In addition there is a standard up front fee of €1,545.30 (£1,360) per notification.</p>
Singapore	Voluntary notification	<ul style="list-style-type: none"> • S\$15,000 (£7,400) where the target turnover is less than S\$200m (£100m) • S\$50,000 (£25,000) where the target turnover is between S\$200m (£100m) and S\$600m (£300m) • S\$100,000 (£50,000) where the target turnover is more than S\$600m (£300m)
Switzerland	Mandatory notification	Lump sum of 5,000 Swiss francs (£3,400), and in Phase II investigation the authority charges an hourly rate of 100 to 400 Swiss francs (£70 - £275)
United States	Mandatory notification	<ul style="list-style-type: none"> • US\$45,000 (£28,000) if transaction is valued at less than US\$126.9m (£80m) • US\$125,000 (£77,000) if transaction is valued between US\$126.9m - US\$634.4m (£80m - £390m) • US\$280,000 (£172,000) if transaction is valued at more than US\$634.4m (£390m)

Jurisdictions with no merger notification fee:

- Argentina
- Australia (although there is a filing fee of A\$25,000 (£16,200) for authorisation applications lodged with the Tribunal)
- Belarus
- Belgium
- Bolivia
- China
- Columbia
- Cyprus
- Denmark
- EU
- Finland
- France

- Iceland
- Indonesia
- Israel
- Japan
- Kenya
- Korea
- Latvia
- Liechtenstein
- Luxembourg
- Norway
- Sweden
- Taiwan
- Turkey



A Competition Regime for Growth

Response to the Department for Business, Innovation and Skills' consultation

13 June 2011

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Section 1

Introduction

- 1.1 Under the Competition Act 1998¹ (“the Competition Act”), Ofcom is a concurrent national competition authority (“NCA”) with responsibility for the communications sectors. Ofcom is charged with enforcing *ex post* competition law in the sectors falling under its jurisdiction.² Ofcom is also the independent designated national regulatory authority (“NRA”) for electronic communications matters, as required by the European regulatory framework for electronic communications.³ In that capacity, Ofcom has a duty to periodically review the markets in the electronic communications sector and, where it identifies that undertakings hold significant market power (“SMP”) in a relevant market, to impose *ex ante* regulation where appropriate.
- 1.2 Ofcom has significant experience in the application of competition law principles, both in its work as an NCA and as an NRA. In its capacity as an NCA, Ofcom regularly conducts investigations under Chapters I and II of the Competition Act and considers whether to make market investigation references under the Enterprise Act 2002 (“the Enterprise Act”). As an NRA, Ofcom is required to conduct market reviews every three years and impose *ex ante* regulation where appropriate.⁴ Ofcom is also required to resolve disputes between communications providers within 4 months. Disputes often raise issues similar to those which might be investigated under the Competition Act.
- 1.3 Ofcom’s work in these areas is underpinned by the application of competition law principles, both where *ex post* competition law is applied and where Ofcom is exercising *ex ante* powers. The Communications Act 2003 (“the Communications Act”) requires Ofcom to promote competition and, in so doing, to apply competition law principles.⁵ In particular, it is Ofcom’s principal duty under section 3(1) of the Communications Act to “further the interests of consumers in relevant markets, where appropriate by promoting competition”.⁶
- 1.4 Ofcom welcomes the opportunity to comment on the proposals set out in the consultation, *A Competition Regime for Growth: A Consultation on Options for Reform* (“the Consultation”). The proposals have the potential to impact significantly on Ofcom in this area and we are pleased to be able to respond.
- 1.5 As a sectoral regulator we are pleased that the proposals recognise that concurrency should remain. We support the view expressed in the Consultation that were the Competition and Markets Authority (“CMA”) to be given a bigger role in regulated sectors this could cause real conflict with our statutory duties. Specifically, empowering the CMA to conduct concurrent market reviews would be duplicative and

¹ Section 54 and Schedule 10 of the Competition Act.

² Part 5 of the Communications Act. Section 369 of the Communications Act defines the “communications matters” with respect to which Ofcom has concurrent powers, conferred under sections 370 (in relation to market investigations) and sections 371 (in relation to anti-competitive conduct (i.e. conduct prohibited under the Competition Act)).

³ Article 3 of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (“the Framework Directive”).

⁴ Article 16(6) of the Framework Directive.

⁵ See for example, sections 3(4)(b), 4(3) and 4(8) of the Communications Act.

⁶ Section 3(1)(b) of the Communications Act 2003

may well lead to conflicting outcomes, given our obligations under European law as the NRA to review these markets in any event.

- 1.6 Ofcom is required to discharge a wide range of competition functions, and as a consequence we have sufficient resource, confidence and expertise to conduct Competition Act investigations. From experience, our Competition Act and Enterprise Act powers are crucial in delivering improved outcomes for citizens and consumers in the UK. For example, the undertakings required from BT that led to the functional separation of the company relied on concurrent powers to deliver such a wide-ranging behavioural remedy. The low number of market investigation references (“MIRs”) cited in the Consultation does not reflect the value of our ability to make such references, e.g. the BT Openreach undertakings producing an equivalent outcome to a full investigation, but far quicker. Ofcom’s current *ex ante* and *ex post* regulatory powers can be combined to deliver effective outcomes.
- 1.7 Sectoral regulators make less use of MIRs due to the structure of the markets they regulate, e.g., problems of dominance rather than structural issues, which can be dealt with more effectively through *ex ante* regulation or *ex post* investigations under the Competition Act. We also believe that there are reasons for the low number of Competition Act cases in the UK that are mostly common to sectoral regulators and the OFT. These include significant procedural demands and the granular degree of scrutiny of the decisions at the Competition Appeal Tribunal (“CAT”).
- 1.8 The Consultation also sets out three options for improving the process of antitrust enforcement. Ofcom considers that retaining and enhancing the existing procedures or moving to an administrative approach remain the most appropriate means of progressing antitrust cases. We have considered the advantages and disadvantages of each of the options set out in the Consultation and, on balance, we do not consider that a prosecutorial system would offer the benefits sought and risks resulting in a less efficient system.
- 1.9 Finally, we note that we have not responded to the questions that are of less direct relevance to Ofcom’s work (i.e., questions in the following chapters: A Stronger Merger Regime, The Criminal Cartel Offence, Scope, Objectives and Governance [of the CMA] and Overseas Information Gateway).

Section 2

Why reform the competition regime?

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

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

- 2.1 Ofcom welcomes the government's recognition that the existing competition regime has been independently assessed as world class. However, Ofcom also recognises that improvements can be made to the existing system to improve outcomes and processes for business and consumers. Ofcom agrees that the objectives set out in the Consultation are ones to which competition authorities should aspire in order to ensure a strong system of competition law which delivers benefits to consumers.
- 2.2 In relation to the specific proposals which flow from the objectives identified in the Consultation, Ofcom sets out its comments in the following sections. Comments included in this section are limited to the objectives themselves identified in Chapter 1 of the Consultation.
- 2.3 As the Consultation recognises, the existing regime has been ranked highly by independent experts on the grounds of clarity of analysis and decision-making, technical competence and the political independence of the NCAs. Ofcom therefore considers that the decisions made are in large part robust to challenge under the current system. Ofcom agrees however, that further strengthening of the operation of concurrency would be beneficial. Recent improvements to the concurrency system as between the Office of Fair Trading ("OFT") and Ofcom have led to a constructive working relationship and sharing of knowledge. Institutionalising that relationship further may give rise to benefits both for the NCAs and for business and consumers.
- 2.4 Ofcom agrees that there is considerable scope to improve the speed of competition decisions. However, it does not appear to Ofcom that there is a lack of predictability for business in this area. Extensive case law has been developed by both the European Commission ("EC") and the European Courts and by the UK NCAs and Courts.⁷ That case law has led to consistent decision making by NCAs in the UK.
- 2.5 Ofcom similarly to the OFT and other sector regulators has found it difficult to conclude CA98 investigations in a relatively short timeframe. In our experience this is because of the number (and complexity) of procedural and substantive challenges arising during such investigations that combined with the (expected) granular scrutiny of our decisions by the Courts require significant internal resources.
- 2.6 Ofcom has a number of concerns with the government's proposals in respect of market investigations:
 - 2.6.1 First, there is a risk that the additional powers of the CMA would risk infringing the principles of independence required in respect of UK NRA for electronic communications set out in Article 3 of the Framework Directive. Under that provision, market reviews are only to be carried out by the designated NRA and not by other bodies. Even if this were not the case,

there is a risk of contradictory decisions by Ofcom and the CMA. As Ofcom has a duty to carry out market reviews every three years, there is a risk that the CMA could consider it appropriate to undertake a market investigation in relation to similar practices into markets regulated by Ofcom. Not only would this lead to duplication between the CMA and Ofcom but would also risk giving rise to an increase in regulation in the market and the potential for regulatory uncertainty in a sector where the market players often engage in long term investment decisions.

- 2.6.2 Ofcom is also concerned that placing a duty on the CMA to keep specific sectors under review may give rise to the same issues. The communications sector for which Ofcom is responsible generated revenues of £52.8 billion in 2009.⁸ In its widest sense, the digital economy which is underpinned by the sector Ofcom regulates has been estimated to account for approximately 8% of GDP.⁹ In those circumstances, the communications sector seems a likely candidate as a “key economic sector” and the risk of overlap is therefore significant.
- 2.6.3 Finally, if the CMA were to conduct market investigations and impose remedies in the electronic communications sector using powers under the Enterprise Act (or similar), it would need to consider whether the analysis carried out and the remedies imposed required notification to the EC under Article 7 of the Framework Directive.

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

- 2.7 Ofcom makes no comment on the creation of a single CMA by merging the competition functions of the OFT and the Competition Commission (“CC”). As set out in more detail in response to question 9, Ofcom notes that the proposals relating to the structure and governance of the new body are broadly similar to the current structure and governance of Ofcom.

⁸ Source: Ofcom Communications Market Report, August 2010.

⁹ Source: Digital Britain interim report, January 2009

Section 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, 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.

Ofcom's experience of using concurrent market investigation powers in a regulated sector

- 3.1 As set out in the Consultation, Ofcom has concurrent powers to make a reference to the CC where it has reasonable grounds for suspecting that any feature, or combination of features, of a market for goods or services prevents, restricts or distorts competition.¹⁰ Since Ofcom assumed its duties and powers in 2003, we have referred one case to the CC (pay TV film channels) and accepted undertakings in lieu of such a reference in another (the BT undertakings). In a third case, we are conducting a market study which may lead to a reference being made (advertising airtime).
- 3.2 More specifically, in the BT Openreach case in 2005, Ofcom decided to make a reference to the CC but accepted undertakings in lieu of such a reference. Those undertakings involved the functional separation of BT's access network from its other operations. In addition in August 2010, Ofcom made a market investigation reference in respect of the supply and acquisition of pay TV movie rights and packages of movies channels. That investigation is ongoing before the CC and Ofcom would anticipate being closely involved with the CC process. More recently, Ofcom has begun work on a market study of the TV advertising trading mechanism to assess whether it might be expected to prevent, restrict or distort competition in the sale of TV advertising airtime. If appropriate, Ofcom will refer that market to the CC for investigation.
- 3.3 The Consultation suggests that the number of references to the CC under the provisions of the Enterprise Act is insufficient and notes that concurrent regulators have made only two references to the CC since the enactment of the Enterprise Act. This figure understates the relevant evidence, because it does not reflect those cases, such as the BT Openreach case, where undertakings have been accepted in lieu of such a reference. NCAs can accept undertakings only on the basis that (a) they have first made a decision to refer the market to the CC, and (b) the undertakings offered address the theories of harm developed during the investigation. Therefore, accepting undertakings represents (from the NCA's point of view) an equally satisfactory solution to a reference to the CC.¹¹ Indeed, this may be a better outcome, since this process is generally quicker than a reference and can

¹⁰ Section 131 of the Enterprise Act and section 370 of the Communications Act.

¹¹ Specifically, an NCA may only accept undertakings in lieu of a reference "for the purpose of remedying, mitigating or preventing" the concerns under examination (section 154 of the 2002 Act).

produce an equivalent outcome to a full investigation. This is important in understanding how Ofcom's current regulatory powers can be combined to deliver an effective outcome.

- 3.4 Additionally, sectoral regulators may be less likely to make use of market investigation references due to the structure of the markets they regulate. Many regulated markets share a history of liberalisation, with former monopolist incumbents supplying essential inputs to downstream markets (and, in the case of the communications sector, remaining a retail supplier themselves). Therefore issues of dominance are more likely to be the cause of problems rather than any market-wide issues that are not linked to single-firm dominance. Those issues may be dealt with more effectively through *ex ante* regulation or *ex post* investigations under the Competition Act than through a market investigation reference. This is in fact one of the reasons for the creation and continued adoption of *ex ante* regulatory frameworks in these sectors.
- 3.5 The statistics referred to in the Consultation in respect of the benefits accruing from market investigations¹² exclude any consumer benefits from cases where undertakings have been accepted in lieu of a reference. We consider that substantial benefits have accrued to consumers as a result of the BT functional separation undertakings. In fact, following the introduction of functional separation, the EC has taken the BT undertakings as a reference and precedent, leading to the incorporation into the revised European regulatory framework for electronic communications of functional separation as an *ex ante* remedy available to all EU NRAs.¹³ Although the Consultation recognises, at paragraph 7.12, that the functional separation will have delivered benefits to consumers, it does not appear that these have been taken into account in the figures at paragraph 3.4.

Ofcom's duties to conduct market reviews of electronic communications markets

- 3.6 Furthermore, in Ofcom's case, the statistics regarding the number of markets referred to the CC for investigation may prove misleading since Ofcom has a duty under the European regulatory framework to review markets at regular intervals. Our duties as the NRA include a duty to review a specified set of markets to assess whether they are effectively competitive and, if not, to impose appropriate remedies.¹⁴ We may also review any other electronic communications market in consultation with the EC and have done so on a regular basis.
- 3.7 Ofcom's market reviews are in many cases similar in nature to a market investigation by the CC since the assessment will consider all features of the market before deciding upon the appropriate regulation. As a result, it is likely that there will be fewer references to the CC since concerns may be addressed more quickly and effectively by Ofcom exercising its powers under the Communications Act. In the

¹² See footnote 11 of the Consultation.

¹³ Para 10 of Article 2 of the *Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services*. Available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF>

period since the enactment of the Enterprise Act, we have carried out 12 market reviews (encompassing the analysis of over 140 individual separate markets) in the electronic communications sector. Therefore there is no lack of effective market review and investigation in this sector and the regulation we impose is regularly reviewed and rolled back as appropriate. Furthermore, the EC is required to review and comment on our proposals and our final decisions in the market reviews both in terms of imposing regulation on individual providers and the type of *ex ante* remedies we impose as discussed below.

- 3.8 In this context, the Consultation proposals to enable the CMA to conduct investigations into practices across markets raise significant concerns about risks of duplication and contradictory outcomes where those practices are present in electronic communications markets. Ofcom would remain under a duty to review markets under the European regulatory framework even where the CMA had chosen to investigate practices in those markets. Parallel reviews of markets or parts thereof by Ofcom and the CMA would lead to a duplication of cost and effort. There is also a risk that any remedies imposed by the CMA could be inconsistent with regulation which Ofcom had put in place in accordance with its statutory and EU law duties, following a market review. Such a situation would give rise to uncertainty for business and, ultimately, consumers.
- 3.9 Aside from concerns in relation to duplication and uncertainty, there may also be a risk that any system which granted equivalent powers to the CMA would undermine the principle of NRA independence set out in Article 3 of the Framework Directive. Under that provision, Member States are to ensure that there is a clear delineation of responsibility between NRAs and NCAs in respect of the imposition of *ex ante* regulation in the electronic communications sector. Remedies imposed by the CMA following a market investigation may impinge on the principle of exclusive attribution of jurisdiction to the NRA where such remedies are prospective in application and are designed to address concerns which might also be considered under the market review procedure.
- 3.10 In the absence of concerns regarding NRA independence, there are further complications in respect of the proposals under the Framework Directive. Article 7 of the Framework Directive envisages the notification of market reviews and remedies imposed thereunder to the EC which has powers to veto certain of those decisions. If a given market investigation sought to impose remedies which were similar in nature to those which might be imposed under the European regulatory framework, the CMA would need to notify those measures to the EC and could be required to modify its proposals, failing which the EC could veto the proposals. Clearly, this risks giving rise to an inconsistency of application and to consequent uncertainty for business where it is unclear which body, Ofcom or the CMA, is responsible for such regulation and the extent to which it may be reviewed, depending upon the procedure adopted for its introduction. It may also have the consequence of extending the period for Phase 2 of any market investigation where the proposed analysis and remedies requires notification to the EC.

Role of sectoral regulators

- 3.11 Ofcom recognises that the Government wishes to ensure that sectoral regulators are making full use of the market investigation process. However, it is unclear why it may be necessary to give the CMA power to refer markets in regulated sectors. Ministers already have the power to refer markets in both regulated sectors and those falling within the jurisdiction of the OFT under section 132 of the Enterprise Act 2002 where they are not satisfied with a decision of the relevant authority to refer a market. This

power might be used to ensure that appropriate market investigation references are made where there is concern that a relevant authority is failing to do so.

- 3.12 It is also not clear to us why the CMA would necessarily be better placed than the sectoral regulator to decide which markets in the communications sector are appropriate for review.
- 3.13 One argument could be that the NCA is less likely to be at risk of over-reflecting the concerns of the industry it regulates. The trade-off therefore would be between the benefits of that independence of view, versus the familiarity of a sector regulator. In the case of the communications sector, the reality is that the decision about which markets to review is at least to some extent determined by the framework. Therefore the question is whether there is evidence that the NRA (Ofcom) is failing to explore other markets than might be more vigorously addressed by an NCA (albeit at the cost of not knowing the markets as well). Our view is that we have been actively deploying market references and accepting undertakings in ways that suggest there is no added value in having an NCA undertake this task instead of Ofcom.
- 3.14 Moreover, Ofcom has day to day overview of the sector and is consequently able to quickly identify where concerns arise, particularly those which have an adverse effect on consumers. An authority which does not have the same level of oversight may be less able to filter and manage complaints from those that have vested interests.
- 3.15 Ofcom is also better placed to understand whether concerns are linked to pure competition law concerns and could therefore be remedied through a Competition Act investigation or the use of sectoral powers, or whether the concerns result from structural issues which are suited to a market investigation reference. Ofcom is accountable in law for the sectors it regulates (level of competition, level of prices and quality of service for consumers) and therefore has the incentive to use the most appropriate regulatory tool (*ex ante*, *ex post* and market reference) to obtain the best outcomes for consumers.
- 3.16 For instance, in the case of BT Openreach, Ofcom considered functional separation as the most proportionate course of action to address the competition problems identified. Ofcom therefore accepted undertakings from BT in lieu of a reference to the CC to deliver that outcome and continues to monitor BT's compliance with those undertakings. Had functional separation been imposed by the CMA, the necessary trustee arrangements to ensure functional separation may have been unduly costly and complex since the undertakings which Ofcom accepted form part of a complex regulatory framework of which trustees are unlikely to have experience and where significant (and costly) learning would be required.
- 3.17 The experience of regulatory price control appeal cases has also shown that NCAs sometimes require significant assistance from Ofcom to appreciate the specific interplay of the characteristics of both markets and products and the regulation in place. Examples of this include, at the CC on mobile call termination and leased lines and the experience of assisting the CC and the EC in designing behavioural remedies during merger investigations (NGW/Arqiva with the CC and T-Mobile/Orange with the EC).. It is not clear that this assistance would be available at the time that "strategic" markets were being selected for review.
- 3.18 Furthermore, any competitive concerns must be placed within the context of the regulatory environment. Coordination between the CMA and Ofcom would need to work well to ensure the CMA had the same overview as Ofcom of the regulation in place in a relevant market at the stage when it decided whether to "call in" a market.

Public Interest Issues

- 3.19 Ofcom notes the proposals in the Consultation to enable the CMA to provide independent reports to government on public interest issues alongside competition issues. Ofcom recognises that it may be necessary for the CMA to adopt a holistic approach to certain markets to take account of public interest issues which may, in certain instances, affect the extent to which competition remedies alone are able to deliver the best outcomes for citizens and consumers. Ofcom would note in this respect that it has a number of duties under the Communications Act to report to the government on public interest matters. In particular, in the broadcasting sector, Ofcom has a duty to report on the fulfilment of the public service remit by public service broadcasters. Ofcom therefore considers that it is important to ensure that there is no duplication of effort in this respect when considering public interest issues which already fall within the remit of sectoral regulators.

Reducing Timescales

- 3.20 Ofcom recognises that a statutory timetable for the market study phase might be useful for providing greater certainty to all parties involved and is supportive of such an approach. However, the periods allowed should be flexible to ensure that a sufficient period of investigation is available. A set timetable which does not allow more time in circumstances of greater complexity might lead to more markets being referred. However, if this were the case, the evidence before the CMA at that stage would be thin and might require more time to be taken in Phase 2 to gather the evidence necessary to reach a decision. Alternatively, a set timetable might reduce the number of referrals as there would be insufficient time to gather evidence to the requisite standard for referral.
- 3.21 The Consultation further indicates that the government may consider introducing statutory time limits in respect of only those markets that have the potential to be referred to a Phase 2 investigation. Whether a market study has the potential to be referred to a phase 2 investigation can only be known at the end of the market study. It is therefore unclear as to when a market study becomes one in relation to a market which has the potential to be referred and the statutory timescale would apply.
- 3.22 This point also illustrates the need to ensure that the point at which any statutory period begins is clear in order to bring about the certainty sought. This will be the case in respect of both businesses and NCAs, each of which will want to have a clear date by which a decision needs to be produced.
- 3.23 A further issue which would need to be clarified if a statutory timescale for Phase 1 is introduced is the extent to which such a timescale might be extended in the event that undertakings in lieu of a reference to Phase 2 procedure are offered or proposed. Where this is the case, there will need to be a period during which such undertakings may be negotiated and assessed in order to ensure their effectiveness. If the statutory timescale did not allow for an extension to the Phase 1 timetable in this case, there is a risk that a reference to the CMA would need to be made despite the possibility that a satisfactory outcome might be achieved in Phase 1 with little additional analysis or expenditure of time. For example, in the case of the functional separation undertakings given by BT in lieu of a reference to the CC in 2005, the entire process from Ofcom opening its investigation to the conclusion of the undertakings took under 12 months. Had Ofcom faced a Phase 1 deadline of, 6 months, it is unlikely that the undertakings could have been agreed within this

timescale. Ofcom would therefore have been required to refer the markets in question to the CC for a Phase 2 investigation of up to 24 months.

- 3.24 Another key issue to decide is whether a regulator's MIR decisions – presently subject to appeal by judicial review – would face the same appeals threshold in terms of substantive evidence to review in a context where there are short statutory timeframes to refer.

Introducing information gathering powers at Phase 1

- 3.25 Ofcom agrees with the proposal to empower NCAs to gather information under statutory powers at Phase 1, which could enable a faster conclusion to market studies and more timely references. In the event that a statutory timescale for Phase 1 investigations is introduced, information gathering powers will be particularly important to ensure that NCAs are able to gather requisite information and evidence as early as possible to enable a robust assessment to be carried out. In addition, the proposal would remove any confusion over whether or not an NCA is able to require information for the purposes of a market study, given that section 174(2) of the Enterprise Act currently only allows formal requests to be issued where an NCA already believes it has the power to make a reference.

Remedies

- 3.26 Ofcom supports the government's proposals to amend the rules on remedies so to allow competition authorities to order the appointment and payment of independent third parties to monitor/implement remedies.
- 3.27 The Consultation indicates that it is intended that any Phase 1 and Phase 2 statutory timescales would also apply in the event of remittal by the Competition Appeal Tribunal ("CAT"), to remove the uncertainty presently existing under the Enterprise Act regime. Whilst Ofcom believes this to be a sensible proposal, it may be worth qualifying it on the basis of circumstances. In particular, following a remittal by the CAT, it may be appropriate for an NCA not to proceed with any further investigation on administrative priority grounds where sufficient time had passed or where evidence has emerged that the initial concerns had been alleviated. If this option were not open to an NCA, both it and the CMA may be required to invest considerable resource in further investigating a market despite the lack of any substantive concerns at that stage.
- 3.28 Ofcom agrees that removing the requirement for a competition authority to consult on a decision not to make a reference is a positive step. We also support the proposals to introduce a duty to consult only in cases where any person has expressly asked for a reference to be made. In order to avoid complainants routinely requesting a referral so as to ensure a consultation, Ofcom would suggest that the duty to consult should be limited to cases where the person asking for the reference has sufficient interest to justify a consultation.

Section 4

A stronger antitrust regime

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

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

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.

Ofcom's activities in antitrust enforcement

- 4.1 Ofcom is the NCA for the communications sector under the Competition Act with responsibility for investigating and enforcing both the Chapter I and Chapter II Prohibitions and their European equivalents. Since 2003, Ofcom has issued 12 decisions under the Competition Act (not including administrative priority decisions) and has one ongoing investigation which is at the Statement of Objections (“SO”) stage.

Proposals for reform

- 4.2 The Consultation sets out a number of concerns with regards to the current system and proposes a number of options for reform. In summary, the key concerns appear to be:
- a lack of decisions by UK NCAs;
 - the length of time taken over antitrust investigations;
 - an excessive burden on NCAs to prove their case before the CAT; and
 - a lack of separation of powers within the NCAs.
- 4.3 Ofcom notes the view expressed in the Consultation that the UK brings fewer antitrust cases than other Member States and takes significantly longer in progressing those cases. However, in our view, that comparison should also be placed in the context of studies which recognise the clarity of analysis and decision-making in the UK, as the Consultation acknowledges at paragraph 1.5.
- 4.4 The Consultation suggests that, due to the comparatively low number of decisions of NCAs in the UK, there is a need for a richer body of case law to maximise the effectiveness of competition law. However, there is an extensive existing body of applicable case law both in respect of decisions in the UK and decisions by the European institutions. Furthermore, there is a wealth of guidance on the application of competition law issued by the EC and the OFT. The extent of that case law and guidance should offer significant levels of certainty to business on the application of competition law in the UK. The case law of the European institutions is equally

applicable to the prohibitions in the Competition Act and NCAs are required to apply that case law by section 60 of that Act. Finally, it is important to note that effects-based cases heavily depend on the facts of the specific case so there is a limit to how much guidance can be provided *ex ante* by the case law.

- 4.5 Indeed, Ofcom has undertaken a variety of Competition Act cases and applies the principles emerging from the available case law available in those cases. For example in the most recent SO which was issued to BT on 21 December 2010¹⁵ Ofcom followed all relevant case law on margin squeeze both before the CAT, the EC and the European Courts, including the recent European Court of Justice judgment in the Deutsche Telekom case.¹⁶
- 4.6 NCAs will also be mindful of the standard of review before an appeals body in deciding whether or not to proceed to a decision that an infringement has occurred. At present, infringement decisions of the NCAs under the Competition Act are subject to appeal “on the merits” leading to a full rehearing. In practice, this often leads to a *de novo* approach to appeals requiring the NCA to act in a more prosecutorial role before the CAT rather than simply defending its own decision.
- 4.7 The question of unfairness due to a lack of separation of powers within an NCA is one which depends in large part upon the standard of review of any decision of that body. Where the standard of review is “full merits”, the separation of the quasi-judicial function of an NCA from the investigatory function is of lesser importance than where a lower standard of review is applied. In the former case, the CAT is the ultimate decision maker possessing judicial functions and therefore ensures procedural fairness. In the latter case, if judicial review alone were to be applied as the standard of review, it may be appropriate to establish greater procedural safeguards within the system in order to ensure that there is a distinction between the investigatory function and the decision making function.

Consideration of the options proposed

- 4.8 Ofcom considers that retaining and enhancing the existing procedures or moving to an administrative approach remain the most appropriate means of progressing antitrust cases. We have considered the advantages and disadvantages of each of the options set out in the Consultation and, on balance, we do not consider that a prosecutorial system would offer the benefits sought and risks resulting in a less efficient system.

Option 1: Retain and enhance the OFT’s existing procedures

- 4.9 In Ofcom’s view, the existing system works well and, as recognised in the Consultation, the National Audit Office (“NAO”) has concluded it is well regarded internationally. The decision-making processes and interactions between the OFT and sectoral regulators are well understood and provide a high degree of certainty to enforcement authorities, businesses and consumers. The improvements which have been made to both the OFT’s processes, and the sectoral regulators processes where these differ, have improved the efficiency and transparency of the investigative process and will continue to do so.

¹⁵ http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/other/BT_Thru_Gamma.pdf

¹⁶ *Deutsche Telekom v Commission* (Case C-280/08 P) (October 2010)

- 4.10 Under the existing regime, the body of experience gained by sectoral regulators in the *ex ante* decision making process is carried through into the *ex post* decision making process. As a result, there is no need for the decision making body in anti-trust cases to develop experience from scratch as might be the case if concurrency did not exist and the OFT/CMA were required to familiarise itself with the sector-specific regulatory framework and its evolving application on each occasion.
- 4.11 The recent publication by the OFT of its new guidance is a significant step forward in further developing procedural efficiency and fairness and Ofcom is considering carefully the extent to which the approach adopted by the OFT should also be applied to Ofcom's anti-trust investigations. Ofcom intends to consult on revised procedures for the investigation of Competition Act complaints shortly. That consultation will draw upon the improvements made by the OFT as applicable to the communications sector.
- 4.12 In particular, Ofcom welcomes the measures adopted by the OFT which will increase the speed of the process whilst maintaining fairness and transparency. A key example of this is the approach adopted by the OFT in seeking to implement a Procedural Adjudicator. In Ofcom's experience, procedural issues have the ability to significantly delay the investigation process where disputes arise between the NCA and the party which is the subject of the investigation. Whilst it is possible for those issues to be dealt with in any subsequent appeal, the implementation of the Procedural Adjudicator should ensure that issues are dealt with swiftly and in a manner which is satisfactory to all parties at an earlier stage thus allowing a greater focus on the substantive issues.
- 4.13 Ofcom recognises that the challenges facing NCAs in respect of improving speed and efficiency are ongoing and that the improvements made thus far should be viewed as a starting point for ensuring that the processes in place are fit for purpose. However, there are certain constraints under the existing system which may mean that not all improvements sought can be delivered in practice. In particular, the high level of scrutiny of NCAs decisions in appeals, as outlined in paragraph 4.6 above, means that NCAs will continue to be required to produce very detailed, highly robust decisions. That process takes time and must ensure that parties are given the opportunity for interaction with the process and the ability to challenge provisional findings during the process. Since NCAs are subject to a very high standard of assessment, there is therefore lesser scope for improvements in the speed of the decision-making process than might otherwise be the case. While Ofcom does not believe that the consequence should be a lowering of the level of scrutiny, however, the resources required to put together a strong and compelling case must be taken into account when considering what improvements might be made to the speed of decision-making.

Option 2a: Administrative approach based on an internal tribunal in the single CMA

- 4.14 The Consultation sets out proposals for an Internal Tribunal to act as adjudicator in anti-trust cases. On the basis of the document, we understand that an independent body would be set up within the CMA which would adjudicate on the basis of the SO issued by investigators and the representations of those which are the subject of the investigation. The Internal Tribunal would reach decisions in respect of both cases brought by the CMA and the sectoral regulators and onward appeal to the CAT would be on the basis of judicial review principles rather than the current "on the merits" review. The CAT would no longer have the power to substitute its own decision for that of the Internal Tribunal and could only remit the decision for re-investigation.

- 4.15 The Consultation indicates that one of the advantages of such an approach might be to guard against confirmation bias by a decision maker in that, under the current system, there may be a tendency to confirm provisional findings contained in the SO rather than a full consideration of all the evidence, taking account representations made by the addressees of the SO. Ofcom recognises that the proposal would appear to guard against the risk of confirmation bias. However, we do not consider that the reality of the present system is one which tends towards confirmation bias. In Ofcom's experience, it is always necessary to reconsider the allegations made in light of representations made and, where representations are considered to have merit, the provisional decision must be reconsidered. Ofcom adopts this approach not just in respect of Competition Act cases but in all aspects of its work where representations are sought. In the case of Competition Act cases, it would undermine the position of the decision maker if it did not do so, given the level of scrutiny of decisions before the CAT.
- 4.16 Nevertheless, Ofcom recognises that such an approach may have benefits in delivering a streamlined process, particularly given the judicial review standard which would apply to decisions of the Internal Tribunal. Cases heard before the Internal Tribunal would not be subject to a full reassessment before the CAT and the time taken on appeal might therefore be significantly reduced. Ofcom recognises, as set out in the Consultation, that the CAT might over time seek to increase the standard of review. However, the judicial review standard is clearly established in the Administrative Courts and any departure from that case law would need to be carefully considered in light of any legislative change.
- 4.17 The Internal Tribunal system may also provide greater consistency of decision making across sectors. However, it will be important to establish a clear division of responsibility between the CMA Internal Tribunal and the sectoral regulators in relation to the decision-making process to prevent any duplication of effort. Furthermore, it would be important that the Internal Tribunal is able to draw fully on the expertise of concurrent regulators in relation to their sectors and this interaction is not currently clear. In particular, if a decision of the Internal Tribunal in a regulated sector is appealed to the CAT, to what extent should a sectoral regulator be involved in that appeal. As it is not the decision maker, it will not be a party to the appeal even though the primary basis for the decision (the SO) will have been prepared by it. In those circumstances, the approach of the CAT will be key in relation to the extent to which the Internal Tribunal is permitted to rely upon the SO in reaching its decision.
- 4.18 A further complication recognised by the Consultation concerns commitments. Under the current system, commitments are often offered after the issue of an SO but may also be offered prior to this point. It is not clear whether the "first-phase" decision makers would be able to accept commitments prior to the issue of an SO. If they were then one could imagine the system working in a similar way to undertakings in lieu of a reference to the CC in the case of market investigations. In the case of commitments offered after the issue of an SO, it would appear that these would need to be decided upon by the Internal Tribunal. This could lead to a situation in which commitments were offered and rejected by the "first phase" decision maker and would then be back on the table before the Internal Tribunal. Given this approach, there is a risk that parties might draw out the investigatory process by requiring an evaluation of the commitments at both stages.

Option 2b: Administrative approach based on Hearing officers / an investigatory and adjudicatory panel of independent office holders

- 4.19 The proposal for a variant of the new administrative approach might offer some benefits, however there is a lack of detail which makes it difficult to comment effectively. For example, it is suggested that independent office holders might have both an investigatory and adjudicatory role. It is not clear, however, at what stage those independent office holders might be able to exercise investigative powers. If there were no clear delineation of responsibility between the CMA executive/sectoral regulators and the independent office holders, there is a significant risk of duplication. If the independent office holders were only able to act once a matter had been referred to them (such as in mergers or markets cases), one would need to consider carefully how the benefits of concurrency might be maintained. A referral at the stage of reasonable suspicion might result in any sectoral experience being lost from that stage forward thus undermining the benefits which concurrency offers in terms of experience in the markets and understanding of the regulatory framework which has been applied.
- 4.20 The proposal also suggests that Hearing Officers might be employed in a similar manner to the approach adopted by the European Commission. In Ofcom's view, that process has already begun with the introduction of the Procedural Adjudicator before the OFT which seeks to ensure that due process is met throughout the investigation in a similar manner to the Hearing Officer. Ofcom welcomes this approach and recognises that the use of the Procedural Adjudicator might be advanced further, whether through the ongoing improvements or by enshrining the role of a Hearing Officer in legislation.
- 4.21 Ofcom is also supportive of the proposal to align the standard of review with that of the General Court in relation to decisions by the European Commission. The current appeal standard of "on the merits" gives rise to significant inefficiencies within the antitrust enforcement regime since it results in a duplication of effort between the NCA and the CAT due to the fact that the CAT will rehear all evidence and will engage in a *de novo* assessment.
- 4.22 As set out in the Consultation, the standard of review for decisions of the European Commission is:
- "limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error or a misuse of power"*
- 4.23 The implementation of that standard of review has two advantages. Firstly, it avoids the appellate body from engaging in a full reassessment of the alleged infringement and will therefore reduce time and cost in reaching decisions. Secondly, it reduces the incentives to appeal decisions since it recognises the expertise of the first instance decision maker. Where a full reassessment is undertaken, there are significant incentives to appeal the decision as the appeal will offer a second bite of the cherry to complainants or parties which are the subject of the decision despite the fact that there will have been an extensive process in which the rights of all parties will have been taken into account.
- 4.24 A further advantage of such an approach, as the Consultation points out, is that it allows for the development of procedures in this area in alignment with those of the European Commission/General Court and therefore increases consistency and the

ability for national and European processes to develop in tandem. This will in turn increase certainty for businesses which will be more fully aware of the processes at both levels.

Option 3: A “prosecutorial” approach, with first instance CAT adjudication

- 4.25 A prosecutorial approach offers an interesting alternative to the administrative systems in operation in the United Kingdom and at EU level. We have given careful consideration to the use of such a system and do not consider that this option is likely to offer the most effective means of progressing antitrust cases. While the proposal for a prosecutorial system is motivated by potential benefits in terms of efficiency and timing, there is a distinct possibility that the effectiveness of the present competition enforcement regime may be compromised, while efficiency and timing benefits may ultimately fail to be realised.
- 4.26 As the Consultation sets out, the burden on NCAs would be reduced under the proposals in that they would not be required to take matters further than the equivalent of issuing an SO. There will consequently be a reduction in the resources needed by the NCA for the investigation itself.
- 4.27 Nevertheless, it is unlikely that any reduction in investigation time prior to the issuing of an SO would occur. Indeed, that period might be lengthened since the SO would need to be a statement of case to present to the CAT and therefore NCAs may consider that the standard required of them would be closer to that which applies to a final decision than an interim decision which is subject to consultation. Similar levels of resource might therefore need to be employed to develop the case to a sufficient standard to convince the CAT to make an infringement decision. In the event that an NCA decided not to pursue a case before the CAT on the basis that there was insufficient evidence to justify pursuing the matter, that decision would, under the current system, also be appealable to the CAT and would require a full appraisal of the facts by the CAT.
- 4.28 Furthermore, the judgment of the CAT would be subject to an onward appeal to the High Court or Court of Appeal, whether on a point of law or broader grounds. This would mean that the end-to-end decision making process might in fact be significantly lengthened with three bodies involved in the investigation and decision-making process (CMA/sectoral regulator, CAT and appeal court). There is therefore a real risk that, taking into account the need for the prosecutor to develop its case to a sufficient standard for a prosecution to be successful and any onward appeal, the benefit suggested in terms of timing may fail to materialise and, in fact, the opposite may result.
- 4.29 Similarly, any reduction in the resources required at NCA level is likely to be offset by the necessary increase in CAT resources. The enforcement of competition law requires the deployment of considerable economic and legal resources, which the CAT would need in order to reach judgment under a prosecutorial approach. As a result, a similar level of resources may end up being employed in the system as a whole. An increase in the number of cases brought might in fact increase the overall resource burden since, whilst NCAs might be able to bring cases more easily, the resources required by the CAT to deal with the increased number of cases may be significant. It is therefore by no means certain that the prosecutorial approach would in fact be a more efficient system on this basis alone.
- 4.30 A prosecutorial system is also unlikely to lend itself to a full consideration of the economic evidence. In our experience, the appraisal of alleged anti-competitive

conduct (whether suspected breaches of Chapter I as network sharing arrangements or of Chapter II as margin squeeze and predatory pricing cases) is based on complex economic analysis. The experience of other UK NCAs such as the OFT and CC shows that, even as NCAs hold somewhat different organisational features, administrative decision making has consistently proven to be able to enable this type of complex economic analyses. The deployment of refined economic arguments within the administrative decision making process is likely to be a key driver of the performance of the UK competition regime, which as the Consultation states is held in high esteem and tops international rankings. It is also widely accepted that the experience of the merger prosecution system in Ireland indicates the difficulty to implement successfully a prosecutorial approach to competition enforcement.

- 4.31 Moreover, if a prosecutorial system were to be followed, careful consideration would need to be given to the possibility of commitments being offered. Under the current system, commitments may be offered after an SO is issued and may therefore lead to no further action being taken. In the case of a prosecutorial system, it would need to be clear whether the NCA could accept commitments during the course of proceedings before the CAT and then withdraw the prosecution without permission or whether commitments could only be accepted by the CAT. In that situation, effective commitments could only be accepted where the CAT had identified the competition concerns fully. That would require the CAT to ensure that it was fully appraised of the facts and economic analysis in order to make a decision on commitments. Such an approach might therefore prolong the process if commitments are offered before the CAT has had the opportunity to fully understand the concerns identified by the NCA.
- 4.32 The position of complainants would also need to be considered under a prosecutorial system. Under the present arrangements, complainants are able to interact with an NCA in putting points forward during the investigation process and may be permitted to intervene in any subsequent appeal. Under a prosecutorial system, it may be more difficult to allow complainants to engage in the process in order to ensure that rights of defence are preserved.
- 4.33 A further complication arises at the appeal stage. If the decision of the CAT is appealed (presumably on judicial review grounds), the respondent would presumably be the NCA despite the fact that it would not have been the decision maker and the decision reached by the CAT may not have followed the reasoning put forward by the NCA¹⁷ before it. This position also raises the question as to whether an NCA would have a right of appeal against the decision of the CAT which made a non-infringement decision. If a pure prosecutorial model were to be followed, and this were to be equivalent to the current criminal justice system, the prosecution (i.e., the NCAs in this case) would not be permitted to appeal on a point of law¹⁸ unless leave were granted by the Attorney General. Whilst this would provide greater certainty, it could lead to an unbalanced system in favour of defendants given the lack of appeal rights for the prosecutor.
- 4.34 Ofcom recognises the benefits of the prosecutorial system with regards to the level of penalties imposed. Having a single body with power to impose penalties would lead to increased consistency of outcome without the additional step currently required. Under the present system, findings of infringement and level of penalties are

¹⁷ For example, in criminal cases, the decision maker is the Criminal Court but the respondent in any appeal is the Director of Public Prosecutions.

¹⁸ Assuming that a prosecution under this system would be akin to a trial on indictment rather than a summary trial.

routinely appealed and the CAT will rule on both issues. The CAT provides some consistency of application of penalties however its starting point will be the level of penalty decided upon by the NCA. There may not therefore be as much consistency in the present system as might be achieved by a single body making a decision on penalties from the outset.

- 4.35 A related issue to consider is the extent to which prosecutors will be able to impose financial penalties for failure to provide information. In a prosecutorial system the incentives for those under investigation are reduced since a failure to provide information will mean that an NCA cannot build an effective case. NCAs must therefore be able to require information and to impose penalties for failure to comply, although due account must be taken of the additional impact on the right against self incrimination which this might imply in a prosecutorial system. The imposition of penalties more generally is discussed at paragraph 4.36 below and would apply in the context of whatever system is adopted.

Other Changes

- 4.36 Ofcom recognises that it should be possible to shorten the length of time taken to bring investigations under the Competition Act to a conclusion. However, any attempt to shorten this period must take into account the burden of proof which an NCA is required to discharge under the legislation. At present, NCAs are required to demonstrate on the balance of probabilities and on the basis of strong and compelling evidence that an infringement of the relevant prohibition has occurred.¹⁹ If a short statutory timescale were introduced, it may be more difficult for NCAs to gather evidence to the requisite standard and this might result in fewer decisions being taken. Ofcom therefore considers that, in deciding whether or not statutory timescales should be imposed on NCAs in antitrust cases, due account must be taken of the burden of proof to which they are subject.
- 4.37 Furthermore, the introduction of statutory timescales should also take into account the potential for those under investigation to delay matters, in particular with regards to information requests. Where a NCA is subject to a tight statutory timescale involving complex analysis, there may be incentives for companies under investigation to seek to delay the process of an investigation in order to reduce the amount of time available to the NCA to conclude its analysis.
- 4.38 The proposal contained in the Consultation which would allow NCAs to impose financial penalties for non-compliance with investigations may go some way to addressing this concern. The existing regime which allows only for criminal prosecution in the event of non-compliance is largely ineffective due to the high standard of proof required to pursue such actions. Financial penalties might be more swiftly applied during the course of an investigation and would act as a deterrent to any attempt to subvert the NCA's investigation.

¹⁹ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs 91 to 113 and *JJB Sports plc v Office of Fair Trading and Allsports Limited v Office of Fair Trading* [2004] CAT 17, paragraphs 187 to 204.

Section 5

Concurrency and the sectoral regulators

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

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

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

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

Ofcom's sectoral expertise

- 5.1 Ofcom welcomes the government's proposal to maintain and reinforce concurrency in competition enforcement. Ofcom has significant expertise in enforcing competition law and understanding issues in the communications sector with a wide range of specialists at all levels that are well versed in competition economics and law, as well as financial accounting and the technologies used in the communications industry. In our view, the expertise which Ofcom has developed in this area is of great importance to the understanding and application of competition law in the communications sector.
- 5.2 Ofcom's expertise in the communications sector in the exercise of its competition powers (under both the Enterprise Act and the Competition Act) is inherently linked to its broader regulatory duties. In conducting its functions under the European regulatory framework for electronic communications and the Communications Act, Ofcom is required to conduct market analyses at regular intervals. The framework for that analysis is almost identical in nature to an analysis under the Competition Act, albeit on a forward looking basis, and will therefore be of importance when considering issues under the Competition Act. In the broadcasting sphere, which is underpinned by a large amount of public policy regulation rather than pure competition regulation, Ofcom's expertise extends to an understanding of the rationale for regulatory interventions in the sector.

Concurrency in practice

- 5.3 In Ofcom's view, the concurrency regime is working well, both regarding the interaction between regulators and in allowing the appropriate regulatory tools to be used to target anti-competitive practices. The statutory framework, the Concurrency Regulations²⁰ and the OFT Rules²¹ provide the basis for an effective system of concurrent regulation under the Competition Act which, in Ofcom's view, ensures that cases are dealt with in the most effective manner whilst ensuring certainty for consumers and business.

²⁰ SI 1077/2004 The Competition Act 1998 (Concurrency) Regulations 2004

²¹ SI 2751/2004 The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004

- 5.4 In addition, Ofcom has agreed a memorandum of understanding with the OFT²² which sets out how investigations under the Competition Act will be dealt with as between them in order to ensure that they are dealt with in the most effective way. Broadly, Ofcom is likely to be best placed to act where there is a desire to ensure consistency of regulation within the ambit of Ofcom's regulatory functions, where Ofcom may be in a better position to appreciate the relationship between the competition case and relevant sectoral regulations and where the specialist experience and knowledge of the communications sector held by Ofcom staff is required. The OFT is likely to be best placed to act where the conduct concerned is potentially criminal, where there is covert or hardcore cartel activity and where the case concerned has effects beyond the areas of Ofcom's specialist expertise. Ofcom keeps the OFT informed of all competition investigations, including providing the OFT with copies of all SOs when they are issued, on which the OFT may comment. During the course of investigations, Ofcom works closely with the OFT, where appropriate, to ensure that all relevant expertise is available.
- 5.5 In addition to the structural arrangements outlined above, if a sectoral regulator decides not to take on a case for administrative priority reasons, it must ask the OFT if it wishes to take that case on, and it is then for the OFT to decide whether or not to do so, as set out in the *Cityhook* case before the CAT.²³
- 5.6 The most recent example of concurrency in practice was Ofcom's consideration of complaints in relation to Project Canvas where Ofcom and the OFT agreed in advance that Ofcom would be better placed to handle the complaints but would keep the OFT informed of progress and seek views. At the end of the process, the OFT was informed of Ofcom's decision not to open an investigation into the complaints on administrative priority grounds, allowing the OFT to take over the case should it have wished. Another recent example is our work with the OFT (and the EC) on the T-Mobile/Orange merger that has been cited a number of times by Commissioner Almunia as a very good example of cooperation between the EC and NCAs. Further details of recent cases in which Ofcom has exercised concurrent powers and has worked closely with the OFT are set out in Annex 1.

Number of decisions in regulated sectors

- 5.7 The Consultation indicates that there is a relative paucity of antitrust cases and market investigation references in the regulated sectors. However, as the Consultation recognises, there are a number of reasons why this is likely to be the case.²⁴ In particular, many regulated sectors are characterised by the presence of large incumbents which will often be dominant in a relevant market and where *ex ante* regulation may offer a quicker and more effective response.
- 5.8 In regulated sectors, the vast majority of *ex ante* regulation imposed on dominant undertakings will be designed to avoid the need for *ex post* competition investigations. Unless account is taken of these *ex ante* decisions, any consideration of statistics in this area will not compare like with like. In a regulated industry, typically with a dominant supplier, the prevalence of anti-competitive agreements/cartels is likely to be very low. Whilst *ex post* abuses of dominance may occur, they are also significantly less likely than in non-regulated sectors if

²² <http://www.ofcom.org.uk/about/organisations-we-work-with/letter-from-the-office-of-fair-trading/>

²³ *Cityhook Limited v Office of Fair Trading*, Case No: 1071/2/1/06
<http://www.catribunal.org.uk/files/Jdg1071City030407.pdf>

²⁴ Paragraph 7.8 of the Consultation

appropriate *ex ante* conditions imposed on the dominant entity are in place and are adhered to.

- 5.9 In addition, in Ofcom's case the European regulatory framework seeks to provide fast and effective recourse in the event of disputes between communications providers which are underpinned by a consideration of competition concerns. Ofcom is obliged to consider disputes between communications providers in a wide range of instances and must issue a reasoned dispute resolution within a period of 4 months. Ofcom's dispute determinations will often consider the competitive positions of the parties, typically drawing on existing findings with respect to the relevant market and the presence or absence of SMP (that is, whether any undertaking is dominant). Particularly when they involve dominant operators who provide services under a requirement not to unduly discriminate, decisions in particular cases are often more generally applied across the sector. Any consideration of statistics in respect of antitrust enforcement in the communications sector should therefore also consider the extent to which Ofcom's dispute resolution mechanism offers a fast and effective alternative to an investigation under the Competition Act.²⁵
- 5.10 Moreover, in addition to the fact that disputes are quick for us to resolve, stakeholders are also aware that we have the power to require repayment or over/underpayment with our determination. In Competition Act cases, complainants need to bring follow-on damages actions against the firm(s) that abused its dominant position. This is obviously more time consuming and costly. As regards market investigation references, Ofcom has exercised its powers in conducting market studies, making references to the CC and accepting undertakings in lieu of a reference, as set out in more detail at paragraphs 3.1 and 3.2 above. Indeed, the Consultation recognises the success of the BT Openreach undertakings in addressing the concerns identified by Ofcom.

Strengthening the primacy of competition law over sectoral regulation

- 5.11 The Consultation asks whether competition law should be given primacy over sector specific regulation and suggests two approaches:
- sectoral regulators establish a common set of factors for deciding whether to use sectoral powers or powers under the Competition Act or the Enterprise Act; and
 - the imposition of an obligation on sectoral regulators to use powers under the Competition Act or the Enterprise Act in preference to sectoral powers.
- 5.12 As regards a specific duty to prioritise powers under the Competition Act or the Enterprise Act, Ofcom is already required by both the European regulatory framework and domestic legislation to consider whether the use of *ex post* powers would be more effective in addressing competition concerns which may arise before imposing any *ex ante* regulation.²⁶ Furthermore, Ofcom has a duty to review

²⁶ The European directives which underpin electronic communications regulation in the UK make specific provision for the interplay between competition law and sectoral regulation. Recital 27 to the Framework Directive provides that "it is essential that *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". Ofcom is thus required by law to consider whether competition law would be sufficient to address any perceived problems – if so, *ex ante*

regulatory burdens and, under the European framework must review markets every three years to determine whether *ex ante* regulation remains appropriate. That assessment involves a consideration of whether competition law would be able to address any concerns. Where it would, Ofcom cannot impose or maintain *ex ante* regulation. Indeed, Ofcom has removed regulation in a number of areas where it has considered it appropriate to do so (e.g. wholesale broadband access, certain fixed telecommunications wholesale transit products as well as retail regulation in a number of markets).

- 5.13 In Ofcom's view, it would be difficult to establish a detailed common set of factors between regulators as regards the balance between competition law and sectoral regulation. This is because their circumstances (including the legal frameworks within which they work) and their experience in applying competition law are very different. Any common factors would need to consider in detail the powers available to individual regulators which may differ widely when considering particular competitive concerns. For example, the dispute resolution tool available to Ofcom as a fast and effective means of resolving disputes between communications providers may not be open to another regulator. In those circumstances, it may be more appropriate for Ofcom to make use of its dispute resolution powers in relation to a narrow issue relating to the terms of supply of a dominant operator whilst for another regulator, powers under the Competition Act may be more appropriate.
- 5.14 There may nonetheless be sensible improvements to make to the system through enhancing the relationship between the CMA and individual sectoral regulators so as to improve concurrency by appropriately reflecting the specificities of the legal context across sectoral regulatory regimes. Ofcom sets out at paragraphs 5.27 to 5.42 below suggestions for improvements which might be made to the arrangements between the sectoral regulators and the CMA, while enabling a restricted backstop role for the CMA.
- 5.15 In other areas, Ofcom is obliged by the relevant legislation, whether European or domestic, to impose certain obligations on undertakings which are active in its sector²⁷. Certain of those obligations are designed to address competition concerns which might be capable of being addressed by an investigation under the Competition Act, but the legislator has removed Ofcom's discretion to consider the appropriate means of addressing the concern. In those circumstances, a statutory requirement to prioritise action under the Competition Act risks placing Ofcom in a position where its duties conflict.

regulatory conditions should not be imposed. In relation to broadcasting, which is not otherwise covered by the European directives, Ofcom is already required to consider whether it would be more appropriate to use its *ex post* competition law powers before exercising its powers under the Broadcasting Acts 1990 and 1996 for a competition purpose.

²⁷ For example, under Article 6 of Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive") and section 75(2) of the Communications Act, Ofcom is required to place obligations on providers of conditional access systems to allow competing platform providers access to necessary infrastructure. Ofcom must impose obligations and has no discretion over the obligations which may be imposed. Those obligations are set out in detail in Part I of Annex I to the Access Directive.

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

- 5.16 Ofcom supports any measures likely to increase co-operation and efficiency as between the CMA and sectoral regulators. As set out at paragraphs 5.3 to 5.6 above, in Ofcom's view, the existing system of concurrency is working well but improvements can certainly be made.
- 5.17 Subject to Ofcom's comments regarding the removal of a decision-making role or a restriction on a sectoral regulator's powers, Ofcom considers that the use of the CMA as a central resource may benefit sectoral regulators. However, Ofcom does not envisage that it would be likely to avail itself of the shared resource system in respect of investigations it undertakes. As already indicated, Ofcom has significant expertise in the enforcement of the competition rules in the communications sector and it is not obvious at this stage what additional expertise it might obtain from the CMA in conducting its investigations. Indeed, for this reason, Ofcom would not consider it appropriate for the CMA to conduct an investigation with Ofcom making the ultimate decision since Ofcom is better placed and sufficiently resourced to conduct the investigation. Ofcom recognises, however, that other sectoral regulators may not be in the same position where *ex ante* work is not inherently linked to *ex post* competition investigations or where resources to conduct cases under the Competition Act may be more limited. Ofcom would therefore propose that any such changes should remain optional for the sectoral regulators to decide upon what action is appropriate taking into account their own circumstances.

Giving the CMA a bigger role in the regulated sectors

- 5.18 Ofcom welcomes the attempts made in the consultation proposals to institutionalise best practice for the interaction between sectoral regulators and the CMA. Ofcom has already established a system with the OFT for effective consultation and coordination of cases as between themselves and considers that an institutionalisation of similar principles might offer an effective means of improving coordination between the NCAs.
- 5.19 Ofcom has given some thought to the improvements which might be made and these are set out below at paragraphs 5.27 to 5.42. Ofcom further notes the proposal that the CMA should be given more authority to drive the strategic direction of competition work and ensure a consistent approach, for example, by publishing an annual review. Whilst Ofcom has no objections in principle to such an approach, consistency of approach is currently ensured by the requirement for sectoral regulators and the CMA to take account of case law at both UK and European level and by the role of the CAT in hearing appeals against decisions under the Competition Act. It is not entirely clear, therefore, what additional consistency such an approach might offer.
- 5.20 Ofcom does, however, have significant concerns around the proposals to give the CMA a wide ranging remit to review "economically important sectors or markets" and detailed comments are set out in response to section 9.
- 5.21 We observe that in the European Competition Network ("ECN") model, the EC is able to require a transfer of cases from NCAs to itself where, for example, a case has a significant cross-border dimension. This avoids the need for multiple investigations and ensures a single assessment of the competition issues. The EC may also step in where it holds concerns about the approach the NCA is taking.

- 5.22 By way of similarity, the Consultation (paragraph 7.29) speculates as to whether the CMA should be able to respond to notifications by taking upon itself cases of the regulators (whether an investigation has been formally opened or it is still at the enquiry stage). While it may be possible that a similar provision in the UK regulators / CMA context could hold benefits in terms of homogeneity of enforcement across sectors, we believe this would be outweighed by the risk of compromising the effectiveness of sectoral regulation and its integrated application with competition law.²⁸
- 5.23 We consider that UK competition authorities do not fundamentally differ in terms of their approach to competition enforcement, noting that their substantive approach is conditioned by case law and, procedurally, many features are common through OFT rules and practice.²⁹ If the CMA acquired a case oversight and allocation role, it would act to determine whether or not a regulator could open investigations and have oversight of the regulator's competition decisions. If the CMA were to be able to unilaterally launch Competition Act cases in a regulator's jurisdiction, this may lead to a confusion of powers and duties in the sector and reduce regulatory certainty – while potentially negating the regulator's sectoral expertise and understanding of interplay with *ex ante* regulation.
- 5.24 Alternatively, if the CMA were to acquire powers to direct a regulator to carry out investigations, the latter would have no control over its own priorities. In the case of Ofcom, we would have to de-prioritise other work which may be of greater importance for consumers. As much of our work is mandated by the European Framework, such de-prioritisation might result in a serious conflict of Ofcom's duties. At the same time, the CMA may not be best placed to appreciate whether a concern has been or will be addressed through *ex ante* regulation.
- 5.25 Moreover, if the sectoral competition enforcement process were to include formal CMA oversight / case management, the complexity of process would increase without necessarily increasing quality. As a result, this could lengthen the end-to-end timing of competition enforcement. In general, the risk of any such arrangements would be to incur duplication of effort leading to inefficiency. Thus, we reckon a regulator to be best placed to decide whether or not to initiate a Competition Act investigation within its sector without being directed to do so.
- 5.26 For the above reasons, we consider that a common approach to antitrust enforcement can be achieved by the close co-operation between the regulators and the CMA which we believe will result from the measures we propose to achieve

²⁸ As set out above, Ofcom is the designated NRA. The CMA would be an NCA, but not an NRA. The distinction between NRAs and NCAs is clearly shown by the amended Article 3a of the Framework Directive, which provides that "... national regulatory authorities responsible for ex-ante market regulation ... shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law". In light of this, we consider that it would likely be unlawful for the CMA to have the power to direct Ofcom as to which cases to take or establishing their approach as this too would undermine Ofcom's regulatory independence as the appointed NRA. In turn this would compromise Ofcom's ability to meet its duties descending from the EU regulatory framework, and as such would be contrary to Article 3a of the Framework Directive set out above.

²⁹ The logically equivalent case of a "cross-border" investigation is one which involves a single undertaking or set of undertakings under investigation but that spans a number of regulated sectors and that might otherwise be investigated independently by a number of sector regulators simultaneously. We are not aware of a single case in the history of concurrency that has these features; if one arose (which we find hard to believe) then it could be handled by agreement by the regulators concerned, with the CMA playing its coordinating role if needed.

greater transparency. Therefore, we do not consider that the risks to effective sectoral regulation should be countenanced by giving the CMA the right to itself investigate under competition law any case raising antitrust issues which is before a regulator. Instead, we believe that incremental changes aimed at strengthening MoUs could deliver the most benefits to the antitrust regime, without the risks associated with a radical departure from the current practice of concurrent enforcement.

Proposals suggested for incremental improvements

A proposal for the enhancement of concurrency based on a revision of the set of regulator-CMA Memoranda of Understanding

- 5.27 Currently, Ofcom seeks concurrency agreement from the OFT when it intends to open a Competition Act case, after having conducted a preliminary 8 week enquiry to assess the case against our administrative priorities. The two organisations must reach a case-by-case agreement on who is best placed to pursue any Competition Act case concerning the communications sector. This relationship is framed by a Memorandum of Understanding (“MoU”) signed by Ofcom and the OFT, which states a presumption for Ofcom to be generally best placed to take these cases forward, albeit with a few exceptions (e.g. the OFT could take responsibility where criminal cartel offences are alleged). We understand that similar MoU are in place across regulated sectors.
- 5.28 On this basis, Ofcom and the OFT – as concurrent NCAs – work together to decide who will deal with any particular case. If an agreement on case allocation cannot be reached between the sectoral regulator and the OFT, under the Competition Act (Concurrency) Regulations 2004, the Secretary of State would be responsible for allocating the case – although this has never occurred in practice. Whilst we see no reason why a conflict should arise in the future, we consider that it is important that this independent role for the Secretary of State is maintained.
- 5.29 The Consultation suggests an incremental reform of this process, while it is unclear whether the Government desires to give the CMA a right of initiative/veto on competition cases in regulated industries.³⁰ In the interest of an effective competition enforcement regime in regulated sectors, we consider that it is valuable for regulators to provide ample clarity in relation to their actions in response to competition complaints in their sector. For instance, in some cases the sector regulators may have a choice between the use of sectoral or competition powers – as recognised in the Consultation (paragraph 7.4). Ofcom believes that an incremental reform proposal centred on a revision of the concurrency MoUs could deliver greater transparency to the competition enforcement regime, by casting a brighter light on the regulators’ statutory trade-off between ex-ante and ex-post powers. In addition, it may help to identify and mitigate any systemic challenge relative to a sectoral regulatory framework and practice at an earlier stage than at present.
- 5.30 In order to address the concern that too few cases are brought in the regulated sectors, a regular review process might be instituted as between the CMA and each of the sectoral regulators to assess the effectiveness of competition law enforcement in that sector. Where the CMA remained concerned that a regulator was not availing

³⁰ Since currently the OFT can initiate preliminary 8 weeks investigations to assess potential cases in regulated sectors – ahead of discussing taking cases forward with the concurrent regulator – we understand that the CMA would maintain this faculty.

itself of its competition powers, a reassessment of the MoU between the CMA and that regulator might take place in order to give the CMA greater power to bring a case. There are a number of reasons that a sectoral regulator might not bring cases and the MoU would provide a flexible means of addressing both the concerns of the regulator and the CMA.

- 5.31 We propose that, as part of the expected transition of responsibilities from the OFT to the CMA, the concurrency MoUs could be revised to include:
- An enhanced notification procedure for competition complaints;
 - As part of that notification, identification of the powers available to the regulator in order to address a complaint, making explicit the specificities of the sectoral legal framework (for example, where the regulator has no option but to apply sectoral legislation); and
 - Resource sharing arrangements between the regulator and the CMA for competition cases.
 - Regular (e.g. 6-monthly) high-level CMA-regulator meetings to discuss the evolution of competition matters; complemented by a restricted backstop role for the CMA.

An enhanced notification procedure for competition complaints

- 5.32 We propose that there should be earlier communication from the regulator to the CMA (and vice versa) than under present concurrency arrangements in order to bring a broader set of cases into the framework. Under the current arrangements, the regulator is only required to reach agreement with the OFT on those cases in which it proposes to open a competition investigation. However, in Ofcom's case, that decision will generally have been preceded by an enquiry phase (of up to 8 weeks) in which it will consider first whether the complaint is sufficiently well formulated in terms of reasoning and supporting material and, if it is, whether an investigation of the complaint is justified.³¹
- 5.33 We propose that regulators notify the CMA (and vice versa) of any complaint on competition grounds within the concurrent field into which the regulator (or the CMA) intend to open a preliminary enquiry to assess the case for opening an investigation. If at the end of the 8-week initial review the regulator (or CMA) wishes to open a formal Competition Act investigation, then the present concurrency procedure would still apply, as informed by the current set of OFT / regulators MOUs. Similar arrangements would apply when a regulator (or CMA) opens a preliminary enquiry of its own initiative.
- 5.34 A key benefit of including this revised arrangement in the new MoUs is the increased transparency of the regulators and CMA's antitrust case load. Moreover, this could facilitate cooperation between the two bodies and avoid duplication of resources from an earlier stage, since information would be available that could avoid the risk of both bodies working on a preliminary enquiry on the same matter. At the same time, in order to avoid overburdening the system, all those complaints which do not meet

³¹ Ofcom published a set of guidelines to inform this type of decisions. See September 2006 Draft Enforcement Guidelines - Ofcom's draft guidelines for the handling of competition complaints, and complaints and disputes concerning regulatory rules.

<http://stakeholders.ofcom.org.uk/binaries/consultations/enforcement/summary/enforcement.pdf>

minimum standards in terms of reasoning and supporting material would be screened out, which is beneficial.

Notification to include an outline of the powers available to the regulator in order to address a complaint, making explicit the specificities of the sectoral legal framework

- 5.35 We propose that the revised MoUs should provide for regulators to give the CMA an outline of the regulatory tools available to address a complaint/own-initiative investigation, for example enforcement under sector specific regulatory obligations. Regulators should also detail where the relevant regulatory legislative regime requires them to apply *ex ante* powers to address competition issues, preventing the opening of a case under the Competition Act.
- 5.36 For instance, Ofcom is subject to a range of specific duties imposed by the European regulatory framework, and these include the interaction between competition law and sectoral regulation. We have sector-specific statutory duties that require us to exercise our sectoral powers, such as the requirement to carry out regular reviews of markets identified by the EC. At the same time, Ofcom has duties to resolve in four months disputes between communication providers in relation to network access if certain (low) jurisdictional thresholds are met. Disputes often raise issues that are akin to matters which might be considered under the Competition Act (such as refusals to supply, or the terms of supply by dominant companies), but we are afforded little or no discretion as to whether to handle them as disputes or as Competition Act cases.³² Once a valid dispute has been raised, Ofcom must deal with it as such, unless there is an alternative means of resolution which will effectively be equally quick.³³
- 5.37 Based on the experience of using our sectoral powers, we consider that any common set of factors is unlikely to be capable of meeting the individual requirements of the European regulatory framework, given the detailed regulatory tools contained within it. However, we believe there could be value in the proposed MoU enhancement, as a result of which regulators would have to articulate in detail the full range of *ex-ante* and *ex-post* options that either could or must be used to address any specific matter considered (e.g. competition complaints).

An understanding of the modus operandi for competition cases, specifically as to resource sharing between the regulator and the CMA

- 5.38 We consider that it would be beneficial for each regulator–CMA MoU to specify in some detail any resource sharing arrangements that may assist the regulator to take forward an antitrust case. The MoU could provide for these arrangements to be made available at the enquiry stage or once a full investigation is opened.
- 5.39 For instance, while some regulators such as Ofcom may be confident in their capability to hold adequate expertise to enable the effective pursuit of competition cases, other regulators may prefer relying on the CMA to support them appropriately upon the regulator opening a competition case.

³² The parties often prefer to have these matters examined under Ofcom's dispute resolution powers because of the requirement for speedy resolution.

³³ Ofcom has to make a decision to resolve the dispute within 4 months, and it is rarely feasible to conduct a complete Competition Act case in that timeframe, so the statute effectively precludes this as a realistic alternative option.

Regular (e.g. 6-monthly) high-level CMA-regulator meetings to discuss the evolution of competition matters; complemented by a restricted backstop role for the CMA

- 5.40 We consider it beneficial for MoUs to include a regular cycle of high-level meetings between the regulator and CMA, so to discuss the evolution of competition matters, in light of the interplay with sectoral regulation. This could be best achieved by means of high-level meetings to be scheduled every 6 months to discuss the evolution of competition matters, in light of the interplay with sectoral regulation.
- 5.41 A more formal approach in the MoU might be for the CMA to notify a sectoral regulator, in a specific case where it had concerns on the regulator's forbearance, that it intends to conduct an investigation under the Competition Act into matters within the jurisdiction of that regulator. The regulator would then have a period of, say, 21 days in which to respond to the notification. If the sectoral regulator informs the CMA that:
- a) it is already investigating the alleged conduct under the Competition Act; or
 - b) it intends to open an investigation into the alleged conduct under the Competition Act; or
 - c) it has addressed or is addressing the alleged conduct through other means specified in detail;
- then the CMA will not proceed to investigate the alleged conduct.
- 5.42 By including such a process within a revised CMA-regulator MoU, the CMA would gain a restricted backstop role which could complement by more formal means the informal coordination resulting from the regular high-level meetings. The combined effect of these two MoU provisions might be to enable the CMA to maintain a role as the guardian of the enforcement of competition law whilst ensuring that the role of sectoral regulators was not usurped by the CMA. In a similar manner, the proposal might be extended to market studies on a similar basis to address the concerns that too few references are made to the CC under the current regime.

Section 6

Regulatory references and appeals and other functions of the OFT and CC

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

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.

- 6.1 Ofcom agrees that the CC should retain its role as the appeal body for Ofcom's price control decisions and that the specificities of that procedure should be maintained. Ofcom further agrees that sectoral differences and the specificities of regulated industries have led those processes to differ to some degree because of EU requirements and the nature of the issues being considered.
- 6.2 Ofcom therefore sees limited scope for either the harmonisation and simplification of regulatory processes or the introduction of model processes for appeals. We also consider that there are unlikely to be net benefits in doing so. That position is accentuated in relation to appeals against Ofcom's price controls where the split nature of an appeal between the CAT (with jurisdiction to consider the legality of the decision to impose a price control) and the CC (with jurisdiction to consider the level of the price control) means that specific procedures are needed to govern the interplay between the CC (and then CMA)/CAT processes.
- 6.3 While Ofcom agrees that the CC remains the appropriate body to review Ofcom's price control decisions, consideration will need to be given to how this role will be managed if it is merged into the CMA. The role of the CC in price control appeals is quasi-judicial in nature even though the formal judgment on all elements of the appeal will be made by the CAT. If the CC is merged with the OFT, this quasi-judicial role will be merged with the administrative and investigatory role currently carried out by the OFT. Any institutional arrangements within the CMA should therefore ensure that there is sufficient separation and clarity between the administrative and quasi-judicial functions with which the CMA is charged. The merging of those functions is likely to affect the relationship with sectoral regulators where the CMA will be a concurrent regulator in certain circumstances and an appeals body in others, and also with the CAT where it may be a defendant in respect of certain decisions and a co-decision maker in respect of price control appeals. Ofcom therefore proposes a clear separation between such functions is made on an institutional basis in order to preserve the good and effective working relationships which exist between the bodies and to ensure clarity and certainty for business.

Section 7

Decision making

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

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

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.

- 7.1 Ofcom welcomes the recognition in the Consultation that key considerations in any decision-making process are the need to ensure robust decisions whilst also ensuring that such decisions are made in a timely manner. Ofcom also recognises the need for any decision making processes to ensure degrees of independence and compliance with Article 6 of the European Convention of Human Rights (“ECHR”), depending upon the approach which is taken to the allocation of functions as between the sectoral regulators, the CMA, the CAT and the judiciary.

Decision making procedures

Potential further changes to the decision-making process

Market investigations

- 7.2 Ofcom notes that the proposed decision-making process for market investigations remains largely unchanged by maintaining a two phase approach. However, the Consultation envisages some or all of the Phase 1 market study team continuing to work on a Phase 2 investigation, which is not currently the case. Whilst this may work effectively within a unitary CMA structure and ensure continuity within the case team, it is unclear as to how this might apply in respect of the sectoral regulators. If continuity were to be maintained as between a sectoral regulator and the CMA in Phase 2, this would imply that the Phase 1 market study team would then join the CMA for the purposes of the Phase 2 investigation.
- 7.3 Although Ofcom has no objection in principle to such an approach, there is a risk that the sectoral regulator is thereby deprived of resources for other cases. Whilst a sectoral regulator will seek to assist the CC with its investigation under the current process, the case team is not absorbed into the CC once an investigation is opened and those individuals remain under the authority of the sectoral regulator which will be able to allocate resources according to its institutional priorities. The inclusion of sectoral regulators in such a system should therefore seek to clarify their position whilst recognising the resourcing constraints which may apply.
- 7.4 It is also unclear from the proposal how the process will deal with undertakings in lieu of a Phase 2 reference. Chapter 3 of the Consultation does not appear to propose

that the availability of undertakings in Phase 1 is removed, but the decision making process makes no reference to how the decision to accept undertakings would be made and by whom. If the proposal envisages that that decision would continue to be made in Phase 1 (and therefore by the Executive Board in respect of the CMA), then there will need to be a clear division of responsibilities as between Phase 1 and Phase 2 to avoid any risk of conflict in approach. If, however, the MIR Panel is to have involvement in the decision to accept undertakings in lieu of a Phase 2 investigation, the interaction with the sectoral regulators will need to be carefully considered. Were the MIR Panel to have a role in the decision on acceptance of undertakings, this would fundamentally alter the powers of the sectoral regulators to decide not to refer a market for investigation by accepting undertakings.

Antitrust

- 7.5 Ofcom does not have any objection of principle to the CMA having a role in Phase 2 investigations but can see some difficulties which would need to be ironed out. A dual phase investigation could require duplication of effort as the Phase 2 body would need to be brought up to speed on all of the evidence which the Phase 1 investigator already has intimate knowledge of. In the case of regulated industries, any sectoral expertise might be lost and both authorities may need to invest considerable time to transmit the regulator's knowledge in the relevant area to the CMA members. We believe that in the communications sector the regulatory expertise that Ofcom has developed and maintained is crucial in ensuring that complex cases are carefully considered from all angles.
- 7.6 As the Consultation recognises, the appropriate decision-making procedures for antitrust cases will depend upon the approach taken to antitrust cases more generally.

Appeals and ECHR compliance

- 7.7 The existing merits-based appeal regime for our *ex ante* telecom decisions requires Ofcom to devote very significant resource to defend its regulatory policy decisions. Because we are subject to an expenditure cap set by HM Treasury, we can only sustain this level of resource and cost by diverting resources from our ongoing regulatory, competition enforcement and policy work.
- 7.8 The current UK approach in this area gold-plates the requirement of EU law that there should be provision for appeal against the NRA's decisions with the merits duly taken into account. Our view, and that of the government, is that judicial review with the merits duly taken into account meets this requirement, and we await the government's further consultation on the subject. Judicial review with the merits duly taken into account is not a novel or untested system, nor will it result in decisions not being appealed. It will simply ensure appeals focus on points of material error. The NAO believes this is a sufficient standard, as does Lord Justice Jacob.³⁴
- 7.9 We therefore welcome that the Consultation also supports this view, stating for instance with reference to the markets regime that "The government also considers that alongside this two phase process, the right of judicial review through the CAT will ensure that the ECHR requirements for a fair trial continue to be fully met" (paragraph 3.6).

³⁴ See *T-Mobile (UK) Ltd and another v Office of Communications [2008] EWCA Civ 1373* and The National Audit Office Report - „Ofcom: The Effectiveness of Converged Regulation”, November 2010.

Section 8

Cost recovery

Recovering the cost of antitrust investigations

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

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

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

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

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

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?

Recovery of CC costs in telecom price appeals

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

Recovery of CAT costs

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?

- 8.1 Ofcom has limited comments on this set of questions. We agree with the Consultation proposals to enable the CMA to recover its own costs in telecommunications price control appeals to promote efficient use of public resources. For the same reason we concur with the government in believing that Ofcom should not be in a position where it is required to pay the costs of an appeal

(whether to the CMA or in addition to the CAT) since this may have a chilling effect on enforcement (paragraph 11.40).

- 8.2 In fact, we note that the Consultation proposes that the CMA should gain the ability to reclaim its own costs from the appellant when the appeal is unsuccessful – while no such provision is considered where the CMA finds against Ofcom. Since allowing for any legal costs to be passed through different public sector bodies would be highly detrimental, this is a point of high importance to Ofcom and we welcome its recognition in the Consultation.

Annex 1

Recent examples of concurrency at work

BT Margin Squeeze

- A1.1 In December 2010, we issued an SO to BT as a result of complaints by Thus and Gamma that BT was operating a margin squeeze in the market for wholesale end-to-end calls. These complaints were received in summer 2008 and, following initial discussions, the OFT agreed in a concurrency letter in July 2008 that we were best placed to act. The OFT remained involved in the process, and when the SO was issued in December 2010, the OFT was informed of this. The OFT will be sent a copy of the SO once certain confidentiality considerations are resolved (at around the same time the ECN and EC were sent an Executive Summary).
- A1.2 This case is also a good example of the interaction between our *ex post* and *ex ante* powers. It involved an upstream market in which BT had been found to have SMP following an Ofcom market review under the European regulatory framework for communications and a downstream market in which we are using our *ex post* powers to address the abuse identified. Our case as set out in the SO draws on the well developed case law of the EC, the General Court and the Court of Justice in this area, including the recent decision in Deutsche Telekom v Commission (Case C-280/08 P) (October 2010).

Project Canvas

- A1.3 Another example is our consideration of Project Canvas, a joint venture between various public sector broadcasters, large internet service providers and Arqiva. We received complaints from Virgin Media and IP Vision in August 2010 that Project Canvas amounted to an anti-competitive agreement distorting competition in the markets for television platforms, in particular IP television. The OFT had originally considered Project Canvas in May 2010 under the Enterprise Act merger regime but cleared it on the basis that it did not have jurisdiction. Even before the complaints were received, we and the OFT met in June 2008 at a senior level to discuss how to handle them (as it was anticipated that they would then shortly be made).
- A1.4 Following receipt of the complaints, we liaised further with the OFT, leading to a concurrency letter of August 2010 in which it was agreed we would take the complaint forward. We and the OFT remained in close contact, and the OFT assisted us by providing certain documents from its merger review (August 2010). The OFT also attended a meeting between us and IP Vision (in early September 2010) and a meeting with us to discuss our provisional views (in late September 2010). Fortnightly conference calls were held throughout with the OFT to discuss progress. The draft decision was sent to the OFT in advance of publication (in early October 2010) and it was informed once the decision had been issued (in late October 2010). We decided not to open an investigation, and it remains open to the OFT under the concurrency framework to pursue a case on its own initiative, which it has not done to date.

Sarah Chambers
Director for Consumer and Competition Policy
Department for Business, Innovation & Skills
1 Victoria Street
London
SW1H 0ET

Via email: sarah.chambers@bis.gsi.gov.uk

Your Ref:
Our Ref:
Direct Dial: 020 7901 7097
Email: Sarah.Harrison@ofgem.gov.uk

Date: 13 June 2011

Dear Sarah,

Ofgem's response to A Competition Regime for Growth: A Consultation on Options for Reform

Thank you for the opportunity to comment on these proposals. We welcome recognition that the UK competition regime is a world-class system, in which Ofgem along with other sector regulators play a key role in promoting vigorous competition. We will continue to actively engage with the debate on reform to shape the way forward and we stand ready to play our part in making the system better still.

We set out the headline points of our response in this letter. Our more detailed answers to the consultation questions are annexed.

We fully support the aims of the review of the competition landscape: to maximise the ability of the competition authorities to secure vibrant, competitive markets, in the interests of consumers and to promote productivity, innovation and economic growth. As you are aware, Ofgem's principal objective as sector regulator is to protect the interests of consumers (including businesses) wherever appropriate by promoting effective competition or by other means. Having concurrent competition law powers is consistent with this.

Ofgem is a National Competition Authority with powerful tools to investigate and put a stop to anticompetitive behaviour and to review markets and take steps to ensure that they are working effectively. These tools greatly assist us in promoting healthy energy markets which benefit consumers and fair-dealing businesses. We have looked into numerous Competition Act 1998 complaints and published eight decisions. Our major infringement decision against National Grid is the most significant abuse of dominance finding in the UK, setting international precedent. Of course, infringement decisions are by no means the only measure of success of the competition regime: as European Commission practice demonstrates, accepting commitments can be an effective means of addressing anticompetitive behaviour and non-infringement decisions can be equally valuable in establishing the boundaries of legal conduct.

Our daily work includes keeping energy markets under review and we have also conducted regular market studies under our full range of market monitoring roles. Under the Gas and Electricity Acts, we have general market monitoring functions and in association with this duties to provide information, advice and assistance to the Secretary of State. Under the Enterprise Act we respond to supercomplaints and can examine markets to determine whether there is a case for making a market investigation reference. The Third Energy Package gives us an express duty to keep under review matters such as the level and effectiveness of market opening and competition at wholesale and retail levels and

restrictive contractual practices, alongside powers to gather information. We are keen to ensure that the reforms to the competition landscape avoid the risk of duplication in the exercise of powers, and therefore ensure that new arrangements are efficient and cost-effective and minimise the risk to business.

The Competition and Markets Authority

We support the merger of the Office of Fair Trading (OFT) and the Competition Commission (CC) to form the Competition and Markets Authority (CMA). We consider that the CMA will be better able to manage peaks and troughs in the CC's reactive workload, making effective use of the CC staff and expertise, and be able to streamline its casework in market reviews and mergers. We look forward to deepening and strengthening our close working relationships with the OFT and CC as they merge. We advocate a carefully managed approach to this significant organisational change to maintain focus on key responsibilities. There must be no hiatus in promoting and protecting competition.

Market reviews

Use of existing powers

We have a range of market review powers duties and functions, drawn from sectoral and EU market monitoring roles as well as those under the Enterprise Act 2002, which we use to improve the health and functioning of energy markets. We believe it is important and effective for us to have a range of review powers at our disposal and will choose which powers to utilise depending on the matter at hand. This approach tallies with the Focus principle within your Principles of Economic Regulation which calls for regulators to choose the tools that best achieve the desired outcome.

An example of where we have used our range of powers, duties and functions effectively in combination is our Retail Market Review (RMR). In this work, we relied on general market monitoring powers and have proposed some sectoral regulatory solutions which we consider, subject to the response from the industry, is the best route to secure cooperation and a swift resolution in this instance. However, we have not ruled out a market investigation reference (MIR) if, in light of responses to the consultation and the industry response to our proposals, we consider this will be the most effective means to achieve the necessary reforms.

The ability to make an MIR is a powerful tool at our disposal in promoting energy consumers' interests. However, we believe there are improvements which could be made to the MIR process which would make it a more effective option for regulators and less burdensome on business. We set out our views on these below and in the annex.

Streamlining market studies and market inquiries

We support the shortening of existing statutory timescales and the introduction of new statutory thresholds and timescales where these are appropriately combined with toughening of our information gathering powers pre-reference. This would minimise duplication of information gathering between the two phases, reducing burdens and speeding up the process.

Any new timescales would need to be sufficient to enable an adequate first phase exploration of the issues, to avoid unnecessary second-phase reviews. The two-tier approach minimises burdens on business where issues are either not causing the scale of problems that it first appeared, or where they can be sensibly resolved in the first phase.

There are limitations to the current "all or nothing" MIR approach which may have a dampening effect on the volume of issues referred. We advocate a more flexible approach to MIRs between sectoral regulators and the CMA, which could include more structured approach and ongoing dialogue around:

- firstly , whether an MIR is appropriate in the circumstances;
- secondly exchanging information on/assessment of an agreed scope of a given MIR; and
- thirdly, reaching agreement appropriate timescales.

This could lead to more tailored and/or focussed inquiries into particular aspects of markets where a second pair of eyes would reach a better, longer lasting solution, potentially involving structural remedies.

Economic regulators have a range of powers at their disposal, including modifying licences to change company behaviour¹ and accepting undertakings in lieu of a reference which are able to address many problematic features of markets. The extra tool available to CC, and in future the CMA, is being able to impose structural remedies, where necessary.

CMA duty to prioritise strategically important markets for review

As part of our transparent approach to regulation, we are keen to engage with the CC, and in future the CMA, on structural market features and the optimum means of addressing any problems inhibiting effective market functioning. In the context of enhanced engagement between the CMA and regulators, we consider that the particular circumstances of industries subject to economic regulation, and the role that the sector regulators play, should be taken into account in the reshaped competition landscape.

We are concerned that the current proposals bring the risk of duplicative reviews and could encroach on our independent regulatory role (under EU and UK law). Regulatory stability and accountability are important, as recognised in your Principles for Economic Regulation. Any unnecessary moves which would lead to an increased perception of regulatory risk, and hence an increased cost of capital should be avoided at a time when the GB energy industry is seeking to attract £200bn of investment.

Regulatory appeals

We consider that it is imperative that the body considering any references we may make and any regulatory appeals of our decisions does so through the same lens as us. This applies whether a panel within the CMA or the Competition Appeals Tribunal (CAT) takes on this role. The CC currently decides on references on matters including licence modifications² and changes to Industry Codes. In doing so, it has regard to our principal objective and general duties, including for example, the protection of vulnerable customers and ensuring security of the energy supply.

If the appeals were heard by a panel of the new CMA solely taking into account its proposed primary objective of promoting competition, it may come to a different decision. This would undermine Ofgem's ability to fulfil its statutory role. Businesses and consumers

¹ At present, Ofgem can also impose licence modifications unless 20% or more of licence holders object (and this blocking threshold is expected to be removed and replaced by an appeal mechanism by the end of this year).

² At present licence modifications proposed by Ofgem must be agreed by 80% of licence holders before they can take effect. Ofgem can make a reference to the CC if the proposed change is not agreed. The CC would then decide if matters are adversely affecting the public interest and if so whether they can be appropriately remedied by means of a licence modification. If so, the CC can require Ofgem to make the modification. The third package of EU energy directives, when transposed in the UK, will mean that modifications proposed by Ofgem take effect unless appealed by a licence holder, consumer representative group or industry representative group.

are better served by a consistent approach where both tiers apply the same range of considerations, preserving predictability. This also complies with European law to the extent necessary for Ofgem to be able to make binding decisions.

Antitrust investigations and decision making

Concurrency

We support BIS' conclusion that concurrency of competition powers should be retained. We have used our competition law enforcement powers successfully in the past and they remain a valuable tool in influencing behaviour. We have found one major infringement and in one case accepted binding commitments. In five cases we have published a finding of either no grounds for further action or a non-infringement and in one instance closed the case to pursue alternative means: by pressing for the ability to introduce a market power licence condition where existing competition law was unlikely to address the harm identified.

As we note above, it is important to recognise that infringement findings are not the only measure of success. As European Commission practice demonstrates, accepting commitments can be an effective means of addressing anticompetitive behaviour. And non-infringement decisions can be equally valuable in setting precedent and the boundaries of legal conduct. Being willing to open investigations (on the grounds of reasonable suspicion) makes it almost inevitable that we will subsequently close down or reach a non-infringement finding in particular cases. The knowledge that a regulator is prepared to open an investigation is a powerful compliance incentive in of itself. Companies wish, and work hard, to remain above suspicion.

We support BIS' commitment to preserving the independence of decision-making from political considerations. As an independent regulator, we are keenly aware of the importance of stable regulatory systems for growth and increasing consumer welfare.

Concurrency not only aids us in influencing the behaviour of companies through enforcement action but also helps us to attract and retain competition expertise which benefits our wider regulatory role (enabling us to fulfil our duties to promote competition and to make the right regulatory decisions). Furthermore, we do not face the same difficulties as other Member States in dealing with the relationship between regulatory bodies with increased powers under the third energy package and separate competition authorities.

We welcome plans for a "network" of competition experts and greater cooperation and joint working more generally with the CMA and other concurrent regulators, alongside retention of Ofgem's decision-making powers. Sharing best practice amongst the concurrency working party (CWP) takes place in a multi-lateral way: OFT has greater knowledge of, for example, cartel cases, and regulators have considerable experience of abuse of dominance cases. Examples of closer co-operation could include more flexibility regarding the secondment of staff between CWP members, more structured discussions with the CMA regarding the strength of a given Competition Act 1998 (Competition Act) case at various stages including prior to seeking concurrency and actively seeking peer review of economic or legal analysis by CWP colleagues. We all benefit from learning from each other, particularly in respect of procedural matters. For example, we found the procedures sub-group of the CWP a helpful forum.

Streamlining the tools

We consider that the optimum approach to achieve BIS' aims, including a higher throughput of cases, is to improve the tools and process. This would benefit the CMA and regulators with concurrent powers and appears to be the most economical and the most effective route.

Decision making

We believe that we are best placed to investigate and take decisions on competition investigations in the energy sector. Our highly trained and experienced competition economists, lawyers and policy staff carry out investigations, and our board, including non-executives, separately takes the decisions.

We believe that the timescales for finding Competition Act infringements could be shortened by improving procedures (such as streamlining the approach to setting penalties) and through greater co-operation across competition authorities - sharing best practice as it develops. We do not believe that separating decision making from carrying out investigations formally or institutionally would necessarily lead to a material shortening of the process or incentivise greater take-up of the powers.

Streamlining the approach to setting the appropriate level of a penalty

The CAT and Court of Appeal are not bound by the OFT guidance on setting the level of a penalty to which OFT, Ofgem and other concurrent regulators must have regard. The OFT guidance is similar but not the same as the equivalent European Commission guidance.

Adopting a consistent approach throughout all the tiers of decision-making and appeals in UK competition law would be much simpler to administer. It is also likely to materially reduce incentives on companies to appeal the level of a penalty (on the basis that the CAT and subsequent bodies are not currently bound by the approach taken by competition authorities). There may also be benefits in more closely aligning the UK and European approaches. We therefore propose that BIS and the CMA look at ways to streamline the UK approach to penalties and, where appropriate, either align it more closely with the European approach, or more clearly set out the underlying reasons for differences.

Primacy of Competition Act powers

We note that the proposal to encourage the use of Competition Act powers is that concurrent regulators use them "wherever legally permissible and appropriate". This aligns with our primary objective to promote the interests of consumers by wherever appropriate by promoting effective competition or by other means. By way of example, under the Gas and Electricity Acts, we are precluded from making a licence enforcement order to secure compliance or imposing a penalty pursuant to a breach of a licence, if we are satisfied that the most appropriate way of proceeding is under the Competition Act.

This also fits well with the Principles of Economic Regulation because it retains our scope to determine what we consider to be 'appropriate', thereby avoiding unintended consequences and inefficiency. Any changes to the regime should not undermine this. We agree that sectoral regulators are best placed to make choices between different tools to remedy problems and to deploy their expertise in dealing with Competition Act cases in their sectors.

Mergers

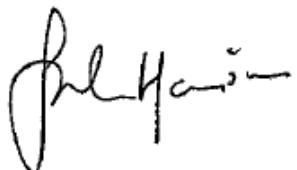
We would like to take this opportunity briefly to reiterate our view that controls similar to those in the water sector (along the lines of the Cave Review) should be put in place for monopoly regulated energy networks. Mergers of two monopolies or near monopolies are unlikely to result in concerns regarding lessening of competition and are therefore unlikely to be addressed by remedies. However, in such mergers, there can be a loss of comparator which affects a sectoral regulators assessment of network companies, for example in respect of efficiency or innovation. We have raised these issues with DECC for possible energy legislation.

Next steps

I am copying this response to Paul Griffiths and Duncan Lawson at BIS and to the other members of the Concurrency Working Party.

If you have any questions on this or wish to discuss, do get in touch. For points of detail, please contact Andy Burgess on 020 7901 7159 or Andy.Burgess@ofgem.gov.uk or Chris Dodds on 020 7901 0544 or Chris.Dodds@ofgem.gov.uk.

Yours sincerely

A handwritten signature in black ink, appearing to read "Sarah Harrison".

Sarah Harrison

Senior Partner, Sustainable Development

A competition regime for growth: a consultation on options for reform.**Response form**Name: **Chris Dodds, Senior Manager, Enforcement & Competition Policy**Organisation: **Ofgem**Address: **9 Millbank, London, SW1P 3GE**

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): Competition Authority and Sectoral Regulator

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 creation of a single Competition and Markets Authority (CMA). This is on the basis that a merged organisation will be able to pool resources in a more flexible way to manage peaks and troughs in a largely reactive CC workload and will foster a single approach to prioritisation of discretionary casework.

This will be especially important at a time of increasing resource constraints so that the UK continues to benefit from a world-class 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:

No 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:

As noted in our cover letter, we have available to us a range of powers, duties and functions to keep energy markets under review including some drawn from European law. Our daily work includes keeping energy markets under review and we have also conducted regular market studies under our full range of market monitoring roles. We have general statutory functions under section 47 of the Electricity Act 1989 (the Electricity Act) and section 34 of the Gas Act 1986 (the Gas Act) which we term our

„market monitoring functions’ and, in association with this, duties to provide information, advice and assistance to the Secretary of State. Under the Enterprise Act we must respond to super complaints and can examine whether there is a case for making a market investigation reference. The Third Energy Package gives us an express duty to keep under review matters such as the level and effectiveness of market opening and competition at wholesale and retail levels, and restrictive contractual practices, and powers to gather information in support of these duties. Under the Directives, our main monitoring duties are provided for under Article 41 of the 2009 Gas Directive and Article 37 of the 2009 Electricity Directive. The Directives are available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0094:0136:en:PDF>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0055:0093:EN:PDF>

We can use these powers, duties and functions effectively in combination. An example of this is our Retail Market Review. In this work, we relied on general market monitoring powers and have proposed some sectoral regulatory solutions which we think, subject to the response of the industry and in the current circumstances, are the best route to secure cooperation and a swift resolution for consumers in this instance. See below for more details.

We consider that the ability to make a market investigation reference is a powerful tool at our disposal in promoting energy consumers’ interests. We believe there are improvements which could be made to the MIR process which would make it a more effective option for us to deliver improved outcomes for consumers and reduce burdens on business, including the potential for more focussed MIRs in regulated sectors. We set out our views on these below.

Enabling in-depth second-tier market investigations by the CMA into practices that cut across markets

“Horizontal” market investigations would represent a significant change as the need for a specific MIR at present constrains the burdens and uncertainty for business to a particular market or markets, and recognises that particular market features may be problematic in one market and not so in another market.

Where markets are sufficiently similar, implementing remedies in one market may well impact on the others as a precedent without their actors having to go through the market review process. This could be positive from the perspective that it avoids repeated MIRs and would encourage faster transformation in related areas. On the other hand, a study on, say, payment methods, could impact on businesses who are not the key target of the study and who (alongside relevant consumer representative bodies) may not be aware of the need to engage with it.

We would need to be involved in any study that could affect energy markets, for example on switching behaviour so that it adds value to rather than duplicating or detracting from our work.

We encourage BIS to carefully weigh up whether the suggested gains in efficiency for the economy of the CMA of being able to conduct horizontal investigations could be outweighed by extra burdens on business. Such a power would need to be handled carefully.

Giving the CMA powers to report on public interest issues

BIS would need to balance this role with its proposal to ensure that the CMA's primary focus is on promoting competition. It could be helpful if, for example, Ministers want a more in-depth competition assessment of a given public policy proposal without the CMA having to exclude consideration of wider benefits.

We support this, on the basis that it does not stray into duplicating our role or work. We have a duty to provide information, advice and assistance to the Secretary of State for Energy and Climate Change arising from our general statutory functions under section 47 of the Electricity Act and section 34 of the Gas Act. Project Discovery (see below) is an example of our work pursuant to this and to our role of publishing any advice and information where we consider that doing so appear to be in the interests of customers (under section 48 of the Electricity Act and section 35 of the Gas Act).

Extending the super-complaint system to SME bodies

We support the extension of supercomplainant status to bodies representing small and medium sized enterprises because small companies are often in a similar position to domestic customers in having little influence over the behaviour of larger energy companies. We support this on the proviso that we have the power to address problems identified. As we note in our RMR work, we are considering whether there is a need to bolster our powers to protect SMEs. This could include enabling Ofgem to enforce the Business Protection from Misleading Marketing Regulations 2008.

Reducing timescales and strengthening information gathering powers

We support the proposals to shorten statutory timescales for phase 2 market investigations (from 24 to 18 months in most cases) and to introduce a new six month timescale for developing remedies.

We would also support the introduction of a statutory timescale, where it is appropriately combined with formal information gathering powers, for phase 1 market studies where an MIR is possible.

At present, we are only able to compel the production of information for the purposes of deciding whether to make the reference or to accept undertakings in lieu where Ofgem has already decided that it is able to make an MIR (i.e. there are reasonable grounds to suspect that there are features of a UK market which are preventing, restricting or distorting competition). It would be helpful to have these powers at an earlier stage, both from our perspective to speed up and improve the robustness of the first stage review, and from the companies' perspective to avoid the CMA feeling compelled to request the same information by formal means.

It will be important to ensure that any new statutory timescale is adequate to enable us to manage within existing resources and to carry out robust and effective first tier reviews. As noted in the cover letter to this response, the two-tier approach minimises burdens on business where issues are either not causing the scale of problems that it first appeared they were, or where they can be sensibly resolved in the first phase.

We will liaise with BIS as it draws up more detailed proposals.

Simplification of review of remedies process and updating remedial powers

We support the proposals here to streamline the process and update the powers.

Ofgem market reviews

It is important to recognise that an MIR is not the only measure of success for a phase 1 market review. Ofgem's market studies draw on a range of powers and duties and can lead to a range of outcomes. Our market review activities and market studies can ultimately lead to MIRs, intervention using sectoral enforcement or licence modification powers or to competition law investigations. In situations, similar to those in which ORR referred the ROSCOs market to the CC, where an issue had been considered before, voluntary remedies already put in place, and where the regulator had few powers to address further concerns raised, an MIR is likely to be an appropriate route. Alternatively, a study may find that a market has developed such that pro-active regulation is no longer required. Below we set out some examples of Ofgem market reviews.

We have recently published the findings of our Retail Market Review (RMR) investigation into the markets for electricity and gas for households and small businesses in Great Britain and consulted on our initial proposals. This work built on our 2008 Energy Supply Probe after which we introduced a number of consumer protection measures designed to give consumers the tools and confidence to make effective choices when switching.

Notwithstanding some positive developments in light of the 2008 Probe, we found that further action was needed to make energy retail markets in Great Britain work more effectively in the interests of consumers: a number of features in the market reduce the effectiveness of competition. Our RMR consultation proposals were designed to make it much easier for consumers to identify who is offering the cheapest tariff; make it easier for new suppliers to enter the market; enforce and strengthen Probe remedies in both the domestic and non-domestic market; and increase the transparency of company accounting practices. We will shortly be able to impose licence obligations, when the Third Energy Package is implemented. We are proposing this set of reforms with this in mind, as we feel that we will have improved tools to drive through reform.

We stated our preference for implementing reform wherever appropriate with the cooperation of the supply companies. This is because this route would be more efficient and economical, reducing the burden on business and delivering faster improvements for consumers. This approach tallies with the Focus principle within BIS' Principles of Economic Regulation which calls for regulators to choose the tools which best achieve the desired outcome.

However, we have not ruled out a MIR following the RMR. If, after we have reviewed the responses to our consultation and seen the reaction of the industry to our firm proposals, we consider that reforms do not have a realistic chance of addressing the concerns identified due to industry opposition or otherwise, we will consider an MIR.

Examples of our earlier market reviews include:

- *Project Discovery* (2009) – an investigation into whether or not future security of supply can be delivered by the existing market arrangements over the coming decade. This has informed the important Energy Market Reform work being carried out by DECC.

- *Liquidity in the GB wholesale energy markets (2009)* – this was an investigation into the level of liquidity in the GB wholesale energy markets outlining possible measures to improve GB electricity market liquidity. This has been developed on in our RMR work.
- *Energy retail supply probe (2008)* – here, Ofgem used formal powers under section 174 of the Enterprise Act 2002 for the purposes of deciding whether to make a market investigation reference. This was a major study into the markets in electricity and gas supply for households and small businesses, which used information obtained from general market monitoring exercises and the use of formal powers. Since the introduction of the Probe remedies, we identified (as part of our RMR work) that there have been some important improvements:
 - we have seen a substantial reduction in undue price discrimination, particularly in relation to prepayment, in-area electricity and off-gas-grid customers. This has delivered a significant benefit for vulnerable consumers.
 - there has been some improvement in the quality of information suppliers provide their customers; and
 - recent survey results show that just under half of energy consumers are aware they have received clearer information from their supplier.
- *Review of competition in gas and electricity connections (2007)* – We have kept connections markets under review and introduced various initiatives designed to improve competition in these areas.
- *Review of the Price Controls on Gas and Electricity Metering (2006)* – following this review, we decided to allow the price controls on electricity meter operation and the provision of new / replacement electricity meters to expire from 31 March 2007. We subsequently found that National Grid had infringed the Competition Act 1998 (Competition Act) in respect of its gas Metering Service Agreements.
- *Gas probe (final conclusions published in January 2006)* - This review was initially launched after a significant increase in wholesale gas prices. We identified concerns regarding the composition of gas supply in relation to interconnectors and North Sea beach deliveries and raised these with the European Commission. Partly in response to these concerns, the European Commission launched its Energy Sector Inquiry which led to regulatory reforms and a number of antitrust investigations. This review influenced the debate at EU level, helping to shape the current regulatory framework, in the interests of consumers.

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:

We consider that it would be helpful for merger authorities to be required to take into account the views of the sector regulators in their consideration of mergers in those sectors and potentially also when collating views on behalf of the UK to provide to the European Commission when considering a merger. At present views are provided and taken on board in an informal manner. This gives us a reasonable degree of input, and enables us to contribute our expertise and help develop remedies which often fall to us to monitor and enforce (such as licence conditions and commitments). However, it would be useful to recognise the importance of taking into account the views of concurrent competition authorities when considering, and potentially also when contributing to European assessments of, mergers in their industries.

A duty to consult and take account of the response of sector regulators in these circumstances would be helpful. This would help promote consistency of decision-making by ensuring that, so far as is practicable, decisions on mergers as well as on the Competition Act and market reviews are made with the full benefit of sector expertise.

Network Mergers

Further, as DECC is already aware, we do not think that the current regime for mergers between energy network companies is fit for purpose as it does not properly protect the interests of consumers. The substantive tests for mergers are competition based, but since the networks that Ofgem regulates do not compete with one another these tests could not be used to address issues arising from the merger of two network companies.

We think that the ability of Ofgem to regulate these networks effectively is a legitimate consideration and any impact from a merger that prejudices this ability should be taken into account by the merger authorities. Legislative change is required to enable the merger authorities to take this factor into account. A special merger regime in the water takes into account any prejudice to Ofwat's ability to undertake comparative regulation.

To remedy this gap in the merger regime Ofgem has expressed support for reforms (along the lines of those proposed by the Cave review which looked these issues from the water sector perspective). This, if put in place for monopoly regulated energy networks, would mean that the CC/CMA would, in the merger assessment process, consider whether a merger would prejudice Ofgem's ability to regulate

monopoly energy networks effectively. This regime would incorporate all the relevant considerations that affect the consumer interest and would allow for remedies such as separation or greater transparency.

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:

Strengthening the antitrust regime

We consider that Option 1 is the optimum approach. As noted in our cover letter, we believe that closer co-operation between concurrent competition authorities, including the CMA, and improvements to the tools will bring about the positive change that BIS is looking for. Our views on decision-making are set out below in the section on Concurrency.

We fully support the OFT's work to improve the investigative and decision-making process, including by means of introducing the sorts of project management disciplines into its Competition Act casework which Ofgem has found useful across its casework portfolio. Ofgem runs every investigation (including sector and consumer law investigations) as a project, with appropriate planning, risk assessment and management, and now conducts lessons learned exercises after each one to capture best practice and learning points to continually improve our approach.

More specifically, we also issue draft information requests where appropriate and place firm deadlines on production of information and documents. We are looking at how we can do more to facilitate compliance, for example by co-ordinating requests to a given company under antitrust action with other requests for information, through dialogue with companies and appropriate targeting of requests. We consider that the ability to impose civil financial sanctions for non-compliance with these requests would significantly strengthen incentives to comply, including the production of confidentiality representations. See below.

We have accepted binding commitments in one instance. We continue to be prepared to accept commitments in the right circumstances and consider them to be an important part of the regime. Commitments can be both effective and the best use of resources in the right circumstances.

We await the outcome of OFT's trial of procedural adjudicators with interest.

We are currently reviewing our enforcement guidelines. At present, we commit to either closing a case down, proceeding to a statement of objections or advising the parties when we will do either of these, within 9 months of opening an investigation. As part of our review, we will look at how best to encourage well-reasoned, substantiated complaints, timescales and liaison with complainants and companies under investigation. We are planning to consult on our proposed new guidelines by the end of 2011.

More generally, we believe there is scope for closer cooperation across competition authorities and sectoral regulators, both to benefit from shared learning and experience and to ensure, where possible, that companies are subject to consistent practice regardless of the investigative body. See below under Concurrency for more on our suggestions for improved cooperation, and regular reporting on that cooperation.

Additional changes to the antitrust powers

We support the proposal to extend enforcement powers to enable competition authorities to impose civil financial penalties for failures to comply with information requests, while retaining the ability to bring a criminal prosecution. This would significantly strengthen compliance incentives. We support moves to increase incentives on parties to promptly provide appropriately detailed confidentiality representations, as preparing documents for access to file disclosure can be particularly process intensive.

We agree that the introduction of statutory timescales for antitrust investigations is likely to be problematic. Competition Act cases vary considerably in complexity in terms of the issues and the parties involved, and any statutory timescale would be open to gaming by parties wishing to make it difficult for the NCA to opine efficiently and effectively within the timescales. Furthermore, the investigative stage is often short when compared to the potential time which could be spent on appeals which cannot, for reasons of ensuring justice, be constrained. We already have a nine month administrative timetable which incorporates appropriate flexibility. Other regulators and the OFT also operate in similar ways, using project management disciplines to keep timescales to a reasonable minimum while ensuring robust analysis and fair decision-making. Interim measures are available where serious harm is likely to accrue ahead of reaching a final decision.

Further ideas

As noted in our cover letter, we propose that BIS look at ways to ensure that all authorities and courts involved in deciding penalties for competition law infringements be bound by the same approach on arriving at an appropriate level of penalty, thereby improving consistency and predictability across the regime and removing incentives on parties to appeal the level of penalties to bodies who do not apply the same approach. The CMA may also wish to consider whether these rules can be aligned more closely with the EU guidelines currently in place and/or to set out more

on the reasons behind the differences.

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:

At present, only OFT has the power to bring criminal prosecutions against individuals for cartel behaviour. We consider, as outlined above, that it is important for us to be able to investigate anti-competitive behaviour under Chapter 1 and Article 101 of the Treaty on the Functioning of the European Union (TFEU). Where we consider that there may be a case for bringing a criminal prosecution, we would liaise closely with OFT, and in future the CMA, in order that it can bring the prosecution.

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:Strengthening concurrency

We strongly support the retention of concurrency for both antitrust and market reviews and support measures to improve upon the current arrangements, including formalising our role in advising on mergers relevant to our sector. We consider that this is the best means of delivering BIS' desired outcomes.

Our current competition law enforcement and decision making powers are a key tool at our disposal and also help us attract and retain competition expertise which benefits our wider regulatory role (enabling us to fulfil our duties to promote competition where appropriate and to make the right regulatory decisions). This wider role includes identifying areas where there is scope for greater contestability and promoting competition. One example of this is our current consultation on issues surrounding development of competition for part funded connections: see our current consultation on part-funded connections:

<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=298&refer=Networks/Connectns/CompinConn>.

As we note in our cover letter, we have used our competition law enforcement powers successfully in the past and they remain a valuable tool in influencing behaviour. Since 2000, we have found one major infringement and accepted binding commitments. In five cases we have published a finding of either no grounds for further action or a non-infringement and in one instance closed the case to pursue alternative means: by pressing for the ability to introduce a market power licence condition where existing competition law was unlikely to address the harm identified.

Concurrency not only aids us in influencing the behaviour of companies through enforcement action, having these powers also helps us to attract and retain competition expertise which benefits our wider business (enabling us to fulfil our duties to promote competition and to make the right regulatory decisions). As noted above, this includes our work to seek, where appropriate, to introduce more competition where markets are not yet fully contestable. Furthermore, we do not face the same difficulties as other Member States in dealing with the relationship between regulatory bodies with increased powers under the third energy package and separate competition authorities.

We welcome plans for a “network” of competition experts and greater cooperation and joint working more generally with the CMA and other concurrent regulators, alongside retention of Ofgem’s decision-making powers. Sharing best practice and expertise amongst the concurrency working party (CWP) takes place in a multi-lateral way: OFT has greater knowledge of, for example, cartel cases, and regulators have considerable experience of abuse of dominance cases. We consider that the CWP provides a foundation for closer working.

Examples of closer cooperation could include:

- more structured bilateral discussions with the CMA regarding the strength of a given Competition Act case or potential case at various stages, including prior to seeking concurrency; and
- where appropriate actively seeking peer review of economic or legal analysis by CWP colleagues;

- developing an ECN-style extranet for UK competition authorities which would facilitate the secure notification of cases and information sharing between CWP members (where legally permissible). This could help further support consistency across the UK system;
 - promoting transparency through more structured reporting on the operation of concurrency;
 - more flexibility around the secondment of staff between CWP members: staff with specialist competition expertise currently move from time to time between all CWP members in range of ways:
 - on a very short-term secondment basis, for example, to assist with site visits to gather evidence;
 - on secondments to cover maternity leave and vacancies; and
 - on a permanent basis.
- Making this sharing of resources easier still, while retaining appropriate safeguards, would be helpful. One use of this could be to help manage peak workloads if one authority has an unusually high antitrust (or market review) caseload;
- a “competition network” of competition specialists:
 - a network of peers across UK competition authorities to foster discussion, support through testing ideas and promote appropriate consistency through dialogue (supplementing rather than duplicating existing fora for economists and lawyers);
 - more routinely opening up continuing professional development (CPD) training provided within a given organisation to the “competition network” of staff within CWP members. This operates successfully at present on an informal basis, for example, on lectures given by Professor Richard Whish on legal developments. This supports CPD, fosters debate and strengthens the network; and/or
 - disseminating best practice: we all benefit from learning from each other, including in respect of procedural matters, for example we found the procedures sub-group of the CWP a helpful forum. This group met regularly for a year and reported back to the CWP on all key aspects of process and procedures for running and deciding on antitrust investigations. We could consider this and other means of effectively sharing learning across the UK NCAs.

Primacy of competition

We would like to reiterate our commitment to, and competence at, using our antitrust (and market review) powers wherever appropriate. This is demonstrated by our having imposed the most significant penalty for abuse of dominance in the UK to date, which was supported on the substance by the CAT and by the Court of Appeal. We also have in some instances chosen to use competition law rather than pursue sectoral enforcement action.

Any duty to consider the application of Competition Act powers ahead of sectoral powers must retain flexibility. We need to retain our ability to choose the right tool for the job, to avoid unintended consequences and inefficiency (and to be compatible with BIS’ Principles of Economic Regulation). As noted in our cover letter, we are already precluded from making an enforcement order to compel licence compliance or imposing a penalty for breach of a licence where we are satisfied that the most appropriate way of proceeding is under the Competition Act. We have some reservations about the Broadcasting Act model obligations affecting Ofcom. These may in fact make the process of opening investigations more unwieldy.

Illustrative examples of the sorts of situation where an absolute obligation could cause difficulties include:

- investment in a network by a natural monopoly provider: a ready made price control regime is a better tool for addressing potential underinvestment than relying on competition law ex-post once problems have already arisen; and
- gas storage: the essential facilities doctrine of EU competition law does not provide sufficient protection to address harm in some areas of gas storage markets. The Third Energy Package is moving to introduce regulatory powers to address this.

We do not find comparisons between the number of cases reported by the UK and other member states to the European Commission via the European Competition Network extranet particularly useful. This is for two reasons. Firstly, within utility and other regulated sectors, there are different levels of market maturity in different member states, as sectors have been liberalised at different times and to different extents. The industries and regulatory systems are quite different – with in some cases more of a focus on market power rather than dominance, making meaningful comparisons of the quantum of antitrust cases difficult. Secondly, only cases with a European dimension are notified to the ECN, meaning that UK cases without an impact on trade between member states are not included in these figures. Given, amongst other things, the closer integration of Schengen states, this may well mean that more of the cases brought by NCAs within other member states have such an effect on trade. We note that the OFT's Competition Act public register includes 26 items for the period 1 May 2004 to 28 February 2011. Table 5.1 in the consultation document does not include all of these – only those 12 decisions which were reported to the European Commission. In this respect, Table 5.1 under represents the enforcement activity taking place during that period.

Antitrust decision-making:

We support Option 1, retaining the status quo with enhanced engagement with the CMA and other concurrent regulators and procedural improvements to ensure that cases are processed as efficiently as possible. We see no need for a change to the appeals process. However, we believe that streamlining the UK approach to penalties (and potentially to more closely align it with the EU approach) may reduce the current propensity for parties to appeal seeking to exploit possible differences in approach. This option preserves our ability to take decisions where we are best placed to achieve positive outcomes for the GB energy sector.

We disagree with the apparent assertion that taking away decision-making powers from concurrent competition authorities would lead to it being more straightforward to make a case. This is not the logical end-result. Indeed, it would likely lead to a loss of internal competition expertise and thus have the opposite effect. We currently have a strong team of competition experts within Ofgem who are available to lead and advise on investigations and also provide wider support and training across the organisation. If we were to lose the power to take Competition Act decisions, it is not clear that we would have the same ability to attract high-calibre specialist staff necessary to enable investigations and provide broader input to our general regulatory work.

There is, of course, no question of unfairness in the current system, where the NCA takes a decision and that decision is subject to appeal on the merits to the CAT.

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:

Regulatory appeals

A range of references can be made to the CC on Ofgem's regulatory decisions. As we note in the cover letter to this response, we consider that it is vital that whichever body fulfils that reference/appeal jurisdictions of the CC in future, must continue to look at these matters through the same lens as Ofgem.

A principal duty to promote competition would not necessarily be incompatible with price control references, but could be too narrow for full consideration of reference (or in future appeals) on licence modifications (for example, on changes relating to the publication of information in consumers' interests or protection of vulnerable customers). This could lead to Ofgem being unable to fulfil its statutory role, and could be in contravention of requirements and to the third energy package for Ofgem to be able to make binding decisions.

This means that the remit and constitution of the panel of the appellate body will need to be specifically defined for the purpose of considering references (and in future appeals) of Ofgem's regulatory decisions.

Turning to the question of whether the CMA should take on these CC roles, we consider that this is dependent on whether or not the CMA adopts an appropriate governance structure. The part of the CMA deciding on references/appeals would need to be clearly separate from the first tier part of the CMA with which regulators are expected to have closer co-operation and discussions.

Regulatory frameworks

We agree that it would be very helpful to evolve away from unnecessary differences in the systems which apply to the sectors which Ofgem and other concurrent regulators oversee. Convergence, where appropriate, will help to promote consistency for regulated industries and better facilitate sharing of best practice between regulators. There are, no doubt areas, in which differences in the underlying sectoral legislation which arose in part due to having been privatised at different times during the past three decades. We are working with other regulators to identify and propose for removal such areas of unnecessary difference. A couple of examples of these have been identified in this consultation paper and we fully support their removal.

We do need, however, to be aware of the need to avoid creating consistency for the

sake of it, at the expense of appropriately tailoring the regime to the needs of the different sectors. As BIS notes in its summary of responses to the Principles of Economic Regulation consultation, industry stakeholders have said that it is important to preserve the ability of regulators to take different decisions, where doing so is appropriate to the specific circumstances of the industries which they regulate. This is important to bear in mind, given the differing stages reached in the development of contestable and competitive markets.

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:

CMA duty to prioritise strategically important markets for review

We support the intention of this proposal: to ensure the CMA carries out the work with the most impact and that markets subject to some form of regulation are not excluded, most industries are subject to some form of regulation, for example under the Health and Safety at Work etc Act, and this should not exclude them from CMA attention.

We consider that the particular circumstances of industries subject to economic regulation, and the role that the independent sector regulators play, should be taken account of in the reshaped competition landscape. We suggest that the regime be adapted to reflect the ability of regulators to address problems using their existing range of tools which are different from those available to the OFT. We consider that an MIR should be used as a means of accessing remedies beyond the scope of sector regulators, notably structural remedies. In this context, the proposal will need to be tailored such that it does not introduce higher risks for business and unnecessary duplication of regulatory functions.

We fully recognise the benefits of CMA involvement in certain circumstances but consider that sector regulators are best placed to judge when this should be (recognising there may be greater scope for consultation with the CMA in this regard). Regulatory stability and accountability are important, as recognised in your Principles for Economic Regulation. We are concerned that the current proposals bring the risk of duplicative reviews, which could be perceived as increasing regulatory risk. Any unnecessary moves which would lead to an increased cost of capital should be avoided at a time when the UK energy industry is seeking to attract

£200bn of investment.

It is also essential to ensure that any enhanced role for the CMA in this area does not encroach on statutory safeguards protecting the independence of economic regulators including, as regards Ofgem, our powers, duties and functions under the Third Energy Package as designated independent national regulatory authority. (Notably Arts 39-44 of Directive 2009/73/EC (gas) and Arts 35-40 of Directive 2009/72/EC (electricity) - relevant aspects of which are being transposed into primary legislation.)

As noted in our cover letter, we are keen to engage with the CC, and in future the CMA, regarding structural market features and the optimum means of addressing any problems inhibiting effective market functioning. We would suggest that we do this by means of more dialogue with the CMA about our thinking, and to take advantage of its thinking. This could link with an expanded range of MIR options. For example, there might be a situation where, following such dialogue, the regulator makes a narrow reference on a specific market feature. This would preserve our independence and ability to choose the right tool for the job (as required under the Principles of Economic Regulation and EU law).

General points

We fully support BIS' commitment to preserving the independence and accountability of the current competition framework.

Other than as noted above regarding regulatory references/appeals, we have no preference as to whether the CMA has a principal focus on promoting competition.

10. Decision making

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

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

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

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

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

Comments:

See above for our views on separation of second tier from first and the need for regulatory experience if they are to make decisions on references/appeals regarding regulatory decisions.

We are not sure about the practicality of any proposal to increase the uniformity of the tools so as to align the decision-making process. Organisations typically employ a variety of decision-making procedures for a range of different purposes.

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?*

Comments:

In principle, Ofgem may support the ability of a competition authority to be able to recover the costs of an investigation from a party found to have been infringing competition law. Our final view is dependent on seeing more detailed proposals.

It would appear that the potential for an undertaking to be liable for the costs of an investigation would increase the deterrent effect of competition law. Competition authorities would need to be mindful of keeping tight control on costs. A reasonableness test would therefore seem appropriate. As BIS notes, this would need to be introduced in such a way as to avoid creating confirmation bias within investigating authorities. This risk can, we believe, be managed by continuing to ensure that the decision on whether or not to find infringement is not made by the

investigating officers.

We could administer the recovery of costs from infringing parties in a similar way to our approach to recovering costs from the losing party in a CC reference regarding one of Ofgem's regulatory decisions. It would also, in a similar way, enables the costs to be appropriately borne by the company at fault, as opposed to being shared out across energy customers (by means of a pass through by energy companies of the licence fees they pay to us).

The recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments would still be appropriate: the investigating authority would be able to apply discount factors to the recovery of costs in a similar way to the application of discounts the appropriate level of a penalty. For example, an undertaking which had been granted leniency from a penalty may well be granted leniency from costs, in order that the incentive to come forward with evidence is not diminished.

We would need to see more detailed proposals in this area. In any event, we consider that this should be an ability to recover costs rather than an obligation to do so.

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?*

Comments:

Yes, we agree that this appears the most sensible route.

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?*

Comments:

The appropriate application costs arising from an appeal should remain a matter for the CAT. However, we agree that thought needs to be given to appropriate means of ensuring that advantages in terms of deterrence and reducing the cost to the public purse of administering the regime are not outweighed by the downsides of having more potential bases for appeals, and potentially more incentive to appeal.

We support the general principle that where appropriate, a party should only be awarded costs in a way which reflects the degree to which the appeal was

successful.

With regard to the latter point, on there being a potential reduction in liability for costs where the substance of a finding is not appealed, it appears to us that the breadth of the appeal would be a determining factor in the scale of the costs accrued at the appeal level, such that it may not be necessary to apply a further „discount” from the level of costs recovered.

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?*

Comments:

We consider that if the amount for cost recovery were to be included within an overall penalty amount, it would need to be clearly differentiable. This could be achieved through a clear calculation – a particular step in the process – dedicated to cost recovery. However, there is a risk that incorporating this within the penalty itself could lead to more challenges of the penalty in association with any challenges to the level of costs. We therefore consider that it would be „cleaner” to separate out the cost recovery from the penalty. That way if a company wishes to challenge the cost aspects, it would not be automatically challenging the level of penalty as well.

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.*

Comments:

Yes, this seems sensible.

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:

This would seem to run contrary to the general principle of promoting justice and contrary to the general rule that costs are not recovered in tribunal cases. It is not clear why justice under competition law should be treated differently than justice under any other law. The ability of the CAT to set aside costs for a small business helps to ensure access to justice, however, it does not appear that this would apply to competition authorities and it would not often apply to companies involved in an abuse of dominance case.

This proposal is likely to be successful in changing the balance of incentives for less clear cut cases, thereby reducing the number of appeals in those circumstances. This will hold true for competition authorities as well as undertakings. Regulators would need to be able to pass on these extra costs to licence fee payers and other funders, including the taxpayer, if we are to continue to be able to fulfil our duties and functions. This would weigh in the consideration of competition authorities of whether to pursue cases which would set new precedent in competition law. It could run contrary to achieving BIS' objective of increasing the throughput of cases and broadening the law.

The converse may be true of the CAT, in that it may be incentivised to take on more appeals than would otherwise be the case if it continued to be funded by the taxpayer. Experience of regulators has shown that a „cost plus’ approach to delivering services or contracts reduces incentives to cut costs. If the CAT were able to pass on all of its costs to the parties, it may reduce the incentive to drive up efficiency. The CAT may wish to introduce a cost-reduction policy, similar to that of Ofgem, if this proposal were to be implemented, so as to preserve current incentives.

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:

Ofgem would find it useful to have concurrent powers with OFT in this area, given the international nature of energy markets, to enable Ofgem to collect information for, and share it directly with overseas energy regulators and competition authorities on energy matters.

At present, Ofgem is only party to the ECN for the purposes of pursuing actions under Article 101 and 102. (Article 12 of the Modernisation Regulation deals with information exchange for such purposes.) We find this information exchange works fairly well. However, Ofgem is not designated as a National Competition Authority for the purposes of Article 22 of the Modernisation Regulation (e.g. information gathering on behalf of the European Commission or other European NCAs).

We have no formal role in merger assessments and are therefore not party to the ECMR disclosure gateways unless a merger authority is seeking our views for the furtherance of its functions. It is possible, therefore, that we would miss out on opportunities to share relevant information with national competition authorities or regulatory authorities in other member states.

There has been at least one instance where Ofgem was not able to assist a European national competition authority directly. The Belgian NCA was conducting an investigation into wholesale market power and asked for our assistance in obtaining information from British companies. As it stood, we provided advice to the Belgian NCA, who then asked OFT for assistance. This does not appear to be the most efficient approach. In principle we should be able to assist with this kind of request, and to benefit from such assistance, however we were not able to do so under Article 22 of the modernisation regulation. We consider that this could helpfully be changed to encourage cross-border cooperation.

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:

In relation to overall costs of a prosecutorial system, it is possible that this would be more costly if it increased the propensity of both sides for using external legal representation. Taken together with the proposals for the CAT to be able to recover its administrative costs over and above awarding costs between the parties, and the proposal for regulators to be able to recover their investigative costs where an infringement is found, this could drive up the incentive to use external representation further as the stakes are potentially higher.

We have noted above in response to particular proposals where we consider there are risks of unintended consequences.

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

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A Competition Regime for Growth: a consultation on options for reform

The OFT's response to the Government's
consultation

June 2011

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1 EXECUTIVE SUMMARY

- 1.1 As the UK's competition and consumer authority, the Office of Fair Trading (OFT) welcomes the opportunity to respond to the Government's consultation on reform of the UK competition regime.
- 1.2 As the consultation document acknowledges, an effective competition and consumer regime fulfils an essential function in the economy. This is especially so in the present economic climate: in the aftermath of financial crisis, at a time of modest economic growth and pressure on public budgets, well-functioning markets are more crucial than ever. As well as serving the interests of consumers, the promotion of competitive and efficient markets drives productivity, innovation, and economic growth.
- 1.3 Targeted, appropriate reforms to the competition and consumer regime, therefore, have the potential to deliver significant benefits to consumers and to economic growth.

Creating a single Competition and Markets Authority

- 1.4 The OFT has long supported the merger of the OFT and Competition Commission (CC) and the creation of a single authority with responsibility for the implementation of competition and consumer policy. The OFT agrees with the Government that the creation of a single Competition and Markets Authority (CMA) could lead to enhanced consumer welfare and greater productivity growth in the UK economy, by providing for the more efficient and effective use of resources and for a more powerful single advocate of the benefits of effective competition.
- 1.5 While the OFT has worked with the CC to make the existing regime as efficient and effective as possible and the two bodies have had notable successes, a merger can bring specific benefits, including:
 - greater consistency and predictability for business, as a result of having the relevant decision-making and policy development within a single organisation, and thereby can improve the environment for investment and innovation and encourage economic growth

- more efficient use of resources, both in terms of balancing peaks and troughs in resource needs relating to different instruments and in terms of more efficient, targeted use of sectoral and/or specialist staff expertise
 - potential streamlining of the processes involved in, and greater clarity around the jurisdictional boundaries between, first and second phases of market investigation references and merger analysis
- 1.6 In order to realise fully the benefits of the creation of a CMA, and to maximise the contribution of the regime to economic growth, the CMA should have a primary focus on making markets work well for consumers and for the economy, and must retain the requisite full range of competition and consumer legislative tools.
- 1.7 In particular, to use its resources in the most effective, proportionate and dynamic way, the CMA must be able to consider and respond to the full range of issues that can stifle competition and innovation, from agreements or conduct which restrict competition between suppliers to practices that impede consumers' ability to exercise choice and stimulate competition. This holistic market analysis enables a virtuous circle of competition and consumer policy, where the two approaches complement each other: consumer policy ensuring that competition results in the right kind of innovation, aimed at addressing consumer demand and improving processes rather than obfuscating consumers, competition policy guarding against over-zealous enforcement of consumer protection legislation, which would be to the detriment of business and economic growth.
- 1.8 This interaction between competition and consumer policy has long been reflected in the OFT's mission statement and across its portfolio of work. It is reflected in how we prioritise our work around impact on consumer welfare and the economy; in our research on everything from productivity to deterrence; in the effects-based approach that we have more recently developed in consumer policy, in bringing together the implementation of consumer and competition policy, and in our focus on measuring market outcomes and evaluation of our impact.

1.9 Indeed, this interaction has been a key success of the regime, and it is notable that many of both the OFT's and the CC's major interventions in recent years have involved consumer policy measures to achieve improvements in wider market and competition issues. In the market for payment protection insurance, for example, a complaint from consumer bodies led to a finding of a lack of competition in the market, which was followed by a package of remedies to open up the market and expose it to consumer choice. Similarly, in the UK banking sector, initiatives to increase the transparency of costs of personal current accounts and improve the process for switching account providers were implemented to enable consumers to put additional pressure on banks to compete and offer better value services.

Building on the strengths of the current regime

1.10 The Government recognises that the current UK regime is regarded internationally as being among the best in the world.¹ However, the Government considers that the performance of the regime can be enhanced further, and has set our a series of possible reforms to achieve the following objectives:²

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

1.11 Given the standing of the regime, the OFT believes that targeted, appropriate reform should build on the existing experience and strengths of the OFT and CC.

¹ See paragraph 1.4 of the consultation document. See Rating Enforcement 2010 (Global Competition Review, June 2010) and KPMG's Peer Review of Competition Policy (2007).

² See paragraph 1.8 of the consultation document.

- 1.12 Whilst the OFT considers that the merger of the OFT and CC may be a logical evolution of the regime which can deliver high impact, quantifiable benefits, we are cautious about some of the more radical proposals being considered by the Government. These proposals would give rise to significant uncertainty and risks and would be likely to require time to bed in, thus potentially jeopardising the ability of the regime to deliver the impact on economic growth that the Government is seeking. Such risks are, in the OFT's view, most apparent in relation to some of the proposed reforms to the antitrust enforcement regime.
- 1.13 We strongly agree therefore with the Government that, in determining which of its proposed reforms should be adopted, the appropriate standard should be whether change will deliver benefits to competition, consumers and the economy, and can be implemented as soon as possible and without significant uncertainty and risks to the momentum and effectiveness of the regime.³
- 1.14 Further, the OFT is mindful that the most successful competition agencies tend to evolve through a series of incremental refinements based on experiences and lessons learned.⁴ By providing the CMA with the overall governance model envisaged by the Government, and by ensuring that processes are not rigidly prescribed in legislation, the OFT considers that the CMA will be well placed to evolve over time, as needed, in order to continue to deliver the Government's vision by using competition and consumer powers and processes in the most flexible and dynamic way possible.

³ See page 8 of the consultation document.

⁴ See William E Kovacic, *How does your competition agency measure up?* (European Competition Journal, April 2011): 'The creation of a competition agency that 'works' by delivering good policy results for consumers typically occurs through a series of incremental improvements over time. An agency tests different approaches, evaluates consequences, and makes refinements.'

The OFT's response to key proposals

The markets regime

- 1.15 The Government suggests that, based on the number of references that have been made to the CC for second phase investigations, 'the markets regime may be being under-utilised'. A number of the Government's proposals for the regime – such as enabling second phase investigations into practices across markets, enabling the CMA to consider public interest issues in its investigations and granting super-complaint powers to bodies representing SMEs – are presented as possible ways of addressing this potential concern.
- 1.16 The OFT considers that the balance between first phase market studies and second phase market investigations has been proportionate and appropriate, and reflects the OFT's focus on market outcomes, rather than outputs. In the context of the OFT's ongoing drive to improve the efficiency of all our interventions, it is evident that second phase market investigations require not only a longer period of investigation than market studies but also, in practice, a significant period of time for the implementation of remedies through secondary legislation. The OFT recognises that the remedial powers available, following second phase market investigations, have an important role to play in those cases where remedies cannot be implemented either on a voluntary basis by business or through recommendations to Government. In many cases, however, market studies can achieve a beneficial high impact outcome far more quickly, and with less risk of harmful chilling of legitimate business activity.
- 1.17 The OFT welcomes the restatement in the consultation document of the principle that the competition regime should operate independently from Government. It is vital, therefore, that any objective or duty on the CMA to keep economically important markets under review should not extend to allowing the Government to specify such markets, or otherwise to determine directly the enforcement and/or policy priorities of the CMA.

The mergers regime

- 1.18 The Government regards the merger control system as one of the key strengths of the wider UK competition and consumer regime, but considers that there is scope for further potential refinements by addressing the disadvantages of the current voluntary notification regime.
- 1.19 The UK merger control system is held in high regard both nationally and internationally.⁵ Since its introduction in 2003, the existing UK merger control system has been made more efficient through the adoption of several innovative mechanisms, such as first phase remedies (undertakings in lieu of reference) and the proactive form of merger intelligence developed by the OFT which ensures that potentially anti-competitive mergers are scrutinised. The net result is a system that balances the ability to resolve and deter anti-competitive transactions that do most harm to competition, with a system that imposes a limited burden on business and provides the certainty that enables business to invest and innovate with confidence. The CC has also sought to finesse the functioning of the merger control system, for example, by having shorter and more targeted second phase reviews in appropriate cases.
- 1.20 Given that the current regime works well, the OFT considers that incremental changes targeted at enhancing the CMA's ability to call in and remedy potentially anti-competitive mergers would be the most effective and efficient of the options presented in this consultation document. In this regard, the OFT therefore supports some of the measures proposed by the Government to address concerns about business integration in respect of problematic completed mergers. However, the OFT is concerned that a move away from the current voluntary notification system inevitably involves risks and uncertainties, and has the potential to increase the chilling effect on business, whose absence is the hallmark of the voluntary regime.

⁵ See paragraph 4.1 of the consultation document. See Rating Enforcement 2010 (Global Competition Review, June 2010)

The antitrust regime

- 1.21 Like all new legislative frameworks, the OFT acknowledges that the Competition Act 1998 (CA98) regime took several years to bed down but considers that it is now delivering successfully for the economy. Given the time and costs invested in making the antitrust enforcement regime work well, any changes to this regime should build on this learning.⁶ The most recent phase of antitrust enforcement by the OFT has been characterised by a focus on improvements in speed, delivery and transparency. This phase has delivered, with new research demonstrating the success of a high impact approach rather than case numbers alone, with a doubling in the number of businesses saying they know a lot or fair amount about competition law since 2006. Further, case numbers are now rising again, investigations are proceeding more swiftly, and the number of decisions will increase in turn.
- 1.22 The OFT is not convinced, therefore, that any case has been made for fundamental reform of the investigation of CA98 cases. In particular, the OFT considers that the option of moving to an internal tribunal model or a prosecutorial model for antitrust enforcement would be a radical change that would require further time to bed in, and would give rise to considerable uncertainty for business, significant transition costs and undue risks to the momentum and effectiveness of the regime. Further, the perceived improvements and benefits of these options, as proposed in the consultation document, in terms of delivering CA98 cases more quickly would more likely than not prove illusory.
- 1.23 The OFT recognises that any CMA must strive for such ongoing improvement in the handling of CA98 cases, but considers that this can be addressed within the current system as part of a process of continued evolution and refinement of the regime. The OFT therefore supports the option of retaining the current system for CA98 enforcement.

⁶ See John Fingleton's speech at Cleary Gottlieb Steen and Hamilton LLP's 40th anniversary event, 11 May 2011: www.oft.gov.uk/news-and-updates/speeches/2011/1011

Governance and decision-making

- 1.24 The Government intends that the governance arrangements of the CMA should deliver durable independence for the authority, both in substantive decision-making and resource allocation.
- 1.25 The OFT agrees that the governance structure put in place will be fundamental to the CMA's ability to ensure that the UK retains a world class competition regime. In this context, the OFT supports the Government's intention to adopt a Board/Executive governance structure, which is widely used in the UK public sector and whose benefits are well recognised – most notably in terms of the strategic and practical insights and challenge that can be provided by non-executive directors, with skills and experience from a variety of backgrounds.
- 1.26 The effectiveness of this structure will however depend on which of, and to what extent, the CMA's processes are prescribed in legislation and, crucially, the flexibility that its Board retains in appointing decision-makers and determining the appropriate decision-making processes. The Board must be fully accountable for the CMA's performance, including the decisions that it takes. It is also desirable that the system has the flexibility to adapt and change over time in the light of ongoing evaluation of different approaches adopted and of the consequences of its interventions, Court decisions and the development of best practice internationally. Building such flexibility into the CMA's governance structure will of course require suitable safeguards. In this context, the OFT considers that the following two are essential:
 - first, the CMA should be required by statute to regulate its own procedures, and do so transparently involving public consultation
 - second, the CMA should be required to put in place some form of two-stage process for mergers and market investigation references (MIR)

Conclusion

- 1.27 The OFT welcomes this opportunity to look to the future, and to the next steps required to support the Government in delivering its vision for

an enhanced competition and consumer regime which will continue to be among the best internationally. The OFT believes that this vision can be implemented by building on the existing experience and strengths of the OFT and CC. Such incremental improvements can be implemented swiftly and without significant uncertainty for business or undue risks, whilst still enhancing the momentum and effectiveness of the regime.

2 A STRONGER MARKETS REGIME

The OFT:

- believes that, to ensure that the markets regime is as effective as possible in contributing to consumer welfare and economic growth, the CMA must retain the consumer enforcement tools and expertise that are relevant to a number of market reviews
- supports the proposal to enable Phase 2 investigations of practices across markets, while anticipating that the use of such a power may be infrequent
- has concerns about the proposal that the CMA should be enabled to provide independent reports to Government on public interest issues alongside competition issues, which in its view requires further cost/benefit analysis
- does not support the proposal of extending super-complaint-type powers to SME representative bodies
- believes that statutory timescales for Phase 1 market studies would be feasible, but suggests that further analysis should be conducted as to the costs and benefits of a 'one-size-fits-all' timescale
- believes that information-gathering powers would be required for Phase 1 market studies if statutory timescales were introduced
- supports the introduction of statutory timescales for the implementation of remedies following Phase 2 market investigations
- acknowledges the need to adopt a statutory definition of 'market study' which is broad, if statutory timescales and information-gathering powers are adopted, but does not believe that a statutory threshold for the initiation of a market study is necessary or advisable
- does not believe that any new measures are required relating to the interaction between market investigation references and antitrust enforcement

- supports the proposed measures to enhance the CC's remedy-making powers, and to improve the process for reviewing remedies
- agrees with the proposal to clarify the powers of the CMA following remittals of market and merger decisions
- believes that the duty to consult on decisions not to make an MIR should be limited to those cases where the decision is taken after the launch of a market study or equivalent case.

Overview

- 2.1 The OFT welcomes the recognition by the Government that the markets regime is one of the key strengths of the UK competition regime. On the creation of a single CMA, the role of market studies and market investigations should continue to be to contribute to the wider aim of making markets work well for consumers, while promoting growth and productivity in the economy.
- 2.2 This will best be achieved by retaining the CMA's ability to address market problems which arise from consumer behaviour and the role of government in markets, as well as from business conduct, and which are not confined only to those arising from an adverse effect on competition. The markets regime should enable the CMA to take a holistic view, using competition and consumer expertise and powers to address both supply and demand side issues effectively and proportionately.
- 2.3 Any reforms to the markets regime which may follow the creation of a single CMA must focus on achieving optimal outcomes, and not just on throughput of more cases, and specifically of more Phase 2 cases in the form of MIRs. In this context, the suggestion in the final bullet of paragraph 3.5 of the consultation document that 'the markets regime may be being underutilised' appears to be based only on the number of MIRs. This conclusion perhaps does not sufficiently reflect the substantial number (listed in Table 5 of Appendix 2 of the consultation document) of market studies conducted by the OFT which have not led

to an MIR, but have resulted in a wide range of positive outcomes without recourse to formal remedy-making powers.⁷

- 2.4 The substantial additional cost of a Phase 2 investigation, and the years which can be taken between the initial identification of concern and remedies coming into effect, compare unfavourably to the low cost and more rapid impact of market studies which do not proceed to a market investigation.
- 2.5 While the CC's powers of remedy following market investigations can secure outcomes (such as divestment) which are not available to the OFT, they are not replicated in the vast majority of other European or the US competition regimes, and there may be limited occasions on which they may need to be employed. Evaluation evidence as to the effectiveness of remedies imposed by the CC is also limited.
- 2.6 The OFT believes that the current balance across its portfolio between (Phase 1) market studies and (Phase 2) market investigations by the CC is proportionate and that the use of the MIR tool should be limited to those cases where it is essential to address a market problem. MIRs as currently constituted carry a high risk of chilling competition. Businesses can be investigated, over considerable time and at substantial cost, even when they have complied fully with the relevant competition and consumer law. At the end of those investigations, the bespoke and specific nature of the findings means that MIRs result in specific regulation (structural remedies aside), different for each market that require monitoring and adjustment. This may prove to be less efficient than the use of the general prohibitions contained in CA98 or in consumer law. The specific nature of the findings in turn means that MIR decisions have a very limited deterrent effect in other markets.

⁷ Other than an MIR to the CC, market studies by the OFT may lead to such outcomes as action by the OFT directed at consumers (10 studies), recommendations to business (15), recommendations to government (15), and enforcement action by the OFT under competition or consumer legislation (2).

- 2.7 The OFT nevertheless agrees that a two-phase markets regime should be retained on the creation of a single CMA, and that the opportunity should be taken to improve some aspects of the regime's operation. The OFT's comments on the specific proposals in the consultation document follow.

Views on specific proposals in the consultation

Enabling investigations into practices across markets

- 2.8 The OFT recognises the objectives underlying this proposal, and agrees that there may be occasions when a Phase 2 investigation of practices across markets may be appropriate. It therefore supports the proposal, while anticipating that the use of such a power may be infrequent. A number of OFT market studies (such as *Consumer Contracts*, *Online Targeting of Prices*, *Internet Shopping*, and *Doorstep Selling*⁸) have examined practices across markets, indicating that a Phase 2 investigation, with its associated additional costs to the CMA and to business, and the use of formal powers of remedy, may not be necessary in order to achieve high impact, positive outcomes.

Enabling the CMA to provide independent reports to Government

- 2.9 The OFT supports the principle that the CMA should have a role in contributing to debate on issues of broad public interest. The OFT currently does this through its market studies and competition and consumer advocacy work.
- 2.10 The OFT nevertheless has concerns about the proposal that the CMA should be able to provide independent reports to Government on public interest issues alongside competition issues. These concerns are based on three grounds, which are to some extent inter-related:

⁸ For details of these and other OFT market studies see www.oft.gov.uk/OFTwork/markets-work/

- requiring the CMA to consider broader public interest issues would risk detracting from the focus which the authority ought to have on competition and consumer welfare
- it would be likely to require knowledge and expertise which was not always available to the CMA, or available only at significant cost
- it would give a role to the CMA, in weighing competition considerations against other public interest issues, which is arguably a political judgment.

- 2.11 The consultation document cites as a key benefit of this proposal that it would negate the need to create ad hoc independent inquiry bodies such as the Independent Commission on Banking. The creation of such bodies to conduct investigations into issues including competition, of a kind which the CMA might be considered competent to take on, seems likely to be infrequent, such that the proportionality of the proposed measure, taking into account also its potential disadvantages as set out above, is open to question. In terms of achieving the objectives set out in the consultation document, it is also possible that the CMA might be perceived as being less independent and objective than an ad hoc body, or likely (because of its core role) to give greater weight to competition than to other considerations.
- 2.12 While it is the case that external expertise could be co-opted by the CMA where necessary, such investigations would be likely to be resource intensive for potentially quite long periods, and divert both financial and human resources away from the core work of the CMA. In the OFT's view, therefore, further consideration needs to be given to establish that the benefits of this proposal would outweigh its disadvantages and costs.

Extending the super-complaint system to SME bodies

- 2.13 The CMA should, as now, access a wide range of sources for pipeline proposals regarding markets to examine, including complaints from individual businesses and consumers and their representative bodies (including super-complaints from designated consumer bodies), as well

as its own research based on intelligence available to it, and suggestions from other Government departments. While being responsive to ideas from such sources, as an independent authority the CMA should have discretion to determine for itself which proposals to take forward, based on objective, transparent prioritisation principles such as those currently used by the OFT. Super-complaints by designated consumer bodies are currently an exception to this discretion, as there is an obligation on the authority to whom they are addressed⁹ to provide a reasoned response within 90 days.

- 2.14 The OFT does not support the proposal to extend super-complaint-type powers to SME representative bodies. There is potential, as acknowledged in the consultation document, for such a system to chill competition in markets by allowing small business groups to challenge business practices which might be pro-competitive and efficiency-enhancing, while nevertheless having an adverse effect on the ability of their members to compete. Such a risk of misalignment between the interests of the complainant and the role of the CMA in promoting competition does not arise in the case of super-complaints by consumer bodies under the current system. The role of a competition authority is to act in the interests of consumers and the wider economy, rather than to protect individual competitors or classes of competitor.
- 2.15 It is of course already possible for representative bodies to make complaints and requests to the OFT to carry out enforcement action or conduct a market study. Such complaints and requests are treated on their merits and in accordance with the OFT's prioritisation principles, and decisions to reject them are subject to legal challenge. Furthermore, the OFT questions the extent of the demand for greater access from bodies representing SMEs. The CBI, in arguing for the abolition of super-complaints by consumer bodies,¹⁰ stated that '[super-complaints] produce an artificial and unjustifiable distinction between complainants,

⁹ Either the OFT, or certain sectoral regulators

¹⁰ *Positioning for the upturn: Reforming the UK competition regime* (CBI Brief, March 2010)

and create quasi-enforcement bodies. They enable lobby groups to substantially influence how the OFT allocates its resources and gain priority over other complainants. These others may have more significant competition problems but have less standing than the 'super-complainants'. The CBI's arguments apply equally to the proposal that SME bodies should be granted super-complaint powers.

Reducing timescales

- 2.16 In the consultation document, the Government proposes that statutory timescales for Phase 2 investigations should be reduced from 24 months to 18 months for the majority of cases, and states that it is considering whether statutory timescales should be introduced for Phase 1 market studies and the implementation of remedies following Phase 2 investigations.
- 2.17 The CC is better placed than the OFT to comment on the challenges which would arise from the reduction of the statutory timescales for Phase 2 market investigations. However, taking into account the commitment to the reduction of timescales already made by the CC, as noted in the consultation document, such challenges would not appear insurmountable, particularly if accompanied – as proposed – by the ability to extend in the event of exceptionally complex cases, and the introduction of 'stop the clock' mechanisms.
- 2.18 With regard to Phase 1 market studies, the OFT has already, as noted in the consultation document, made a commitment that – where a reference to the CC is one of the outcomes being considered at launch – it will aim to consult on a reference within six months of launch, where this appears the most appropriate and proportionate outcome. Subject, therefore, to the ability to extend in exceptional cases, the introduction of stop the clock mechanisms, and the availability of information-gathering powers (see paragraphs 2.22-2.24 below), the introduction of a six-month statutory timescale for those market studies that have the potential to be referred for a Phase 2 investigation would, in the OFT's view, be feasible, and respond to the concerns expressed by some

business stakeholders about the length of time potentially taken by those cases where a Phase 1 market study leads to an MIR.

- 2.19 The consultation document also seeks views on the introduction of statutory timescales for those market studies for which a reference for Phase 2 investigation is not envisaged as an outcome. As shown by Table 5 in Appendix 2 of the consultation document, the duration of such studies has varied substantially from two to 21 months. While the OFT has pursued a series of reforms based on experience to achieve a general downward trend in the duration of market studies, as is apparent from Table 5, this substantial variation remains, as it primarily reflects the range of complexity and scope of the issues considered in studies.
- 2.20 In the OFT's view, the existing effectiveness and flexibility of the market studies tool suggests that further analysis should be conducted as to the costs and benefits of a 'one-size-fits-all' statutory timescale for studies. If, however, the Government were to decide that such a timescale is to be introduced, the OFT's experience to date suggests that 12 months might be appropriate, subject to the availability of the same measures (ability to extend, stop the clock, information-gathering powers) as for those studies for which a reference to Phase 2 is made. This longer timescale for cases which do not lead to a Phase 2 investigation is necessary to provide additional time for the OFT to reason its conclusions fully, and to identify the appropriate outcome from the study – comparable to the remedies stage of a Phase 2 investigation.
- 2.21 The OFT notes from Table 4 of Appendix 2 that the implementation of remedies following a Phase 2 investigation can take as long as, or even longer than, the combined duration of the two investigation phases – albeit in most cases the delay has been a consequence of litigation before the CAT, or delay on the part of Government in responding to and implementing recommendations which were beyond the scope of the CC's order-making powers. While the introduction of a statutory timeframe for the implementation of remedies would not be able to address those causes of delay which would be outside the control of the CMA (for example, a stop the clock mechanism would be an inevitable requirement in the event of appeals), the OFT would support such a

measure as a means of ensuring that the benefits to the economy and to consumers arising from investigations achieve their impact as quickly and efficiently as possible.

Introducing information-gathering powers at Phase 1

- 2.22 As noted in the consultation document, the OFT's powers of investigation at Phase 1 are limited (under section 174 of the Enterprise Act 2002 (EA02)) to those situations where it already believes that it has the power to make a reference for a Phase 2 investigation. It cannot, therefore, use formal powers of investigation to gather the information necessary to demonstrate that the threshold for making a reference is met. In practice, the OFT has not found this to be a significant obstacle to date, and has generally preferred to seek information voluntarily rather than using its section 174 powers.
- 2.23 The OFT is concerned, however, that this approach might not be sustainable in the event that statutory timescales were introduced for Phase 1 studies. If parties were not obliged to provide information, or subject to binding deadlines to do so, it might not be possible for the CMA to gather sufficient information to complete its Phase 1 study and, where appropriate, to take a decision on whether to make a reference for a Phase 2 investigation, within the statutory timeframe. Studies and potential references could therefore be unacceptably frustrated by lack of cooperation by parties. More generally, as the consultation document notes, and whether or not statutory timescales are introduced, the use of formal information-gathering powers at Phase 1 could speed up studies and lead to MIRs being made more quickly, thus responding to business concerns about the duration of the overall process and leading to beneficial outcomes for the economy and consumers being implemented more swiftly.
- 2.24 The OFT notes the powers granted to the National Consumer Council (now Consumer Focus) by section 24 of the Consumers, Estate Agents and Redress Act 2007 and suggests that these might provide a useful model for the provision of information-gathering powers for the CMA to use for the purposes of its market studies work. It is noted that the

exercise of these powers does not require any specific threshold to be met, with reliance being placed on section 24(7) to provide a safeguard against inappropriate or disproportionate use.

Facilitating prompt referrals to Phase 2

- 2.25 The OFT has no suggestions for other possible changes to the statutory framework to facilitate prompt references to a Phase 2 investigation. As indicated in paragraphs 2.3-2.7 above, the OFT believes that the current balance between Phase 1 market studies and Phase 2 market investigations is appropriate and that – while cases should be quickly and efficiently referred to Phase 2 where that is the appropriate course of action – there should be no presumption in favour of making a reference. Measures such as those proposed to introduce statutory timescales, along with enhanced information-gathering powers at Phase 1, should facilitate prompt referrals and – notwithstanding the close cooperation which already exists between the OFT and the CC, and the continuing need to ensure an appropriate degree of separation between the two phases – the bringing together of the two bodies into a single authority has the potential to make the transition between phases faster and even more efficient.

Introducing a statutory definition of a market study and a statutory threshold for initiation

- 2.26 In the OFT's view, the existing effectiveness and flexible nature of the market study tool, with its statutory basis in the OFT's general functions under the EA02, is one of its strengths, allowing a wide range of issues to be considered and to be subject to a variety of outcomes. This could be seen as militating against the adoption of a statutory definition. It would appear, however, that a specific definition is likely to be required in the event that measures such as statutory timescales and information-gathering powers were to be adopted, as there would need to be a defined tool to which these measures apply.
- 2.27 Any such definition should, in the OFT's view, be broad enough to encompass studies into a wide range of competition and consumer

issues, and enable outcomes other than a reference to a Phase 2 investigation, including enforcement or other action by the CMA itself, recommendations to government, and recommendations for voluntary action by business.

- 2.28 The possible need for a definition of a market study is, in the OFT's view, distinct from the need for any statutory threshold for initiating such a study. Any threshold for the initiation of a Phase 1 market study would self-evidently need to be lower than that for a reference to a Phase 2 investigation ('reasonable grounds to suspect ...') and be capable of applying to the wide range of issues which might be considered in the course of a study. It seems doubtful whether a threshold which was both low and broad enough to meet these criteria would be of sufficient clarificatory value, and capable of addressing the kind of stakeholder concerns referred to in the consultation document. In the OFT's view, it would be preferable for the CMA to retain the discretion exercised within a transparent framework, such as the OFT currently follows, based on published prioritisation criteria. In the OFT's view, the transparency of these criteria, combined with the incentives for the CMA to focus its limited resources to achieve high impact outcomes for consumers effectively and efficiently, protect against any risk (perceived or otherwise) of imposing costs on business through unwarranted interventions.

Improving interaction between MIRs and antitrust enforcement

- 2.29 The market investigation and antitrust enforcement tools were, in the OFT's view, designed to be distinct and complementary in addressing different types of harm, and different models of investigation and decision-making were adopted accordingly.
- 2.30 One of the criteria applied by the OFT in deciding whether to exercise its discretion to make an MIR¹¹ is that it would not be more appropriate to deal with the competition issues identified by applying CA98 or using

¹¹ As set out in the OFT's guidance on *Market investigation references* (OFT511)

other powers available to the OFT. The OFT is not aware of any cases where the exercise of this criterion has deterred the making of an MIR, and in any such case such a determination would have been based on the analysis that the issues could be appropriately addressed through the application of CA98. Similarly, the OFT is not aware that the CC in any of its Phase 2 investigations has used its remedy-making powers to address issues which might better have been dealt with under CA98.

- 2.31 In the OFT's view it is, therefore, unclear that there is any, or at least sufficient, evidence of identifiable, evidenced 'harm' with the existing interaction between market investigation and antitrust enforcement tools. The OFT notes in any event that the consultation document proposes no specific measures to address any perceived issue. In this context, the OFT would be wary if any measures taken in this area were based on a presumption either that the decision-making model for market investigations was appropriate also for antitrust enforcement, or that greater use of market investigations in preference to competition enforcement was desirable per se.
- 2.32 Nevertheless, the OFT agrees with Government that, to the extent that such issues do arise in future, the creation of a single CMA does have the potential to provide for simpler and more streamlined interaction between the MIR and antitrust regimes.

Ensuring remedies are proportionate and effective

- 2.33 The consultation document's proposals under this heading fall into two categories: amendment to the current remedy-making powers, and potential improvements to the process for reviewing remedies.
- 2.34 Under the current institutional arrangements, whereby the OFT monitors and enforces the remedies implemented by means of undertakings or Orders following the CC's investigations, the two bodies have a common interest in ensuring that such remedies are both effective and workable. When designing remedies, the CC takes account of views based on the OFT's experience of monitoring and enforcement, particularly with regard to workability. The OFT agrees that the two proposals for

amendment of Schedule 8 would each be useful enhancements to the CMA's remedies toolkit.

- 2.35 The OFT also has a statutory duty to keep remedies under review, and to make recommendations as to whether, in the light of any change of circumstances, they should be varied, revoked or superseded. The consultation document suggests that the process might be streamlined by the introduction of statutory timescales for reviews, and of information-gathering powers similar to those proposed for remedies implementation.
- 2.36 With regard to timescales, the OFT observes that the scale and scope of remedies reviews varies hugely from case to case. The 'change of circumstances' in question might on the one hand be in the nature of a change to other legislation (such as an EU Directive) which requires consequential changes to a CC Order or, on the other hand, consist of wider changes to the way in which the market in question operates, such that a detailed market analysis is required to determine whether the remedy remains appropriate. In the former case, the necessary review may be a routine technical exercise which takes a matter of weeks or even days to conduct, while in the latter, reviews are more akin to market studies and may therefore take much longer. That being the case, the appropriateness of a 'one-size-fits-all' statutory timescale is, in the OFT's view, questionable. If such a timescale were nevertheless to be introduced, the OFT's experience to date suggests that a 12-month timescale – as for market studies – might be appropriate, subject to the availability of the same measures (ability to extend, stop the clock, information-gathering powers) as are proposed for market studies. As noted, however, such a long timescale, while appropriate and necessary in some cases, would evidently be too long to apply any meaningful desired discipline on the efficiency of more straightforward reviews.
- 2.37 While information-gathering powers would, in the OFT's view, be a necessary backup in the event that statutory timescales were introduced (for the same reasons as set out in paragraph 2.23 in respect of Phase 1 studies), it should be noted that the incentives on the parties subject to remedies to cooperate with a review of those remedies are different from

those on businesses in a market which is the subject of a market study. The outcome of the former has the potential to reduce regulation in the market concerned, and thus costs to business in the medium to longer term, while the latter may lead to intervention and costs to business. It is possible, therefore, that – if granted – such powers might not need to be used as a matter of course and would thus not constitute a significant burden on business.

- 2.38 With regard to the threshold for reviews, the OFT has identified two situations in which the current requirement to identify a 'change of circumstances' before initiating a review of remedies may be problematic. In the first scenario, in the absence of a definable change of circumstances, there is no avenue (short of a further Phase 2 investigation and adverse finding) whereby a remedy which is subsequently discovered to conflict with the provisions of existing legislation, or which experience of monitoring and enforcement indicates would benefit from amendment in order to achieve its desired effect, can be changed. This has the potential to lead to inappropriate or ineffective regulation remaining in force, and consumer detriment not being addressed as intended.
- 2.39 In the second scenario, the OFT has in mind situations where – while it may be difficult to identify a specific change of circumstances – it could be thought desirable, in the interests of better regulation, to be able to review remedies to determine whether their benefits (in terms of enhanced competition and consequent benefit to consumers) continue to outweigh their costs to business and the public purse.
- 2.40 The OFT does not anticipate that either of these scenarios would arise frequently, and it would clearly not be in the interests of legal certainty and good regulation for remedies to be under review, or the threat of review, on an ongoing basis. In the OFT's view, however, the removal of a potentially onerous pre-condition for review has the potential to provide greater flexibility and to be consistent with a better regulation agenda.

Clarifying powers following remittals of mergers and markets

2.41 Although under the present institutional arrangements it has not been directly affected, the OFT recognises the concern that this proposal seeks to address, and supports the proposed clarification of the legislation.

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

2.42 Section 169 of the EA02 states that the OFT has a duty to consult on decisions as to whether to make an MIR under section 131 of the Act. The OFT interprets this duty as applying not only when it proposes to make such an MIR, but also when it has provisionally decided **not** to make an MIR in the course of:

- a market study that considers competition issues
- examination of a super-complaint that involves consideration of competition issues or
- a remedy review, where an MIR has been considered as a real possibility.

2.43 In each case, the OFT will, in accordance with section 169, consult any person on whose interests the MIR is likely to have a substantial impact, and the scope of the consultation will be informed by reference to what is practicable in the circumstances.¹²

2.44 In this context, should a statutory definition of a market study be adopted as a consequence of other changes such as the introduction of statutory timescales and information-gathering powers, the OFT proposes, for the avoidance of doubt, that it should be specified that the

¹² See OFT Policy Note *Practice on consultation on proposed decisions in relation to market investigation references*, March 2011:

www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft1308.pdf

duty to consult applies to decisions as to whether to make an MIR only where such decisions are taken following the launch of a market study, super-complaint, or remedy review, and that a decision taken at an earlier stage, for example a rejection of a complaint, should not give rise to an obligation to consult.

- 2.45 While the OFT recognises that the duty to consult on decisions not to make an MIR, as well as those to do so, may delay the adoption of final decisions on market studies and similar cases, this is, in the OFT's view, counterbalanced by the benefits. In particular, the consultation process provides increased transparency, and the potential for further improvement in the quality of decision-making.
- 2.46 In the OFT's view, limiting the scope of the duty to consult to decisions taken following the launch of a market study, super-complaint, or remedy review would be preferable to the suggestion in paragraph 3.40 of the consultation document, that the duty should apply only to those cases where any person has expressly asked for an MIR to be made. Such an approach would draw a distinction based on the form of the complaint rather than its substance (and would potentially favour complainants with access to advice on the relevant legislation over those with fewer resources, including individual consumers). It would also, for example, require consultation on decisions to reject complaints which the CMA had determined, perhaps through the application of prioritisation principles such as those currently used by the OFT, did not merit further consideration. Consulting only on decisions following the launch of a market study or equivalent investigation would enable consultation to be based on a reasoned decision by the OFT, in which a wider range of stakeholders than the original complainant might be expected to have an interest.
- 2.47 The OFT notes that such an approach would be analogous to the CC's current practice of consulting on the provisional findings of its investigations in all cases, including those where it proposes to make no adverse finding. It would also be consistent with the principle of consultation and open discussion with interested parties which, as stated in paragraph 3.39 of the consultation document, the Government

regards as a fundamental aspect of the current markets regime which the Government wishes to retain in the proposed single CMA.

3 A STRONGER MERGER REGIME

The OFT:

- believes that the current voluntary notification system balances the need to tackle anti-competitive mergers and regulatory burden on business and the financial burden on the taxpayer and should therefore be strengthened to deal with the issues raised by completed deals
- does not support the introduction of a mandatory notification system but, to the extent that the Government were minded to introduce some form of mandatory notification, considers that a 'hybrid' model is preferable to a full mandatory regime
- to the extent that the Government were minded to introduce some form of mandatory notification, would support the retention of a voluntary notification system for cases that give rise to the material influence level of control, while having mandatory notification based on the de facto control threshold
- considers that an exemption from merger control for transactions involving small businesses is appropriate but that the threshold must be set at an appropriate level to avoid allowing too many anti-competitive mergers to escape review
- supports the Government in seeking to strengthen the voluntary system by giving powers to the CMA to suspend existing integration on commencement of its inquiry, pending negotiation of tailored hold separate undertakings and clarifying the measures that the CMA could take to prevent pre-emptive action
- supports the introduction of financial penalties for parties that take steps to integrate in breach of interim measure obligations
- agrees that the introduction of a mandatory regime would necessitate the introduction of a statutory time limit for Phase 1 investigations, but considers that a range of factors would need to be considered before

introducing such time limits under a voluntary regime

- agrees with the proposal to provide the CMA with information-gathering powers, backed with penalties, at Phase 1, and that stop the clock powers should continue to apply in Phase 1 where merging parties have failed to provide information.

Overview

- 3.1 The current structure of the merger control system in the UK has been in place since the introduction of the EA02 in June 2003. The eight years of experience of the current legislation has seen the implementation of that legislation by the OFT and CC develop and mature. In this period, both agencies have developed a strong body of decisional practice, and publish reasoned decisions alongside published guidance on both the jurisdictional and substantive application of merger control.¹³ This body of decisions and guidance supports the voluntary system of merger control, and enables businesses and their advisers to have confidence in the use of the mergers regime, for example in determining when it is appropriate not to notify to the OFT a transaction that genuinely does not raise competition concerns.
- 3.2 The UK's merger control system has overall been rendered more efficient through the use of mechanisms such as Phase 1 remedies (undertakings in lieu of reference) in a number of cases. In addition, the OFT has developed a proactive form of merger intelligence which ensures that potentially anti-competitive mergers are scrutinised. The net result is a system that balances the ability to resolve and deter anti-competitive transactions that do most harm to competition with a system that imposes a limited burden on business and provides the certainty that

¹³ See in particular OFT *Mergers – Jurisdictional and procedural guidance* (OFT527), OFT/CC – *Merger assessment guidelines* (OFT1254) and OFT *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122)

enables business to invest and innovate with confidence. The CC has also sought to finesse the functioning of the regime, for example, by having shorter and more targeted second phase reviews in appropriate cases. As a result the UK merger control system is held in high regard both nationally and internationally.¹⁴

- 3.3 The OFT believes that the current voluntary notification system balances the need to identify, and prevent or remedy, anti-competitive mergers with the aim of avoiding undue regulatory burden on business and undue financial burden on the taxpayer. A move away from this system inevitably involves risks and uncertainties, and has the potential to increase the chilling effect on business, whose absence is the hallmark of the voluntary regime. Given that the current regime works well, the OFT considers that incremental changes targeted at the CMA's ability to call in and remedy the right mergers would be the most effective and efficient of the options presented. In this regard, the OFT therefore supports some of the measures proposed by the Government to address concerns about business integration in respect of problematic completed mergers.
- 3.4 The OFT does not believe that it is the role of the competition regime to interfere with mergers on any ground other than their impact on competition. Any new measures which are introduced should be capable of being implemented swiftly, and without significant uncertainty and risks, and clearly enhance the CMA's ability to assess mergers effectively and efficiently.
- 3.5 The OFT strongly supports the continued assessment of mergers by reference to the 'substantial lessening of competition' test, which is used in other key jurisdictions, including the US. It believes that the application of this test, based on sound economic principles, by an independent competition agency has proved to be a successful model for merger control under the EA02, as reflected in the high international

¹⁴ See paragraph 4.1 of the consultation document. See Rating Enforcement 2010 (Global Competition Review, June 2010

regard in which the UK's merger regime is held. The OFT would therefore support the retention of this system going forward.

Views on specific proposals in the consultation

Improving the voluntary notification regime – introduce penalties for completion of mergers which are found to be anti-competitive

- 3.6 The current voluntary system does not seek to penalise parties who complete mergers that are subsequently found to be anti-competitive. In line with the legislation, the OFT and the CC each endeavour to ensure that parties are neither advantaged nor disadvantaged in terms of the assessment of their merger according to whether or not it has been completed. Although the OFT may in appropriate cases seek to obtain initial undertakings from the merging parties, these are not punitive and merely ensure that future remedial options are preserved.
- 3.7 The fact that a merger has completed does not intrinsically make it more likely to be anti-competitive. Although a higher proportion of the completed mergers examined by the OFT are found to be anti-competitive than is the case for those that are anticipated, this may well be explained by the fact that the cases that the OFT elects to examine on its own initiative are generally completed rather than anticipated: these cases are ones where the OFT believes, on the basis of public information, that the merger may raise concerns such that it should be investigated. By contrast, parties may voluntarily choose to notify (anticipated) transactions in order to avoid any regulatory risk, however small, or because they decide to file in all jurisdictions in which the merger is reviewable regardless of the competitive impact of the merger in a given jurisdiction. As a result of the fact that these own-initiative cases tend to be completed, on average, the completed mergers that the

OFT assessments are statistically more likely to be problematic than the anticipated mergers.¹⁵

- 3.8 In the light of this, the OFT considers that a move to a penalty-based system would be likely to reduce the number of anti-competitive completed mergers, given the strong deterrent effect that such a shift would bring. However, it is plausible that such an approach could come at the cost of unduly deterring mergers which might, following an investigation, have been found to be benign or pro-competitive.
- 3.9 In addition, such a move would be a significant shift away from the current voluntary regime and – as acknowledged in the consultation document – it is not clear that it would deliver sufficient benefits to competition without creating significant uncertainty and risks to the momentum and effectiveness of the regime.

Improving the voluntary notification regime – strengthened interim measures

- 3.10 The OFT welcomes the Government's proposals to strengthen the interim measures powers available to the CMA as a means of addressing the issue of completed mergers. This would address the 'unscrambling' problem which is part of the justification for a mandatory regime. In the OFT's view, the benefits that can be achieved by these improvements to the voluntary regime mean that a move to a mandatory regime would yield comparatively small additional benefits to competition, consumers and economic growth in comparison to the uncertainty and risks to the momentum and effectiveness of the regime that it would create.

¹⁵ The sample of cases examined by the CC at Phase 2 contains an even greater skew towards completed deals because completed transactions cannot be abandoned upon reference in the way that anticipated ones can be.

- 3.11 The OFT notes that two proposals are put forward in the consultation document:
- a) a statutory restriction on **further** integration that would apply automatically as soon as the CMA commences an inquiry into a completed merger. A variant of this proposal would give the CMA additional powers to suspend **existing** integration on commencement of its inquiry, pending negotiation of tailored hold separate undertakings
 - b) 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.
- 3.12 The OFT supports the second variant of option (a) as it believes it would allow interim measures to be imposed more quickly, thereby reducing the time available for pre-emptive action to occur. However, the OFT believes that a statutory restriction on further integration that would apply **automatically** as soon as the CMA commences an inquiry into a completed merger (that is, the first variant of option (a)) carries a number of disadvantages, namely that: (i) in some scenarios, there may in fact be no risk of pre-emptive action such that it would not be appropriate for a statutory restriction to apply; (ii) the automatic imposition of a statutory restriction in every completed merger risks disincentivising the CMA from sending out enquiry letters in appropriate cases (because of the commercial difficulties they anticipate will follow); and (iii) a certainty that a statutory restriction will apply in every case may risk encouraging companies to avoid notifying their merger to the OFT until a level of integration has been achieved that could not be unwound; perversely, this effect may serve to undermine the objectives of this particular reform proposal.
- 3.13 The OFT considers that option (b) – clarifying the legislation to make clearer the type and range of measures that the CMA could take, including at Phase 1 – should be taken forward regardless of whether option (a) is adopted or rejected. Such clarification should refer, for example, to the CMA's powers with regard to the reversal of existing

integration that has already occurred and the prohibition of further actions that are the subject of a pre-existing contractual obligation on the part of the merged firm.

Improving the voluntary notification regime – penalties for breach of interim measure obligations

- 3.14 The OFT would support the introduction of financial penalties for parties that take steps to integrate in breach of interim measure obligations, as a means of improving compliance with such obligations. The OFT believes that the level of any such penalties needs to be set so as to provide a sufficient deterrent for parties to avoiding breaching such obligations.

Mandatory notification regime

- 3.15 The OFT has two key concerns with the introduction of a mandatory notification system:
- a) an increased and potentially unnecessary burden on both public resource and business that would risk undermining, rather than promoting, productivity, innovation and economic growth
 - b) depending on the thresholds set, potentially a loss of the ability to capture harmful merger activity below such mandatory thresholds. This concern is particularly significant in relation to the impact such a change could have on the ability of larger firms to acquire smaller competitors in multiple markets (see paragraph 3.22(a) below).
- 3.16 In relation to point (a), the consultation document and the Impact Assessment consider a move to mandatory notification in the context of turnover thresholds set at £5 million UK turnover for the target and £10 million global turnover for the acquirer. However, according to paragraph 121 of the Impact Assessment, these thresholds would be expected to result in the notification – and review by the CMA – of 1190 cases per year, as opposed to the current number of under 100 (55 actual cases in 2010). This threshold may appear low, and would lead to an increased burden on business (in terms of notification) and the public purse (in

terms of review). It might be possible to respond to, and potentially alleviate, such concerns over these increased burdens by raising the notification threshold. However, the OFT would be concerned about the potential competitive impact of the loss of merger control review in relation to cases falling below that higher mandatory level. These tensions demonstrate the inherent disadvantage of a mandatory notification regime.

- 3.17 In relation to (b), the data in Figure 4.1 of the consultation document¹⁶ show that if the mandatory threshold had been set at £25 million (£10 million), 46 per cent (28 per cent) of Phase 1 'realistic prospect of a substantial lessening of competition' cases would not have been captured.
- 3.18 The OFT welcomes the Government's wish to ensure that the competition rules apply as widely as possible. However, the OFT considers that this can be achieved by alternative means which place far fewer burdens on business and the taxpayer than mandatory notification. In particular, any mandatory system would lead to the notification of more cases, many of which will ultimately prove to be benign. As noted below (see paragraph 3.20), there are alternative 'hybrid' mandatory options which deserve careful consideration, since they may be able to achieve the twin objectives of capturing mergers which may lead to substantial economic harm, but in respect of which there may be public policy reasons for having a 'light touch' regulatory system.
- 3.19 The OFT recognises that seeking to set a threshold for a mandatory notification system at a level which does not create an undue notification burden, but which captures anti-competitive mergers, is inherently a challenging exercise. The OFT believes that a £5 million jurisdictional threshold would be required in a mandatory system to capture the range of mergers where it has previously found a realistic

¹⁶ Cumulative distribution of cases in which the duty to refer arose at the OFT stage based on UK target turnover for 116 cases since 2004

prospect of a substantial lessening of competition (as shown by the Impact Assessment). A jurisdictional threshold at this low level will, however, inevitably lead to the notification of a vast number of additional mergers, most of which will not be problematic.

- 3.20 Consequently, to the extent that the Government were minded to introduce some form of mandatory notification element, the OFT considers that a 'hybrid' model is a preferable alternative to a full mandatory regime. This would involve mandatory pre-notification and suspensory obligation for transactions above a certain threshold and, effectively, a voluntary notification system below that threshold.¹⁷ This model seeks to address the concern around the completion of problematic larger mergers (from which most consumer harm ensues) while, proportionately, maintaining a voluntary regime for smaller mergers. The OFT welcomes, therefore, the inclusion of this model in the consultation and would support it if the Government were minded to move away from a purely voluntary system of merger control.
- 3.21 The OFT agrees that, to the extent that any form of mandatory notification were introduced, coupled with a suspensory obligation on completion prior to approval, then appropriate sanctions would be needed where businesses did not respect the suspensory obligation and continued with a merger without waiting for clearance. The OFT believes that the level of any such penalties should be set so as to provide a sufficient deterrent for parties to avoid breaching such a suspensory obligation.

Jurisdictional thresholds in a mandatory regime

- 3.22 As noted above, the OFT does not support the introduction of a 'full' mandatory regime. To the extent that the Government were minded to

¹⁷ In the US merger control system, for example, the antitrust authorities may review and assess a transaction raising competition concerns that falls below the reportable notification thresholds under the Hart-Scott-Rodino Antitrust Improvements Act (HSR).

introduce a full mandatory regime, the OFT would support a turnover threshold which is sufficiently low to avoid two specific concerns:

- a) that large companies would be able to acquire a number of smaller competitors in a number of distinct markets, for example acquisition of local competitors in different geographic markets which collectively have a very significant economic impact across the UK. This is of particular concern given the sometimes underestimated importance of small and medium-sized business to the UK economy: see paragraph 3.44 below
- b) that once the threshold is set, all consolidation that occurs below that level is by definition excluded from merger control and cannot be reviewed. To the extent that any threshold were subsequently revealed to have been too high, it is clearly impossible to reverse the concentration that will have already taken place below it. We understand that it may have been these concerns that motivated the introduction of lower thresholds for mergers in the retail sector in France.¹⁸ The threshold was subsequently lowered so as to capture a greater proportion of retail cases, evidently on the basis that the consolidation that had not been subject to merger control scrutiny had been detrimental to consumers.

- 3.23 In the light of these concerns, if the Government were to seek the introduction of a mandatory regime, the OFT considers that any thresholds would need to be calibrated cautiously.
- 3.24 In the event that the Government were minded to move to a hybrid regime, with mandatory pre-notification only above a certain threshold, the OFT considers that the £70 million target turnover threshold should not necessarily be adopted as the trigger simply because it is currently the turnover threshold. The turnover threshold under the current regime effectively determines which vertical mergers are capable of review, as

¹⁸ The Law No. 2008-776 on *the Modernisation of the Economy*, 4 August 2008, provided specific notification thresholds for mergers in the retail trade sector.

vertical mergers cannot satisfy the (horizontal) share of supply test. The threshold in a hybrid regime would have a very different purpose, essentially also determining which horizontal mergers are sufficiently large that they should be notified and reviewed in advance of completion. For this reason, the OFT considers that the turnover threshold for notification in a prospective hybrid regime should be determined by reference to analysis of the profile of cases considered under the EA02 (and what the implications would be of setting the threshold at a given level), and not simply by adopting the previous £70 million threshold.¹⁹

Nature of turnover test and mandatory notification

- 3.25 The OFT has the following comments on the nature of the turnover test under a mandatory system of merger control. As is recognised in the consultation paper, there are benefits to a turnover threshold referring to both the turnover of the target and the acquirer. Specifically, having regard to the size of the acquiring entity can result in a more nuanced and targeted approach to the determination of jurisdiction than reliance on the level of the target's turnover alone.
- 3.26 However, the OFT notes that there is an apparent misunderstanding in the consultation document in relation to how the turnover thresholds would function in relation to the mandatory regime (option 1) discussed in paragraph 4.27. Paragraph 4.32 states that 'under a mandatory notification regime, the jurisdictional threshold in option 1 makes reference to the acquirer and target turnover to reduce the likelihood of anti-competitive mergers escaping review.' In fact, including an acquirer turnover threshold in this situation **reduces** the number of mergers that would be potentially reviewable, compared to a situation where the

¹⁹ To the extent that the share of supply test were retained for jurisdiction over transactions falling below the mandatory notification threshold in a hybrid regime, the OFT would be concerned if the turnover threshold were increased above £70 million, given that one side effect of this would be to reduce the number of large vertical mergers that are caught (given that purely vertical mergers are not caught by the share of supply test).

turnover threshold was calculated by reference to the target alone, because two turnover thresholds have to be met (one for the acquirer and one for the target) and not just one (for the target). However, in practice, a global acquirer turnover threshold of £10 million would be unlikely to reduce the number of transactions that were reviewable, given the fact that, at least historically, most acquiring companies whose transactions have been investigated by the OFT have had turnover levels above this level.

- 3.27 In relation to a hybrid regime (option 2, discussed in paragraph 4.28 of the consultation document), the consultation document recognises that reducing the turnover thresholds would capture more cases, and therefore reduce the reliance on the share of supply test and the number of mergers that are completed. While this is correct, the OFT would caution against reducing this threshold figure to such a low level that the regime is, in effect, turned into a 'full' notification regime.

Material influence and mandatory notification

- 3.28 The OFT strongly supports the Government's desire to retain the ability to look at 'material influence' cases. In certain circumstances, the acquisition of material influence in a competitor or potential competitor can have very significant consequences in terms of the impact on rivalry. Where the companies involved are large, the harm to consumers may be great.²⁰
- 3.29 However, the OFT considers that the de facto control standard may be a more appropriate standard for mandatory notification than material influence. Material influence is intentionally a lower, wider and more flexible concept of control than other 'hard edged' jurisdictional

²⁰ By way of illustration, British Sky Broadcasting plc's acquisition of a 17.9 per cent share in ITV plc was found by the CC to restrict competition and the Secretary of State ultimately ordered divestment of the stake to a level of 7.5 per cent.

standards. This is recognised in the OFT's Jurisdictional and Procedural Guidance,²¹ where it is stated that:

'Assessment of material influence requires a case by case analysis of the overall relationship between the acquirer and the target. In making this assessment, the OFT will have regard to all the circumstances of the case. In most cases, a finding of material influence will be based on the acquirer's ability to influence the target's policy through exercising votes at shareholders' meetings, together with any additional supporting factors ... that might suggest that the acquiring party exercises an influence disproportionate to its shareholding. However, material influence may also arise as a result of the ability to influence the board of the target and/or through other arrangements... The variety of commercial arrangements entered into by firms makes it difficult to state categorically what will (or will not) constitute material influence' (paragraphs 3.17 – 3.18).

- 3.30 The de facto control standard, which the OFT considers may, in broad terms, be regarded as similar in nature to the concept of 'decisive influence' under the EU Merger Regulation,²² is a higher standard of control and is arguably more predictable in application. This standard covers situations where 'an entity is clearly the controller of a company, notwithstanding that it holds less than the majority of voting rights in the target company (that is, it does not have a controlling interest). This is likely to include situations where the acquirer has in practice control over more than half of the votes actually cast at a shareholder meeting'.²³

²¹ *OFT Mergers – jurisdictional and procedural guidance*, June 2009 (OFT527), www.oft.gov.uk/shared_oft/mergers_ea02/oft527.pdf

²² See paragraph 3.29 of the *OFT's Jurisdictional and Procedural Guidance*

²³ See paragraph 3.30 of the *OFT's Jurisdictional and Procedural Guidance*

- 3.31 Although de facto control is not a completely bright line test – in the way that a test based purely on shareholder voting levels would be – the OFT considers that it strikes a reasonable balance between capturing minority stakes that do in effect provide control of a company, and providing companies and their advisers with a sufficient degree of predictability to determine when notification is required. A comparable threshold ('decisive influence') has worked very satisfactorily in the context of the mandatory notification system of the EU Merger Regulation.
- 3.32 The OFT would therefore support the retention of a voluntary notification system for cases that give rise to the material influence level of control, while having mandatory notification based on the de facto control threshold.

An alternative approach to capturing minority interests

- 3.33 An alternative option to the scheme outlined above that sought to preserve jurisdiction over minority influence cases would be to provide clarity about what cases needed to be notified by having a fixed shareholding or voting level at which mandatory notification was required. This is the approach adopted by the German Act against Restraints on Competition of 1958, which requires notification where a firm acquires capital or voting rights of 25 per cent or more.
- 3.34 The disadvantage of such an approach is that even a relatively low mandatory shareholding level (such as 25 per cent, for example) would not catch all the situations that are potentially caught by the more flexible 'material influence' threshold. For example, the BSkyB/ITV transaction, referred to at footnote 22 above, would not have been caught by a fixed shareholding level of 25 per cent.
- 3.35 Clearly, it is possible to set the notification threshold at such a low level that a large proportion of material influence cases would be caught – for example if the threshold were set at 7.5 per cent. However, a threshold set at that level would potentially catch a significant number of additional cases in a mandatory system and might well be regarded as

unworkable in practical terms. In this context, the OFT notes that it is common to find multiple investment institutions holding stakes of more than this level in listed companies. The vast majority of these would be of no competitive significance (for example, stakes acquired as investments by non-overlapping financial institutions).

- 3.36 Such a move would be difficult to reconcile with the stated aim in the consultation document of limiting the burden on business and providing the certainty that enables business to invest and innovate with confidence. For this reason, the OFT considers that not requiring mandatory notification for transactions resulting in a material influence level of control (but instead retaining voluntary jurisdiction over them) is a preferable and more cost-efficient way of proceeding, while also ensuring that consumer harm is prevented.

Jurisdictional thresholds in a voluntary notification regime

- 3.37 The share of supply test is a flexible and useful jurisdictional test that is appropriate in the context of a voluntary regime. However, the OFT recognises the lack of certainty in terms of its scope and application and understands why business might prefer the predictability of a turnover test.
- 3.38 The OFT would support the move from a share of supply test to determine jurisdiction for a voluntary regime (or the voluntary part of the regime in a hybrid regime) to jurisdiction over all cases except for those covered by the 'mergers between small businesses' exemption, provided that the thresholds for the exemption were those stated in paragraph 4.41 of the consultation document (that is, the target's UK turnover does not exceed £5 million and the acquirer's worldwide turnover does not exceed £10 million). (The OFT acknowledges that such an approach to jurisdiction would be impracticable in the case of a mandatory regime, but considers that it is workable in the context of a voluntary regime.)

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

- 3.39 The OFT believes that, since the publication of revised guidance in 2007,²⁴ the 'de minimis' exception to the duty to refer has operated successfully to prevent the reference of a material number of cases (18 as at the beginning of April 2011) that met the test for reference, but where the costs of an investigation by the CC would have been disproportionate to the potential customer harm involved. The OFT has consolidated its practice in this area through publication of revised guidance,²⁵ in which the OFT sought to give as much certainty and predictability to business as possible in how it would apply the 'de minimis' exception going forward.
- 3.40 The OFT recognises that a discretionary exception to the duty to refer is inherently less predictable for business than fixed jurisdictional thresholds. It also normally involves the parties in undergoing a Phase 1 investigation (whereas a jurisdictional cut-off means that the companies involved do not have to bear the cost of any investigation). On the other hand, a discretionary exception to the duty to refer is potentially more targeted and precise, whereas a jurisdictional cut-off is by its nature more arbitrary in application.
- 3.41 The OFT does not object to the replacement of the 'de minimis' exception to the duty to refer with an exemption from merger control for transactions involving small businesses, provided that the thresholds for the exemption were those stated in paragraph 4.41 of the consultation document (that is, the target's UK turnover does not exceed £5 million and the acquirer's worldwide turnover does not exceed £10 million).

²⁴ *Mergers – Exception to the duty to refer: markets of insufficient importance* (OFT516b), November 2007, www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft516b.pdf

²⁵ *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance*, December 2010 (OFT1122) www.oft.gov.uk/shared_oft/mergers/Consultations/oft1122res.pdf

- 3.42 The imposition of an exemption from merger control for transactions involving smaller businesses would be likely to mean that a number of transactions that would currently be susceptible to exemption under the 'de minimis' exception would be caught by the thresholds and would, given the competition concerns they raise, be referred for a Phase 2 investigation notwithstanding the small level of customer harm they could cause. This is because the exemption for transactions involving small businesses operates by reference to the turnovers of the firms involved, whereas the 'de minimis' exception operates on the basis of the size of the market in which a competition concern is found. A merger involving large companies could at present still benefit from the exception to the duty to refer where the market in which the competition concerns are created is small (whereas it would be unlikely to be protected by the exemption).
- 3.43 However, the OFT considers that the additional certainty that would be provided for small businesses when considering acquisitions of other small businesses may nevertheless mean that an exemption from merger control for transactions involving small businesses is appropriate and would provide the certainty that enables business to invest and innovate with confidence.
- 3.44 As noted above, the OFT would be concerned if the thresholds for the exemption were higher than those proposed in paragraph 4.41 of the consultation document (that is, the target's UK turnover does not exceed £5 million and the acquirer's worldwide turnover does not exceed £10 million). The OFT notes the CBI's argument²⁶ that the exemption should be for mergers where the target's UK turnover is less than £5 million, but agrees with the position taken in the consultation document, namely that such a threshold would allow too large a number of anti-competitive mergers to escape review. In this context, the OFT notes that many of the mergers involving smaller companies are between business-to-business suppliers. Allowing anti-competitive consolidation in relation to

²⁶ *Positioning for the upturn: Reforming the UK competition regime* (CBI Brief, March 2010)

such transactions can have a significant impact on growth and productivity in the UK economy, given that 99.9 per cent of businesses (4,828,160 businesses) are small and medium-sized enterprises.²⁷

Streamlining the merger regime – statutory timescales

- 3.45 The OFT welcomes the consultation document's emphasis on streamlining the merger regime. It recognises and agrees that, to be effective, any system of merger control must be proportionate and work to appropriate timescales: this applies with equal force to both Phase 1 and 2 reviews of mergers. The OFT also recognises that quality and robust decision-making is more likely to lead to effective outcomes for competition and rivalry in the UK, including growth of the UK economy. Consequently, as it is with other tools of competition policy, the balance between speed of decision-making and robustness of decisions is an important one.
- 3.46 The OFT has some specific concerns in relation to the time periods that should be considered when the Government determines whether to fix the timescale by statute or to adopt a more flexible approach. If fixing the timescale by statute, the OFT would be concerned that an appropriate length of time was prescribed to ensure effective and robust scrutiny of cases.
- 3.47 The OFT's existing administrative timetable²⁸ (in cases that are notified other than by means of the statutory merger notice) allows the OFT to balance the importance of control over timing with the flexibility to take

²⁷ Source: *BIS Small and Medium-sized Enterprise (SME) Statistics for the UK and Regions 2009* (stats.bis.gov.uk/ed/sme/Stats_Press_Release_2009.pdf)

²⁸ See OFT *Mergers – Jurisdictional and procedural guidance* (OFT527), paragraphs 4.63 to 4.70, which includes at paragraph 4.65 the statement that: 'Except for the four-month statutory deadline for completed mergers, there is no formal review timetable when notification is made by informal submission. However, the OFT's practice is that, on receipt of a satisfactory complete submission, it would generally endeavour to reach a decision within 40 working days by way of administrative target.'

account of the specific profile and circumstances of individual cases. The OFT constantly evaluates its success in keeping to its 40 working day administrative timetable and records this as part of its 'key performance indicators' by which the performance of the OFT's merger enforcement is monitored.²⁹

- 3.48 The OFT considers that the question of a time period in relation to Phase 1 of the merger investigation is somewhat more nuanced than the consultation document indicates. The OFT accepts, as noted above, that it is desirable to ensure that Phase 1 investigations do not extend beyond what is necessary to reach a conclusion on whether the statutory tests for reference to Phase 2 are met or not. However, it is also important to recognise that the consequence of limiting Phase 1 with a strict statutory timetable may be either:
- (a) to encourage firms to use pre-notification discussions more extensively, effectively shifting time 'off the clock' (as is the experience in other jurisdictions with mandatory notification and statutory Phase 1 timetables)
 - (b) to result in a greater proportion of cases being referred for a detailed Phase 2 investigation.
- 3.49 In relation to potential consequence (a), pre-notification discussions are effectively 'open-ended', in so far as there is by definition no time limitation attached to them. 'Shifting' time from the Phase 1 part of the investigation into pre-notification is unlikely to reduce the overall resource demands on the system, and could, if anything, increase it. In relation to potential consequence (b), a greater proportion of Phase 2 investigations clearly has the potential to increase the resources used in the overall merger control system. As a result of these concerns, while the OFT does not object to the use of statutory time periods in Phase 1, it notes that they must be considered, and designed, with great care and

²⁹ These performance indicators are intended to be published in due course on a quarterly basis: see the OFT Business Plan 2011-2015.

should not be assumed to be accompanied by a reduction in the costs of the system or use of agency resources.

- 3.50 The OFT agrees that the introduction of a mandatory regime would necessitate the introduction of a statutory time limit for Phase 1 of the investigation. The OFT believes that, judged by reference to the range of time periods permitted for Phase 1 review of mergers in other jurisdictions, the proposed time period of 30 working days is a sensible period in which to conduct a review and reach a judgment on whether a matter should be referred for a Phase 2 investigation or not.
- 3.51 However, this time period is subject to several caveats. The first is that the CMA must be provided with sufficient resources with which to undertake a robust analysis within the stipulated time frame. The OFT considers that any statutory time limit for Phase 1 must be considered in the context of the increased number of mergers that would need to be assessed in a mandatory regime and of the resources available to the CMA to undertake these Phase 1 assessments. Put simply, for a given statutory time limit, the more mergers the CMA examines, the greater the resources needed to examine them. As a corollary, in a scenario in which resources are constrained, the more mergers the CMA is required to assess, the more time it will need to assess them. In this context, it is also worth noting that the volume of mergers workflow is necessarily 'lumpy' (in that the number of cases investigated varies materially over time and is not predictable in advance), thereby placing an additional stress on resource levels at certain times.
- 3.52 The second caveat is that the OFT is concerned that the time period put forward does not take proper account of the need to assess any offer of undertakings in lieu of a reference for a Phase 2 investigation. The OFT therefore considers that a further 10-working day extension would be appropriate where the parties propose such undertakings in lieu of a reference.
- 3.53 An automatic extension of time at Phase 1 in which to consider undertakings in lieu of a reference is provided under the EC Merger Regulation. Article 10(1) ECMR provides that the 25-working day period

for Phase 1 investigation is extended to 35 working days where the undertakings concerned offer commitments.

- 3.54 In relation to a voluntary regime, the adoption of a statutory time limit would raise a number of additional complexities. There are a number of ways in which a review can commence under the current voluntary regime, all of which may have different impacts on the review timetable. These are a statutory merger notice made by the parties (the OFT has a total of 30-working days in which it is required to review such a notification and reach a decision), an informal submission (the OFT works to a 40-working day administrative timetable on these cases which it meets in the large majority of cases³⁰) and mergers which are completed and then called in by the OFT. If a fixed time limit were imposed under a voluntary system, it would be very important to identify the 'trigger point' at which such a time period commenced. There are several options, such as the trigger point could start: (a) start from the OFT's sending of an enquiry letter, or (b) the receipt by the OFT of the response to an enquiry letter, or (c) the receipt by the OFT of a satisfactory informal submission or merger notice. The OFT strongly recommends that a statutory time period in relation to a voluntary regime should normally be from the receipt of a satisfactory submission.
- 3.55 That said, even this approach is not without complications, namely:
- there has been a small number of completed mergers investigated by the OFT under its own initiative where the parties never actually sent sufficient information to the OFT for the submission to be deemed satisfactory
 - there is a certain amount of time spent on negotiating or seeking to impose 'initial undertakings' in order to hold separate and prevent further integration by the merging parties.

³⁰ See note 31 above

- 3.56 Both factors militate in favour of a more flexible or longer time period in which to review mergers in a voluntary regime.
- 3.57 In this regard, a potential option which combines the objectives of streamlining the process and ensuring that workable hold separate undertakings are put in place is to provide that the CMA is able to pause the time period for investigation ('stop the clock') in completed merger cases where it is seeking initial undertakings but where these have not been provided to the parties. By specifically allowing time for the negotiation of initial undertakings in completed mergers, it may be possible to achieve a firmer time limit of 30 working days, extendable by a maximum of 10 working days where undertakings in lieu are offered in the context of a voluntary system of merger control.

Information gathering and stop the clock powers

- 3.58 The OFT agrees with the Government's proposal to provide the CMA with compulsory information gathering powers, backed with penalties, in respect of both merging parties and third parties at Phase 1. The OFT believes that the provision of such powers at Phase 1 could have several key advantages:
- it would enable the CMA to obtain information from parties in a timely manner. At the moment, the only pressure that the OFT can exert on parties to obtain information is the incentive to avoid a reference to a Phase 2 investigation and the possibility that the administrative and statutory clocks may be stopped pending receipt of the information. However both of these incentives may operate inadequately in certain circumstances given that the OFT is reluctant to take too long in Phase 1 simply because parties to a merger are reluctant to provide information swiftly
 - it would give the CMA information-gathering powers as regards third parties, which the OFT currently does not have at Phase 1. Although third parties regularly supply information to the OFT in order to further their own commercial interests, it may not be in the interests of a third party to provide information that indicates that the merger

under review is not of concern (for example, in respect of competitors, any entry plans). It nevertheless remains important to be able to obtain that information where it is relevant to determining whether the merger should be referred for a Phase 2 investigation

- there may be a burden to individual businesses of complying with compulsory information requests, but there are benefits to the wider economy as more information leads to better and more robust decisions which in turn help to secure vibrant, competitive markets, in the interests of consumers and to promote productivity, innovation and economic growth.

3.59 The OFT agrees with the proposal in the consultation document that stop the clock powers should continue to apply in Phase 1 where merging parties have failed to provide information.

4 A STRONGER ANTITRUST REGIME

The OFT

- supports the option of retaining and enhancing the OFT's existing procedures for antitrust enforcement
- considers that the option of moving to an internal tribunal model or a prosecutorial model for antitrust enforcement would give rise to considerable uncertainty for business, significant transition costs and undue risks to the momentum and effectiveness of the regime. Further, the perceived improvements and benefits of these options in terms of delivering CA98 cases more quickly would more likely than not prove illusory
- considers that the use of case-specific administrative timetables will give rise to considerable benefits, but does not currently support the adoption of statutory timetables for CA98 cases
- welcomes the Government's statement that it will take account of the OFT's 2007 recommendations on private actions in competition law in its proposed work on methods of collective redress
- supports the proposal that the CMA should have the ability to impose financial penalties on parties who do not comply with formal requirements made during CA98 investigations
- believes that there is a case for making certain other amendments to OFT procedures, including amending the powers in section 26 of CA98 to more closely mirror the provisions of section 193 of the EA02

Overview

- 4.1 The OFT supports the Government's objectives of improving the speed and predictability of antitrust cases, while retaining the fairness and robustness of decisions. The OFT also welcomes the Government's

overall objectives of enhancing the regime's ability to resolve and deter the competition restrictions that do most to harm competition, consumers and economic growth, and of supporting the ability of the UK competition authorities in taking forward high impact cases.³¹

- 4.2 Competition law enforcement is a fundamental focus of the OFT's work and is key to encouraging compliance with the law. Research carried out for the OFT³² has consistently emphasised the importance of strong enforcement action, including financial penalties on companies and sanctions on individuals, in deterring companies from breaching competition law. Enforcement decisions issued by the OFT and sectoral regulators also provide important guidance to business on what is, and is not, acceptable under competition law, and play an important role in developing the law where there is limited case law or precedent.
- 4.3 In particular, the OFT welcomes the Government's recognition of the potential benefit of competition authorities focusing on high impact cases, targeting the restrictions that do most harm to competition. The OFT has worked hard to ensure that its use of the competition and consumer regimes is targeted towards maximising, and that its enforcement work prioritises cases that maximise, the contribution to, consumer welfare, innovation and economic growth.
- 4.4 The OFT considers that the success of a regime cannot be measured solely by reference to the number of cases opened or decisions taken by

³¹ See paragraph 1.8 of the consultation document.

³² Research carried out for the OFT has consistently shown that the key drivers for compliance with competition law are concerns about the risk of financial penalties, sanctions against individuals, the reputational damage resulting from a finding of an infringement and the prospect of private damages actions (which may be facilitated by the finding of an infringement by the OFT). For example, in November 2007, the OFT published a report by Deloitte & Touche on deterrence (*The deterrent effect of competition enforcement by the OFT*: www.oft.gov.uk/OFTwork/publications/publication-categories/reports/competition-policy/oft962). This showed strong multipliers from previous cases on business behaviour, and further encouraged the OFT's work in the direction of compliance.

a competition agency in a particular year, as this does not take into account the impact on consumer detriment of the agency's work, or indicate the effectiveness of a competition regime in achieving deterrence.³³ For example, although more infringement decisions were issued by the OFT in 2000-2005 (16 infringement decisions, with financial penalties of £50 million against 55 parties), greater deterrence was very likely achieved in 2005-2010 (nine infringement decisions, with financial penalties of over £500 million against 204 parties³⁴). It should be noted that bigger cases, brought against more parties, will typically (and inherently) require greater resources per case than smaller cases. The data set out in Annex A shows the number of the number of cases that have been formally opened, the number of infringement decisions reached by the OFT and the associated level of penalties that have been imposed in each year since 2000.

- 4.5 As this data illustrates, there have been different phases of enforcement by the OFT as the CA98 regime has bedded down and the OFT has reflected on learning from competition cases. The OFT initially opened an
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³³ In particular, this does not include any measure of the scale of the decisions taken (in terms of number of parties) or the importance of the decision in achieving deterrence. In terms of direct financial benefit for consumers, the latest public estimates show that the annual average of the costs savings for consumers resulting from the OFT's competition enforcement activity has been at least £84 million per year, for 2007-2010 (see OFT 1251, *Positive Impact 09/10*: www.oft.gov.uk/sharedoft/reports/Evaluating-OFTs-work/oft1251.pdf). In addition to this, there is the indirect or deferred benefit of the deterrent effect of the OFT's competition enforcement. For instance, (according to the Deloitte and Touche report on deterrence (see previous footnote for every cartel investigated by the OFT, five others (according to conservative estimates) are deterred or abandoned.

³⁴ The level of penalties for the 2005-2010 period includes the original level of penalties imposed by the OFT as a result of its infringement decision against 103 parties in the construction sector in 2009. 25 parties appealed this decision to the CAT and the level of penalties imposed on these parties has been substantially reduced. However, the OFT considers that the judgments do not undermine the important deterrence effect achieved by its original decision in the construction sector more generally. Indeed, it is clear from independent evaluation that the OFT's action has already increased awareness in the construction industry, contributing to behavioural change and effective deterrence.

ambitious number of cases at a time in which the OFT was also implementing significant legislative change resulting from the CA98 and EA02 and important legal points were being clarified by the CAT on decisions taken early in the regime. The OFT's experience during this period and its thinking on how to further develop the regime led to a shift in policy towards opening fewer cases prioritised around impact.

- 4.6 Having recently completed a number of large-scale, long running cases, the OFT has been able to redeploy resource to the opening of new investigations. This can be seen in the trends of number of cases opened per year (as set out in Annexe A). The OFT currently has 23 CA98 or EA02 competition cases open, 11 of which are investigations that have been opened in the past 12 months. This level of activity also reflects the OFT's Annual Plan for 2011-12, in which the OFT has committed to step up its enforcement activity in CA98 cases and developing a stronger delivery culture supported by the right processes, tools and support systems.
- 4.7 However, those cases which were commenced in the early phase of the CA98 regime provided significant lessons for the OFT as to how case procedures might be streamlined and more generally improved. The statistics referred to in Appendix 2 of the consultation document regarding the average length of cases are to some extent driven by such cases, which are likely to have taken longer to complete than if they were commenced by the OFT now.
- 4.8 The OFT recognises that any CMA must strive for such ongoing improvement in the handling of CA98 cases, but considers that this can be addressed within the current system as part of a process of continued evolution and refinement of the regime. The OFT therefore supports the option of retaining the current system for CA98 enforcement and considers that the CMA should have the flexibility to build on the successes that have been achieved and the incremental improvements that have been made to date.
- 4.9 In addition, as the consultation document recognises, some caution must be exercised when making direct comparisons between the number of

antitrust cases completed by different competition authorities internationally.³⁵ In this context, the OFT notes that it is not possible to determine any obvious trends between the models for decision-making processes for antitrust cases followed in the various jurisdictions referred to in Appendix 1 of the consultation document, and the speed of decision-making or throughput of cases generally.

- 4.10 Further, while enforcement action is the key to an effective competition law regime, the OFT also considers that influencing businesses not to breach competition law in the first place should be an important parallel objective for the CMA, whichever option is chosen. This may be achieved through published guidance on the law or on how to comply with it,³⁶ through reasoned enforcement decisions that are published and provide guidance to business and advisers, or through more general competition advocacy activities designed to encourage businesses to
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³⁵ A number of points can be made about the international comparators set out at Table 5.1 of the consultation document: (i) some competition agencies are unable to close cases on grounds of administrative priorities and these agencies will inevitably have a higher throughput of enforcement decisions, whereas a case may have been closed on administrative priority grounds in the UK; (ii) the number of the OFT's published infringement decisions does not necessarily reflect the actual number of infringement findings made by OFT – for example, the OFT recently issued a decision against over 100 companies in the construction sector involving nearly 200 infringements. In other member states, such a case would have resulted in, and been counted as, a series of individual decisions against each party in the case; (iii) a large proportion of decisions by the European Commission and certain National Competition Authorities relate to regulated sectors. In the UK, CA98 investigations in regulated sectors tend to be undertaken by the sector regulators; (iv) the OFT uses a wider range of tools to address competition concerns than is available in other Member States (and where there is therefore a greater emphasis on Article 101/102 decisions). These include criminal prosecutions and market studies, which may lead to market investigation references to the Competition Commission.

³⁶ For example, the OFT has recently consulted on two pieces of guidance aimed at helping businesses and directors comply with competition law, together with an accompanying 'Quick Guide'. To the OFT's knowledge, no other competition authority has published guidance specifically targeted at directors to help them ensure that their businesses comply with competition law.

adopt a competition law compliance culture. The OFT also currently plays an important role in highlighting the importance of competition law to government departments, and advising on its implications for their policy proposals, pursuant to section 7 of the EA02. The OFT considers that this role is vital in helping to frame and deliver public markets that work well for users and taxpayers and that it is crucial that the CMA should retain this role.

- 4.11 The OFT also believes strongly that review by the CAT currently provides the requisite 'second pair of eyes' within the competition regime in a most thorough manner. The OFT considers that the presence of the CAT, alongside the OFT's Board structure (where non-executive directors play an important role in challenging the organisation's activities and processes), the OFT's accountability to Parliament and stakeholders, all combine to provide stimulus and incentive for the OFT to examine and improve its performance over time.
- 4.12 In this context, the OFT notes that page 5 of the consultation document states that in determining what proposals for reform should ultimately be adopted, the Government will focus on '*those reforms which can deliver benefits to competition, consumers and economic growth, and which can be implemented as soon as possible and without significant uncertainty and risks to the momentum and effectiveness of the regime*'. The OFT considers that this is a valuable measure by which to gauge whether a case has been made out for fundamental reform to the CA98 regime. The OFT is not convinced, therefore, that any case has been made out for fundamental reform of the investigation of CA98 cases, which would be a radical change and require further time to bed in, and would give rise to considerable uncertainty for business and significant transition costs.

OFT views on the options set out in the consultation document regarding a stronger antitrust regime

Option 1: retain and enhance OFT's existing procedures

- 4.13 The OFT supports the option of retaining the current system for CA98 enforcement. The current CA98 regime is proving itself fit for purpose and is sufficiently flexible to enable the regime to develop yet further over time. The OFT keeps its investigation procedures under ongoing review and has improved them based on its experience of enforcing CA98, innovating as appropriate. The OFT has also benefited from the experience and developing practice of the European Commission, which has a similar regime for investigating antitrust infringements. The OFT considers that the CMA should pursue such a process of continuous improvement.
- 4.14 In terms of the current CA98 regime already leading to positive outcomes for the economy, the available evidence suggests that there have been significant improvements in business awareness of, and compliance with, competition law over the last 10 years, since the introduction of CA98.³⁷ The OFT has used its published prioritisation principles to focus its limited resources in the most effective way on cases that have a high impact on consumer welfare and the economy.³⁸
- 4.15 Many of the improvements to CA98 procedures that have already been adopted by the OFT are set out in paragraphs 5.24-5.26 of the consultation document.

³⁷ A recent survey shows that from 2006-2010, the number of businesses claiming to know 'a lot' or 'a fair amount' about competition law more than doubled from 12 per cent to 25 per cent. For larger businesses this number is higher at 45 per cent, with only 13 per cent in this category saying they knew nothing. This increase in awareness coincides with a period of substantial media coverage of high impact cases such as in construction and banking sectors – so that 65 per cent of large businesses in the survey said they were aware of OFT enforcement activity in 2010.

³⁸ The OFT opened a large number of cases in the early days of the CA98 regime, which meant that its resources were sometimes over-stretched. The OFT's experience during that period and a report by the NAO which recommended that the OFT prioritise its resources more effectively on high impact cases led to a shift in policy towards opening fewer cases prioritised around impact. This led to the publication of the OFT's Prioritisation Principles in 2008.

- 4.16 In terms of improvements targeted at improving the pace of CA98 cases, for example, the OFT has introduced the ability for parties to settle CA98 cases, resulting in considerable resource savings for the OFT. In the latest review of its procedures (a process which culminated in the OFT published guidance regarding its CA98 procedures in March 2011 ('CA98 Procedural Guidance')³⁹), the OFT adopted a number of changes, some of which were targeted at improving the speed of delivery of cases (for example, sending focused information requests to collect less irrelevant material, tighter deadlines for parties to respond to information requests and an emphasis on narrowing the scope of investigations, where appropriate). The OFT has also developed project management tools to manage all its investigations more tightly, including its CA98 investigations, which add to the efficiency of the decision-making process. The OFT considers that the various efficiency and streamlining measures it has adopted have resulted in, or are currently leading to, improvements to the speed in which investigations are being carried out, while fully respecting parties' rights of defence.
- 4.17 The OFT has also reacted to concerns from parties to investigations about delays to cases caused by disputes over procedural matters by establishing a trial of a Procedural Adjudicator role in 2011. During the trial the role of Procedural Adjudicator will be carried out by a senior OFT official⁴⁰ who will report directly to the OFT Chief Executive. This trial will give the OFT an opportunity to evaluate whether the existence of a Procedural Adjudicator leads to the resolution of procedural disputes in a swift, efficient and cost-effective manner.⁴¹
- 4.18 Other improvements have been targeted at ensuring that parties have access to the decision-maker in a case and improving the robustness of

³⁹ See OFT 1263 *A guide to the OFT's investigation procedures in competition cases*

⁴⁰ The Director of Competition Policy, Jackie Holland.

⁴¹ The first decision of the Procedural Adjudicator was taken on 8 April 2011, 6 working days after the application for review was received.

decision-making generally). Following the recent judgments of the CAT in the *Construction* and *CRF* cases, the OFT will be reviewing its internal processes for the setting of penalties and its procedures for assessing and weighing up evidence in CA98 investigations, to consider whether these can be improved in future cases. This will include a review of its penalty policy, including considering whether changes should be made to the OFT's penalties guidance to reinforce its ability to set substantial fines that ensure deterrence, in the light of these judgments and other factors. As set out above, the OFT considers that strong enforcement action backed up with significant penalties play an important role in deterring companies from failing to comply with competition law.⁴²

- 4.19 The OFT has also committed in its recent Procedural Guidance set out the likely timeframes for the next steps in the case and as outlined in paragraph 4.69 below, the OFT is also rolling out the introduction of case-specific administrative timetables in CA98 cases.
- 4.20 More generally, in May 2010, the OFT published a transparency statement which outlined a number of commitments regarding how the OFT engages with parties and what information we will provide throughout the life of a case or project. This included providing regular updates to parties on case status and timescales, including, where appropriate, providing draft information requests in advance of issuing them formally and sharing provisional thinking.
- 4.21 The OFT is concerned that a radical change to the CA98 regime at this stage is therefore wholly unnecessary and could lead to considerable uncertainty for business and could risk having a negative effect on the significant progress that has been made in the last decade. In particular, there may be a negative impact on deterrence if businesses are unclear whether or in what circumstances the CMA may be prepared to prosecute infringements of competition law. The OFT considers that the case for fundamental reform to the CA98 regime has not been met, by

⁴² The OFT's review will consider the merits of wider options, such as the introduction of statutory criteria regarding the assessment of the level of financial penalties under the CA98.

reference to the threshold for reform set out at page 5 of the consultation document and referred to at paragraph 4.12 above.

Option 2: develop a new administrative approach

- 4.22 The consultation document considers a number of variants on a new administrative approach.

Option '2a': the creation of an internal tribunal

- 4.23 The first proposal under Option 2 is the creation of an internal tribunal in the single CMA, whose membership would include independent members appointed to adjudicate on cases after the CMA has issued a Statement of Objections (SO). The consultation suggests that under this option, it may be possible to reduce the level of appeal to a judicial review standard, instead of a full merits basis, on the basis that an independent impartial tribunal with full jurisdiction could be created internally.
- 4.24 As stated above, the OFT considers however that a full merits review by the CAT currently provides the requisite 'second pair of eyes' within the competition regime in a most thorough manner. Internal checks and balances within the OFT, combined with the full merits review carried out by the CAT, ensure due process within the current system.
- 4.25 Despite this, the OFT does recognise the Government's rationale for suggesting this model, as a way of ensuring a separation between the case team and the decision-maker in a case (and therefore increased the perceived fairness of the process and reducing any perception of any confirmation bias).
- 4.26 The OFT considers, however, that such concerns are largely addressed, or in progress of being addressed already, within the current system.
- 4.27 At present, a decision-maker in a CA98 case will decide which course of action to adopt after considering all the relevant facts and the full range of views articulated within the OFT, including those of internal Steering Committees (which are made up of senior staff from across the OFT and often include members of its Executive Committee). Specifically, the role

of Steering Committees within the OFT is to debate case team proposals and provide feedback, review the substance of the issues raised by the case team and highlight strengths/weaknesses, provide quality assurance of analysis that has been undertaken and make suggestions regarding strategy and/or other activities that should be carried out. There is also detailed input from specialist advisers in the OFT's Chief Economists Office and General Counsel's Office. The OFT also seeks advice from external counsel in many cases.

- 4.28 Further, in terms of perceived risks of confirmation bias, the OFT regularly reviews whether a case remains an administrative priority after having formally opened a case under section 25 CA98, and closes cases where they are no longer an administrative priority or the emerging evidence is not sufficiently strong to support a finding of infringement. Since January 2005, the OFT has closed approximately 45 per cent of the cases that have been formally opened under the CA98 on the grounds that they are no longer an administrative priority or that the OFT has not found sufficient evidence to support a finding of infringement in the case. Further, the OFT also regularly reviews the scope of individual investigations and may decide to reduce the scope of an investigation either in terms of the number of infringements being pursued or the number of parties. Accordingly, there is no clear or compelling evidence of the OFT deciding to pursue cases to infringement decision just because it has opened a formal investigation.
- 4.29 Further, the OFT has a relatively strong track record before the CAT where the OFT's finding of liability has been challenged,⁴³ suggesting that there is not a major issue with the OFT doggedly pursuing infringement decisions in cases where the parties have not in fact broken the law.

⁴³ Of the 50 decisions taken by the OFT under CA98 to date, there has been an appeal to the CAT by one or more addressees of the OFT's decision in 23 cases. Eight of these cases have either involved an OFT finding of infringement being set aside or a matter being remitted to the OFT after a finding of infringement, or the scope of an infringement decision being reduced.

- 4.30 The OFT is not persuaded, therefore, that there is any compelling evidence of confirmation bias within the current system for CA98 enforcement.⁴⁴
- 4.31 In terms of access to decision-makers, in recent years, the OFT has developed project management tools for CA98 investigations which add coherence and efficiency to the decision-making process for CA98 cases. In particular, the OFT has put in place measures which include making sure that parties are fully aware of the identity of the decision-maker in a case, that parties have the opportunity of a meeting with the representatives of the case team (including the Senior Responsible Officer or Project Director of a case) prior to the stage of issuing an SO, to ensure that they are aware of the stage that an investigation has reached and a case team may also share its provisional thinking with a party to an investigation where appropriate. The OFT's CA98 procedural guidance contains a commitment that the decision maker will attend the oral representations meeting, providing an important opportunity for the party to the investigation to present their case orally to the decision maker in the case.
- 4.32 In terms of future enforcement of the CA98 regime by the CMA, the OFT also considers that the perceived fairness of the regime could be addressed by a requirement on the CMA to publish its proposed procedures for CA98 cases and to consult publically on these.
- 4.33 A second rationale for an internal tribunal would be potentially increased efficiency, as a result of reducing the standard of review carried out by the CAT following a decision by the internal tribunal. However, the OFT does not consider that this option would achieve the objective of creating a shorter end-to-end process for CA98 cases. Under an internal tribunal model, the tribunal would be involved in hearing *all* of the factual

⁴⁴ While paragraph 5.17 of the consultation document states that 'Business and practitioners have also expressed concerns ... that the roles of the OFT and sector regulators lead to potential unfairness because of a lack of separation of powers', there are no other statements in the consultation document which expand on the nature of or basis for such concerns.

and evidential issues for each case that proceeds to Phase 2.⁴⁵ In order to enable the reduction of the standard of review, the internal tribunal would need to hear a considerable amount of evidence in CA98 cases, requiring lengthy hearings and the cross-examination of witnesses and experts. Case teams would also have the considerable additional burden of preparing to 'prosecute' its cases before the internal tribunal.

- 4.34 More fundamentally, as set out above, the OFT is not persuaded that the judicial review standard would be appropriate for antitrust cases under any such internal tribunal model, as such cases involve complex findings of fact and law. In most systems of antitrust enforcement in the EU, there is some scope for the appeal court to undertake some form of review of the facts underpinning an infringement decision. Indeed, paragraph 5.36 of the consultation document refers to the possibility that the CAT may apply a more intensive form of review over time, given the seriousness of the issues involved and the OFT considers that the CAT would be likely to move to a standard of enhanced judicial review which would involve a review of the established facts, to determine if these had been reasonably/properly addressed.
- 4.35 Moreover, judicial review proceedings can also potentially lead to slower outcomes, as a key remedy in a judicial review case is the remittal of the case back to the authority. This can add significant time to the overall decision-making process.

⁴⁵ See footnote 43 above. Where an appeal has been brought against an OFT decision, not every party may decide to appeal. For example, approximately 75 per cent of addressees of the OFT's Construction decision (of which there were over 100) did not appeal the OFT's finding either on liability or the level of penalty. In addition, a party's grounds of appeal may not relate to every point of fact or analysis in the OFT's decision. Of the 23 OFT decisions that have been appealed under the CA98 to date, 16 have related to both the OFT's finding of liability and the level of penalty imposed, or to the OFT's finding of liability alone. Some appeals have related to specific points of fact or law, such as parent/subsidiary liability issues or the scope of the infringement decision reached by the OFT. By contrast, under an internal tribunal model, the adjudicatory body would hear the entirety of the evidence in each case.

- 4.36 Further the OFT considers that an internal tribunal would be vulnerable to challenge on the basis that it does not have sufficient independence from the CMA or credibility to carry out a fully judicial function for the purposes of Article 6 of the ECHR. Although internal safeguards could be put in place to mitigate such concerns, such as ring-fencing permanent members that have necessary expertise and are independent of the executive of the CMA for the purposes of particular CA98 investigations, it is unclear whether this is a particularly efficient approach, given that there is already a specialist tribunal in existence in the form of the CAT.
- 4.37 Consideration would also need to be given to whether and, if so, how a two-phase decision-making process could allow case teams at an early stage of an investigation to assess leniency applications and/or negotiate settlements with the parties. In particular, it would need to be clarified whether the internal tribunal would be required to honour the leniency and/or settlement discussions that the case team had had with parties. This would be important so as not to have an adverse impact on parties' incentives to come in for leniency and/or settle cases.
- 4.38 Overall, the OFT considers that it would be preferable to preserve the current system of internal decision-making alongside full merits review by the CAT. This provides for an appropriate set of checks and balances on decision-making, without unnecessarily adding delay into the overall process. The OFT does not consider that a case has been made out for moving to an internal tribunal model, according to the threshold for reform that is set out in the consultation document, because it would give rise to significant uncertainty and risks to the momentum and effectiveness of the regime.

Option '2b': (investigative panel)

- 4.39 As a variant of a new administrative approach to antitrust enforcement, the consultation document enquires whether decision-making could 'follow the same approach as Phase 2 of mergers and markets cases and be led and determined by panels of independent office holders'. Under this proposal, the panel would have an investigatory as well as an adjudicatory role and may 'take over' cases at an earlier stage than an

internal tribunal – for example where a reasonable belief has been formed that a prohibition has been infringed.

- 4.40 The OFT recognises the Government's rationale for suggesting this model, in that it could appear to provide potentially greater scrutiny of the evidence in a case by a panel of senior decision-makers from an early stage in an investigation and could potentially increase efficiency, as a result of reducing the standard of review carried out by the CAT following a decision by the internal tribunal.
- 4.41 However, as noted above, the OFT is not convinced that this option would address any perception of confirmation bias within the current system for CA98 enforcement (see paragraphs 4.27-4.30 above), given the panel members would be investigators as well as adjudicators.
- 4.42 As explained above, the OFT considers that it would be preferable to preserve the current system of internal decision-making alongside a full merits review by the CAT. The OFT considers that the scrutiny that would be provided by such panel members in a case would not significantly enhance the operation of the regime, given the current role already played by Steering Committees, the detailed input given by lawyers and economists external to the case team and the role of the senior responsible officer in a CA98 case who is held to account within the OFT for CA98 case delivery.
- 4.43 In addition, the OFT is even less convinced (than for Option 2a) that it would be feasible to reduce the standard of review on appeal to a judicial review standard on the basis of the reforms suggested within this option, since the panel members would be investigators as well as adjudicators. Therefore this option would not seem likely to lead to any reduction in the duration of cases from end to end and in fact CA98 procedures would be considerably lengthened, as the panel would be involved in hearing *all* of the factual and evidential issues for each case that proceeds to Phase 2 and would also be involved in each of the procedural steps from an early phase of the investigation.

Option '2c': improving current system for CA98 enforcement, but with EU-style judicial review by the CAT

- 4.44 As a further variant of a new administrative approach, the consultation document suggests that 'further protections [could] be built in to the current OFT arrangements for antitrust enforcement', such as the use of Hearing Officers, requiring decision-makers to be specified, or mandating oral hearings at which the parties are able to put their case to the actual decision-makers. The Government suggests that these might be sufficient to reduce the level of appeal to an EU-style judicial review by the CAT.
- 4.45 The OFT recognises the need to build on the successes and improvements already achieved in relation to antitrust enforcement⁴⁶ and implement further improvements to enhance the effectiveness of the regime.
- 4.46 For the reasons stated above, however, the OFT does not consider it desirable to reduce the level of appeal to judicial review nor EU-style judicial review. Retaining a system of full merits review of CMA decisions by the CAT, would provide important additional scrutiny of the CMA's work and would require the CMA to adopt processes that ensure a robust standard of evidence, in order for cases to survive being tested on appeal. The right to appeal to the CAT in CA98 cases is an integral part of the regime and an important safeguard in terms of parties' rights of defence.

⁴⁶ As noted above, the OFT has recently set out in its Procedural Guidance for CA98 cases that parties will be informed of the identity of the decision-maker in a case at the outset of an investigation, and that the decision-maker will be present at oral hearings (unless impracticable, in which case another senior executive will attend instead). The OFT has recently introduced a trial of a Procedural Adjudicator role and will decide at the end of the trial whether this has assisted in dealing with procedural disputes more efficiently and whether the role should be expanded to cover other procedural matters in CA98 cases and/or whether to recommend to Government that the role should be carried out by an external individual on a statutory basis.

Option 3: a prosecutorial system

- 4.47 Paragraph 5.44 of the consultation document describes a model where the CMA or sector regulator would 'prosecute' cases before the CAT, which would decide the matter.
- 4.48 The OFT recognises that there are a number of reasons for considering a move to a prosecutorial model. In particular, parties would argue their case before a court in the first instance, rather than an administrative body so that such a model appears to reduce any risk of perceived confirmation bias in the decision-making process (see paragraphs 4.27-4.30 above). Further, there is *potential* for a shorter end-to-end decision-making process, as the evidence in a case would be tested by the CAT at an earlier stage of proceedings and there is *potentially* an elimination of duplication between the current administrative stage of proceedings and the hearing of evidence on appeal by the CAT.
- 4.49 However switching from an administrative to a prosecutorial model would represent a radical change for CA98 procedures, at a relatively early stage in the existence of the regime, and the OFT doubts the extent to which the possible hypothetical resource savings and potential improvements to the robustness of decision-making that may result from a prosecutorial model would in fact be realised, for the reasons given below, and would in fact be better than would be achieved through further continuous improvements to the current CA98 administrative regime.⁴⁷ The OFT suggests that the perceived improvements and benefits are more likely than not to prove illusory.
- 4.50 The most resource-intensive part of a case (currently around 75 per cent in terms of case team resources) relates to the gathering and review of evidence, preparing access to file and drafting the SO, all of which the CMA would still need to do. It is not clear that this stage of a case would, or should, be any less resource-intensive under a prosecutorial

⁴⁷ For example, following the recent judgement of the CAT in the *Construction* and *CRF* cases, the OFT will be reviewing its procedures for assessing and weighing up evidence in CA98 cases

model (although the CMA would prepare a statement of case rather than an SO – see paragraph 4.53 below). In fact, this stage of a case may be *more* burdensome for the CMA, as it would have the additional hurdle of preparing the case for a full trial. Experience from other jurisdictions, such as the US, demonstrates that this is a significant hurdle. Further, case teams may show greater caution before deciding to prosecute cases because of the resources involved in preparing for a trial, with the result that some cases that would have an important impact on deterrence are not pursued.

- 4.51 Although the consultation document also notes that court procedures may be more flexible than the initial stages of an administrative procedure (and the OFT acknowledges that the CAT would try to actively manage cases under its existing procedures and under the Civil Procedure Rules 1998), it is not clear that this would result in material resource savings as compared to the current CA98 regime. In any event, interactions between the CMA as the prosecuting body, the parties and the CAT on procedural and case preparation issues in a more formal court process, different from the administrative process, will inevitably lead to opportunities for delay.
- 4.52 In terms of further procedural complexities under a prosecutorial model, it would still be necessary to give the parties access to the documents held on the CMA's case file, perhaps through a Court-ordered disclosure process. A potential saving might arise if it were not necessary for the CMA to prepare redacted versions of the documents in its files. Currently, the OFT generally prepares separate versions of the file for each party to the investigation to ensure that each party does not receive another party's confidential information, although the OFT has stated that it will consider requests to use confidentiality rings and data rooms in suitable cases and a streamlined access to file process using a confidentiality ring has already been followed in one case to date. The OFT considers that it may be unlikely that the need to produce redacted versions would be eliminated, even in a Court-ordered disclosure process and, indeed, there are legitimate reasons why competitors should not generally be able to obtain access to each others' confidential data through an antitrust investigation. If this is correct, there may not be

much, if any, saving of resource for the CMA by using a Court-ordered disclosure process as compared to access to file under the current system.

- 4.53 Further, although the CMA would prepare a statement of case rather than an SO, the statement of case would still need to set out the CMA's case comprehensively, together with the evidence that is relied on in the case against the parties to an investigation, in order for the CMA to prosecute its case and provide parties with sufficient opportunity and transparency so as to enable parties to rebut this evidence. In practice, therefore, it is likely that parties would not accept significant differences between the level of detail contained in an SO under the current system and a statement of case under a prosecutorial model.
- 4.54 Under a prosecutorial model, the CAT would also need to hear and consider the entirety of the evidence against each party in cases brought before it, rather than the more limited issues subject to an appeal. Many CA98 cases involve multiple parties and would give rise, therefore, to lengthy hearings. In more complex cases under Chapter I of the CA98, and in abuse of dominance cases under Chapter II of the CA98, the court will also need to adjudicate on the conflicting views of expert witnesses, in some cases including highly technical (for example, economic) evidence. In some jurisdictions, this has meant that a court has appointed an independent expert to assist in the adjudication of such evidence. Further, where some parts of the evidence in a case is confidential between parties, this can lead to complex and time-consuming procedures in terms of access to evidence, hearings and cross-examination of witnesses.
- 4.55 Although a prosecutorial model would potentially remove the stage of a case between the issue of an SO and a decision by the OFT (because a case would move straight to the CAT at this stage), this would only remove duplication in cases where a party currently appeals an OFT decision. As noted above, less than a half of OFT decisions to date have been appealed to the CAT and, within each appeal, the points heard by the CAT are limited to those raised by the appealing parties and to the points specifically raised in each appeal. Therefore, the CAT does not

currently 're-hear' the entirety of the evidence relating to each decision issued by the OFT.

- 4.56 On this basis, the OFT considers that the end-to-end process under a prosecutorial model is likely, taking account of all the circumstances, to prove to be longer overall than is the case under the current CA98 process. Hence if a prosecutorial model is adopted, the potential for time and resource savings will depend heavily on the extent to which parties are willing to settle cases with the CMA *before* the case is brought to Court. In other jurisdictions with prosecutorial models, settlements (or plea bargains) play a very important role in achieving case resolution and deterrence. As such, it would be very important to have an effective method of settlement within a prosecutorial system.
- 4.57 In this context, the OFT is concerned that a number of points need to be considered regarding how settlement could work and the impact of settling cases on deterrence:
- under the current CA98 regime, a settlement involves the settling party admitting the infringement and agreeing to pay a financial penalty. An infringement decision is then issued, which could form the basis of a follow-on damages action
 - the OFT considers that settlements would only have a deterrent effect under a prosecutorial model if: (i) the settlement involves an admission of liability *and* leads to a decision of infringement by the CAT; (ii) it is possible for the OFT to agree a penalty with parties to an investigation and the CAT was prepared to accept the settlement terms and the level of financial penalty that had been agreed. The CMA would therefore need to have an explicit right to settle cases and recommend a level of penalty to the CAT, which the CAT would be obliged to accept, without examining the facts of the case or the evidence, other than in exceptional circumstances (in which case the party could withdraw its admission of liability). There should also be an explicit provision for the CMA or the CAT to publish a case summary setting out the key facts and evidence in the case and the settlement that has been reached

- in cases where a party agrees to modify its conduct, the OFT considers that it would be beneficial to reach a court-approved settlement, so that any violation of the terms of the settlement agreement could be enforced through the court and would potentially attract financial penalties, but again this would need to be without the CAT examining the facts or the evidence
 - while it may be possible to settle some cases involving cartel conduct at a relatively early stage of a case (and prior to a case being brought before the court by the CMA) the OFT's experience is that other more complex cases have typically been settled after an SO has been issued (and the party has considered the full evidence and analysis set out by the OFT), so under the prosecutorial system this would take place after the case had been fully prepared and the prosecution stage had begun
- 4.58 It should also be noted that settlements are likely to take time to emerge under any prosecutorial system. It should be expected that the incentive to settle will be low in the early days of a prosecutorial system. Parties may not be sure of the CMA's likely ability to prosecute cases successfully and to convince the CAT to impose significant financial penalties on them. Further, there will be uncertainty around the CAT's approach to the handling of cases in such a system, which would be very different from the present appeal system. However it may be that over time, after the CMA has prosecuted successfully a number of cases (and where the CAT has imposed significant financial penalties on the parties involved), the prospect of a full hearing before the CAT may induce some parties that it is beneficial to settle with the CMA before the case is brought to Court. The OFT considers that the potential loss of the benefit of settlements for any significant period would be a loss to the impact and effectiveness of the CA98 regime.
- 4.59 It is worth also noting that settlement can itself present challenges in terms of achieving quick and effective outcomes in cases. If not handled efficiently (and if parties make insufficient settlement offers), the settlement process could lead to significant delays and could result in

some cases (where settlement discussions prove ultimately unsuccessful) taking a long time in getting to court.

- 4.60 Further, careful consideration would also need to be given to how penalties would be determined under a prosecutorial model. In particular, the OFT considers that measures would need to be put in place to ensure that the CAT sets penalties at a level sufficient to achieve deterrence of the parties involved and other companies, since this ability is at the heart of a deterrence-based regime. The OFT considers that this could be achieved by introducing a statutory provision setting out the criteria to be assessed by the court when setting penalties, including the need to achieve effective deterrence (both in relation to the infringing parties and more widely) and/or in combination with some form of binding guidelines.
- 4.61 In addition, given the critical importance of the OFT's leniency policy in detecting cartel activity,⁴⁸ careful consideration would also need to be given to how the leniency policy and system would interact with a prosecutorial model and agreed guidance would need to be binding on the CAT in this respect. For example, the experience of the OFT, and other authorities operating leniency programmes worldwide, is that certainty of treatment is essential *before* a company will consider coming in for leniency. It would be necessary to ensure that any leniency agreements entered into by the CMA were fully respected by the CAT under a prosecutorial model. The biggest challenge may be in relation to parties benefiting from Type B or C leniency, who are offered a percentage discount from the penalty eventually imposed.⁴⁹ It would be

⁴⁸ This is demonstrated, for example, by the fact that the OFT has not imposed a fine in a cartel infringement decision which did not involve a leniency applicant since May 2002.

⁴⁹ The OFT's practice distinguishes between three types of leniency. A 'Type A' case refers to a situation where an applicant is the first to come forward and there is no pre-existing administrative or criminal investigation. In such circumstances, the OFT automatically grants full immunity from financial penalties. A 'Type B' case refers to a situation where an applicant is the first to come forward and there is a pre-existing administrative and/or criminal investigation. Although full immunity remains available in a Type B case, the grant of such immunity is discretionary. A 'Type C' case describes a situation where an applicant is not the first to come

essential to ensure that the CAT honoured such agreements, as decisions by the CAT to diverge from the immunity/leniency reductions proposed by the CMA would significantly undermine parties' willingness to apply for leniency. It is evident that leniency would be fatally undermined if, for example, the CAT could decide that, based on its assessment of the facts and the evidence when the case came before it, perhaps at the instigation of other parties, Type A leniency should not have been given.

- 4.62 In all leniency and immunity cases, the OFT presumes that the CMA would still prosecute the case at the CAT (or seek the CAT's approval of a settlement), since it would wish there to be an infringement decision against the parties, allowing follow-on damages actions as appropriate. For Type A and Type B immunity recipients, we assume that the CMA would recommend that the CAT did not impose a financial penalty on these parties. For Type B and Type C leniency recipients, the CMA would recommend that the CAT impose a financial penalty but respect the percentage discount given by the CMA to the party involved.
- 4.63 Although the CMA could still set policy to some extent by deciding which cases to prosecute and by settling cases, in the OFT's view, there are also considerable benefits to having a single body responsible for developing policy and considering the application of the law to new and emerging issues, advancing new and economic policy theory, developing in-depth understanding of specific sectors and providing guidance to firms about new or novel issues, rather than fragmenting issues of policy determination between the CMA and the CAT as would be the inevitable consequence of the prosecutorial system.
- 4.64 If a prosecutorial model were to be adopted, the OFT considers it would be important for the CMA and sectoral regulators to remain able to make

forward with evidence and there is a pre-existing administrative and/or criminal investigation. In a Type C case, the OFT has discretion to grant a reduction of up to 50 per cent in the level of any financial penalties. See the *OFT's Guidance as to the appropriate amount of a penalty* (OFT423, December 2004) and *Leniency and no-action* (OFT803, July 2005).

pronouncements that there are no grounds for action under CA98 on the basis of the evidence considered so as not to lose the precedent value of no grounds for action decisions.⁵⁰

- 4.65 Prosecuting cases before the CAT in each case would require staff with advanced advocacy skills, which generally do not currently exist across the OFT and/or the CC, and would therefore require either significant churn and/or re-training of staff, or significant use of external counsel in each case, at least in the short, and likely medium, term. This is likely to result in the costs to the public purse of taking cases through the prosecutorial system being substantially higher than under the present system. The resources, and thus the costs to the public purse of the CAT would also, of course, have to be substantially increased.
- 4.66 In addition to the risks outlined above, the OFT considers that moving to a prosecutorial model would involve significant transition costs for business and may lead to a negative impact on deterrence if businesses are unclear whether, or in what circumstances, the CMA may be prepared to prosecute cases before the CAT. Further as already noted above, the possible hypothetical resource savings and potential improvements to the robustness of decision-making that may result from a prosecutorial model could be achieved through further improvements to the current CA98 regime. On this basis, the OFT considers that the case for a radical shift to a prosecutorial model has not been met, by reference to the threshold for reform set out in the consultation document.⁵¹

⁵⁰ In this context, it would need to be determined whether a decision by the CMA not to prosecute a case where it considered that there are no grounds for further action would constitute an appealable decision to the CAT, or an administrative decision that would be reviewable by the High Court.

⁵¹ See page 8 of the consultation document.

Statutory and administrative timetables in CA98 cases

- 4.67 Paragraph 5.48 of the consultation document refers to the possibility of the introduction of statutory or administrative timetables in CA98 cases.
- 4.68 The OFT does not currently consider that statutory timetables are appropriate for CA98 cases. In particular, there would be considerable difficulties in determining the appropriate time limit for completing a case, as CA98 cases vary considerably according to the number of parties to an investigation and the complexity of factual, legal and economic issues. Although it would be possible to build-in mechanisms to 'stop the clock' to deal with delays to an investigation, the OFT is concerned that the use of statutory timetables would perhaps incentivise parties to game the system (for example by providing large volumes of unnecessary documents in response to a request for information, in order to extend the time needed by the case team to review the documents provided), which could give rise to difficulties in determining whether it would be appropriate to stop the clock in a case. These types of difficulties may undermine the ability of the CMA to progress a case as well as diverting resources that should be deployed on the substance of the case to dealing with tactical and procedural issues.
- 4.69 As noted at paragraph 5.27 of the consultation document, the OFT is in the process of rolling out the introduction of administrative timetables that are disclosed to parties in CA98 investigations. The OFT considers that the use of case-specific administrative timetables wherever possible will give rise to considerable benefits, particularly in terms of clarity for parties in terms of key decision-making stages in a case and giving a commitment to parties in a case in terms of speed and resourcing. This will enable the OFT to determine whether greater transparency can be used to incentivise parties to co-operate with the OFT in concluding cases more swiftly and efficiently and whether 'standard' administrative timetables (which provide target dates for issuing an SO and/or reaching a decision in a case) would be appropriate.

Private actions

- 4.70 The OFT welcomes the statement by Government that it is considering methods of collective redress and that it will take account the recommendations made by the OFT in its 2007 report on private actions in competition law in doing so.
- 4.71 The OFT considers that, in addition to looking at options in relation to collective redress, Government should also consider the other aspects of the OFT's 2007 recommendations on options for improving access to redress for those who have suffered loss as a result of competition law breaches. In particular, the Government should consider the recommendations made by the OFT in relation to funding and costs arrangements⁵² for competition private actions and in relation to the position of leniency parties and use of certain leniency evidence.

Offences for non-compliance with an investigation

- 4.72 The OFT supports the proposal at paragraph 5.55 of the consultation document, that the CMA should have the ability to impose financial penalties on parties who do not comply with formal requirements made during the course of investigations under CA98 and the EA02. The OFT considers that the existence of such penalties is likely to result in quicker and better quality responses to requests for information and consequently lead to more efficient investigations. We also believe that there are few cases of non-compliance where criminal prosecution would

⁵² We note that the landscape in relation to some of the costs and funding arrangements has changed, such that some of the precise detail of the 2007 recommendation will need to be reconsidered. Specifically, the Government recently announced its intention to abolish the general recoverability of success fees in conditional fee agreements (CFA) from the losing party; see www.justice.gov.uk/consultations/docs/jackson-report-government-response.pdf. If this provision goes ahead, although it would appear that the OFT's 2007 recommendation that success fees of up to 100 per cent should come from the losing party would not be possible to implement, it would remain possible for any success fee to be met by the CFA funded party, typically out of any damages recovered by a claimant.

be warranted, although this possibility should be retained to address the most serious cases.

Powers of investigation including powers of entry

- 4.73 The OFT is currently able to exercise various powers of entry as set out in paragraph 5.58 of the consultation document, either in connection with our own investigations, or when assisting with investigations carried out by the European Commission or other EU member states. The OFT considers that having and exercising these powers is both necessary and proportionate, in light of the nature and seriousness of the conduct we investigate, and the type of evidence required to prove our cases. Where it is assisting the European Commission, the OFT considers that these powers are necessary for the OFT to be able to comply with its obligations to assist the European Commission. Further, the OFT has used these powers on numerous occasions since the relevant provisions came into force, and believes it has demonstrated its ability to carry out inspections of both business and domestic premises efficiently and professionally, and with proper regard to the need to limit the degree of intrusion involved to only that which is absolutely necessary.
- 4.74 The consultation identifies that OFT warrant applications are heard by the High Court, when a more usual venue for applications of this type would be the Magistrates Court.⁵³ The OFT believes that consideration should be given to whether or not changes to the current provisions would be appropriate and if so, what those changes should be. It suggests that the issues for consideration could cover what differences exist between the warrants applied for in the Magistrates Court and those applied for in the High Court, and whether any consequent changes to the present procedures would be desirable in

⁵³ The SFO, who are joint enforcers in relation to the cartel offence, and carry out investigations into commercial conduct that are of comparable or greater complexity than those carried out by the OFT, obtain warrants from the Magistrates Court under section 2 of the Criminal Justice Act 1987.

such a way as to make the process and procedure for applying for warrants more efficient, whilst at the same time ensuring that appropriate procedural safeguards remain in place, given the intrusive nature of the powers involved. While the OFT does not envisage that this would involve any change to the statutory criteria that have to be fulfilled before a warrant could be issued, the OFT considers that it would be appropriate to explore whether or not different procedures, including different jurisdictions, would be likely to offer a quicker and simpler process, with consequent resource savings both for the OFT and the courts. Those changes might include the current provisions of the CA98 and the EA02 being altered such that applications are heard in the Magistrates' or another appropriate Court.

- 4.75 In the context of considering the CMA's investigative powers, the OFT believes that there is a case for amending the powers contained in section 26 of CA98 to more closely mirror the provisions of section 193 of the EA02. In particular, we believe that the OFT should have the power in CA98 investigations to require a person to answer questions, as well as providing information and documents, as this will support more efficient and more productive investigations.
- 4.76 There is significant overlap between the type of conduct investigated under the two Acts, and the evidence that the CMA will wish to rely on in taking a case forward. Where that includes witness evidence, the OFT is currently dependent on information provided voluntarily, or in response to a request made pursuant to section 26 of the CA98.
- 4.77 Under section 26 of the CA98 the OFT may require the provision of information by an individual, but the provisions of section 26 require the provision of a notice in writing. The OFT considers that having the ability to require individuals to answer questions will, produce higher quality evidence more efficiently, and result in more robust and effective enforcement.
- 4.78 The OFT considers that it would be necessary to have adequate safeguards in place to restrict the use of material against the relevant individual, similar to those contained in section 197 of the EA02.

Further, the OFT recognises, as reflected in its current guidance on powers of investigation, that such a power could not be used to compel answers to questions where that might amount to an admission of an infringement of competition law by an undertaking.

Additional improvements to the CA98 regime

- 4.79 The consultation document states that the Government welcomes further ideas to improve the current process of antitrust investigation and enforcement.
- 4.80 The OFT supports the Government's desire to implement improvements to competition enforcement, focusing on changes that can be implemented as soon as possible and without significant uncertainty and risks to the momentum and effectiveness of the regime. The OFT considers that a number of additional changes could be made (to legislation or otherwise) to improve the efficiency and effectiveness of the CA98 regime.

Interim measures

- 4.81 Section 35(2) of the CA98 provides: "*If the OFT considers that it is necessary for it to act under this section as a matter of urgency for the purpose (a) of preventing serious, irreparable damage to a particular person or category of person, or (b) of protecting the public interest, it may give such directions as it considers appropriate for that purpose*".
- 4.82 The 'serious, irreparable damage' requirement is a high threshold in practice. The test is often interpreted as a requirement that, absent interim measures, the undertaking will exit the market or even go out of business. This prevents the OFT from making an interim measures direction under section 35(2)(a) in cases where an undertaking is likely to suffer significant harm from the alleged infringement, but there is no current threat of the undertaking exiting the market or going out of business.
- 4.83 The OFT considers that section 35(2)(a) of the CA98 could be changed to read "of preventing significant damage to a particular person or

category of persons". This is consistent with the threshold used in some UK regulatory regimes before a regulator is able to make a provisional enforcement order. For example, the test in section 23 of the Postal Services Act 2000 requires the Postal Services Commission to have regard to "*the extent to which any person is likely to sustain loss or damage as a result of anything likely to be done or omitted in contravention of the licence condition before a final order may be made*". Similar wording is included in section 25(3)(a) of the Electricity Act 1989 and section 28(3)(a) of the Gas Act 1986.

- 4.84 The OFT considers that this change in legislation is important, in particular for investigations into the alleged abuse of a dominant position. The change would enable the OFT to act to prevent further harm to consumers and the wider economy resulting from the alleged abuse of dominance, which may be beneficial in circumstances where the incentive of the dominant firm is to delay an investigation in order to protect its continuing monopoly profits.

Absolute privilege in relation to notices regarding the existence of an OFT investigation in a CA98 case

- 4.85 Section 57 of the CA98 states that for the purposes of the law relating to defamation, absolute privilege attaches to any advice, notice or direction given, or decision made by the OFT in the exercise of its functions under Part I of the CA98.
- 4.86 The OFT suggests that section 25 of the CA98 should be amended to so that there is an explicit provision giving the OFT a power to publish a notice on its website regarding the existence of a CA98 investigation, the parties involved and the subject matter of the investigation. Currently, some parties argue that publishing such a notice before details of a case have already entered the public domain could be defamatory.
- 4.87 The OFT considers that publishing such a notice will assist it in carrying out its functions in many cases, in particular, by alerting third parties to the existence of an investigation and potentially triggering evidence or

submissions from such parties which may assist the OFT's evidence gathering process.

Part 9 of the EA02

4.88 Although the OFT has made specific comments in Chapter 11 below regarding Part 9 of the EA02, the OFT would welcome the opportunity to input into a wider review of the operation of Part 9 of the EA02 in the context of CA98 investigations and more generally. In striving for ongoing improvements, the OFT's experience has shown that there are a number of practical difficulties regarding the interpretations of these provisions which impact on the momentum and effectiveness of the regime.

5 THE CRIMINAL CARTEL OFFENCE

The OFT:

- supports the amendment of the criminal cartel offence in the EA02
 - to remove the need to prove dishonesty on the part of defendants, whilst ensuring that
 - the offence is defined so that it does not include agreements made openly
- considers that such an approach will achieve the objectives originally behind the inclusion of the dishonesty test, whilst removing some of the uncertainties that its inclusion has caused

Overview

- 5.1 The Government's consultation document recognises that cartels are the most serious form of anti-competitive behaviour, and potentially the most damaging to the UK economy and UK consumers. Given the seriousness of the conduct, the OFT believes that criminal sanctions for individuals who participate in hard-core cartels are warranted and that such sanctions have a substantial deterrent effect. The significant deterrent effect of such sanctions is supported by research conducted for the OFT by Deloitte.⁵⁴ The cartel offence contained in section 188 of the EA02 is therefore an important element of the UK competition regime.
- 5.2 In order to be a fully effective element in the competition regime, the offence needs to be clearly defined, so that individuals can be sure about when their conduct may expose them to criminal penalties. The offence

⁵⁴ *The deterrent effect of competition enforcement by the OFT* - see footnote 29

must also have the correct scope, so as to capture all of the essential features of hard core cartels, namely agreements between undertakings that fix prices, restrict supply, share markets or rig bidding processes, whilst excluding, so far as possible, those exceptional cases where an agreement may include one or more features of a hard core cartel but nevertheless be beneficial overall, or where the conduct of the individuals is essentially blameless.

- 5.3 We also consider that it is essential that the cartel offence be framed in such a way that the UK retains the ability to pursue criminal investigations into individuals in parallel with an EU investigation into undertakings, as the OFT did successfully in the *Marine hose* case.⁵⁵ This would otherwise severely limit the scope for prosecuting those involved in international cartels, which, as the consultation document recognises, may often be the most damaging to the UK economy and consumers.
- 5.4 The serious anti-competitive nature of hardcore cartels and the capacity of such cartels to cause significant damage to the UK economy and consumers do not depend on the dishonesty with which they were made or implemented. Rather, as set out in the consultation document, the requirement of dishonesty was included in the definition of the cartel offence:
- to distinguish the offence from both the EU and the UK civil antitrust prohibitions
 - as a means of excluding from criminal trials detailed consideration of economic evidence about the effects of cartels in the relevant market. This was considered to be desirable because such evidence

⁵⁵ Under Article 3 of Council Regulation (EC) 1/2003, where an EU national competition authority applies national competition law to conduct to which the EU competition rules apply, it must also apply the relevant provisions of the Treaty on the Functioning of the European Union. Under Article 11(6) of the Regulation, the initiation by the European Commission of enforcement proceedings under the EU competition rules has the effect of relieving EU national competition authorities of their competence to apply EU competition law.

would be difficult for juries to understand and evaluate, and this might lead to unmeritorious acquittals

- to provide juries with a familiar test they would find easy to apply, whilst also signalling the seriousness of the offence.

As the consultation document acknowledges, it was recognised at the time the offence was created that the dishonesty element was an imperfect means of achieving these ends. In view of this, we welcome the opportunity to revisit the issue. Moreover, whilst we recognise that the number of prosecutions has to date been small, we do not believe that this should necessarily stand in the way of reform if it will enhance the regime, can be implemented swiftly and will promote the efficient and effective use of public resources without creating uncertainty.

The case for change

5.5 Relying on a normative concept, such as dishonesty, to define the criminal cartel offence inevitably introduces some uncertainty,⁵⁶ particularly in an area of the law with which juries are likely to be unfamiliar. Such uncertainty is reflected to some extent in the range of factors that have been raised by those under investigation by the OFT as potential counter-arguments to the suggestion that their conduct was dishonest. These include:

- the motivation for engaging in the cartel was to preserve jobs which might otherwise be lost
- no financial benefit accrued to the individual concerned
- the individual concerned only participated because it was seen by his/ her employer as part of their job

⁵⁶ Dishonesty in criminal offences means that the jury apply the test set out in the case of *Ghosh*, such as whether the defendant's conduct was dishonest by the standards of reasonable honest people, and if so, whether the defendant must have realised that it was.

- the cartel was a response to severe pressure on suppliers by customers with 'excessive' buying power
- the defendant was aware that the conduct may have been 'wrong' from a regulatory perspective but did not consider that it was dishonest.

There is no certainty as to how a jury would approach any of these matters when assessing dishonesty, particularly in relation to conduct which many jury members may not consider inherently dishonest.^{57,58}

- 5.6 The OFT believes that such uncertainty is inherently undesirable, both for businesses and employees seeking advice in this area, as well as for those under investigation or facing prosecution. It also makes it more difficult and resource-intensive to investigate and prosecute the offence, as even those who may be ready to admit their involvement in cartel conduct will have an incentive to contest the case in the hope that a jury will be persuaded that they were not acting dishonestly. This in turn impacts on the number of cases that can realistically be investigated and prosecuted and the level of deterrence that can be achieved.
- 5.7 Also, under the OFT's leniency policy, it is a condition for the grant of a no-action letter conferring immunity from prosecution that the recipient must admit that they have committed the cartel offence.⁵⁹ The OFT

⁵⁷ See Stephan, A. (2007) Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain (ESRC Centre for Competition Policy and Norwich Law School, University of East Anglia), cited at foot note 92 of the consultation document.

⁵⁸ The OFT is not of the view that considerations of the sort listed in paragraph Annexe(s)5.5 cannot be taken into account but, rather that they should form part of the considerations as to whether a case merits prosecution and, if so, any resulting sentence, rather than determining whether an offence has been committed.

⁵⁹ See 'The cartel offence: no-action letters for individuals' (OFT 513), paragraph 3.3; and 'Leniency and no-action - guidance note on the handling of leniency and no-action applications' (OFT803), paragraphs 7.3 ff. regarding the circumstances in which an individual qualifying in principle for immunity from prosecution would be required to admit the offence.

believes that the inclusion of dishonesty as an element of the offence is likely to act as a disincentive for both individuals and businesses to report their involvement in cartel activity, thus reducing the effectiveness of the leniency policy in enabling the OFT to uncover and take enforcement action against cartels.

- 5.8 As regards the other objectives which informed the inclusion of dishonesty as an element of the offence, the OFT considers that it should be possible to achieve these either equally or more effectively by other means, without the uncertainty and resulting difficulties created by the dishonesty requirement (see assessment of the options below). Specifically:

- it seems to the OFT that it should be possible to frame the offence in other ways, that do not rely on dishonesty as an element of the definition of the offence, of ensuring that agreements that would be lawful under the civil antitrust prohibitions are excluded from the offence
- retaining dishonesty as an element of the offence would also not appear to be essential for ensuring that the OFT remains able to prosecute individuals for their participation in cartels that are the subject of civil enforcement action by the European Commission.⁶⁰ The OFT agrees with the consultation document, however, that this may be more difficult to achieve if the dishonesty requirement were to be removed without making other changes to the offence
- as regards the objective of excluding the need for juries to consider the economic effects of an agreement, it appears likely that trial courts will in fact be asked to admit expert economic evidence of effects as being potentially relevant to establishing dishonesty.⁶¹ As

⁶⁰ *IB v R* [2009] EWCA Crim 2575, on appeal from the Crown Court ruling in *R v George, Crawley, Burnett and Burns*

⁶¹ Crown Court ruling in *R v George, Crawley, Burnett and Burns*, 24 July 2009

well as being contrary to the intention of Parliament at the time the EA02 was debated, the OFT believes that this is likely to present considerable difficulties in jury trials. Rather, the OFT believes that consideration of the effects, or likely effects, of cartel behaviour is better addressed by the prosecutor in determining which cases merit prosecution, and in the event of a conviction, by the sentencing court in considering the seriousness of the offence and mitigation.

Assessment of options

- 5.9 The OFT has assessed each of the options set out in the consultation document for changing elements of the cartel offence, as well as the option of retaining the offence in its present form, in each case by reference to the need to achieve clarity in the definition, and the correct scope, of the offence. Further, the OFT has noted the desirability of excluding the need for juries to consider economic evidence, and the need to maintain the OFT's ability to prosecute individuals for their participation in cartels that are the subject of civil enforcement action by the European Commission. Specifically, we have considered each option by reference to the objectives which informed the decision at the time the offence was created to include the dishonesty requirement (see paragraph 5.4 above). Finally, the OFT has also had regard to the ease with which each option proposed could be implemented, including the practical challenges both of re-defining the cartel offence and drafting new, related provisions and applying them in practice. Further, we have considered whether the reform would deliver benefits to consumers and growth and can be implemented without significant uncertainty and risks to the momentum and effectiveness of the regime.
- 5.10 Having considered all of these matters, the OFT would, on balance, favour option 4 (removing the dishonesty element from the offence and defining it so as to exclude agreements made openly) as offering the preferred way of bringing greater clarity vis-à-vis the definition of the offence, whilst achieving either equally or more effectively the objectives which motivated the adoption of the dishonesty requirement originally. Option 4 would also, in our view, be the least onerous to implement. Specifically, we think that:

- an offence based on option 4 is likely to be the easiest to draft into legislation in clear, unambiguous language and (unlike option 1) does not depend on a separate set of provisions, such as prosecutorial guidance. Indeed, the concept of excluding overt conduct from liability is already reflected in the bid-rigging provisions of the cartel offence⁶²
- under option 4, determining in individual cases whether offending arrangements have been disclosed or not, and thus whether an offence has been committed, will involve relatively straightforward questions of fact. This should allow for early and reliable decisions about which cases ought to be pursued, reducing uncertainty for those involved, and also enabling more efficient use of investigative resources
- option 4 recognises that secrecy should have no place in legitimate business arrangements between competing undertakings to the extent that those arrangements are intended, for example, to fix prices or share markets. That is not to say that businesses may not have a legitimate interest in maintaining the confidentiality of other aspects of such arrangements, in particular where their disclosure might significantly harm the parties' legitimate business interests. The OFT considers that it should be possible to frame the offence in such a way as to avoid the need to disclose any such confidential information
- the fact that the arrangements were made openly would only exclude liability for the criminal offence, and not liability for the civil antitrust infringement. The OFT would not, therefore, expect a revised offence reflecting option 4 to act as an incentive for hard core cartelists to avoid prosecution by conducting their cartel openly. Equally, a revised offence reflecting option 4 could not be

⁶² Under section 188(6) of the Enterprise Act, arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made.

used as a loophole to avoid civil liability for antitrust infringements falling short of genuine hard core cartel conduct

- option 4 also recognises that when customers are aware of potentially anti-competitive arrangements they will be able, in most cases at least, to take steps to mitigate any harmful effects by, for example, seeking supplies from elsewhere. This is already reflected in the existing bid-rigging provisions of the cartel offence⁶³ and applies equally to other types of cartel arrangements. Where customers are, for whatever reason, unable to mitigate the harmful effects of the agreement (for example, where there are no alternative suppliers), it will still be open to them to take action to the extent that the arrangement amounts to a civil antitrust infringement, for example by reporting the agreement to the relevant competition authority or taking private enforcement action.

5.11 Of the other options, the OFT believes that removing the dishonesty element from the offence and introducing guidance for prosecutors (option 1) would create less certainty for businesses and their advisors, and would also heighten the risk of defendants seeking to challenge decisions to prosecute, affecting the speed and efficiency with which criminal cartel offences could be prosecuted. The OFT also considers that option 1 would increase the risk that parallel UK criminal and EU civil enforcement would be precluded under Regulation 1/2003⁶⁴, significantly undermining the OFT's ability to investigate and pursue international cartels effectively.

5.12 As regards option 2 (removing the dishonesty element from the offence and defining the offence so that it does not include a set of 'white-listed' agreements), the OFT considers there is likely to be substantial difficulty in drafting a 'white list' that does not result in a revised criminal cartel offence that is unduly wide or narrow in scope. Moreover, any such list

⁶³ See footnote 62 above.

⁶⁴ See footnote 55 above.

would need to be kept under review and would be likely to require amendment in light of changes in business practices. Further, the OFT believes that this option is likely to result in ongoing uncertainty as to the scope of the criminal cartel offence, with trial courts regularly hearing legal argument as to the characterisation of the particular agreement, adversely affecting the speed and efficiency with which such offences could be investigated and prosecuted.

- 5.13 The OFT considers that option 3 (replacing the dishonesty element with a secrecy element) is a better option than 1 or 2 in that secrecy is a common feature of hardcore cartels, and a good indicator of knowledge or belief on the part of participants that the conduct is unlawful and potentially harmful. However, the OFT believes that option 4 is preferable, given that it provides a greater level of certainty and hence predictability for business, and will be more straightforward both to draft into legislation and to apply in practice. Moreover, if option 3 were to be interpreted as requiring proof of active concealment by a defendant, this would often be difficult. Concealment often consists of omissions, for example, failing to note meetings in diaries, or failing to claim for cartel-related expenses. Also, requiring such proof creates a perverse incentive for cartel participants to minimise evidence, and destroy such evidence as it is created. Such risks do not arise to the same extent with option 4.
- 5.14 In summary, the OFT considers that removing the dishonesty requirement within the definition of the criminal cartel offence and defining the offence so that it does not include agreements made openly (option 4) would, on balance, enhance the regime, in particular by reducing uncertainty and improving the speed and efficiency with which such offences could be investigated and prosecuted, thereby increasing deterrence.

6 CONCURRENCY AND SECTOR REGULATORS

The OFT:

- agrees that the relative paucity of CA98 cases in the regulated sectors is of concern and should be addressed
- considers that a combination of the options of strengthening the primacy of competition law over sectoral regulation, and giving the CMA a greater role in the regulated sectors, would be the most effective means of strengthening the concurrency regime.

Overview

6.1 The OFT agrees that the relative paucity of CA98 cases in the regulated sectors is of concern and should be addressed. The OFT has in the past expressed serious concerns about the functioning of the concurrency regime, noting that it leads to a duplication of pressure on scarce resources (in that the OFT and the sectoral regulators each need to have staff skilled in competition law enforcement) and a fragmentation of the roles of the various UK competition authorities, leading to a weakening of the overall competition regime. Concurrency raises the risk of the inconsistent use of competition enforcement tools leading to greater uncertainty for business. Moreover, in practice, it seems that the current concurrency framework has resulted in the OFT having extremely limited involvement in regulated sectors, creating the real potential for an 'enforcement gap', particularly in the light of the relative paucity of competition enforcement noted above.⁶⁵ That said, the OFT notes that, in determining which reforms should ultimately be adopted, the

⁶⁵ See John Fingleton's speech 'Challenges and Opportunities for the Competition Regime' delivered at King's College on 5 July 2010.

Government is focusing on only those reforms which can be implemented as soon as possible and without significant uncertainty and risks to the momentum and effectiveness of the regime and, in this context, is not minded to bring an end to the concurrency regime.

Assessment of options

- 6.2 In view of the Government's intention to continue the concurrent competition regime, the OFT welcomes the exploration in the consultation document of ways in which the effectiveness of the regime might be increased. Having considered the options set out in the consultation document, the OFT considers that a combination of the strengthening of the primacy of competition law across the tool kits of the sectoral regulators, and the option of giving the CMA a greater role in the regulated sectors, would be the most effective means of strengthening the concurrency regime. We set out below why we consider this to be the case. In reaching these conclusions, the OFT has had regard to the objectives set out in the Executive Summary of the consultation document, which are to:
- improve the robustness of decisions and strengthen the regime
 - support the competition authorities in taking forward high impact cases
 - improve speed and predictability for business.

Strengthening the primacy of competition law over sectoral regulation

- 6.3 The OFT supports the option of establishing a consistently strong obligation on all sectoral regulators that they will use their competition powers in preference to their sectoral powers wherever legal and appropriate. While the preferred route to achieving this may be on a statutory basis, the OFT accepts that the complex array of differing duties imposed by EU legislation across the various sectoral regulators might mean that this needs to be done using policy tools.

- 6.4 For the avoidance of doubt, the OFT would welcome a common set of factors adopted by the sectoral regulators as to how they conduct their primacy assessment. Such a set of factors could complement the Principles of Economic Regulation produced by BIS as part of the Growth Review, to which the OFT inputted.⁶⁶ The OFT does not regard the development of such a common set of factors between the sectoral regulators as mutually exclusive to a statutory or policy imperative of primacy.
- 6.5 One possibility might be for such a framework to be developed through the Concurrency Working Party (CWP) mechanisms.⁶⁷ For example, if there was interest and agreement in CWP to do so, there could be a working group of CWP members which could work to develop the framework and then present that for approval to CWP. If it was considered desirable, CWP could in turn present such a framework to the Joint Regulators Group, which is comprised of senior staff from the economic regulators and in which the OFT currently sits as an observer.
- 6.6 The primacy option, which draws upon obligations imposed upon Ofcom when exercising its powers under the Broadcasting Acts 1990 and 1996, is to be welcomed. The OFT considers that such a reform would

⁶⁶ The Principles are available at www.bis.gov.uk/assets/biscore/better-regulation/docs/p/11-795-principles-for-economic-regulation.pdf

⁶⁷ CWP membership consists of the OFT and regulators, including Postcomm which sits as an observer but does not have concurrent powers. The CWP ordinarily meets bi-monthly and is chaired by a representative of the OFT. The aims of the CWP are:

- to facilitate, to the greatest extent possible, a consistent approach by the sectoral regulators and the OFT in the exercise of their powers under CA98
- to consider the practical working arrangements between them
- to provide a vehicle for the discussion of matters of common interest, and the sharing of information where appropriate and legally permitted, and
- to co-ordinate the provision of advice and information on the application of Article 101 and Article 102 TFEU, and of the Chapter I and Chapter II prohibitions to the public

CWP members regularly discuss and co-operate on issues of common interest with the OFT in between CWP meetings. The CWP may agree to form ad hoc groups comprised of its membership where appropriate. See in general 'Annexe B, Competition law terms of reference of the Concurrency Working Party' in OFT405 *Concurrent Application to Regulated Industries*.

be a significant step forward to achieving one of the original goals of concurrency, which was for the need for economic regulation to decrease over time and for concerns about the competitive process to be addressed under competition enforcement tools such as CA98. To date, the concurrency regime does not seem to have developed as envisaged in this respect – as suggested by the relative paucity of cases discussed in the consultation document. Achieving such a goal will impact positively on the growth agenda, by removing undue reliance on economic regulation. Furthermore, this option will potentially help to increase the number of competition high-impact cases in regulated sectors, which can have precedential value both in those sectors and across the competition regime more widely. This option, crucially, does not remove the option of the use of economic regulation, but instead focuses attention on increasing competition enforcement, where appropriate, in the regulated sectors. For that matter, we would strongly encourage the Government to consider including a similar obligation with respect to consumer law, such as the sectoral regulators' powers under the Consumer Protection from Unfair Trading Regulations 2008.⁶⁸

- 6.7 This option could help to move regulated sectors from a dominant paradigm of ex ante regulation to a system of ex post enforcement with self-assessment. In the longer term, it could reduce the regulatory burden on firms in regulated sectors, which can enhance productivity and growth. Lowering of regulatory burdens can stimulate increased entry by smaller firms – high regulatory burdens, on the other hand, may well give a competitive advantage to incumbents and to larger businesses.⁶⁹ It could further have the effect of reducing the regulatory burden on such new entrants, and could allow greater dynamic efficiency and innovation. Reliance on licence conditions and/or other potentially complex ex ante regulatory structures tends to define and channel market behaviour and innovation and may often favour

⁶⁸ SI 2008/1277.

⁶⁹ See, for example, Irwin Stelzer's article 'Saving Capitalism from the Capitalists', *the Weekly Standard*, 18 January 2010.

incumbents and stultify competition, since the primary focus tends to be on compliance with regulations, rather than aggressive competition. In contrast, general competition law, which does not impose ex ante restraints, encourages self-assessment for allowing firms a far greater degree of freedom of behaviour. This leads to more dynamic markets in which the primary focus is on winning business by delivering better results for consumers.

- 6.8 Finally, given their sector-specific primary duties and objectives, sectoral regulators must ordinarily consider whether and how to use their competition enforcement tools with a primary view towards achieving sectoral goals, with the impact on the wider competition regime often being a secondary consideration. Imposing clear primacy of competition law tools on the regulators addresses this, and allows for a potentially rich stream of competition law cases to be progressed across the regulated sectors.

Giving the CMA a greater role in the regulated sectors – with the European Competition Network (ECN) model

- 6.9 The OFT considers, however, that imposing competition law primacy across regulatory sectors is a necessary, but not sufficient, means of achieving an optimal effectiveness of the concurrency regime. It considers that it is also necessary for the CMA to have a greater role in the regulated sectors, with the ECN model set out in the consultation document to be the preferred route. The model proposed in paragraphs 7.28–7.34 of the consultation document would, in the OFT's view, make a very significant contribution to improving the robustness of decisions and strengthening the regime, supporting the UK competition authorities in taking forward high impact cases and improving speed and predictability for business.
- 6.10 There are a number of reasons for this. Under this model, the CMA could ensure that, as appropriate, CA98 cases were taken in the regulated sectors, as – even without taking over any such cases from the sectoral regulators – the CMA would have more influence to challenge the

sectoral regulators on their approach to CA98, such as if they proposed to close a CA98 case by preferring their use of regulatory powers.

- 6.11 The CMA would be able to liaise on a detailed basis with the regulators at various key milestones on the case. It would be able to assist, and where appropriate, challenge - on an objective basis, and drawing on its own experience – decisions by the regulators on whether to open competition cases and, once they are opened, the outcomes aimed for by the regulators of those cases. Under this option, the CMA would have the benefit of seeing cases across the range of all economic sectors – concurrent and non-concurrent – and could share its experience and expertise, having regard to the competition law enforcement regime as a whole. The CMA would have the benefit of being able to see the full range of competition casework that the regulators were taking. It would also be able to understand the complex issues that may be raised in such cases, as well how such cases relate to the regulatory framework and objectives in the sector.
- 6.12 This option could also give the regulators more freedom of action in opening CA98 cases, by removing the potentially onerous process under which cases in regulated sectors are currently opened under the Concurrency Regulations.⁷⁰ The Regulations could be amended to remove the existing process under which the OFT (or CMA going forward) and the relevant regulator would have to agree as to who is going to take a case before either can use their formal investigative powers in the case. Instead, the first authority to use its formal powers would have the exclusive right thereafter to use such powers, subject to a clear, transparent, agreed framework for case transfer between the regulator or the CMA, or the CMA formally taking over the case from the regulator, following consultation with the regulator and the undertaking(s) under investigation.
- 6.13 The CMA taking over cases in the latter circumstances would likely be very rare, and might only apply if the CMA had significant concerns

⁷⁰ Competition Act 1998 (Concurrency) Regulations 2004 (SI 2004/1077).

about the approach that the regulator was taking in a specific case, or if the CMA was better placed to take a particular case. There would need to be a clear, transparent, agreed framework setting out the circumstances and process for when such case transfers might occur. Such case transfers would nevertheless be an effective deterrent against sectoral regulators opening too few and/or closing down too many competition cases in their sectors: the CMA would be able to step in, as appropriate, to ensure effective, high impact outcomes, much like the role of the European Commission in the ECN.

- 6.14 An ability for the CMA to take cases might be particularly important if a sectoral regulator, notwithstanding any primacy of competition law commitment that it might have, had concerns that applying a competition enforcement tool could create tension with its other regulatory objectives, and/or that it simply lacked the resource to take a competition case through to a final decision.
- 6.15 In addition, this approach would remove the Secretary of State's current role in the case allocation process under the Concurrency Regulations, which involves adjudicating on any dispute between the OFT and the sectoral regulator as to who should take a case in a concurrent sector.⁷¹ This role for the Secretary of State seems anomalous in the context of the existing reformed UK competition regime, under which government has been substantially removed from decision-making roles in competition law.
- 6.16 In the OFT's view, merely amending the existing guidance OFT405 *Concurrent Application to Regulated Industries* as proposed in the consultation document would not go far enough, as doing so would still not give the CMA a suitably pivotal role in coordinating the development of competition law across the entire economy. Such amendments, which would be non-statutory, would likely be limited to revising some of the assumptions expressed in the current guidance, to the effect that the sectoral regulator will normally deal with competition issues in its sector,

⁷¹ See Regulation 5 of the Concurrency Regulations.

and perhaps clarifying the circumstances under which transfer of cases could take place under the Concurrency Regulations.⁷²

- 6.17 The option set out in paragraphs 7.28-7.34 of the consultation document, of giving the CMA a greater role in the regulated sectors, would also enable the CMA to act as a central resource for the sectoral regulators. Given the CMA's central role, it would be able under this option to share its expertise with the sectoral regulators, without necessarily taking over cases from them. Suitable amendments to the Concurrency Regulations could also make secondments – for example, between the CMA and the sectoral regulators – easier, thereby allowing for a free flow of expertise and experience across the authorities.
- 6.18 For the option of the CMA taking a more central role to be workable, in a model akin to that of the ECN, the OFT considers that there would need to be effective equivalent frameworks in place, allowing for the CMA and sectoral regulators to share details of their competition cases on a secure basis. This framework would be used to notify the CMA of competition complaints received by a sectoral regulator, and also if and when the sectoral regulator was proposing to use formal competition investigation powers in a case. The CMA would also be provided with updates on progress in such cases, proposed statements of objections and decisions (whether to close a case on prioritisation grounds or to make an infringement or no grounds for action decision); and also proposed decisions not to use competition powers but to use regulatory powers instead.
- 6.19 Statutory gateways to share information for these purposes might also be needed. The CMA would issue guidance, in consultation with its concurrency partners, on how this framework would operate, including the circumstances under which it might be appropriate for it to take a case from the sectoral regulators.

Other options

⁷² See Regulation 7 of the Concurrency Regulations.

- 6.20 The option discussed in paragraphs 7.24-7.27 of the consultation paper, envisages the CMA acting as a central resource to the sectoral regulators and proposes a number of possible means of achieving this in paragraph 7.27. These include the following:
- the CMA being obliged to act if a sector regulator demands it
 - the CMA could run the case and the sector regulator make the decision
 - the CMA could act as an advisor or source of expertise
 - the CMA could maintain enough resource to 'hire' them out to sector regulators to use
 - changing the legislation to permit joint sector regulator/CMA antitrust investigations. Responsibility for decision-making would have to be carefully considered and would need to be flexible to accommodate different situations, and/or
 - less radically, increasing the number of secondments between the competition authorities to help with particular cases.
- 6.21 The OFT does not consider that this option would be an adequate, appropriate or efficient way of achieving optimal effectiveness of the concurrency regime.
- 6.22 While the OFT has had very good experience working jointly with other regulators in some areas, and supports the principle of increasing the number of secondments between the competition authorities, it is concerned that most of the means proposed could raise very complex governance arrangements; and such a potential diffusion of responsibility or roles between the CMA and the sectoral regulators could undermine accountability for effective case outcomes. For its part, the OFT has recently reformed several of its internal procedures for CA98 cases in order to address external stakeholder concerns about the need to

improve case transparency and the ability to engage more with decision-makers.⁷³ The OFT is also concerned that most of the means proposed would have adverse implications for case transparency, accountability and lead to confusion about access to decision-makers in CA98 cases in regulated sectors.

- 6.23 Furthermore, the OFT is concerned that the CMA's ability to prioritise its own resources would be distorted if, as is proposed in one of the sub-options, it were required to act in a case when requested to do so by a sectoral regulator. All casework under CA98 is currently discretionary, determined on the consistent basis of a framework of prioritisation considerations, and this requirement would be significantly anomalous in this respect. Under this proposal, the CMA could be required to divert resources in order to act on behalf of the regulators. Depending upon resource availability, the CMA's existing cases could be delayed as a result, which in turn could have an adverse effect on the speed and predictability of its enforcement programme. .
- 6.24 The OFT has not addressed in this part of its response the option in paragraphs 7.17-7.19 of the consultation document, which discusses making competition powers easier for the CMA and the sectoral regulators to use. We have limited our comments in this part of the consultation document to options dealing with specific possible changes within the concurrent regime, whereas this option addresses change across the whole of the competition regime. Comments on these broader changes are set out in Chapters 2 and 4 of this response.

⁷³ See for example, OFT1263 *A Guide to the OFT's Investigation Procedures in Competition Cases*, March 2011 and available at www.oft.gov.uk/shared_oft/policy/of1263.pdf

7 REGULATORY APPEALS AND OTHER FUNCTIONS OF THE OFT AND CC

The OFT:

- has no experience in dealing with regulatory appeals or references and therefore only has limited views of the issue at this stage, though it will be pleased to engage further on the issue post-consultation as necessary
- does observe that the issues to be determined in regulatory appeals are not limited to competition issues but can include other matters, including those relating to consumer protection. Thus a CMA that hears regulatory appeals would benefit from having a general consumer protection function as well, to ensure that it has suitable consumer protection experience and expertise to draw on in such cases.

- 7.1 The OFT does not have any regulatory reference or appeal functions similar to those of the CC. In the light of this lack of experience, the OFT does not consider that it is appropriate for it to make any significant or potentially far-reaching suggestions for the future of the regulatory appeals and references regimes. The OFT has very limited views on the issue, which it will set out below, though it will be pleased to engage with BIS on the issue further in the post-consultation period, if necessary.
- 7.2 The OFT also observes that this consultation on regulatory appeals is taking place against a background of considerable change and uncertainty in the competition, consumer and regulatory enforcement landscapes. The OFT also is aware of the complexity of the existing regulatory appeal landscape itself, with different regulatory appeal frameworks across sectors being potentially subject to differing bodies (while most are considered by the CC, non-price regulatory appeals in the telecommunications sector are heard by the CAT).

- 7.3 In the light of this complex situation, the OFT queries whether this would be an appropriate time for any significant changes to the regulatory appeals landscape. It may well be that any changes concerning the operation of regulatory appeals and references can be better considered once the wider landscape changes have had time to settle in. Similarly, while some simplification and/or harmonisation of the differing regulatory appeal frameworks might on the face of it appear attractive, having regard to the wider picture discussed above, now may well not be the time for significant changes in this respect either.
- 7.4 The OFT further considers that there is no obvious reason why the regulatory appeal and reference functions currently carried out by the CC cannot be accommodated within the CMA. There may be some tensions around the combination of this appellant role under concurrency with the regulators. However, we think such tensions can be solved with careful institutional design and clarity of responsibilities.
- 7.5 Such a role for the CMA could of course be subject to review at a later date, depending upon how the respective roles of the CMA and economic regulators evolve, as well as upon any changes in the respective regulatory frameworks.
- 7.6 That said, the OFT does observe that the scope of regulatory appeals considered by the CMA would not be limited to pure competition matters. Appeals could potentially include consumer protection issues within the regulated sectors, such as licence conditions concerning the protection of vulnerable consumers or requiring provision of information to consumers in general. More specifically, the CMA might be called upon to determine whether consumer protection could be better achieved through the use of non-sector specific consumer protection tools, such as the Consumer Protection from Unfair Trading Regulations,⁷⁴ or through a licence condition.

⁷⁴ SI 2008/1277.

7.7 The OFT takes the view that a CMA which hears regulatory appeals would therefore strongly benefit from having a general consumer protection function, as it would be able to draw upon internal consumer protection expertise and experience, thereby enhancing the robustness of such decisions. It would also then be better equipped to have regard to how such decisions fit within, and impact upon, the wider consumer protection regime. This would be of benefit in potentially reducing ex ante regulatory burdens where appropriate and to the potential growth and coherence of the wider consumer protection regime.

8 SCOPE, OBJECTIVES AND GOVERNANCE

The OFT:

- considers it essential that the CMA retains the ability to take consumer enforcement action against practices that hinder consumers' ability to drive effective competition, and to undertake market studies which can address both competition and consumer issues
- recognises that there may be benefits to embedding suitably framed objectives for the CMA in statute
- would be concerned if any such objectives prevented the CMA from exercising its discretion as to which cases to pursue independently of government
- agrees that the CMA's structure should include a Supervisory Board and Executive Committee(s): the Supervisory Board to include a number of non-executive directors, and to have overall responsibility for the CMA (including overall governance, resourcing, strategy and policy, including the development of rules and guidance), the Executive Committee(s) to be responsible for the day to day running of the CMA
- agrees that the Supervisory Board should be accountable to Parliament for the performance of the CMA
- believes that, for the Supervisory Board to be accountable for the performance of, and decision-making within the CMA, the Supervisory Board must have ultimate responsibility for determining the identity of the CMA's decision-makers and the detail of the decision-making procedures that the CMA should follow
- considers that, while the CMA Board should retain ultimate responsibility for the decision-making of the CMA, it may be appropriate for legislation to prescribe certain core checks and balances, including requiring the CMA to put in place some form of two-stage process for mergers and MIRs
- considers that it would be inappropriate for any further details of the CMA's

decision-making processes to be prescribed in legislation.

Overview

- 8.1 The OFT considers that the CMA should have a primary focus on making markets work well for consumers and for the economy, and that its objectives should be to ensure fair and effective competition between companies, to enable consumers to drive competition and innovation and to promote competitive markets conducive to growth, innovation and consumer welfare.
- 8.2 To achieve these objectives, the OFT considers it vital that the CMA's toolkit includes the range of consumer enforcement powers required to enable the CMA to undertake holistic reviews of markets, and to take proportionate and targeted interventions, which are of most value to consumers and economic growth, efficiently and with minimal burdens on business.
- 8.3 In addition to retaining the requisite consumer enforcement powers, the OFT agrees with Government that the CMA should retain responsibility for antitrust cases, merger cases, market studies and investigations, reviews of undertakings and orders, and competition advocacy, both across government and internationally.
- 8.4 The OFT also agrees that the CMA's structure should include a Supervisory Board and Executive Committee(s), and considers that, suitably formulated, this structure can provide the authority with the appropriate level of strategic direction and transparent, credible accountability.
- 8.5 To enable the Board to be genuinely accountable for the performance of the CMA, and to ensure that the CMA retains the flexibility to amend its decision-making procedures where necessary, the OFT considers that the Board must retain ultimate responsibility for determining the structure of the organisation, the identity of the CMA's decision-makers

and for shaping key aspects of the decision-making procedures that the CMA will follow.

- 8.6 The OFT considers that it would be inappropriate to adopt a governance model that required decisions to be made by a group drawn from a large pool of members, as such a model is likely to hinder the CMA's ability to efficiently deliver consistent and robust decisions.

Views on issues relating to scope, objectives and governance

Scope of the authority

- 8.7 The OFT considers that the CMA should have a primary focus on making markets work well for consumers and for the economy, and that its objectives should be to ensure fair and effective competition between companies and to promote competitive markets conducive to growth, innovation and consumer welfare.
- 8.8 The OFT considers that, to achieve these objectives, its responsibilities should in fact be wider than that envisaged at paragraph 9.2 of the consultation document.
- 8.9 In particular, the OFT considers that it is vital to provide the CMA with both consumer and competition powers in order to achieve both these objectives, and the Government's vision of creating a single agency that can address market problems in the most flexible and dynamic way possible.
- 8.10 The OFT notes that without an appropriate toolkit of consumer enforcement powers, the CMA will be hindered in its ability to undertake holistic reviews of markets, and to take the proportionate and targeted interventions which are of most value to consumers and economic growth, efficiently and with minimal burdens on business.. Analysing interdependent market issues holistically within one authority ensures that the virtuous cycle of competition and consumer protection materialises:

- consumer policy ensuring that competition results in the right kind of innovation, one that is aimed at addressing consumer demand and improving processes, not at obfuscating consumers
- competition policy guarding against over-zealous consumer protection enforcement which would be to the detriment of business and economic growth.

- 8.11 More specifically, the OFT's considerable experience of examining different market sectors has demonstrated that barriers to effective competition can arise on either the supply or demand side of a given market. For example, insufficient competition may be the consequence of agreements between suppliers that limit choice, or the consequence of pricing structures that limit consumer switching and consumers' ability to drive competition.
- 8.12 Further, at the outset of a market assessment it is not always apparent whether competition and/or consumer remedies may be the appropriate response, splitting out responsibilities for competition and consumer enforcement risks duplicative analyses being conducted across the same markets, and the prospect of resource being diverted to tackling jurisdictional debates. In contrast, the OFT also considers that significant resource synergies exist in an integrated consumer and competition enforcement model, and notes that to tackle high impact and high risk national consumer enforcement the same substantial economic and legal analysis skills are required as are necessary to ensure robust, high impact competition enforcement. Retaining both tools within the CMA would therefore further facilitate the Government's objective for the CMA of enabling more efficient and effective use of scarce public resource.⁷⁵

⁷⁵ The OFT expects to comment further on the Government's proposals on the future handling of consumer enforcement and market studies dealing with pure consumer protection issues in the context of the forthcoming consultation referred to in paragraph 9.31 of the consultation document.

8.13 This interaction between competition and consumer policy and enforcement has indeed long been reflected in the OFT's mission statement and across its portfolio of work. In particular, it is reflected in the OFT's focus on measuring effects in the market, rather than the more traditional focus on form of behaviour and structural concentration; in how the OFT prioritises what it does around impact on consumer welfare and the economy; in the research that it undertakes on everything from productivity to deterrence; in the effects-based approach that the OFT has recently developed in consumer policy; in the OFT's joining of the implementation of consumer and competition policy; and in its focus on market outcomes and evaluation of its impact.

The appropriate objectives for the CMA and whether they should be embedded in statute

8.14 The OFT agrees with the Government that the CMA should have a clear mission and objectives, which should be to make markets work well for consumers and the economy by:

- ensuring fair and effective competition between companies
- enabling consumers to drive competition and innovation
- promoting competitive markets conducive to growth, innovation, and consumer welfare.

8.15 The OFT recognises that there may be benefits to embedding suitably framed objectives in statute, and that high-level institutional objectives may assist if they express a clear mission that then frames the CMA's various legislative roles and that underpins how the authority prioritises its projects and cases.

Prioritisation

8.16 The OFT recognises that there is an expectation that the CMA should focus in its work on economically important markets, but would be concerned that any objective or duty imposed on the CMA should not prevent the exercise of its discretion to pursue cases where the CMA believes intervention can have the highest impact. Furthermore, it should be clear that such discretion can be exercised independently of Government. The OFT welcomes therefore the suggestions in the consultation document that – should such an objective or duty be imposed – concerns of this nature should be addressed by allowing flexibility in the definition of 'economically important market'; the Government not specifying individual markets to be subject to review; and any reporting on delivery of such an objective should be to Parliament rather than to Ministers.

Constitutional form of the CMA

- 8.17 The OFT notes the potential alternative constitutional forms that the Government has identified for the CMA, and anticipates being closely involved in further consideration as to which form should be adopted for the CMA following the current consultation.
- 8.18 In this context, the OFT considers that it is crucial that the CMA should be independent of Ministers, but accountable to Parliament. Further, in determining the constitutional status of the CMA, the OFT would encourage the Government to consider innovative alternative forms looking to, amongst other issues, the options regarding the terms that the CMA may offer to staff, which will be key to the CMA's ability to recruit and retain an appropriate calibre of staff.

The CMA's governance structure and the composition of the Board

- 8.19 The OFT agrees that the CMA's structure should include a Supervisory Board and an Executive Committee(s),⁷⁶ and considers that, suitably

⁷⁶ The OFT does not consider that a single Executive Board or Committee should be prescribed, and considers that the CMA Board should have the freedom to establish an appropriate executive structure, which may include a main Executive Committee and other committees.

formulated, this structure can provide the authority with the appropriate level of strategic direction and transparent, credible accountability.

- 8.20 An appropriately formed Board can deliver significant benefits to the CMA, combining the wide ranging commercial and/or specialist expertise of its executive directors with the complementary strategic, specialist and practical insights that can be provided by non-executive directors. The objective insights, and scrutiny, provided by the Board are an effective way of preventing potential for organisational 'group think' ensuring that an agency's actions, interventions, processes and procedures are continually questioned and that there is an added, external pressure for the agency to be committed to ongoing improvement. The OFT therefore agrees that it is appropriate for the Supervisory Board to include a number of non-executive directors, to have overall responsibility for the CMA (including overall governance, resourcing, strategy and policy, including the development of rules and guidance) and for it to be accountable to Parliament for the performance of the CMA.
- 8.21 For the CMA's governance model to operate effectively, the interactions of the Board, Executive and (if relevant) any decision-making groups must, however, be clarified more fully than set out in the consultation document.
- 8.22 It is essential that any governance model adopted for the CMA provides for clear accountability. In order for the Board to be fully accountable for the performance and decisions of the CMA, the Board must retain ultimate responsibility for all aspects of the CMA and, crucially, for determining the identity of the CMA's decision-makers and the detail of the decision-making procedures that the CMA should follow. If this were not the case, the CMA Board could not be reasonably held fully accountable for the CMA's performance, as the Board would have no influence over significant aspects of the decision-making that would then underpin the CMA's performance.
- 8.23 Further, it is vital that any governance model adopted enables the Board to determine the appropriate decision-making processes for the CMA.

This flexibility would help to ensure the ongoing effectiveness and efficiency of the regime as:

- the governance model would retain flexibility and could incorporate periodic reviews to enable the CMA to innovate and make improvements to its procedures in the light of the evaluation of different approaches adopted and the consequences of its interventions, Court decisions and any best practice noted internationally
- for each tool, the Board can ensure that the CMA's decision-making processes reflect the characteristics of its legislative tools and maximise the CMA's ability to deliver robust and consistent decisions in a timely and efficient way
- the Board can ensure that the governance model is being operated in a clear and transparent way, securing the respect of external stakeholders and parties
- governance arrangements and investigative and decision-making processes can be adopted which enable senior staff within the CMA to play a substantial role in analysis and decision-making, thereby assisting the CMA to recruit and retain staff of a suitably high calibre.

- 8.24 Further, providing the Board with such flexibility avoids the risks and potential costs of adopting a one-size-fits-all governance model, such as mandating panel decision-making for all legislative tools. For each legislative tool, the Board can take the requisite due account of the potential costs and benefits of the various decision-making models that could be employed (see chapter 9 below).
- 8.25 While the OFT considers that the Board should retain ultimate responsibility for the decision-making of the CMA, given the unitary nature of any single CMA, the OFT acknowledges that it may well be appropriate to prescribe certain core checks and balances in legislation.

- first, the CMA should be required by statute to regulate its own procedures, and do so transparently involving public consultation. This would require the CMA to set out clearly in binding guidance its decision-making procedures and internal challenge processes
- second, and related to the first point, it would also require the CMA to put in place some form of two-stage process for mergers and MIRs, with a ‘second pair of eyes’ that would satisfy a JR standard of review. However, the Board would retain the flexibility, following public consultation and taking into account both appeal and judicial review issues, to determine how best to do this so as to ensure the momentum and effectiveness of the regime.

8.26 The OFT considers that it would be inappropriate, however, to prescribe further detail of the CMA's decision-making processes in legislation. In particular, given that a number of the decision-making structures proposed would not, if adopted, have previously been applied to certain of the legislative tools (for example, if independent panels were used as some form of decision-makers for Competition Act investigations), any such prescription has the potential to result in the uncertainty, implementation costs and negative unforeseen effects that the Government wishes to avoid.⁷⁷ Further, it would unnecessarily fetter the CMA's discretion to depart from certain models in the event that they prove sub-optimal, thereby jeopardizing the pace and effectiveness of the regime.

⁷⁷ Paragraph 10.41 of the consultation document.

9 DECISION MAKING

The OFT:

- supports the Government's objective of designing decision-making structures in a single CMA that achieve the right balance between robustness of decision-making and speed of delivery
- believes that it should be for the CMA Board to determine the identity of the CMA's decision-makers and for shaping key aspects of the decision-making procedures that the CMA will follow
- believes that the differences between the legislative tools that will be applied by the CMA are such that tailored processes and approaches to decision-making are required for each of them
- believes that some form of separation of decision-making between Phase 1 and Phase 2 may be required for mergers and MIRs.

Overview

- 9.1 The OFT supports the Government's objective of designing decision-making structures in a single CMA that achieve the right balance between robustness of decision-making and speed of delivery.
- 9.2 As set out in Chapter 8 above, the OFT considers that while legislation should prescribe separate decision-makers for Phase 1 and Phase 2 of the mergers and MIR regimes, it should otherwise be for the Board ultimately to determine the detail of an optimal decision-making framework for the CMA. This approach will ensure that the CMA Board can retain accountability for the CMA's decision-making record, and that it retains the flexibility to make incremental improvements to the process adopted by the CMA.

- 9.3 Notwithstanding this approach, the OFT has below set out a number of key points relating to the decision-making options set out in the consultation document.
- 9.4 In designing the decision-making structure of the CMA, the OFT considers that the following requirements are core to ensuring that the CMA's decision-making processes are, and will remain, capable of delivering robust and timely outputs:
- **Transparency** – external stakeholders must be able to identify the key decision-maker(s), and the relevant process, for any investigation in which they are involved; as well as being satisfied that they have due opportunity to express their views to the decision-maker(s)
 - **Flexibility** – optimal decision-making models evolve over time, and develop to reflect experience and evaluations of past cases, Court decisions and international best practice
 - **Objectivity** – to mitigate the risk of actual or perceived confirmation bias, decisions made by the CMA are subject to sufficient review and challenge through internal processes and procedures, which are overseen by a Board with ultimate accountability
 - **Accountability** – the CMA Board should have ultimate responsibility for the CMA's decision-making record to ensure that decision-makers can be held suitably to account and have further impetus to deliver robust decisions on a timely basis
 - **Capacity** – the decision-making models employed by the CMA should also be designed to enhance its ability to recruit and retain a sufficient pool of highly skilled, high calibre staff, capable of taking a significant volume and variety of decisions
 - **Efficiency** – the CMA must be able to take decisions in a timely and efficient way

- **Consistency and predictability** – consistent and predictable decision-making is vital to ensure effective deterrence and to ensure that businesses are able to invest and innovate with confidence.
- 9.5 The balance of significance of each of these objectives will vary according to the legislative tool employed and an optimal framework of robust, resilient decision-making processes should reflect this. Indeed, the differences between the legislative functions that will be enacted by the CMA are significant and require tailored processes and approaches to decision-making. For example, significant differences exist in relation to the types of analysis necessary, the extent to which the relevant decision is guided by case law and will create precedent, and the potential for those decisions to have unintended chilling effects on competition.
- 9.6 In summary, in designing an optimal decision-making framework, the OFT considers that it vital that there is sufficient scrutiny by a ‘second pair of eyes’. For antitrust enforcement, the OFT considers that this is most efficiently achieved by the CAT, particularly with full merits based review for CA98. This does not, however, remove the need for the agency to have transparent, robust procedures to avoid any perceptions of group-think and confirmation bias. We believe this can be most effectively dealt with by: (a) continuing to have a Board with non-executive directors, and which has ultimate accountability for decision-making within the CMA, and that (b) there should be a statutory requirement for the CMA to set out its decision-making procedures as binding Guidance following public consultation. With regards to mergers and MIRs, the lesser standard of review at the CAT means that the CMA should establish some form of two-stage process internally.

The decision-making considerations identified by BIS

- 9.7 In the consultation document, the Government states that a number of alternative decision-making models can deliver robust and transparent decision-making, and that final choices will be guided by considerations relating to:

- the degree of separation between first and second phase decision-making
- degrees of difference or uniformity of approaches between tools
- the role and nature of panels and the roles of executives in the different tools available to the single CMA
- the steps necessary to ensure that for each of these tools, the overall process complies with the requirements of the ECHR.

9.8 The OFT has below set out its views on the first three of these issues. In doing so, the OFT has considered the need to ensure that the relevant processes comply with the requirements of the ECHR, and has assumed that the prevailing appeal standards applicable to the markets, mergers and antitrust regimes are retained.

The degree of separation between first and second phase decision-making

- 9.9 Within an optimal decision-making framework, the OFT considers that it is important that, for each legislative tool, the relevant decision-making structure provides sufficient scrutiny by a ‘second pair of eyes’ and is, and is seen to be, thorough and objective.
- 9.10 As set out above, the OFT considers that the CMA should put in place a two-stage process for mergers and MIRs. Given that in both regimes appeal is by judicial review, the OFT considers that this decision-making separation is necessary to provide for a sufficient ‘second pair of eyes’ and to provide businesses with confidence in the integrity of both regimes.
- 9.11 For mergers and MIRs, the OFT considers that, within the CMA, there would be benefits to members of a Phase 1 case team remaining involved with cases that progress to Phase 2. Retaining members of the Phase 1 case team throughout the process has the potential to improve continuity, reduce duplication (for the CMA and for business), and additional efficiency benefits. Possible concerns about the potential for confirmation bias or group-think would be mitigated by decision-making

separation between the two phases, and also by the fact that considerable further resource would necessarily be added to the case team following its progression from Phase 1 to Phase 2.

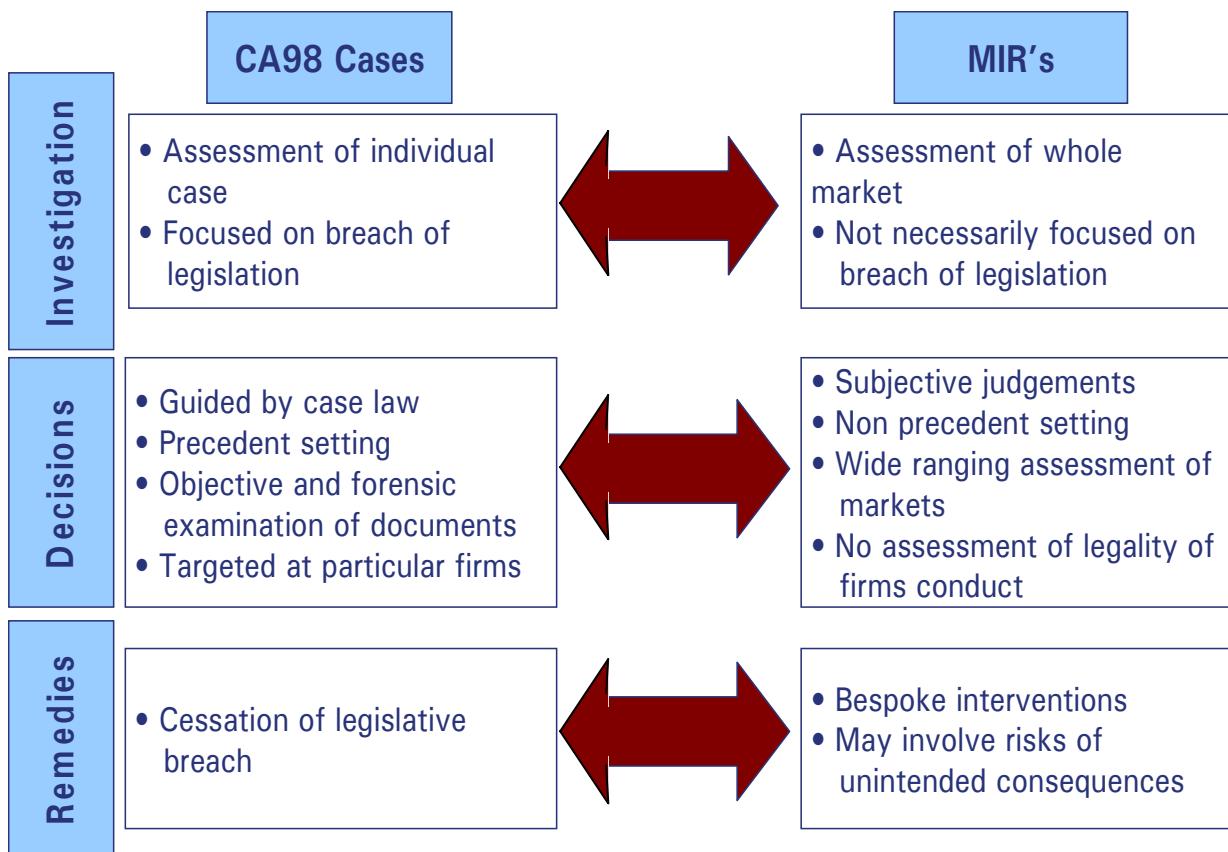
- 9.12 Such separation of decision-making is not, however, required for antitrust enforcement cases, where decisions are subject to full merits appeal. A full merits appeal ensures that, as necessary, decisions are subject to a rigorous review by 'second pair of eyes'. Further, given the forensic assessments necessary to antitrust investigations, rigorous quality assurance by full time staff and/or counsel provides a more effective and efficient means of preventing concerns relating to perceptions of group think or confirmation bias. The OFT's practice is to ensure that its decisions are subject to review by a steering committee comprising senior staff, representation from the Office of the Chief Economist and General Counsel's Office, as well as often by external counsel. These checks and balances, combined with the additional scrutiny provided by a full merits appeal, ensure that due process is provided without recourse to decision-making separation.

Degrees of difference or uniformity of approaches between tools

- 9.13 The differences between the legislative functions that will be enacted by the CMA are significant and require tailored processes and approaches to decision-making.
- 9.14 At one point on the spectrum, the CMA will take MIR decisions that involve subjective assessments which are based on a wide-ranging analysis of the effectiveness of competition in a particular market, and which are not typically guided by past practice. Further, as MIR remedies are 'bespoke' and designed to address the specific competition restriction identified, there is a far greater risk that the associated intervention will have unintended chilling effects on competition.
- 9.15 By contrast, antitrust decisions typically involve, for example, a forensic assessment of whether a body of documents establishes sufficient evidence of an anti-competitive agreement that represents an infringement of Chapter I of the CA98 or Article 101 TFEU, or whether a

financial cost test indicates the existence of an exclusionary pricing practice that represents an abuse of a dominant position under Chapter II CA98 or Article 102 TFEU. In the majority of cases, the relevant decision will be guided by a body of case law that will have established the legal tests that must be applied to determine whether or not an infringement has been committed, and will also create precedent that will guide other companies. Finally, interventions aimed at terminating, for example, a collusive agreement, will generally involve little to no risk of chilling effects on the competitive process.

- 9.16 While MIR and CA98 decisions involve very different considerations, the mergers process shares characteristics with each of those regimes. For example, the investigation and analysis has similarities with that performed for MIRs, involving a broad market analysis and the interpretation of economic evidence. Conversely, the implications of mergers decision are, to some extent, more akin to decisions within the antitrust regime, in that a merger decision will create precedent and guidance for businesses and specific interventions will not typically involve significant risks of 'chilling'.



9.17 These significant differences between the legislative tools must be recognised when determining the appropriate decision-making model. For example, the risks associated with MIRs are such that having some element of independent second stage decision-making is likely to be preferable. In contrast, the priority for antitrust decision-making is a structure that involves forensic reviews and the provision of the consistent and predictable decision-making so as to establish the clear precedents that enable companies to self-assess the legality of the conduct that they are contemplating. For mergers, the decision-making model must also deliver consistent and predictable decision-making, while the decision-maker(s) will typically need to make judgements based on a market wide assessment of relevant economic evidence.

The role and nature of panels and the role of executives

9.18 In the consultation document, the Government request views on the roles and nature of panels, and the role of executives, in CMA decision-

making. In summary, the Government refers to the following decision-making alternatives for the markets, mergers and antitrust regimes:

- for Phase 2 MIR decisions, the Government considers that the options are: (i) to retain the existing system, using decision-making panels with members drawn from a large pool of independent part-time members; or (ii) retain the panel model, but use decision-making members that have a greater time commitment to the CMA and/or include members of the CMA's senior staff
- for Phase 2 merger decisions, the Government considers that the options are as for the markets regime, but with a further option that would involve Phase 2 decisions being taken by a member of the executive (possibly in conjunction with a CMA Board member) that had not been involved at Phase 1
- the decision-making options for antitrust are set out in chapter 4 above, and include retaining the current administrative model that involves senior staff taking decisions, or decisions being taken by panels as currently used at Phase 2 of mergers and MIRs

9.19 The OFT considers that a decision-making structure that relies on a small group of full time expert staff, accountable to the CMA Board, is likely to provide for the most efficient and effective means of achieving the consistency, predictability, efficiency, accountability and capacity necessary to the majority of decisions taken by the CMA. In particular:

- using a small pool of senior staff to take the majority of decisions would be expected to assist the CMA in delivering consistent and predictable decision-making. It is inevitable that, by ensuring that decisions are taken by a small team of expert senior staff, who dedicate sufficient time to investigations, take decisions repeatedly on similar questions and who interact with one another on a day to day basis, the risks of inconsistent and incoherent decision-making are significantly decreased

- decision-makers who take repeated decisions learn from experience and repeat interaction, enabling them and the CMA to improve incrementally. Those decision-makers can also share these experiences with one another, ensuring that their decisions are articulated consistently, that they apply consistent principles and deliver the predictability that provides business with the certainty it needs. Indeed, in the variety of decision-making models we see utilised by agencies internationally, virtually all have this feature
- the day to day involvement of executives also has advantages to the efficient progression of cases. For example, to progress a competition enforcement case efficiently it is necessary to be able to take timely decisions in respect of key issues relevant to, for example, leniency applications, early resolution, and to procedural matters relevant to confidentiality and information gathering. The OFT's experience is that senior staff who retain a day to day involvement with a case, and who are aware of the development of the case 'in real time', can take these decisions in a timely and efficient way
- providing senior staff with the responsibility for decision-making also has the potential to assist the CMA in attracting and retaining high calibre individuals with significant knowledge and experience of relevance to each of its legislative tools. The CMA would benefit from this in a number of ways, for example by ensuring that it commands the respect of its stakeholders, has a strong and persuasive voice as an advocate of competition, and retains individuals that can inspire and develop staff on a day to day basis

9.20 While recognising that using a large pool of part-time independent members may provide for greater, at least perceived, objectivity vis-à-vis decision-making, this model is likely to present significant challenges to the efficient delivery of consistent and timely outputs. For example, where decision-making panels are drawn from a significant pool of members, it is inevitable that decisions will reflect a greater variety of views, expertise and approaches. Further, with such a model, to the extent that consistent and predictable decision-making can be achieved,

it will necessitate significant negotiation and co-ordination between decision-makers and the rest of the CMA.

- 9.21 There is also a tension between the extent of decision-making independence and the degree to which the CMA Board can be held accountable for decision-making and the CMA's performance. For example, the greater degree of independence between decision-maker and the CMA Board, the more difficult it is for the CMA Board to hold decision-makers accountable for their decision, and the more difficult it is for the CMA Board to be held accountable for its performance.
- 9.22 Overall, there are significant benefits to decisions being taken by a small group of suitably qualified staff. In particular, by limiting the number of decision-makers to the extent possible, the CMA will be better able to deliver consistent and predictable decisions, to evaluate approaches and evolve swiftly, to retain and to attract driven and talented staff, and to respond quickly to changes in an investigation's circumstances.
- 9.23 For the majority of its decisions, including for mergers, consumer enforcement and competition enforcement, an optimal decision making model is therefore likely to rely on suitably qualified staff employed by the CMA. For competition and consumer enforcement decisions, therefore, it is appropriate to retain the existing approach; with decisions being taken by senior members of staff. For mergers, there may well be merit in the CMA considering a structure that envisaged Phase 2 decisions being taken by a senior member of staff or by decision-making groups that included senior staff and possibly independent members drawn from a small pool of individuals. The OFT would caveat, however, that if any such small pool of individuals was to be established, any members would have to be able to make a significant time commitment to the CMA.
- 9.24 For MIRs, the higher risks associated with the interventions, and the lack of precedential value of each inquiry, is such that having some further element of independent decision-making may be prioritised over the need to ensure consistency and predictability across a portfolio of decisions. To that end, decision-making groups that include independent members

may be preferable. However, the OFT considers that, in order to ensure continuity, reduce duplication (for the CMA and for business), and to tap into additional efficiency benefits, as well as to provide for coherence in policy making within the CMA, it may be appropriate for members of the CMA's senior staff to also capable of being included within any such MIR decision-making groups.

10 MERGER FEES AND COST RECOVERY

The OFT:

- believes that merger fees are essentially a matter for the Government to determine
- considers that mergers between smaller firms should continue to be exempt from fees
- is not opposed in principle to the charging of parties to antitrust investigations in the event of an infringement finding, but if this proposal were adopted, believes that it would be appropriate for the CMA to have a power, rather than a duty, to recover costs
- takes the view that, if this proposal is adopted, it must be done in such a way as not to prejudice the effective operation of the regime, with particular reference to immunity and leniency, and early resolution through settlements and commitments
- agrees that it would be appropriate for costs recovered to go to the Consolidated Fund rather than being retained by the CMA.

Merger fees

10.1 The OFT believes that merger fees are essentially a matter for the Government to determine. The OFT recognises the Government's wish to seek full cost recovery, where possible and appropriate, for certain regulatory activities. The OFT considers that the need for full cost recovery must be considered in the context of the positive benefits for consumers that accrue as a result of its merger control activity (£125 million per annum over the period April 2007 to March 2010⁷⁸). Such

⁷⁸ See Positive Impact 2009/10 – *Consumer benefits from the OFT's work*, July 2010 (OFT1251), www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1251.pdf.

benefits are of such a magnitude that fee recovery should be carefully designed so as not in any way to inhibit the continued successful operation of the merger control system, whether notification is mandatory or voluntary. The OFT has no comment on the level of the fees since this is a matter for HM Treasury and BIS. However, the OFT does consider, to ensure that recovery is proportionate, that deals between smaller firms should continue to be exempted from merger fees.

Cost recovery for antitrust investigations

- 10.2 The OFT is not opposed in principle to the charging of parties to antitrust investigations in the event of an infringement finding. However, the OFT notes that every case is different and has its own specific considerations: accordingly, the OFT would propose that if this proposal is adopted, then it would be most appropriate for it (or, eventually, the CMA) to have a power, rather than a duty, to recover costs in infringement cases. (See paragraphs 10.6-10.8 below for specific considerations relating to leniency, early resolution and commitments.)
- 10.3 The OFT considers that, in principle, the most equitable approach to recovering costs is to seek to recover the actual costs incurred in each antitrust investigation against each party, since the actual costs incurred will vary significantly between cases, dependent on the volume of the evidence, number of parties and complexity of the infringement.
- 10.4 The OFT acknowledges, however, that there may be practical difficulties in allocating the costs of an antitrust investigation between parties:
 - over the course of most competition investigations, the number of parties and suspected infringements may decrease (or increase) as evidence is collected and analysed
 - cases will likely involve detailed considerations of legal and policy issues which not be readily attributable to particular parties
 - the CMA would also wish to minimise the administrative costs of introducing and operating such a system, which would require more

detailed time recording and cost allocation procedures than are currently in place.

- 10.5 In the light of these practical problems, one option might be for there to be standardised cost-recovery bands, which would depend upon the length and complexity of the case. This in practice would mean that there was not full recovery of costs, since the banding would need to be calibrated downward to avoid over-recovery, but it would avoid difficulties, and the potential resource costs associated, with identifying specific costs.
- 10.6 The OFT takes the view that if this proposal is implemented it must be done in such a way as not to prejudice the effective operation of the regime by, for example, discouraging immunity and leniency, or inhibiting the early resolution of cases through settlements or commitments.
- 10.7 As noted above, the OFT considers that it would be most appropriate for there to be a discretion to recover costs in any case. More specifically, however, it would need to be made clear, in the interests of transparency and predictability, that it would not be appropriate to exercise such a discretion to recover costs from parties benefitting from immunity or leniency or commitments.
- 10.8 Whether to recover costs in early resolution cases would need to be considered on a case by case basis. Any decision taken not to recover costs, or to recover a lower level of costs than those actually applicable to the case under the relevant costs framework, would be part of the early resolution agreement.
- 10.9 The OFT agrees that it would be appropriate for costs recovered to go to the Consolidated Fund. Any recovered costs going directly to the CMA could be perceived to have an adverse impact on its incentives with respect to the kind of cases it brings. This could potentially lead to a disproportionate focus on infringement decisions, to the detriment of the CMA's other competition activities such as business education and advocacy.

- 10.10 There could also be concerns that making the CMA's revenue dependent (at least in part) on issuing infringement decisions could similarly distort its approach to case prioritisation. It would also adversely impact upon the CMA's business and resource planning, because the revenue generated from cost recovery would be unpredictable, in both quantum and timing.
- 10.11 The OFT accepts that a party who successfully appeals all or part of an infringement decision should not be liable for investigative costs (to the extent that the decision is overturned). However, where the party successfully appeals only the method of penalty calculation used by the CMA, but not the finding of infringement, then the OFT does not consider that this would justify a reduction in the level of investigation costs payable.
- 10.12 The OFT considers that a power to recover investigative costs should be separate from the penalty calculation and the investigative cost amount should be clearly stated separately from the penalty.
- 10.13 It is crucial that penalties are set with a view to reflecting the seriousness of the infringement as deterrence. Conflating the penalty recovery power with the penalty calculation process would mean that the penalty calculation process becomes less transparent and that it would lose its precedential value, as the CMA's investigative costs might differ between cases raising similar issues, in turn yielding a different overall penalty amount for similar infringements.

Costs for telecoms appeals

- 10.14 The OFT does not have any experience with this issue and is not in a position, therefore, to offer a view on it.

Recovery of costs by the CAT

- 10.15 The OFT can see merit in the CAT being able to recover its full costs except where the interests of justice dictate otherwise. The OFT considers that the CAT is in a more experienced position to offer a view on this question.

11 OVERSEAS INFORMATION GATEWAY

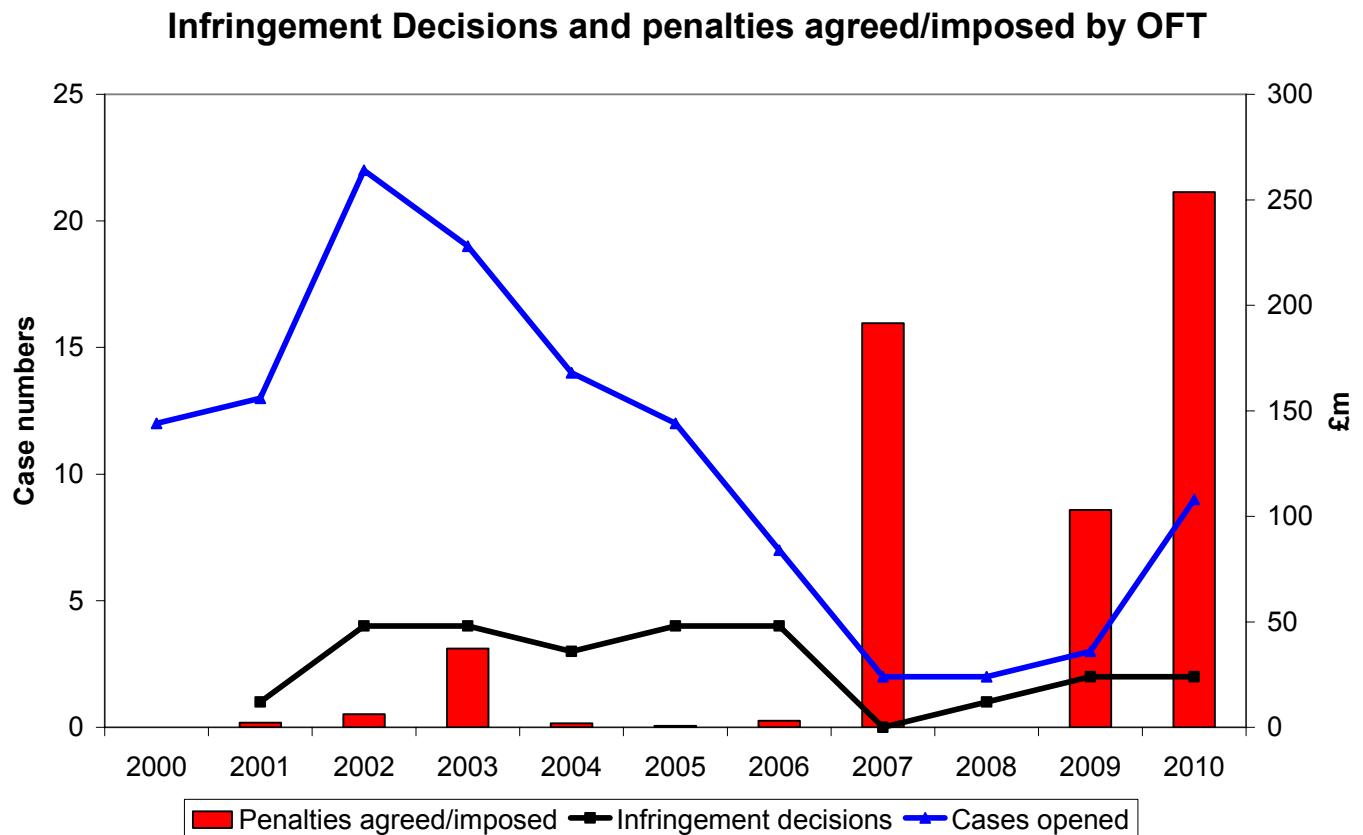
The OFT:

- considers that section 243 of the EA02 could be amended to allow an up-front assessment of which jurisdictions have sufficient legal safeguards in place for the handling of information disclosed to them, rather than having to conduct a full assessment each time a disclosure is made
- considers that the obligation under section 244 of the EA02 to have regard to the business interests of the undertaking or the interests of the individual to whom the information relates could be streamlined in certain cases.

- 11.1 The OFT considers that the overseas information gateway could be streamlined to make its operation more efficient. Currently, where the OFT proposes to make disclosures under this gateway, it must have regard to certain considerations (contained in sections 243 and 244 of the EA02) with the consequence that each time it proposes to disclose information to an overseas competition authority, the OFT must first conduct an assessment which includes a review of legal safeguards that exist in the jurisdiction for the handling of the disclosed information (section 243(6)). Under section 244(3) it must also assess, among other things, whether the disclosure might significantly harm the legitimate business interests of the undertaking or the interests of the individual to which it relates.
- 11.2 The growing internationalisation of competition enforcement (especially in relation to cartels) means that competition authorities are more frequently obtaining information that, in addition to furthering their own investigations, can assist overseas authorities in the conduct of their own enquiries. The OFT experience to date is that having proper regard to the relevant considerations under sections 243 and 244 each time it is considering a disclosure can be a lengthy and resource intensive process both for it and the overseas authority, which it is often impractical to achieve within the time constraints of the investigation.

- 11.3 The OFT considers that section 243 could be amended to allow an up-front assessment of which jurisdictions have sufficient legal safeguards in place (for example those with more mature general and competition legal regimes, or where repeated information exchanges may be expected) rather than having to conduct a full assessment of the conditions under section 243(6) each time a disclosure is made. A list of such overseas public authorities could be maintained. The list could be kept under review and amended by statutory instrument. For overseas public authorities that are not on the prescribed list, the existing procedure for assessing the considerations under sections 243 could remain. Whether information is disclosed under the list or not, it must remain open to the public authority disclosing the information to impose such conditions on disclosure as it considers necessary.
- 11.4 The OFT also considers that the section 244(3) obligation to have regard to the business interests of the undertaking or the interests of the individual to whom the information relates could be streamlined in certain cases. Where overseas public authorities are themselves subject to making disclosure on the basis of the same or similar restrictions, it could be more efficient and involve less duplication if the OFT did not have to carry out a review that the receiving authority would in any event have to carry out before it uses the material. Also, the receiving authority may be better placed to carry out the assessment, as the consideration of whether to withhold confidential material must have regard to how the material will actually be used in the relevant investigation or proceedings).
- 11.5 Although the OFT considers that both revisions described above could lead to a more streamlined process in relation to disclosures under section 243, we consider that the suggestion in relation to section 243(6) is in practice likely to enhance efficiency to a greater extent than the suggestion in relation to section 244(3). Accordingly, if Ministers were minded not to accept the latter suggestion, the OFT considers that changing the position as regards section 243(6) would still be of significant benefit.

ANNEXE A





Ofwat's response to 'A Competition Regime for Growth: A Consultation on Options For Reform'

June 2011

Key points

We welcome and support the importance that the government places on competitive process and its ability to deliver benefits to consumers.

We agree with the continued commitment to retain the concurrent competition powers of the sector regulators. These concurrent powers are vital to us in meeting our statutory duties, realising our strategy of sustainable water, and contributing to Governments objectives.

We support the desire to improve what we agree is a world class competition regime in the UK. We believe there is scope to enhance effective working between the sector regulators and the proposed Competition and Markets Authority (CMA): we provide both examples of where we are engaging in joint working and specific proposals for greater cooperation, transparency and inter-working.

We would wish to see any proposed changes made in a way that is consistent with the Government's own recently published Principles for Economic Regulation.

Introduction

As a sector regulator with concurrent competition powers, the Water Services Regulatory Authority (Ofwat) welcomes this opportunity to contribute to the debate on reform of the UK competition regime. We draw on our experience of positive interactions with other sector regulators and the OFT.

We concur fully with the Government's view that effective competition increases productivity growth. Our strategy as a regulator is predicated on competition generally delivering better outcomes for consumers and markets than regulation, and, wherever appropriate we intend to roll back regulation in areas where effective competition can operate in the interests of consumers. Indeed, one of our primary duties is to promote the interests of consumers through effective competition, where appropriate. The ability to use and apply concurrent competition powers in the water and waste water sectors is a vital tool in achieving this aim. So we welcome the Government's commitment to retain concurrent competition powers of the sector regulators.

It is important to recognise that competitive sectors can be promoted through the application of statutory sector-specific duties as well as through competition law. We believe that the decision to apply competition law or sector powers will continue to need to be determined on a case-by-case basis and that this approach in no way represents a failure of the current system. In fact one of the key strengths of the UK competition regime is the recognition that it recognises that outcomes are crucial (e.g. increasing choice and innovation in the economy) and outputs (such as the number of competition cases) are a means to this end. Therefore it is vitally important that sector regulators have a full and effective 'tool kit' to enable them to pursue the right outcomes, in the right circumstances for consumers in their respective sectors.

In particular, the exercise of *ex ante* sector regulation and *ex post* competition powers by the same body is likely to lead to more consistency in the treatment of companies in the sector and therefore provides greater certainty to investors. We also believe that the Government's ongoing commitment to concurrency will help to ensure that the expertise that is required to promote effective competition will be retained. Without a strong concurrency regime, it is very likely that the sector regulators would lose the vital set of competition skills that are essential to implement pro-competitive regulatory measures such as those currently pursued by Ofwat in our market reform programme.

We believe the final reforms the Government proposes should be wholly consistent with its own, recently adopted Principles for Economic Regulation and associated commitments, specifically its commitment that the "*Government will ensure regulators have discretion to choose the regulatory tools to deliver their objectives*", recognising that regulators "*are legally distinct and functionally independent from any other public or private entity when carrying out their functions*" and "*do not seek or*

*take direct instructions from any government or other public or private entity when making regulatory decisions*¹.

It is within this context, that we provide answers to and additional suggestions to the questions raised in the consultation in relation to Chapter 5, A Stronger Antitrust Regime, and Chapter 7 Concurrency and Sector Regulators.

A Stronger Antitrust Regime

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

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

We share the Government's objectives for the future antitrust regime for decisions to be taken faster, to a high standard of quality and increased transparency. We do not consider that the number of competition decisions taken in the UK is in itself a good indicator either to the deterrent effect on anti-competitive behaviour or as an indicator of the effectiveness of the regime as a whole. What matters is the quality of the decisions taken and the outcomes that they ultimately deliver. Delivering high quality decisions within a reasonable timescale should be the aim for all competition authorities. The prospect of legal challenge, by either party, means that out of necessity these decisions are made after thorough investigation and are firmly grounded in sound economic and legal analysis.

Option 1. Retain and enhance the OFT's existing procedures

We believe that Option 1, namely incremental improvements to the existing regime is the most appropriate option. This approach would create less unnecessary risk, uncertainty and cost to the regime itself, to business and ultimately to the consumer and the economy. As it stands the current arrangements work well whereby the OFT or we as a concurrent authority can examine a case thoroughly on the basis of the facts and law at the administrative stage. This will include considering the key economic and technical issues to high standard, particularly as the competition authority concerned recognises the ability of the parties concerned will have a right of the appeal to the Competition Appeal Tribunal (CAT). If there is a subsequent appeal, the CAT can carry out a review on the full merits of the case. We believe that improvements to speed and robustness of decision-making can best be achieved through further continued improvements to the current regime. We would welcome the opportunity to work further with BIS, the competition authorities and the sector regulators to achieve these improvements. We elaborate on how to improve inter-working between the competition authorities and the sector regulators in response to the Question 16, below.

¹ Commitment 2, Principles for Economic Regulation, April 2011, page 7.

Option 2. Develop a new administrative approach

We do not consider that either of the two sub-options elaborated under Option 2 should be a preferred approach (i.e. either the establishment of a functionally separate internal tribunal within the CMA or to the creation of an investigatory panel). Both options seem to increase complexity with different evidential thresholds and raised possibility of increased risk of bringing forward cases for appeal. They also both involve final decision making for all competition cases (including those initiated by sector regulators) being made by the relevant CMA tribunal. We believe it would raise issues of independence of the CMA in such matters if it is also acting as the regulatory appeal body.

If cases brought by sector regulators were to be heard by such internal CMA tribunals (which should be a complete rehearing), any subsequent appeal would, in our view, have to be on the basis of a judicial review type approach alone and not on the full merits, otherwise this would achieve the direct opposite result of what the Government seeks to achieve and increase the length of time decisions were heard adding an additional tier of review instead of speeding-up the process. While we do not believe this decision making structure is would be an improvement, an alternative, less harmful, way of introducing such a 'panel' type decision-making structure for the sector regulators might be to use the Boards of the sector regulators as the appropriate decision making panel.

In relation to market investigation references, we have the ability to refer markets but this goes straight into a Phase II, in-depth market investigation. We would not want this replaced by having to go through to an initial, Phase I review by the CMA. The market investigation regime (including the market study phase) has already been extensively criticised for the time a study/investigation takes from inception to conclusion; we consider that an additional phase I review by the CMA would add time – and therefore cost – into the process in return for no discernible benefit. To the extent that CMA expertise may help the phase I market study and reference decision, this can be achieved by close working between the sector regulator and the CMA during the market study, as we are doing with OFT at present in the organic waste treatment investigation.

Option 3. Develop a 'prosecutorial' approach

At first sight, the introduction of prosecutorial approach to antitrust cases appears to have merit. However, given the cost implications both with respect to personnel and upfront legal costs, we have reservations about this option and in particular how it would impact on sector regulators with concurrent competition powers and whether it would actually deliver better anti-trust decisions on a faster timescale.

Under such an approach, the competition authority or sector regulatory with concurrent competition powers would build a case which would prosecute in an adversarial setting. The court would be the ultimate decision maker, not the competition authority. While BIS refers to such an approach applying in the US, Australia, Canada, and Ireland, it is not clear from the Consultation Paper nor the Impact Assessment that such an approach would lend itself to boosting transparency, reducing the number of appeals or making enforcement more

effective. By contrast there is a strong likelihood that both the CMA and the concurrent sector regulators would have to increase their legal resources significantly in order to conduct prosecutions effectively, beyond what is currently required to conduct administrative procedures.

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.

Statutory deadlines

We are concerned that gathering information under conditions of binding timescales could lead to situations where there was insufficient information to build an evidential base and complete detailed economic and legal analysis and therefore to take a decision on whether to proceed with a case. This would provide a further disincentive for competition authorities or the sector regulators with concurrent powers to pursue competition cases and could compromise the quality of the decisions and ultimately deterrence effect of the regime.

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

The emphasis of the Chapter on strengthening the antitrust regime is focused on cases taking too long and too few decisions being taken. We believe the process of antitrust investigation and enforcement would benefit from a more robust evidence base of the costs and benefits of different approaches already applied in other jurisdictions.

Specifically, further evidence of the effectiveness of the prosecutorial approach in other jurisdictions would need to be demonstrated. Generally, the Government should commission additional research to determine why other jurisdictions, including in other EU Member States, have delivered far greater numbers of competition decisions than the UK, particularly given that most EU Member States do not follow a prosecutorial approach.

As previously indicated, we believe that the accuracy and impact of decisions taken is far more important than the number of cases prosecuted. It is important for the Government to recognise that sector regulators have the option to use ex-ante powers to address potential competition problems and have done so successfully to promote competition in their respective sectors. This is a strength rather than a weakness in the UK's regulatory and competition regimes. What matter are the outcomes.

As outlined above, we believe that Option 1 is preferable because it builds on solid, existing foundations, is well understood and avoids the additional delays that Option 2 could easily generate and is based on. Option 3 has the potential to raise additional legal and personnel costs during a period of austerity and would provide additional challenges to the sector regulators over and above those of the CMA.

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?

We strongly agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA. We consider that the issue of concurrency is a separate issue to whether there should be any *ex ante* regulation at all. Where statutory regimes are present and regulation continues to be in place, it is vitally important that the sector regulator maintains its considerable expertise in the specific issues that are relevant to the regulated industry in question, and this should aid it in dealing with some often very complex technical and economic issues which arise in industries such as water and sewerage sectors. In particular, sector regulators have a good idea of whether to use regulatory tools or not and a better understanding of how the industry, and its investors, operate than a national competition authority. The removal of concurrent powers from sector regulators would in most cases increase regulatory risk and uncertainty in the regulated.

From a practical perspective, one of the key drivers of the sector regulators is to reduce the burden of its regulation, in part by increasing the amount of competition in the sectors that we regulate. In order to do this we need to have personnel who are competition specialists to deliver effective competition across the entire sector. The retention of such key and highly specialised staff would be difficult to achieve if our ability to conduct antitrust and market investigations were no longer available or even if all final decisions were determined by the CMA.

Q15 The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:

The arguments for and against the options;

The costs and benefits of the options, supported by evidence wherever possible.

Whilst regulators have significant expertise and resources within their sectors, we believe that the individual regulators can benefit from sharing best practice with one another and also to draw on the competition authorities as a source of expertise either in running investigations or deciding to run cases jointly as appropriate. Specifically, our experience of running competition cases has benefitted greatly from talking to other regulators, from secondments and advice that we have received from the OFT and CC. It would be important going forward that sufficient resources are made available to the CMA for such cooperation to continue.

By contrast providing the CMA with a 'supervisory role' over the concurrent regulators would be counterproductive and be contrary to the Government's Principles for Economic Regulation. We have the following substantial concerns about this proposal:

- the creation of such a 'super regulator' could not help but interfere with the independence of the concurrent regulators. While this is obviously the case for

regulators whose independence is required by European legislation, it is also the case for other regulators who are accountable to their 'parent' departments and Parliament. We do not believe that also making them accountable to the CMA for their decisions would be efficient, nor would it be likely to encourage the kind of constructive engagement that characterises our relationship with the OFT in relation to antitrust measures at present (and which we see as beneficial to all).

- Indeed, the Principles for Economic Regulation and associated commitments, now adopted specifically state that: "*Government will ensure regulators have discretion to choose the regulatory tools to deliver their objectives*", recognising that regulators "*are legally distinct and functionally independent from any other public or private entity when carrying out their functions*" and "*do not seek or take direct instructions from any government or other public or private entity when making regulatory decisions*"².
- We do not believe that there should be a presumption in favour of the CMA in case allocation nor should the CMA have the ability to take over control of cases from sector regulators in mid investigation. Our view is that the current equal footing arrangements work well and we have never had an issue with them. We are also concerned where a sector regulator decided not to use sector rather than antitrust powers to resolve a problem it could be required to clear that with the CMA in advance. This would generate substantial additional work for no material benefits and lead to unnecessary delays in dealing with cases. In particular it would:
 - dramatically increase the workload of the CMA requiring it to be a specialist in each of the regulated sectors as well as a general competition authority in order for it to be able to take informed decisions about what is best for competition in those sectors and therefore whether the relevant regulator is acting in the best interests of competition through its choice of action in any particular circumstance; and
 - increase the workload of regulators and act as break on the conduct of regulatory competition or other cases while the CMA is considering the regulator's actions at the very time when the focus of the reforms is aimed at speedier decision making.
- it could add to the regulatory burden for companies under investigation, as they could feel the need to put submissions to the CMA as well as sector regulators concerning the case.
- it would generate substantial uncertainty in any sector where consistency of decision-making and certainty are associated with final costs to end-customers.

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

² Commitment 2, *Principles for Economic Regulation*, BIS, April 2011, page 7.

Whilst we are opposed to the CMA supervising independent sector regulators with concurrent competition powers which would run counter to the Principles for Economic Regulation and in some sectors run counter to EU legislation, it is our view is that the CMA can play a very positive central role in antitrust enforcement and the promotion of competition generally without the excessive burdens and over-regulation.

We support the CMA having a general role to promote competition to the benefit of consumers across the economy as a whole. From a practical perspective we believe it should play a central role in the coordination of competition cases that it and sector regulators are running. We have had positive experiences of dealing with the OFT and other concurrent regulators through the Concurrency Working Party and through our informal network of contacts.

We think that the most positive role for the CMA would be to build on that currently played by the OFT in coordinating knowhow and the exchange of information between the concurrent regulators.

In terms of specific proposals, we believe that if the OFT's Procedural Adjudicator trial is successful, then it could make sense for a CMA procedural adjudicator to act as adjudicator (i.e. as independent hearing officer) on procedural matters for sector regulators' anti-trust cases. This would alleviate many of the concerns raised about the processes of concurrent regulators without having the same effect on their ultimate independence of decision making and action.

In conclusion, our view is that the CMA should have a crucial central role to play in competition enforcement and that role can be achieved by building on the success of the concurrency working party, but it should not go so far as to become the regulator of concurrent regulators actions. We fear this would be inefficient and have a considerable number of extremely negative unintended consequences.



Ofwat
Centre City Tower
7 Hill Street
Birmingham B5 4UA

Phone: 0121 625 1300
Fax: 0121 625 1400
Website: www.ofwat.gov.uk
Email: enquiries@ofwat.gsi.gov.uk

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ORR

Bill Emery
Chief executive
Telephone 020 7282 2006
Fax 020 7282 2118
E-mail bill.emery@orr.gsi.gov.uk

14 June 2011

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

Dear Sirs

A Competition Regime for Growth: ORR response to the consultation on options for reform

We welcome this opportunity to participate in your review of the competition regime. Although the UK competition regime is highly regarded internationally it needs continually to improve, to respond to the needs of the economy and to give businesses the confidence they need to grow and make investment and employment decisions without uncertainty arising from lengthy investigations and unnecessary scrutiny.

We welcome moves, therefore, to make competition powers easier to use and to simplify processes. There is a tremendous opportunity here to learn from experience; to take the best of the current system including improvements already implemented and to introduce change particularly to address residual criticisms around unfairness and burden.

We believe that sector regulators can bring significant expertise and experience to the design of a new framework. Importantly sector regulators share the objective of making markets work in the interests of consumers and will use the most appropriate tools at their disposal to make this happen.



The importance of competition concurrency for the regulatory framework

The Office of Rail Regulation (ORR) is the independent safety and economic regulator for Britain's railways. The ORR is led by a Board, appointed by the Secretary of State for Transport.

One of our key strategic objectives is that "*Passengers and freight customers benefit fully from improved safety, performance, efficiency and capacity*"¹. Our approach for achieving this is to promote, where possible, effective market mechanisms and competition, because these are more likely to be responsive to the changing needs of rail users and more likely to lead to better outcomes than regulatory mechanisms alone². Where market mechanisms fail, economic, competition and consumer policy all play their part in the design of the most appropriate framework for intervention.

The consultation document makes an important point³ that the removal of concurrency may actually impede that integrated application of powers and reduce the scope to apply the sector regulator's industry expertise to competition. It is also true that clarity about what competitive outcomes could lead to can help to shape regulatory regimes in a way which leaves regulated markets more open to competition, even where there are constraints on how far it is sensible to use competition powers as the primary instrument to achieve better outcomes for consumers.

For this reason we welcome the recommendation - and believe that it is very important - that sector regulators should maintain their concurrent antitrust and market investigation reference powers (and looking forward to the upcoming consultation on the reform of the consumer landscape, we welcome too the emerging view that sector regulators retain consumer enforcement powers in the new structure⁴). The continued interaction with the regulated sector over time gives the regulatory authority the knowledge and empirical evidence it needs to respond appropriately. It also provides the sector with the confidence it needs that economic regulation will be rolled back in full understanding of the implications and that it has a regulator who can react swiftly where there is evidence of harm.

¹ Theme 1, *Promoting safety and value in Britain's railways, ORR's strategy for 2009-14*

² Paragraph 9, *ibid*

³ Paragraph 7.15

⁴ Paragraph 9.21 of the consultation

Our preference, as a regulator, is to use competition tools wherever possible. Our track record attests to this. We have undertaken eleven investigations over the past ten years, one of which resulted in an infringement decision and associated penalty of £4.1m. We believe that this decision had a reputational impact beyond the decision alone and contributed significantly to the subsequent liberalisation of the railfreight market. We also, in 2007, referred the passenger rolling stock market to the Competition Commission (CC) using our market investigation reference powers. To remove concurrency we believe would send out the wrong signals to the sector.

We also consider ourselves to have close working relationships with the CC and the Office of Fair Trading (OFT) and have welcomed discussions on issues of policy and procedure with both bodies. We have additionally on two previous occasions seconded an OFT officer to assist on on-site inspection and this worked very well from our perspective.

The concern among critics that there is a paucity of cases in the regulated sectors and that this results from the UK's system of concurrency, seems not to be supported by the evidence. We note, for example, that the proportion of railway cases amongst competition authorities in member states where concurrency does not exist are a very small proportion of the total cases investigated⁵. This is more likely to reflect the nature of rail markets and the application of prioritisation criteria than the favouring of sector specific legislation, as is the criticism here.

However, we regulate in a sector where passenger train services are provided under franchises which are specified, competitively tendered, let, monitored and enforced by government and where regulation continues to play a critical role in the delivery of tax-payer funded outputs.

The recent rail value for money study⁶ has recommended a move towards a more conventional regulatory model in the sector, with a bigger role for independent regulation of train operators, and we are considering with the Department for Transport whether and how this could be implemented. Importantly, the report also set out recommendations for improved efficiency and value for money in the rail industry and highlighted the challenge facing the whole rail industry if the recommended target of £1bn per year of savings is to be achieved. It is likely to lead to a period of change in the industry and its regulation.

⁵ For example since 2000 the number of railway cases compared to total cases investigated in the four member states that we hold statistics for were as follows: in the Czech Republic one out of 220; in Spain seven out of 692; in Finland three out of 4902; and in France seven out of 639. Since 2007 in Belgium there have been 0 cases out of a total of 53.

⁶ *Realising the Potential for GB Rail – Report of the Rail Value for Money Study, May 2011*

Regulation will, for the time being at least, continue to have a role in the railways not least in helping to create the ground rules for a more cohesive railway in which all parties co-operate for the purpose of delivering the high quality, efficiently priced railway which taxpayers; passengers and users of rail-freight services are looking for as demand continues to grow.

The removal of concurrency or the proposed alternative⁷ of providing the CMA with the power to question each regulatory decision; each regulatory approach; and to direct the form of regulatory intervention are entirely inconsistent with commitments provided by government as to the importance of independent regulation in providing the predictable and stable framework that business needs to invest⁸.

This is particularly concerning in a sector where there is a requirement for significant investment to accommodate growth in demand and to meet the needs of users and of the economy as a whole. Total public and private sector spending on the railways currently amounts to about £11bn per year. In recent years, much rail investment has relied on government guarantees. Government and ORR believe it is important for the private sector to play a bigger role in financing investment and to take more risk. A stable and predictable regulatory regime, reflecting the needs of the sector, will be a key enabler for this.

Similar concerns exist around the proposal that the CMA be provided with an objective or duty to keep key sectors under review. Although we understand that there can be benefits from reviews being undertaken, from time to time, by a 'fresh pair of eyes' there are also countervailing risks of dampening progress and innovation in sectors which are already under a significant amount of scrutiny.

The relationship with the CMA going forward

We value challenge, however, and believe that it leads to better and more rigorous decision making. We understand also that there is a need for an authority with overall responsibility for setting the strategy for competition policy and for ensuring that those who operate concurrently are cognisant of and are moving in the same direction of travel. However, the speed of travel will inevitably reflect the nature and characteristics of the

⁷ Paragraphs 7.30-7.32

⁸ Commitment 2 in which the Government acknowledges the need not to erode the independence of regulation over time and commits to amongst other things to: "[...] preserve the independence of economic regulators. [...] ensure that: regulators' staff and management act independently from any market interest and do not seek or take direct instructions from any government or other public or private entity when making regulatory decisions.

sector involved. We would be happy to have closer bi-lateral engagement with the CMA in the future which recognises the competition policy lead on the one hand and the sector specific expertise on the other.

There are also undoubtedly major benefits in the CMA becoming a centre for expertise in competition policy and enforcement. As noted above we already have experience of asking the OFT and CC for advice and assistance and, from our perspective, this has worked very well. We look forward to developing options which enable such joint working in the future.

Regulatory appeals

We note that the preferred option here is to essentially 'lift and shift' appeals currently heard at the CC to the newly merged CMA and there are various options in terms of how such appeals will be heard in the new structure, although these are not fully developed in the consultation. Our major concerns going forward around appeals – and we are happy to work through the detail of this as the proposals develop – are:

- that the panel appointed to hear such appeals is sufficiently separate so as not to appear biased by association with concurrent relationships (which is a concern with the preferred option); and of course
- that the panel has sufficient expertise to hear cases which given their statutory genesis will require understanding of a broad range of disciplines.

We are also happy to be part of an initiative for regulators to develop model regulatory processes for adoption over time but the challenge will be considerable given the significant differences in statutory frameworks.

Summary

We are ready to play a full part in developing a framework which delivers the objectives of the reform and enables close and mutually beneficial working relationships between the CMA and regulators. The challenge will be to create a framework which allows each regulated sector to move from a world of regulatory rules and processes to one which relies much more on competition case law and precedent at a speed which suits its own evolutionary progress. The objective must be to avoid unnecessary uncertainty and risk to industry; and importantly delayed remedy for the consumer and the tax-payer during the period of design and in implementation.





OFFICE OF RAIL REGULATION

There is a significant body of work wrapped up within the proposals and a period of transformation which will require us all to contribute so as to bring about the improvements we all want, without losing what is excellent about the current system in the process.

Yours faithfully

Bill Emery



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

Response form

Bill Emery, Chief Executive
Office of Rail Regulation
One Kemble Street
London WC2B 4AN

Return completed forms to:

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

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

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

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

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 the views of ORR.

Consultation Questions

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: [Chapter 1 – Why reform the competition regime?]

There is a significant body of work wrapped up within the proposals and an inevitable period of transformation which will require careful management to deliver the sought for improvements without losing what is excellent about the current system in the process.

A particular concern must surely be the possibility that such a major change embracing both structure and process could result in a regrettable diminution in the service provided currently and an ensuing loss of credibility in the system and loss to the consumer at a time when we are facing severe challenges for the economy.

There will be an inevitable resource consequence to the development of the proposals and the implementation of change and although we want to work with BIS to follow through on some of the detail of the proposals, this is also a significant period of change in the railways (see covering letter). It would undoubtedly be easier to advise and contribute to the latter with greater certainty about what the competition framework will look like going forward and what our role will be within it.

In summary we wonder whether it would be more sensible to adopt a more stepped approach to change.

That said we remain supportive of options which increase speed; efficiency; and certainty. And it can only be a good move to reduce burdens on both regulators and industry, whilst at the same time retaining the integrity of the current system. We believe there are some good ideas which are worthy of development around decreasing overlaps in the two phase market investigation regime and introducing more rigour in timescales in both this and in anti-trust investigations including ensuring that opportunities for game-playing are avoided. This is also an opportunity to address concerns around confirmation bias and/or unfairness.

We also see major benefits in the CMA becoming a centre for expertise upon which regulators can draw (particularly where greater reliance on competition rather than ex-ante intervention is likely to lead us into unchartered waters in terms of precedent and will start to test the boundaries of current thinking particularly on exploitative abuse of dominance cases). Though this will need to be carefully managed so as not to erode and ultimately undermine regulatory independence.

In terms of the detail there needs to be more clarity around how sector regulators will interact and fit within the governance arrangements and decision making in the new structure (for example, proposals in chapter 10 around closer interaction between phase 1 and phase 2 staff to minimise overlap in market investigations; in chapter 5 questions around where sector regulator cases will be adjudicated; and in chapter 8 the future of licence and price determination appeals).

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: [Chapter 2: The UK Competition regime and the European context]

It is critical to an understanding of how competition law applies in the rail sector to appreciate that certain of our principal economic functions cover territory that would in an unregulated sector usually fall to be governed by competition law. Furthermore and relevant to this section of the consultation, railway sector specific regulatory scrutiny and intervention is also increasingly driven by requirements in European legislation.

For example,

The **First Railway Package**, which was adopted by the European Commission in 2001, includes measures to:

- open the international rail freight market;
- clarify the formal relationship between the State and the infrastructure manager and between the infrastructure manager and train operators; and
- introduce a defined policy for capacity allocation and infrastructure charging.

The **Second Railway Package** was adopted by the European Commission in 2004. Its aim is to create a legally and technically integrated European railway area. It includes Directives that:

- harmonise and clarify interoperability requirements;
- open up both national and international freight services on the entire European network from 1 January 2007; and
- set up a steering body, the European Railway Agency, to co-ordinate groups of technical experts seeking common solutions on safety and interoperability.

The **Third Railway Package**, which was adopted by the European Commission on 26 September 2007, is designed to open up international passenger services to competition within the EU by 2010. It includes measures to:

- deal with the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure. It envisages opening the market for international passenger services to competition from 1 January 2010;
- establish the conditions and procedures for the certification of train crews operating

locomotives and trains across Europe; and

- establish rail passengers' rights and obligations around, for example, insurance, compensation and ticketing.

Other relevant European legislation include:

- Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road.
- Communication from the Commission — Community guidelines on State aid for railway undertakings.
- Regulation (EU) No 913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight.

Article 30 of Directive 2001/14/EC requires Member States to appoint an independent regulatory body, as a charging body, an allocation body and a body to whom applicants may lodge an appeal if they feel unfairly treated, discriminated against or in any other way aggrieved.

Regulation 30 of The Railways Infrastructure (Access and Management) Regulations 2005 (which transpose and implement a number of the requirements of the First and Third Package and which came into force on 28 November 2005) establishes ORR as that regulatory body and provides us with the three interlinking roles of:

- monitoring competition;
- dealing with complaints from aggrieved parties; and
- whether on our own initiative, or as a result of a complaint, taking appropriate measures to correct undesirable developments.

The measures contained in the three packages in essence accept that competition policy alone is not sufficient to deliver the objective of fully liberalised and competitive railway markets operating freely across member states.

Although we exercise our responsibilities as a national regulatory body '*without prejudice*' to Community and national regulations concerning competition policy¹, the interplay between the two areas is complicated. The design of a domestic competition framework needs to have cognisance of this not least because it facilitates understanding of the current scope for some of the proposals to deliver their objective of increased reliance on

¹ EU Directive 91/440, Article 5 point 7

competition tools alone.

In common with Slovakia, the Netherlands and Macedonia we are both the national regulatory body and competition authority for the railways.

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: [Chapter 3 – A stronger markets regime]

We are pleased that BIS is proposing to retain the two stage process for market investigations. We consider there to be significant value to having access to a 'fresh pair of eyes' and this was certainly a consideration for ORR when we referred the **market for the leasing of passenger rolling stock to the CC in 2007**. We noted in our findings that these markets had been scrutinised to a greater or lesser extent on a number of previous occasions: by the Office of the Rail Regulator in 1998, (following a request from the Deputy Prime Minister); by the Strategic Rail Authority as part of its rolling stock strategy in 2003; and by the Secretary of State as part of his review, *The Future of Rail* (published in July 2004). We thought it important that an authority with no previous history in this area should provide the means for an in-depth independent review, in order to, amongst other things, give greater credibility to the findings.

We do, however, agree that the two phase system can create overlap and that the new framework should look to address this. We support, for example, the proposal to provide investigatory powers for the first stage (and ask for this to be extended to sector regulators). In our view this would provide two key advantages in that it is likely to:

- help to speed up the first phase. Our own experience is that there are challenges in asking for information voluntarily both in terms of what you can reasonably ask for and the extent to which you can push timescales; and
- be capable of providing a body of evidence which since given under legal direction is more likely to be able to be relied upon in the second stage.

We are also supportive of moves to tighten up on timescales.

As a first stage authority we have structured our framework for market monitoring² (see below) to keep the burden to industry proportionate to the stage that we have reached (for example, our 12 week 'diagnostic stage' which is designed to assess the existence, potential scale and impact of any problems mainly relies on information and data already available to us and relies only infrequently on interviews with third parties). We are also mindful of the possibility that a second stage investigation (our public study – which is nearest in equivalent to the OFT Phase I study) could lead to a reference. We, therefore, aim to complete such a study within six months.

Based on our experience, it is possible that more cases could be referred from regulated sectors if there was a way to fashion timescales to suit the scale of the problem.

² ORR's approach to reviewing markets, October 2009: <http://www.rail-reg.gov.uk/upload/pdf/407.pdf>

The principles of good regulation demand that regulation should not impose costs to business which are disproportionate and outweigh the (potential) value of the benefits achieved. The factors (set out in our guidance referred to above) that we will take into account in exercising our discretion to refer include:

- the nature and significance of the competition problems that we believe exist in the market concerned; and
- whether a reference would be a proportionate response to the scale of the competition problems identified.

At paragraphs 131-132 of *ORR's consultation on the findings of its Rail freight sites public study*, May 2011 we set out how these factors affected our decision on whether or not to refer this market to the CC. Our findings here are currently out for consultation with responses due back on 29 July. It is possible that the responses will be enlightening in the context of the review of the competition framework.

In this context there may be merit in pursuing the idea of providing the CMA with powers to carry out 'horizontal' investigations (3.9 of the consultation) for features or practices that affect more than one market. Although the scope and scale of such investigations should not be underestimated and there would need to be significant co-operation between regulated sectors and the CMA to ensure that such reviews were properly resourced and informed.

There needs to be some more clarity about how some of the proposals are expected to be extended to sector regulators i.e. proposals around statutory definitions and thresholds (particularly proposals which could limit our discretion on how we discharge our various responsibilities to monitor markets³) and the proposal at paragraph 10.33 that "some or all of the phase 1 market study team would continue work on the phase 2 investigation, taking with them their existing knowledge of the case and market."

We set out at the end here some key elements of ORR's market studies framework in

³ Specifying in a high degree of detail the manner in which a regulator is to achieve its objectives limits the scope of the regulator to identify or achieve the optimal outcome because those tools and inputs form, in effect, objectives in their own right. Specifying tools and inputs may also undermine the benefits associated with independent economic regulation. For these reasons, regulators' duties should be outcome-focused and avoid specifying means, tools or inputs." (paragraph 39 of BIS principles of economic regulation)

⁴ Section 82 of the Railways Act defines railway services as: services for carriage of passengers, carriage of goods by railway, light maintenance services, station services and network services.

⁵ Article 30 (2001/14/EC) requires Member States to appoint a regulatory body, independent of the Infrastructure Manager, as a charging body, an allocation body and to whom applicants may lodge an appeal if they feel unfairly treated, discriminated against or in any other way aggrieved.

order to facilitate understanding of the statutory background; our approach and the different terms that we use.

We are not particularly supportive of the proposal at 3.39-40 to revise the duty to consult on decisions not to refer. We are committed to transparency and accountability and consider that this is an important part of making good decisions and ensuring that all views and evidence have been captured in our final conclusions.

Finally we note the proposal to amend Schedule 8 of EA02 to require parties to publish non-price information and agree that information remedies can be an effective solution to lack of competition in some markets. However, in this context we draw attention to *Realising the Potential of GB Rail, Report of the Rail Value for Money Study, Summary Report*, published May 2011 which states at paragraph 6.11:

"...the Study is aware of the remedies put forward by the Competition Commission following its review of the rolling stock leasing market. However, although it is too early to make a full assessment of the effect of those remedies, the Study finds it difficult to understand how these remedies will give the DfT sufficient information to satisfy itself that rates on re-leases are value for money..."

The thoughts of the author might be helpful in delivering further improvements to the system.

ORR's approach to reviewing markets

The legal framework for our market monitoring responsibilities comes from:

- **Section 69 of the Railways Act 1993** - this provides that we must, so far as it appears practicable from time to time, keep under review the provision of "railway services"⁴ in Great Britain and elsewhere. We must also (again so far as it appears practicable from time to time) collect information, with respect to the provision of those services, in order to facilitate the exercise of our functions under Part 1 of the Railways Act 1993;
- **Article 10(7) of Directive 2001/12** on the development of the Community's railways, was implemented in Great Britain by the Railways Infrastructure (Access and Management) Regulations 2005. These require the regulatory body established under Directive 2001/14⁵ (i.e. ORR in Great Britain) to monitor competition in rail services markets and on the basis of a complaint; and
- As a concurrent competition authority under **the Enterprise Act**.

Two points:

- concurrent jurisdiction under the Enterprise Act and the Competition Act goes wider than the definition of railway services in section 82 of the Railways Act and includes services such as the leasing or maintenance of rolling stock as provided by the rolling stock companies (ROSCOs), the supply of goods and services to Network Rail, and the provision and purchase of goods and services to, or by, London Underground Limited (LUL); and
- we are also the competition authority and regulatory body for the Channel Tunnel Rail Link (CTRL). Our jurisdiction as a regulatory body does not extend to the tunnel or to shuttle services. However, allocation of competition cases involving the tunnel and international railway services travelling through the UK from Europe would be a matter decided between the relevant national competition authorities including ORR.

Our approach to market scrutiny consists of three potential stages:

- an initial **diagnostic research study** (usually lasting up to three months) in which we will gather information in-house: from our own records; governmental; and public sources, in order to assess how a market is functioning and whether there appear to be market problems that warrant further attention.
- a more detailed consultative **public study** (usually lasting up to six months), including consultation with external stakeholders, in which we make a fuller assessment of any concerns identified during the research study.
- a concluding **remedies study** (usually lasting up to twelve months), including further engagement and appropriate public consultation with external stakeholders in which we reach a view on the appropriate remedies for market problems, we would use this stage, for example, to develop undertakings in lieu of a market investigation reference.

A reference to the CC is most likely to result from a public study and in our published terms of reference for a public study we will identify a reference as a possible outcome. A public study is the closest equivalent to a Phase I study. We undertake approximately two-four diagnostic studies per year (depending on size). Last year 2010-11, this resulted in one public study.

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: Chapter 4- A stronger Merger regime

No comments here.

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: [Chapter 5 – A stronger Antitrust Regime]

Anti-trust

The key issues to be addressed here appear to be:

- timescales (the need to reduce the burden on business and to increase certainty and to incentivise the throughput of more cases); and
- perceived procedural unfairness and bias.

Timescales

We support moves to insert more certainty and efficiency into the system and consider

that there are considerable efficiencies to be gained already from improvements put in place recently by the OFT. In particular we consider the establishment of a **Procedural Adjudicator** to be an excellent move and if it proves successful should be maintained within the new system – open also to the sector regulators to use. Our experience on the long running EWS case (identified at table 3 of Appendix 2 to the consultation) was that procedural dispute featured very heavily from outset. Parties need, however, to be bound by the Adjudicator's decision and there needs to be a presumption that the Adjudicator is used in preference to the Courts.

Similarly we are supportive of proposals to create offences under CA98 and EA02 for non-compliance with an investigation (paragraph 5.53 of the consultation). We agree that pursuing a criminal prosecution for non-compliance in most cases would not appear to be the most proportionate or appropriate measure to take. Non-compliance takes various forms and is rarely an all out rejection of the authority of the investigator and is more to do with pushing the boundaries of reasonableness on timescales for responding; creating difficulties around the retrieval of information and data; and responding to the letter not the spirit of the requests. All of these exchanges create drag and difficulties in keeping to timescales and the scope for game playing is huge. We agree with the view at paragraph 5.55 of the consultation that the ability to propose fines similar to those available to the Competition Commission currently would incentivise parties in a positive direction.

At ORR we have introduced targets within our procedures to reach a non-infringement decision or a statement of objections (SO) within six months of opening the case. Our thinking is that the statement of objections will set out the case on the basis of the evidence gathered to date and there is a chance that it may not, at that stage, be resilient to challenge. A decision would then be made whether there was sufficient evidence to move to a further SO (which addresses the response and moves the case forward) or to close the case by way of a non-infringement decision. Those timescales would not withstand the rigour of then having to argue our case before another authority. The SO would in effect become the de facto decision and the timescales could extend accordingly. We are, therefore, concerned at proposals which would require the sector regulator or first phase investigator at the CMA to argue the case before a Tribunal at this stage (either in the Administrative or Prosecutorial model) and seriously doubt that it would deliver the reduction in timescales that this proposal is seeking to achieve.

Bias

We note here options around establishing a system whereby investigation is separated from adjudication. Our key concerns around these proposals are:

- how sector regulators would fit into this framework which is predominately drafted around how the newly merged CMA would work;
- and concerns about timescales if the SO effectively became the de-facto decision (see above).

How ORR currently deals with cases

Our current practice is to brief but not to involve the senior team or the Board in the conduct of an investigation. This is to:

- reduce confirmation bias from any final decision; and
- discourage lobbying of the senior team which might otherwise occur given the dual relationship that we have with the industry as sector regulator and to ensure focus on the facts and substance of the case.

Hearings are chaired by a director separate to the investigatory team.

At SO stage a Committee of the Board is established with the dual function of:

- challenging the team; and
- providing assurance to the Board that all issues have been covered.

A Decision is a matter reserved to the Board.

To reduce even further the possibility of confirmation bias we could consider delegating the decision on whether to move to an SO to the Chief Executive.

A further option (and one not discussed within Chapter 5 where the focus is on how the system would work within the CMA) is for regulators to establish an impartial and independent panel system for the hearing of such cases, either independently or jointly. Issues for consideration here are, however:

- the panel would need to be seen to be sufficiently separate and impartial and in an organisation the size of ORR that would probably mean the establishment of a call-off specialist panel – called in to make decisions only when required; and
- the implications of establishing different processes for making decisions on competition matters and those made in the course of our sector specific role.

The two stage variant at 5.39 is not addressed in any detail here and is the least persuasive of the options. It does not address the issue of confirmation bias and would create a bottle neck of cases presented all at reasonable suspicion stage. We would be concerned if any application of prioritisation criteria resulted in a sector case being closed due to resourcing implications at the time.

In summary it is important that any new system retains the benefits of:

- non-infringement decisions fully argued and capable of setting rules for future behaviour;

- fully argued decisions where the underpinning economics are fully set out and thus capable of providing guidance in an effects based regime; and
- the ability to settle.

In relation to the second bullet we have concerns around moving toward a system where appeals dealt with on the same basis and grounds as those made to the European General Court against decisions of the European Commission. We ask whether this would provide the richness of economic discussion which has become a feature of appeals on the merits at the CAT. This is particularly important if we are to move to a world where ex-ante rules no longer form a part of the regulatory framework.

Such an approach may increase the volume of cases and make the UK throughput more comparable with that of competition authorities in other member states (as set out at Table 5.1) but the cases themselves may not be as capable of moving competition policy forward beyond the existing *per se* application of the law.

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: [Chapter 6 -- The criminal cartel offence]

No comments here.

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: [Chapter 7 – Concurrency and the sector regulators]

We have set out our commitment to and case for concurrency in the covering letter and the risks of withdrawal in particular:

- Concurrency and the knowledge that it brings is an integral part of our regulatory approach. It moreover provides us with the credibility to advise government on railway policy and the implications of railway structural and franchise reform. It provides us with the opportunity to promote competition as an important stimulus of economic growth.
- Our competition resource is not confined to the pursuit of cases but is called upon in the development of regulatory policy. Similarly our knowledge of the sector provides significant efficiencies to us in the investigation of cases. Our recent non-infringement decision involving the carriage of petrochemicals by rail was completed within six months, a timescale made possible by our sector understanding of industry costs. We would caution against moving toward a system which seems to promote policy silos and where the direct interaction between economic regulation and competition policy will be lost.
- We support the case for rolling back regulation in line with increased competition but to do so needs an understanding of the implications. Removing concurrency could lead to regulators being even less inclined to rely on ex-post intervention, if that is then outside of their control and expertise. Removing concurrency would send out the wrong signals to the regulated sectors.
- Further, there is no compelling argument that ending concurrency will lead to more cases. On the contrary the inevitable resource constraints on a single body could mean that railway cases (which are sometimes small in value; limited to Article 102 (abuse of dominance cases rather than cartels); and perhaps of less relevance to the economy as a whole than abuses taking place in other sectors) might not be prioritised. See comparative data from other member states set out in the covering letter.

We have also set out in our response to Chapter 2 (which covers the vast range of European legislation that covers this sector) how it is critical to an understanding of how competition law applies in the rail sector to appreciate that certain of our principal economic functions cover territory that would in an unregulated sector usually fall to be governed by competition law. For example we,

- determine through periodic reviews Network Rail's outputs and funding, reflecting government specifications and the money available and set charges which train operators pay for access to the track. We monitor and enforce delivery of those outputs through Network Rail's licence; and
- approve or, where terms are not agreed between the parties, direct the terms by which access is granted to train operators to use track, stations and light

maintenance depots. Under European legislation we have an appeal role for a broader range of railway facilities than are covered by domestic legislation.

This should set in context:

- the volume of cases (both non-infringement and infringement decisions which we have made); and
- the extent to which more cases will result from implementation of the proposals outlined in the consultation.

Further elements of the railways regulatory structure which are relevant here are:

- the extent to which existing exclusions from scope of competition law apply for example to:
 - certain passenger services which could be classified as the performance of services of general economic interest⁶ and;
 - agreements between passenger operators which (primarily to protect network benefits for passengers) are subject to legal direction either as a result of a licence or franchise obligation or to agreements covered by the terms of Council Regulation (EC) 169/2009 which removes from the scope of Article 101(1) agreements such as those promoting the standardisation of technical equipment or the co-ordination of timetables for through journeys.

Regulation will, for the time being at least, continue to have a role in the railways in:

- ensuring that passengers continue to see network benefits which might not otherwise be delivered in a vertically separated railway and where there are regionally based franchises;
- providing certainty and assurance for the dependent customers and funders of the national monopoly provider of the railway infrastructure;
- protecting taxpayers money by way of delivery of funded outputs;
- targeting the level of market power in a market and thereby encouraging effective competition to become established;
- continually driving down costs (where the prospects for effective competition are

⁶ Though no undertaking in the rail sector has yet argued that it satisfies the criteria for it to be considered as performing such a task.

limited⁷) and provide a regulatory stimulus/incentives framework for better performance and efficiency; and

- regulating against exploitative behaviour in particular where the market alone will not deliver outcomes (including a price) which is compatible with economic growth.

Making competition powers easier to use

Our response is contained in comments relating to Chapters 3 and 5.

Strengthening the primacy of competition law over sectoral regulation

This should not make a significant difference to the way we do business currently but any measure adopted should not undermine the *Government's Principles for Economic Regulation* which establish the principle that regulators should be given discretion to act in a way that they consider most appropriate. Two principles are particularly relevant here:

- **Adaptability** – the framework of economic regulation needs capacity to respond to changing circumstances and continue to be relevant and effective over time; and
- **Focus** – economic regulators should have adequate discretion to choose the tools that best achieve [the protection of the interests of consumers and taxpayers].

We are happy to discuss a common set of factors with other regulators which set out the circumstances/factors where competition law would be used. In practice this might be difficult to achieve due to the differences between us in terms of the markets we regulate and our sector specific statutory frameworks.

Creating CM(A) as a central resource

Tremendous opportunities in the proposals here. There are clearly times where regulators would benefit from advice and resource from each other and from the CMA, particularly where cases are likely to lead into unprecedented case law. However this already happens, to some extent, through CWP and on a bilateral basis, for example:

- we have on two previous occasions seconded an OFT officer to assist on on-site inspection and this worked very well from our perspective;
- we have had exchanges on matters of procedure (for example we discussed with

⁷ "In certain sectors network effects and/or economies of scale create circumstances, such as natural monopolies, which, under current technological patterns, limit the prospect for effective competition" (paragraph 2 of the BIS Principles for Economic Regulation, April 2011

OFT our proposal to settle the EWS case by way of a settlement decision);

- our economists have had bi-lateral exchanges (for example, in developing an approach for assessing pricing complaints during periods of excess capacity; and to discuss our views on how competition law applies to franchised passenger services); and
- we hosted a joint regulatory workshop to discuss issues around services of general economic interest.

We would welcome more fluidity between us but this is inevitably going to be constrained by capacity and given that most investigations are re-active, the sharing of resource will be difficult to plan particularly during this period of public sector spending restraints and recruitment freezes.

Giving the CMA a bigger role in the regulated sectors

We have material concerns with these proposals and these are set out in the covering letter, in summary some of the proposals seem to establish in practice more than one regulator for the regulated sectors and this is not in accordance with Government's Principles for Economic Regulation particularly in terms of certainty and stability for business and the commitment not to erode the independence of regulators.

In preference we consider there is a case for much closer bi-lateral working relationships which could be of mutual benefit in sharing expertise and understanding.

We also have significant concerns around the proposal that the CMA be provided with an objective or duty to keep key sectors under review. Although we understand that there can be benefits from reviews being undertaken, from time to time, by a 'fresh pair of eyes', there are also countervailing risks which would need to be controlled such as:

- regulated sectors are already subject to a significant degree of scrutiny particularly at each pricing control period. In addition railways have recently been through the McNulty review. Markets need time to settle and to respond;
- the timing and frequency of such reviews would have to be thought through carefully in order to limit inevitable dampening effects on markets and to avoid unnecessary compliance costs; and
- the proposal (depending of course on the scale and scope and remedies attached to such reviews) could be considered disproportionate and surely should be triggered by at least a suspicion of harm.

Such arguments could equally be applied to such a duty being given to regulators.

In November 2006 the National Audit Office (NAO) published a report on the modernisation of the West Coast mainline. The report specified that in three instances

tenders for signalling contracts were let at around 20% above Network Rail's cost estimates.

Our closer scrutiny of the market (<http://www.rail-reg.gov.uk/server/show/ConWebDoc.9566>) demonstrated that a lack of stability and continuity in supply markets (due in this instance to the contracting strategy of Network Rail) had contributed to costs significantly in excess of estimates.

There could be similar effects where periodic and in depth scrutiny of markets dampens activity due to uncertainty particularly as to long term outcomes.

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: [Chapter 8 – Regulatory references and appeals]

We note that the preferred option is essentially to 'lift and shift' appeals currently heard at the CC to the newly merged CMA and there are various options in terms of how such appeals will be heard in the new structure.

ORR is interested from two perspectives:

- our ability to refer licence modifications to the CC under s13 of the Railways Act 1993 in the event that such modifications are not agreed by the licence holder; and
- our ability to refer our access charges review to the CC under paragraph 9 of Schedule 4A the Railways Act 1993.

As noted in the covering letter the consultation sets out various options for how such appeals will be heard in the new structure, although these are not fully developed. Our major concerns going forward are:

- that the panel appointed to hear such appeals is sufficiently separate so as not to appear biased by association with concurrent relationships (which is a concern with the preferred option); and of course
- that the panel has sufficient expertise to hear cases which given their statutory genesis will require understanding of a broad range of disciplines.

We are happy to discuss proposals as they develop but currently we are not persuaded that either of the CMA or the CAT would as proposed or currently structured necessarily address those concerns.

We are also happy to be part of an initiative for regulators to develop model regulatory processes for adoption over time but the challenge will be considerable given the significant differences in statutory frameworks.

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: Chapter 9 – Scope, objectives and governance.

We note in this Chapter (paragraph 9.21) the reference to the upcoming consultation on the reform of the consumer landscape. We welcome the emerging view that sector regulators retain consumer enforcement powers in the new structure. We agree with the consultation that performing these functions in the regulated sectors ensures the application of specific expertise which would be lost by distributing the functions elsewhere.

We would add that our role as sector regulator provides us with the opportunity to take a national view which may not be possible should enforcement rest at local level alone. This is important in sectors, such as the railways, where network benefits are valued by passengers and where the harm may be systemic rather than contained to say a single train operating company.

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: Chapter 10, decision-making

We set out our process for making decisions on anti-trust cases in our response to chapter 5. For completeness the management of our market studies programme is delegated to a programme board which has a cross-office representation and is chaired by a director. A decision on whether or not to refer a market (and to undertake the statutory obligation to consult on our intention) to the CC is a matter reserved to the ORR Board. Our practice has been to establish a sub-committee of the ORR Board to challenge our processes and emerging findings on markets where (such was the case in the referral of passenger rolling stock) we consider that a reference is becoming a real possibility and we are, for example, preparing to consult to that effect.

In order to respond fully to this chapter would require more clarity on how concurrent regulators are expected to fit into this structure of governance and how regulators will be expected to manage governance of future cases.

As noted in chapter 5 we would have to think through the implications of any proposals for a procedural and governance framework which were at variance with the established and agreed structures for the management and governance of our safety and economic functions.

Merger fees and cost recovery

Merger Fees

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

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

Recovering the cost of 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:

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

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

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

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

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

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

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

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

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

Recovery of CC costs in telecom price appeals

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

Recovery of CAT costs

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

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

Comments: [Chapter 11 – Merger Fees and Cost Recovery]

The following text is for information and to inform the discussion going forward. Our only comment about future cost recovery is that it is clear that any new system should remain mindful of small parties who may be disinclined to enter into proceedings where costs can be considerable. We note the proposed safeguards including the proposal to modify the Rules of Procedure (paragraphs 11.49-11.50) to provide greater flexibility to the CAT.

ORR's economic functions are funded by licence fee* and our safety functions are funded by safety levy on the industry. We have no separate funding for our competition functions and it is possible, therefore, that industry parties might prefer for costs to be recycled rather than sent to the consolidated fund.

*In addition to a licence fee, licence holders must also pay a contribution to any costs incurred in connection with licence modification references made to the CC by ORR (in relation to that licence) in the previous year. Where occurring, such costs are determined by ORR following discussion with the CC.

For safety enforcement, the court can order the defendant to pay the costs of prosecution (including the costs of investigation with a view to prosecution) where the prosecution leads to the defendant's conviction. The court's power to do so is the same as that in other criminal cases, namely the Prosecution of Offences Act 1985. The cost of serving an enforcement notice is not recoverable but if we successfully resist an appeal against a notice the employment tribunal has the power to order the duty holder to pay our costs (in most circumstances to a maximum of £10,000). The tribunal's powers are found in Schedule 4 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004.

12. Overseas information gateways

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

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

Comments: [Chapter 12 – Overseas Gateways]

No comments here.

13. Questions on the impact assessment

Mergers

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

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

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'.

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

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

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

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

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

Comments

No specific comments here over and above those already made in response to previous questions.

Orrick, Herrington & Sutcliffe (Europe) LLP

RESPONSE TO BIS CONSULTATION PAPER A COMPETITION REGIME FOR GROWTH: A CONSULTATION ON OPTIONS FOR REFORM

A. INTRODUCTION

1. We welcome the opportunity to comment on the consultation paper and support efforts to address options for reform. However, we have serious concerns with regard to some of the proposed changes to the competition regime. We are particularly concerned by the suggestion that the current voluntary regime for merger notification could be replaced with a mandatory notification regime. As we explain below, we are not persuaded that such a major change to the status quo is necessary or desirable. We also believe that certain other proposals in the consultation paper should be re-considered, in particular the suggested changes to the criminal cartel offence and the funding of the regulatory bodies.

B. REFORM OF THE MERGER REGIME

2. Paragraph 4.6 of the consultation paper states that the Government is considering the replacement of the current voluntary notification regime with a mandatory notification regime. As the Government acknowledges, however, the current system works for the most part very well and is highly regarded internationally. We would therefore oppose any fundamental change to the existing regime, unless it is in response to the identification of a genuinely serious problem.
3. The consultation paper identifies two drawbacks to the current regime which the Government considers might justify the introduction of mandatory notification. First, under a voluntary regime there is a risk that some anti-competitive mergers will escape review altogether. However, it is acknowledged at paragraph 4.4 that that this is not, in reality, a serious problem, since those mergers which escape review tend to be relatively small. Moreover, we consider that this issue could be adequately dealt with if the OFT continues to improve and dedicate resources to its merger intelligence function.
4. The second issue raised is that, under the current voluntary regime, a number of problematic mergers are only identified and investigated after they have completed. The consultation paper cites the fact that, since 2004/5, of the 125 cases at phase 1, where the duty to refer arose, 60 were already completed.
5. Ultimately, it is the parties to the merger who bear the risk if they decide not to notify the regulatory body. These businesses will, as a matter of course, have taken legal advice on the pros and cons of notifying. It is their own choice whether they wish to take the risk of not notifying, and they will have factored into this decision the possibility that the regulator may become aware of and decide to investigate the merger after completion. We consider that it is in fact an advantage of the current system that it allows businesses this freedom.
6. We would only see scope for change if there were evidence that (i) the current system results in the investigation of large numbers of mergers post-closing; and (ii) this is preventing the imposition of effective remedies and thus having a major negative impact on the market. On current empirical evidence, we are by no means persuaded that this is the case.

7. We are therefore of the view that the best option is to retain the current voluntary notification regime. We agree, however, that the system could be made more efficient through the addition of statutory deadlines, coupled with the introduction of discretionary stop the clock powers for the CMA.
8. In the event that the Government decides to introduce mandatory notification with penalties for non-compliance, it is vital that appropriate thresholds are set, in order that businesses are provided with sufficient certainty. The consultation paper suggests two options for thresholds in a mandatory regime. The first would require mandatory notification of all mergers where the target's UK turnover exceeds £5 million and the acquirer's world-wide turnover exceeds £10 million ("full mandatory notification"). We do not consider this a serious proposal - the thresholds are well below those of any comparable jurisdiction and would result in the notification of a very large number of transactions that are entirely harmless; it would place a disproportionate burden on public and private resources. Such low thresholds, moreover, would arguably not be in line with the Recommended Practices of the International Competition Network, which state that "*[I]n establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit.*"¹
9. We prefer the second option, which would require mandatory notification of all mergers where the target's UK turnover exceeds £70 million, with the CMA retaining the power to investigate mergers below that limit if the share of supply test is met ("hybrid mandatory notification"). We also agree with the introduction of an exemption for small mergers as suggested in paragraph 4.41, as this would ensure that the CMA does not waste resources on mergers that are unlikely to have an effect on competition.
10. If mandatory notification is adopted, this would need to be accompanied by the imposition of tight statutory time limits for investigation, to avoid creating onerous delays for businesses awaiting clearance for completion. The EU system with a deadline of 25 working days for phase I, which can be extended by 10 days if undertakings are offered, would seem appropriate also for the UK.

C. THE CRIMINAL CARTEL OFFENCE

11. Paragraph 6.6 of the consultation paper proposes the removal of the dishonesty element from the criminal cartel offence, in order to make it easier to prosecute. We acknowledge that, to date, there have been very few prosecutions under this offence, and even fewer convictions. However, the consultation paper provides little or no empirical evidence to back the claim that removing the element of dishonesty would lead to an increase in convictions.
12. We note the argument in paragraph 6.16 that proof of dishonesty is not a requirement of the criminal cartel offences of other common law jurisdictions, such as the USA, Canada and Australia. However, we do not consider this alone to be sufficient reason to change the UK offence, without evidence that it is not fit for purpose. There is, in fact, very little evidence

¹ ICN's Recommended Practices for Merger Notification Procedures, January 2010.

based on precedent as to how effective the cartel offence would be in practice. To date, there has only been one contested prosecution under the criminal cartel offence, in the *British Airways/Virgin* case. That case collapsed at the pre-trial disclosure stage for reasons unconnected to the need to prove dishonesty. Given that the dishonesty element of the offence has yet to be properly tested at trial, we are not persuaded that there is solid evidence that it is unsatisfactory, or that removing it would increase convictions.

13. Moreover, even if changing the cartel offence were to bring about a small increase in the volume of prosecutions, we would still have serious concerns about the dilution of the offence to achieve that aim. If the element of dishonesty were removed from the offence, it would be essentially indistinguishable from the non-criminal cartel prohibitions. We consider it important that there remains a clear difference between the two.
14. In addition, the test for dishonesty in *R v Ghosh* is well-established and has a large volume of case law behind it. As is acknowledged in paragraph 6.10 of the consultation paper, this test was selected because juries are already familiar with *Ghosh* in the context of theft offences. By contrast, the proposed changes to the wording of the offence, such as a new definition of “secrecy” or the exclusion of agreements which were made overtly, would not be familiar to juries and could create more confusion than they resolve. We consider that option 2, in particular, would be problematic, as an exhaustive white list of acceptable agreements would be very difficult to draft.
15. For the above reasons, we are strongly opposed to the proposal to omit the requirement for dishonesty from the criminal cartel offence. If the OFT wants to increase the number of prosecutions under the cartel offence, it should allocate greater resources to this area and encourage closer liaison with the Serious Fraud Office. Moreover, we believe that lessons have been learned from the unsuccessful *British Airways* prosecutions and that it would be more effective to build on what has been learned, instead of making radical changes to the cartel offence itself.

D. PROPOSALS FOR RECOVERY OF COSTS

16. Paragraph 11.16 of the consultation paper proposes that the CMA should be able to recover its own costs from parties who are found to have infringed competition law. We strongly oppose this suggestion, as we believe it would create a serious conflict of interest. The CMA's funding would, at least in part, depend on how many infringement decisions it reaches, so it would have an incentive to find the existence of an infringement in order to cover its own costs. Even if it takes steps to safeguard its own impartiality, the confidence of businesses in the CMA is likely to be damaged by this conflict of interests.
17. For the same reasons, we oppose the proposal at paragraph 11.48 that the Competition Appeal Tribunal (“CAT”) should be able to recover its expenses from the losing party to an appeal. We consider that it would be particularly damaging to allow the CAT to recover its expenses from parties, since this would create a disincentive for parties to appeal against questionable decisions.

E. PRIVATE DAMAGES ACTIONS

18. Paragraphs 5.49 to 5.52 raise the issue of improving access to redress for consumers and businesses who have suffered a loss as a result of a breach of competition law. However, the discussion in these paragraphs has very little substance and it is unclear what action, if any, is being proposed.
19. The consultation paper refers to the recent European Commission publication on this issue in February 2011 and states that the Government is considering the implications of the Commission's approach "*in developing a way forward, in terms of its thinking about collective redress both at European and domestic level*". It is unclear from this statement whether the Government intends to take steps now, to consult on the issue, or to wait and see whether the Commission takes action. We note that the Commission's consultation covers a broad area of law far wider than antitrust damages claims and, given the different legal traditions in EU Member States, it may well result in nothing. We would therefore welcome a clear statement as to what the Government's intentions are in the field of private damages claims.

F. THE PROCEDURAL ADJUDICATOR

20. We are in favour of the trial of the Procedural Adjudicator role, which is discussed at paragraph 5.26 of the consultation paper. We consider that this role will be useful in enabling procedural disputes to be resolved as quickly as possible.
21. However, it is important to ensure that the procedural adjudicator has sufficient powers to be able to resolve disputes effectively and impose remedies. It is also important that the role's independence is safeguarded, in order that the adjudicator is a viable alternative to judicial review for parties. We would welcome more information as to how the Government intends to ensure the effectiveness of the Procedural Adjudicator's role. We note the recent consultation with regard to reform of the role of the European Commission Hearing Officers. We consider that some of the proposals for strengthening the role of the Hearing Officers may potentially be applicable to the Procedural Adjudicator role.

Orrick, Herrington & Sutcliffe (Europe) LLP
13 June 2011 (DXL/RYD)

Response to consultation on the reform of the UK competition regime

Prepared for the Department for Business, Innovation & Skills

June 13th 2011

1 Introduction

Oxera is delighted to respond to the BIS consultation on reforming the UK competition regime.¹ Formed in 1982, Oxera is one of Europe's leading economic consultancies, with extensive practical experience as economic experts and advisers in competition regimes across the world. We have acted on all Competition Commission (CC) regulatory inquiries, on every CC market investigation since the Enterprise Act 2002 came into force, and on more than a dozen market studies, including some on which we advised the Office of Fair Trading (OFT) and Ofcom. Oxera has also been very active in merger cases before the OFT and the CC, and in Competition Act 1998 cases before the OFT, the Competition Appeal Tribunal (CAT), the High Court, the Court of Appeal, and the Court of Session.

Oxera therefore considers itself well placed to contribute to this consultation. We do so mostly from the perspective of consulting economists; as such, we comment less on legal and procedural matters, but focus instead on the overall structure of the UK competition regime and the use of economic and other analysis within it.

2 A merger forming the new 'Competition and Markets Authority'

Oxera welcomes BIS's consultation on whether the OFT and CC should be merged to form a new Competition and Markets Authority (CMA). The current UK competition regime, as set out in the Competition Act 1998 and Enterprise Act 2002, has been in place for a sufficient period of time that its strengths and weaknesses can be meaningfully analysed. The split

¹ BIS (2011), 'A competition regime for growth: A consultation on options for reform', March.

between the OFT and the CC/Monopolies and Mergers Commission has existed for considerably longer.

This being a proposed merger, the standard tools for merger analysis, as applied by the OFT and CC on a day-to-day basis, might provide some insight here.

It should first be acknowledged that the proposed ‘transaction’ is primarily a vertical merger. The CC does not and cannot initiate cases itself, but must instead have cases referred to it by the OFT (or the sectoral regulators acting under their concurrent powers). The OFT is therefore the primary provider of work to the CC.

The current structure of vertical separation has some downsides and inefficiencies. While the CC has many high-quality resources available to it at both panel and staff level, the usage of these resources is somewhat unpredictable, given that the CC cannot initiate cases and therefore cannot manage its staff utilisation. By moving to a vertically integrated structure, there may be scope to (i) reduce demands for information from parties by avoiding the duplication of data requests, as can sometimes occur under the current system; (ii) enhance staff understanding of cases by retaining the same project team for phase 1 and phase 2, making meetings at phase 1 more valuable in cases that are highly likely to be referred to phase 2; and (iii) reduce the overall duration of market studies and investigations. As with vertical mergers in general, whether such inefficiencies will be eliminated in practice depends on the detailed design and implementation of the new structure.

There are, in fact, some quasi-horizontal aspects to the merger as well. Some direct rivalry between institutions would be lost under the proposals. In particular, there is currently a form of informal ‘benchmark competition’ between the OFT and the CC, reflected in the various rankings of international competition agencies. While the ‘relevant market’ for this benchmark competition includes competition agencies worldwide, the OFT and CC probably currently see each other as their closest rivals. This horizontal rivalry can be healthy. As emphasised by BIS in its consultation document (para 1.4), both the OFT and the CC have consistently been ranked among the leading competition authorities in the world by *Global Competition Review* and other studies.

Yet another part of the merger is of a ‘conglomerate’ nature. The CC deals with mergers and market investigations only, not with Competition Act 1998 cases (while the OFT does not deal with regulatory references and appeals). Indeed, further merger efficiencies may arise in this regard. For example, the expertise of the competition economists and financial experts at the CC can readily be applied to abuse and agreement cases (not being able to work on such cases is somewhat inefficient, and perhaps also unsatisfactory, from the perspective of the CC staff). Also, there seems to be scope for greater alignment of the decision-making structures across Competition Act cases and market investigations (see comments below).

Oxera notes that BIS is minded to retain the ‘divestments’ made by (or forced upon) the OFT when the Competition Act was enacted in 1998—ie, the concurrent powers awarded to the sector regulators in rail, water, energy, telecoms and air traffic control to apply the competition rules. Indeed, concurrent powers have been or are being extended to cover postal services and health as well. The case for or against concurrency is complex, and would require more in-depth debate and analysis than currently provided in the BIS document (Chapter 7). Meanwhile, some of BIS’s suggestions that go towards greater involvement of the new authority in those sectors seem to have some merit, even if concurrency is retained (for example, the European Competition Network model). Avoiding conflicting decisions and achieving better coordination between sector regulators and competition authorities are important, both for better decision-making and for providing greater legal certainty to regulated companies.

Lastly, as with mergers of any nature, there are issues surrounding brand name and culture. As noted above, the OFT and the CC both have well-established international names. A

merger between two big brands inevitably destroys some brand value if one of the brands disappears. Sometimes one brand is kept, but that may be difficult if the merger is between equals, as is likely to be the case here. Brand advisers might come up with a new name that sounds as familiar and authoritative as the previous ones. Oxera would note that the name ‘Competition and Markets Authority’ may not be uniformly seen as meeting this criterion (footnote 8 of the consultation document says this is merely a working title for the new entity), but we have no other naming suggestions to make at this stage.

In any merger it is important that the best cultural aspects are taken from the merging parties. In this case, for example, one of the great strengths of the CC is that it has a culture of openness (at both staff and panel level), and is generally willing to submit to analysis and review of much of its work during investigations (both formally and more informally). The OFT also has this to some extent, but its formal and informal processes have fewer built-in mechanisms for interaction with the parties. Openness to scrutiny will form a key part of the high-quality decisions to be made by the new authority.

3 A competition system in which evidence is properly assessed

From Oxera’s perspective, one of the most important elements of the competition regime as a whole is to ensure that economic evidence and the economic merits of the case receive the attention that they deserve. This is not a plea to increase the use of economists in these cases; the aim is to improve the quality of the competition regime. Weighing economic evidence in the legal context is crucial to reaching appropriate decisions.

When considering timelines for cases of all types, it is therefore important that parties are given sufficient time to fully review and respond to the competition authority’s economic analysis. This can be a time-consuming task where the competition authority has produced complex analysis. Time also needs to be built into case timescales to allow parties to submit their own primary analysis, which can be helpful in enabling competition authorities to reach well-reasoned conclusions. This implies that, if timescales are to be shortened as currently suggested, this should not be at the sole expense of time allowed for parties to make submissions to the authorities; these timelines are already tight under the current structure.

In Oxera’s experience, the most effective legal cases—from the perspective of both the parties and the decision-maker—are those where the legal advisers, the business people and the economists present an integrated submission that reflects both the business reality and sound economic reasoning. This may then be complemented by separate, probably more technical, economic submissions containing empirical evidence. Competition authorities and courts must take a view on how much weight to attach to this evidence. Economic evidence needs to be presented in such a way that it allows for a proper peer review by the economists at the competition authority or on the other side of the dispute. In this regard, the various guidance documents on best practice for submissions of technical economic analyses that have been issued in recent years by competition authorities, including those provided by the European Commission and the CC, are a welcome development.²

The CC panel structure lends itself to a thorough weighing of the evidence (factual, financial and economic), with a panel of lawyers, economists and business people. The panel hearings offer the opportunity to ‘leave no stone unturned’, and to ask questions of parties and their advisers from both a public policy and a technical perspective. Indeed, as part of its

² European Commission (2010), ‘Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases’, January; and Competition Commission (2009), ‘Suggested Best Practice for Submission of Technical Economic Analysis from Parties to the Competition Commission’, February.

ongoing emphasis on quality and independence, Oxera’s internal project debriefs routinely ask the following question: ‘Would the project director/project manager be happy to present this piece of work in front of a CC panel?’

The CC panel structure has merits, and the BIS consultation document seems to want to retain such a structure within the new organisation for market investigations and mergers. In principle, a thorough review of the evidence by a panel could also benefit Competition Act 1998 cases. There is no inherent difference between these types of case in terms of the need to assess the economic merits and arguments on both sides.

An alternative suggested by BIS (option 3 in Chapter 5)—which would also be preferable to the current approach to Competition Act cases—is the move towards a more prosecutorial system. There are several types of costs and benefits of such a regime, and weighing these is a complex exercise. Below, Oxera focuses on one of the types of benefit—ie, how the system takes into account economic and other evidence.

Economic evidence is rarely black and white in the context of any Competition Act case that is sufficiently interesting to be considered in detail by the competition authorities. This makes the task of a competition authority conducting these cases under an administrative regime difficult: individuals from the same organisation must first collate evidence, then act as a prosecutor by pulling this evidence together and putting it to the parties, and finally act as a judge by deciding on the merits of the case. Even with an independent person from outside the case team (but within the competition authority) acting as the final decision-maker, it is difficult to prevent biases slipping into such a system.

Consequently, Oxera would see merit in a move to a prosecutorial system for Competition Act cases. By removing decision-making power from the OFT/CMA, this would ensure independence of outcome, and remove any conflicts of interest that the decision-maker may have. Furthermore, such a system would increase incentives for the authority, and the parties, to conduct high-quality work throughout, and be clear and transparent about their arguments and conclusions. Any errors, omissions or incoherent logic would be subject to independent scrutiny. In light of this, a solution may be to convert the CAT from an appellate body to a court of first instance to which the OFT (or the CMA) would bring its prosecutorial case. This would preserve the expertise that exists within the CAT, would not necessitate the creation of a new body, and so would be likely to limit the costs and disruption of such a change to the competition regime.

By the same token, Oxera considers that the ‘new administrative approach’ referred to in the BIS consultation document (option 2 in Chapter 5) may not be an appropriate solution. Even if an independent tribunal within the CMA were set up, there is a risk that, by continually dealing with the staff of this competition authority, these independent individuals would over time become subject to regulatory capture, and come to identify with the CMA; moreover, it does not allow the same degree of scrutiny and review of the evidence.

In a prosecutorial system, economic experts could be subject to the same rules as currently applied in the English courts (and CAT). Part 35 of the Civil Procedure Rules determines that experts have a duty to help the court on matters within their expertise. In Oxera’s experience, this provides a powerful incentive to the expert to carry out the analysis objectively and reliably. Judges tend to rapidly dismiss the evidence of an expert who does not appear to want to be helpful to the court. There have been numerous judgments in which courts have explicitly stated that they found an economic expert’s evidence to be credible, persuasive or authoritative, and that they felt they could rely on the expert. Equally, courts have indicated where there were some doubts in this respect. In addition, the experts from both sides of the dispute are normally expected to hold discussions and to produce a joint statement setting out the issues on which they agree and disagree (and their reasons for disagreeing). Together with the duty to the court, this requirement on experts to narrow the issues in dispute can be a powerful mechanism to help courts understand the economics of the case.

Finally, an economist involved in court proceedings faces the prospect of cross-examination by a barrister representing the other side. Subjecting the new CMA to such rigour and discipline would be likely to improve the quality of decision-making.

4 Concluding comment

Overall, Oxera considers that several of the changes recommended by BIS and some of the ideas discussed above can enhance the UK competition regime and allow it to maintain its position among the world leaders for years to come. Oxera looks forward to BIS's progress in this consultation, and would be happy to help further through clarifications or follow-up discussions if needed.