

**Responses to BIS Consultation - "A competition regime for growth: a consultation on options for reform" - H to J**

Hallsworth, Professor, Alan.....	17
Harding, Professor, Christopher and Joshua, Julian.....	18
Herbert Smith LLP .....	19
Hogan Lovells .....	20
Incorporated Society of British Advertisers.....	21
In-House Comp Lawyers' Association.....	22
International Chamber of Commerce UK .....	23
Joint Working Party of Bars & Law Societies .....	24

**Hallsworth, Professor, Alan**

	Legal
X	Academic
	Other (please describe):

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

**(please see enclosed narrative)**

## 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:**

My motivation to respond arises because most conventional competition thinking seems to be incapable of comprehending why consumers do not immediately switch to a cheaper supplier when prices rise. Academic/ scientific disciplines – including several branches of economics itself (welfare/environmental etc) - that consider **actual behaviour** offer the most appropriate methodologies for consumer-facing industries. Despite this, Inquiries seem to be dominated by econometric approaches that ignore the real world. Indeed, conventional competition methodologies make heroic assumptions about the ability of consumers even to spot that prices have risen. This concern for appropriate methodologies drives my observations: making it inappropriate to offer direct answers to many of the questions. My narrative (attached) explains more fully my concern with procedures/ methodologies

### 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:

I have some concerns that the EU has too readily adopted US-style Chicago-School thinking with its emphasis on large corporations, econometric studies and short-term low price.

Perhaps an even greater problem is that the EU's pro- integration mindset and associated promotion of cross-border activity automatically privileges large corporations at the expense of small, local ones. It is doubtful if this has been thought through in respect of retailing.

### 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:

I generally support:

in-depth investigations into practices that cut across markets (provided the appropriate measures are used)

giving the CMA powers to report on public interest issues (but these should cover topics I raise in Q20 below)

If we **do not** extend the super-complaint system to SME bodies then I doubt there will be many SMEs left ere long

strengthening information gathering powers (though if the quality of national-level data were better we would not need to start virtually every investigation from scratch.)

#### **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:

I support mandatory notification.

#### **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:

I inherently dislike the conflictual, prosecutorial approach since it almost always advantages existing powerful vested interests. Whenever the inquiry process calls for parties to provide their own evidence, it is obvious that the richer, powerful ones will bring forth the best-presented evidence: increasing their chances of winning any adversarial debate.

## **6. The criminal cartel offence**

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

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

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

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

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

Comments:  
I have no specific comments on this topic

## **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: I have no specific comments on this topic

## **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: I have no specific comments on this topic

## **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:

Fairness, diversity, security, sustainability, pro-SME, pro small supplier (farmer) pro-choice, pro-local, pro-environment.

Ideally embedded in statute and with a competition focus that stresses diversity over short-term low price and that evaluates the social negativities (usually un-costed) that go with market-concentration, land-use exploitation and car-dependency.

Finally, lay experts should be involved.

## **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:  
Again, we need layperson inputs.

## **11. Merger fees and cost recovery**

### Merger Fees

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

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

### Recovering the cost of anti trust investigations

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

13. **Q.26** *Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons.*
14. **Q.27** *What are your views on recovery where there has been an infringement decision being based on the cost of investigation?*
15. **Q.28** *What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?*

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

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

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

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

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

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

#### Recovery of CC costs in telecom price appeals

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

#### Recovery of CAT costs

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

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

Comments:  
I have no specific comments on this topic

## 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:  
I have no specific comments on this topic

## 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:

My final observation is that we need to step back and look closely at the costs and benefits of continuing with an "Anglo" – style regime (see also USA & Australia) which leads to market concentration in all sectors. The contrast with outcomes in countries such as Germany is stark.

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**Submission from:**

Dr Alan G. Hallsworth, Professor *Emeritus*

**Submission type:** personal/academic.

*NB* I was involved with the CC Groceries Inquiry – a recent and very high-profile Inquiry - via the *Grocery Market Action Group* (Chair, Andrew George MP) and my comments are largely informed by that experience.

I am presently a supporter of the Competition Advocacy Forum (CAF) but do not in any way write on their collective behalf.

**Personal Background**

As noted, I was involved with the CC Groceries Inquiry via the *Grocery Market Action Group* during which time I was lecturing on one of the UK's undergraduate degrees in retailing. Having also lectured in retailing at Manchester Business School, I had previously held a Professorial position in Retail Management at Manchester Metropolitan University - lecturing on the UK's first-ever undergraduate degree in retailing.

Accordingly, my perspective was that of an extensively-published researcher into an important sector (retailing) that had come under the scrutiny of the OFT and CC. My doctoral research had provided some underpinning to John Gummer's *Sequential test* for retail location planning.

I found it professionally interesting to contrast the attitudes and assumptions of the Inquiry team with the corpus of [largely disregarded] research that had been produced by the academic retail – and wider academic - community. For example, there is a great deal of available literature on how individuals actually shop and their motivations and drivers. The CC Inquiry team, however, prioritised econometric models of hypothetical behaviour. This leads me to respond to this consultation with the question: *why* are things done this way – however eminent, professional, competent and admirable the particular actors may be?

Essentially, then, I bring the standard inquisitiveness over attitudes and assumptions and with the academic's eternal question – *on what basis do you make such assertions?* - to this interesting consultation.

**General observations.**

Most of the consultative document falls outside my areas of interest but other members of CAF will doubtless be responding in full. My main interest lies in the epistemological underpinnings to the wider debate: what knowledge is deemed appropriate? What belief systems underpin it? Curiously, I find wider background/context to be sadly lacking and this extends to more prosaic aspects such as case studies that are mentioned.#

**Because it is the assumptions underpinning the writing of the document itself that concerns me, I shall now italicise portions of the consultation *text* and follow these with my comments.**

In the text we find:

**Context:** *enhancing the regime's ability to resolve and deter the competition restrictions that do most harm to competition, consumers and to economic growth .*

**Comment...** This is the main aspect that is referred to as *context* yet it is both brief and laden with assumptions. Restrictions, we are assured, harm competition, consumers and growth. It would be interesting to see someone attempt to explain the stunning growth in the economy of South Korea in terms of 'hands off' governmental attitudes and restrictions. Furthermore, ours being a small, beautiful island and not the wild west, some longstanding restrictions exist to protect the wider environment and the local citizenry. The latter usually also happen to be consumers, but they are first and foremost citizens.

**P7** *maintain the strong competition focus and ultimate independence of the UK's competition regime. They do not, for example, extend Ministers' involvement in the processes of referral of mergers or markets for investigation, decision-making on competition remedies, or in public interest considerations.*

*(see also P 15.. ...The Government is committed to maintaining the independence of a CMA from political interference. Final decisions on competition issues would continue to be taken by independent competition bodies: Ministers*

*will continue to take decisions only in the small minority of cases which raise defined, exceptional public interest issues.*

**Comment...** I am under the impression that this much-vaunted political independence is a relatively new development (post 1998?) and wonder why competition seems to outrank politics/politicians and the democratic process. After all, politicians are democratically elected whilst CMA officials will not be.

**P96** ....*have clear accountability whilst recognising the single CMA's independence from Ministers in relation to the decisions that it takes in individual cases.*

**Comment...**Do we infer, again, that market competition is **sitting above** the political process? In recent times our current Prime Minister has noted the problem that national Government may, troublingly, be held responsible (even *blamed* by the public) for decisions actually taken by lower tiers - albeit still ones that were democratically elected. How is this wider accountability issue to be incorporated? The phrase "**sitting above**" brings to mind a statement by US Anti-trust campaigner Barry Lynn:

"the issue before us is not how Wal-Mart grew to scale but how Wal-Mart uses its power today and will use it tomorrow. The problem is that Wal-Mart, like other monopsonists, does not participate in the market so much as use its power to micromanage the market, carefully coordinating the actions of thousands of firms from a position **above** the market".

WalMart grew to become the world's largest retailer due to increasingly hands-off market regulation in the USA. The lesson would appear to be that hands-off market regulation leads to market-dominant firms: yet that "aim" is not explicitly stated in the consultation: why??

**P26** . Tackling competition problems is fundamental to consumer welfare and to growth. To do this effectively, the CMA needs to have the right tools .

**Comment...**This goes to the heart of my concerns. Competition Policy has been offloaded from the democratic process: but what sort of competition policy ought that to be? Who decided? What questions did they ask? How ought competition to be measured? Can someone supply copies of documents about such debates?

One way to enhance consumer welfare would be to revert to Adam Smith's ideal-typical world (free of joint-stock companies) with its myriad small suppliers: each sole-agent entrepreneur sticking to his/her specialist skill. That would increase choice, robustness, security and lower the risk of cartels. Another, as just noted above, would be to further promote hands-off market regulation: leading to market-dominant firms: provided that they claimed to offer lowest price. But is that short-term lowest price or long-term, sustainable price with all – including inter-generational - externality costs factored in?

If we take the USA as exemplar, the Great Depression brought a raft of anti-trust legislation and acts such as Glass-Steagall which had the effect of localising banking. The next era was the neo-conservative era (Reagan onwards) with its market liberalisations : seen by Haldane of the Bank of England (who instead calls for robustness, diversity and, by implication , re-localisation) as the underpinning to the current economic crisis in western nations. If we are to have robust systems for the future, what new visions of sustainable , localised, competition may be needed?

If my experience of the CC Groceries Inquiry procedures is anything to go by then there were strong indications of that preoccupation with short-term low price. In a very recent report for the Association of Convenience stores, Phillip Blond's *Res Publica* researchers state:

“competition law must go beyond price-based consideration of consumer interest” and, later they link small, local shopping to ‘social capital’ – usually an un-costed wider, societal benefit.

Further, as I noted above : “The CC Inquiry team, however, prioritised econometric models of hypothetical behaviour. .” Where was the debate around the value and appropriateness of such competition mindsets and methodologies?

To take an analogy: we might agree that a problem needs a ‘scientific approach’. The methods and outcomes would vary if the scientific approach was that of a Nobel Prize-winning Physicist or Chemist or Biologist or Mathematician. All – like the OFT CC people – extremely able, respected and honourable: yet all very different. Presumably, too, a Competition Lawyer would take a different approach from a

Competition Economist. With the economy in crisis, surely it is time to ask again: who has mandated who to do what?

**Other indicators**

**P32** The UK merger regime is highly regarded internationally and, out of nine merger regimes, was ranked second behind the US. Its strengths include its technical competence, independence from the political process, transparency, accountability and robustness of decisions. (later, **p108** we are told that the UK is seen as being on a par with DG Comp.)

**Comment...**I would ask: who chose the criteria? Does this measure permissiveness towards mergers/ takeovers/ foreign takeovers or preparedness to require divestiture/ de-merger? Are there data on the cost-effectiveness of mergers *versus* demergers/ breakups? On this listing we seem to be close to the USA: yet we have no Robinson-Patman nor Hart-Scott-Rodino legislation. Nor do we have the countervailing power of Attorney-General at the State level (available to the circa 0.5 million population of Wyoming) nor does the FTC too closely mirror the CC.

**P34**

The Government wishes to ensure that mergers add value to the economy and are driven by the longer term interests of the companies, their employees and wider stakeholders.

**Comment...**Given that mergers rarely take place between equals, does the above apply to the acquired firm or the acquirer? (Whatever happened to ICI? AEI? GEC? Marconi? etc etc)

**P46**

Combating anti-competitive agreements and abuse of dominance is a critical part of the competition regime. Harm caused to consumers and competing businesses (including new entrants) can be considerable. Competition authorities need to tackle, and be seen to tackle, such practices in order to deter, strongly, others from engaging in similar activities.

**and**

A comparison of case numbers suggests that the UK brings fewer antitrust cases than (sic) a number of other EU member states. .... (ranks 11<sup>th</sup> in notifications to EU in a table dominated by France & Germany).

**Comment...** The first of the above issues arose with the CC Groceries Inquiry: it was extant regulation over planning that attracted their attention. The CC seemed happy to reach out beyond pure competition issues to use its vested powers to look at planning – which is not strictly a competition issue. However, it was reluctant to accept counter-arguments based on the sort of social objectives that gave us planning in the first place. Note that before the big retailers – in their search for non-trading windfall property profits – went out of town they did not attract planning debates. When they were all located on the High Street there were more stores, more fascias more choice and more opportunities to price-compare. All of the latter factors – mostly now lost – would contribute to my vision of the outcomes from a good competition regime. Lax merger policy itself led to big firms that then attracted the attention of planning rules. Crucially, the attention paid to planning in the last CC Groceries Inquiry was not called for by the Parties: it came as an initiative from the OFT.

The second point is that the UK ranks much lower in a prosecutions table dominated by France & Germany (two countries where most firms do not carry the UK's standard "FOR SALE: everything must go" logo. They retain domestic control of their economies – and nowadays a substantial chunk of *our* domestic energy supply).

**P48** follows with another aspect of context : the contrast between European "inquisitorial" and ANGLO "adversarial" models....yet the question of whether or not competition interests are better served by the one than the other is not discussed.

### **P23**

In the markets regime.... use of this capability in public interest cases is limited. Where the SoS has made a public interest intervention the CC can only investigate the competition issues. It cannot investigate or make recommendations on any public interest issues. The CC reports to the SoS on whether there is an adverse effect on competition and on possible remedies to these, and although the SoS is required to accept the CC's findings on the competition issues, when deciding on appropriate remedies, it is for the SoS to

decide based on his own views of the public interest issues where the balance lies between competition concerns and public interest issues.

**Comment...**This returns to the heart of my comment that “The CC seemed happy to reach out beyond pure competition issues to look at planning: but was reluctant to accept counter-arguments based on the sort of social objectives that gave us planning in the first place”. I firmly believe that one cannot carve out competition issues and treat them separately from the wider context. Planning is a public interest issue: why did the OFT come to believe that it had a mandate to become involved? If ministers are to be by-passed, should such beyond-portfolio ‘outreach’ not be banned?

#### **P26**

In the current regime the OFT has limited powers of investigation in carrying out a market study. Data, material and evidence have to be collated from parties on a voluntary basis.

**Comment...**This raised issues with the CC Groceries Inquiry. Nationally-available standard data were mostly not available. The choice of evidential databases was hotly disputed. What was never in doubt is that rich, powerful market-leading firms can fund the supply of more detailed, more convincing data than can their weaker rivals: again a challenge to fairness & democracy.

#### **P24**

Tackling **barriers to entry** and conduct by large firms which have the effect of squeezing out small firms is critical to the promotion of competition and growth. Section 11 of the Enterprise Act allows a consumer body designated by Ministers to make a ‘super-complaint’ to the OFT about features of a market that appear to be significantly harming the interests of consumers.

**Comment...**This, too, raised issues with the CC Groceries Inquiry. There were deemed to be few or no entry (nor exit\*\*) barriers to the failing small shop sector: little attention was paid to the cost barriers that restrict building of huge superstores to the four dominant players which possess the resources to devote £millions to a single store in the hope of massive non-trading profits. Note too, that suppliers are likely to

pay more attention if a large number of customers contest their prices. However, if 1,000 small shops feel that supplier X is giving them a poor deal they are barred by competition law from colluding to get a better deal. But a single big retailer can legally pressure supplier X to give a better deal to its 1,000 stores. Note, too, that it is illegal to trade at a loss: but how could you prove that a new out of town store in an already-crowded market is not trading at a loss?

\*\* Shop leasing contract obligations may tell a different tale.

**P24** It would be possible to extend the super-complaint system to SME bodies thus providing a speedy mechanism to address features in a market(s) that have an impact on competition that significantly harms the ability of SMEs to compete.

**Comment...** This is an important reference to SMEs: however they are rarely coordinated and in the present environment would likely see poor access to affordable finance as their major problem.

## **P22**

Some practices, such as the costs to consumers of switching suppliers, below cost selling, or the provision of extended warranties and other secondary point of sale practices, may be apparent in more than one market.

**Comment...** True: but the more important point is this: most conventional competition thinking seems to be incapable of comprehending why consumers would not immediately switch to a cheaper supplier. All academic/ scientific disciplines – including several branches of economics itself (welfare/environmental etc) - that consider **actual behaviour** could give a cogent answer to that question. Equally, conventional wisdom seems incapable of comprehending why small suppliers are afraid of the power of big retailers – even when such a retailer may be their sole route to market. Understanding words like power and fear is important! All of which merely serves to reinforce my question as to whether or not the right tools are being used - and the right questions being asked.

And.. **P22**

We are also investigating whether there are complementary and additional changes that might enhance private sector-led challenge to anti-competitive behaviour.

**Comment...**This, I suspect, is an important issue that CAF colleagues will wish to address.

**P62** Hard core cartels are typically secret and unlawful arrangements under which competitor businesses agree to coordinate their activity, usually in order to drive up prices. They are highly damaging to consumers at all levels of the supply chain and to the wider economy. The US competition authorities estimate that that there is a gain to cartel members, on average, of a 10% increase in the price of the goods or services affected. By adversely affecting the efficient running of the economy, the potential harm to society could be much greater: the harm can be assumed to be 20% of the volume of affected commerce.

**Comment...**It is not explicitly stated, but cartels are more easily run by just the sorts of large market-dominant firms that have been permitted under our historically lax merger policy. It might also be inferred that such Cartels would later signify their activities through excessive rewards to employees funded by abnormally high profits beyond normal rates of return. Many Banks would, unfortunately, appear to exhibit the latter tendencies: perhaps it is time to investigate.

The use of the term 'hard core' draws my attention to resale price maintenance. Why is this seen as a hard core restrictive practise across the EU? Power over local suppliers is increasingly enjoyed by transnational retailers. This one means to protect the local supplier is, however, banned. Yet if the 'fixed' price is set too high it is clear that substitutes and cut-price rivals should emerge. Or is it that economists no longer believe that the latter can happen?

# Case study example:

**P12** /. Following a Market Investigation by the CC, BAA sold Gatwick Airport and is also required to sell two further airports to increase competition in the UK airports sector.....and

**p 75** following liberalisation where some of the big monopoly elements have been broken up.

**Comment...** Even to the casual observer such as myself it is obvious that when *Ferrovial* bought BAA – it bought (originally from the British Government itself) a quasi-monopoly. It was hardly a work of genius to conclude that controlling several airports might be *per se* anti-competitive (given that there was previously an explicit, approved, *State* monopoly). Surely the airports should, *ab initio*, have been sold off separately. Any ‘blame’ lies not with *Ferrovial* but with the flawed initial sell-off process: though I still struggle to see why a local resident of Gatwick would choose to “exercise choice” by preferring to fly from Birmingham..

**Coda:** It will be evident that most of these comments relate to how the debate was pre-constructed. Nevertheless I have attempted also to complete the pro-forma.

**Harding, Professor, Christopher and Joshua, Julian**

# CONSULTATION : A COMPETITION REGIME FOR GROWTH

## DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS

### PROPOSED REVISION OF THE CARTEL OFFENCE

**Christopher Harding\* and Julian Joshua\*\***

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Views have been invited on the proposal in the consultation document to revise the wording and definition of the cartel offence as laid down in Section 188 of the Enterprise Act 2002. The proposal is to remove the dishonesty element in the current offence and a number of options have been put forward to improve the definition of criminality for purposes of this offence. This response addresses those questions.

#### **The dishonesty element in the present version of the offence**

We are clearly of the view that the dishonesty element should be removed from the offence and we have forcefully argued that dishonesty is an inappropriate concept for purposes of conveying the sense of criminality inherent in the cartel offence since the offence was first proposed under UK law. In particular, we presented this argument in an article published in the *Criminal Law Review* on the eve of the enactment of the offence<sup>1</sup> and have repeated and developed that argument in a number of jointly and individually written publications since then.<sup>2</sup> It may indeed be the case that the dishonesty element has proved a disincentive to prosecution and this may partly explain the very low level of prosecutions under Section 188 over a period of eight years. But our main argument against the dishonesty element has been one of substance : that it is not a relevant concept for purposes of conveying the essential *mens rea* of a criminal cartel offence. Consequently, the dishonesty element was

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<sup>1</sup>Christopher Harding and Julian M Joshua, 'Breaking Up the Hard Core : Prospects for the Proposed Cartel Offence', (2002) *Criminal Law Review* 933.

<sup>2</sup> See, for instance, Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (2<sup>nd</sup> ed., Oxford University Press, 2010), pp 340-2; Julian Joshua, 'A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid-Atlantic ? A Close Look at United Kingdom Proposals to Criminalise Hard-Core Cartel Conduct', 23 (2002) *European Competition Law Review* 231; Julian Joshua, 'The UK's New Cartel Offence and Its Implications for ED Competition Law ; A Tangled Web', (2003) 28 *European Law Review* 620; Julian Joshua, 'D.O.A. Can the Cartel Offence Be Resuscitated ?' Ch 8 in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels* (Hart Publishing, 2010); Julian Joshua and Christopher Harding, *Observations regarding the Commonwealth of Australia invitation to submit comments on the draft legislation introducing criminal penalties for serious cartel conduct* (submitted to the Australian government as part of its consultation, 28 February 2008).

always likely to bemuse and perhaps confuse those charged with applying the offence, especially in the light of the interpretation of dishonesty under English criminal law.<sup>3</sup>

Although many regulators and some commentators have taken up the call that cartel strategy is akin to a ‘theft’ against consumers, it is not convincing to characterise the objectionable mindset of the cartel as dishonest, except perhaps in the case of bid rigging, in so far as that is included as one of the classic or ‘hard core’ cartel strategies. Indeed, it is interesting to observe that a number of jurisdictions now criminalise involvement in cartel bid rigging, but not other cartel activity, largely on the basis that bid rigging may be seen as a species of criminal fraud.<sup>4</sup> Since the essence of most hard core cartel activity is anti-competitive collusion between parties who would naturally be competitors, the essential objection to such behaviour resides in the fact that a conscious agreement has been made to do something known to be illegal as detrimental to market and consumer interests. Given the now clear condemnation of hard core cartel activity as a matter of both official policy and law, such agreements typically now have a covert and contumacious character which may be seen as adding to the delinquent character of such conduct.<sup>5</sup> The essential delinquency of hard core cartel activity thus may be seen as residing in the agreement made in awareness of its legal condemnation, and is well encapsulated and expressed in the Sherman Act language of ‘agreement or conspiracy’. The present UK cartel offence correctly refers to an agreement at the core of the offensive conduct and the main issue is how to convey more precisely and convincingly the objectionable character of such agreements. The problem in casting such conduct as dishonest lies in the core understanding of dishonesty as comprising an untruthful statement or conduct addressed directly to an intended victim of that act. Cartel conduct typically operates more remotely from those considered to be its eventual victims. At most, the activity of cartellists, especially in its covert form, may be analysed as a kind of trick performed within the market, more akin to a deception<sup>6</sup> than a dishonest taking. The other problem in using dishonesty, as pointed out by a number of other commentators,<sup>7</sup> is the very real possibility that traders may plausibly assert a genuine belief in the allowable nature of some restrictions,<sup>8</sup> or put forward some economic

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<sup>3</sup> As laid down in *R v Ghosh* (1982) QB 1053, involving the two-stage test articulated by Lord Lane CJ: was the act in question dishonest according to the ordinary standards of reasonable and honest people and, if so, did the defendant realise that what he was doing was by those standards dishonest? Arlidge and Parry have described dishonesty as ‘a deceptively simple name for a complex concept’ (*Arlidge and Parry on Fraud* (3<sup>rd</sup> ed, Sweet and Maxwell, 2007), 2-002).

<sup>4</sup> For instance, Germany, Austria and Hungary. For further discussion, see: Peter Lewisch, ‘Enforcement of Antitrust Law: The Way from Criminal Individual Punishment to Semi-Penal Sanctions in Austria’, Ch 14 in Katalin J Cseres et al, *Criminalization of Competition Law Enforcement* (Edward Elgar, 2006).

<sup>5</sup> We have previously characterised this situation as a ‘spiral of delinquency’ or ‘delinquency inflation’ – see for instance, Harding and Joshua, note 2 above, at p 149.

<sup>6</sup> The deception, in this sense, operates at two levels: that the competitors are not actually competing, as might be assumed from the market; and this fact is deliberately kept hidden from public view. The main victims are then (a) the market, and (b) a large number of end consumers.

<sup>7</sup> Andreas Stephan, ‘The UK Cartel Offence: Lame Duck or Black Mamba?’ (2008) University of East Anglia Centre for Competition Policy Working Paper 08-19; Brent Fisse, ‘The Cartel Offence: Dishonesty?’, 35 (2007) *ABLR* 235; Angus MacCulloch, ‘Honesty, Morality and the Cartel Offence’, 28 (2007) *European Competition Law Review* 353.

<sup>8</sup> Since, as a matter of competition law and policy, a number of cartel-like arrangements may be exempt from prohibition (as discussed in 6.26 – 6.28 of the Consultation Document).

justification (e.g. safeguarding employment or a local economy) as a genuine objective which could negate a dishonest mindset, especially in the view of a jury.

In short, dishonesty is neither a relevant nor a helpful concept in this context, and there is now a strong consensus to that effect, evidenced by the fact that no other jurisdiction has resorted to the use of dishonesty as an element of cartel criminality, and more especially that Enterprise Act model was considered and rejected in the more recent Australian criminalisation of cartel activity<sup>9</sup>.

We have urged in our own published argument that a more convincing basis for criminal liability in relation to cartels is the idea of conspiratorial action, while accepting that the actual use of the term ‘conspiracy’ may be problematical in the context of UK criminal law.<sup>10</sup> The problem is to find appropriate legislative vocabulary to provide a sense of *agreed* action which is *cognisant* of its clear illegality, *contumacious* (or defiant of established policy) in its determination to go ahead with such illegal behaviour, and *covert* (employing cunning and subterfuge) in its method of doing so.<sup>11</sup> It is difficult to find a single word to indicate precisely such a mindset. Terms such as ‘conspiratorial’ and ‘collusive’ convey something of this meaning, but are insufficiently exact, both technically and in nuance.

### **The options contained in the consultation document**

The four options remove the element of dishonesty but do not attempt to replace it directly with an alternative *mens rea*, except in Option 3, which uses the secrecy of the behaviour as a hallmark of its criminality. Option 1 simply leaves a defined illegal agreement subject to prosecutorial guidelines. Option 2 leaves a defined illegal agreement, further defined by the carving out of acceptable cartel restrictions. Option 4 leaves a defined illegal agreement, further defined by carving out any such agreements made openly in the sense of being announced to customers when made. The Consultation Document favours this latter option.

The concept of secretly made agreements goes some way towards translating the delinquency of cartel conduct as we have described it above, but is only part of that landscape of criminality. In practice, proof of such secrecy in itself may be difficult, yet would be an important part of the case for a successful prosecution and conviction. It might also be said that much of the evidence for secretive measures would already constitute evidence for existing obstruction of justice offences, so that secretive cartel action is already covered by criminal law, and such offences have indeed been used in the cartel context (notably, for instance, in the Norris extradition<sup>12</sup>).

The concept of ‘open’ or announced agreements addresses the same element of covert behaviour, by inviting cartel participants to publicise their actions, in effect

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<sup>9</sup> See Caron Beaton-Wells, ‘Criminalising Cartels : Australia’s Slow Conversion’, (2008) 31 *World Competition : Law and Economics Review* 205; 6.16 of the Consultation Document.

<sup>10</sup> See Harding and Joshua, note 1 above, at p 943.

<sup>11</sup> See Christopher Harding, ‘The Anti-Cartel Enforcement Industry’, Ch 16 in Beaton-Wells and Ezrachi (eds), (2010), note 2 above, at p377.

<sup>12</sup> See *Norris v Government of the United States* [2008] UKHL 16.

automatically casting undeclared hard core cartels as secret and therefore criminal in nature, if proven. But this incentive to declare acts of price fixing, or whatever, would seem doubtful in practice. In return for immunity against criminal prosecution, cartelists would be revealing their illegal arrangements, thus undermining their planned profitable enterprise and exposing themselves to non-criminal law sanctions.

Options 1 and 2 both use the concept of a defined illegal agreement as the basis for criminal liability, the ‘agreement’ encapsulating the necessary elements of both *actus reus* and *mens rea*. Option 1 bolsters the application of the offence defined in this way with the use of guidelines indicating to prosecutors when it may be inappropriate to take formal action against certain types of more approvable cartel arrangements. We agree with the argument in the Consultation Document that such an approach may well fall foul of requirements of legal certainty, which are imperative in the context of serious criminal offending, and of provisions within the European Convention on Human Rights and other applicable legal protection.

Option 2, which refines the definition of the illegal agreement by carving out ‘white listed’ arrangements which may be approvable in policy terms avoids this last problem. It is the approach which has recommended itself in some other jurisdictions, notably Canada and Australia<sup>13</sup>. It has the appeal of more accurately defining the objectionable cartel behaviour in economic terms and avoiding difficult defence argument based on economic and market analysis. At the same time it bases criminal liability on the concept of an illegal agreement and brings the process of agreement to the forefront for this purpose.

## **Recommendation**

We therefore would view Option 2 as the most preferred of the four options listed.

**Most importantly, however, we argue that the salient element of cartel criminality is an agreement to act in defined illegal anticompetitive ways, doing so determinedly with an awareness of the prohibited nature of the conduct.**

It may be that the term ‘agreement’ used in this context would sufficiently convey this mindset. But a more watertight definition might add to the simple vocabulary of ‘agreement’ by inserting the words ‘intentionally’ and ‘legally prohibited’ (illegal), in order to indicate both determination and knowledge. Thus the wording may read :

‘An individual is guilty of an offence if he *intentionally agrees* with one or more other persons to make or implement, or to cause to be made or implemented, *legally prohibited* arrangements of the following kind  
.....’

This last would be our recommended approach to defining the offence.

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<sup>13</sup> Amendments to the Canadian Competition Act, in force March 2010; Beaton-Wells, note 9 above.



## Herbert Smith Submission

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

#### 1. INTRODUCTION

- 1.1 We welcome the opportunity to comment on the BIS consultation proposals on options for reform of the UK competition regime.
- 1.2 The UK competition regime in general is recognised to be a world class regime. We therefore strongly recommend that any reform be limited to those areas that are perceived as not working well. In our view the proposals for reform should focus in particular on the following issues:
- lack of efficiency in relation to Chapter I and Chapter II prohibition investigations;
  - need for greater consistency in respect of concurrency powers of the regulators;
  - greater clarity in general as to who is the ultimate decision maker; and
  - some inefficiencies in market investigations and the need for a review on the merits where a market investigation results in divestment being imposed.
- 1.3 It is important to bear in mind how long it takes for fundamental changes to the competition regime to bed down. In view of the time and cost involved in large changes it is even more important for the Government to focus on those areas where improvement is clearly necessary and will achieve considerable benefit.
- 1.4 In respect of merger control, we strongly oppose a mandatory regime that would divert resources from mergers that matter to those that don't. The UK does currently have one of the leading merger control regimes in the world and introducing a mandatory regime would be a retrograde step, and would also go against the general trend for self assessment in other areas of competition policy. We agree that there is some room for improvement and support a number of proposals, but would urge the Government to beware of aiming to produce 'the perfect model', which would end up being too burdensome and risk being over-interventionist.
- 1.5 In respect of the cartel offence, we are concerned that any significant reform would be premature, given the comparatively short period over which the criminal cartel offence has been effective. We are of the view that arguments for the inclusion of dishonesty in the criminal offence made in advance of the Enterprise Act remain of merit and therefore recommend the retention of the dishonesty element, at least for the time being.
- 1.6 We note that, although the Government is consulting on the proposal to merge the competition functions of the OFT and the CC to create a single Competition and Markets Authority, it announced in October last year that it is minded to merge the two bodies. The proposals are drafted on the basis of a single competition authority and our comments are based on the premise that there will be a single CMA.
- 1.7 The comments contained in this paper are those of Herbert Smith LLP and do not represent the views of any of our individual clients.

# Herbert Smith

- 1.8 Our comments are set out in the order in which they appear in the consultation. We have not aimed to comment exhaustively on all points but have focused on the main issues raised by the consultation.

## **2. OBJECTIVES FOR REFORM**

- 2.1 The Government acknowledges that it has inherited a competition regime that has been independently assessed as world class, but is proposing to reform the regime in order to improve the robustness of decisions, support the competition authorities in taking forward the right cases and improve speed and predictability for business.

### **Q1 – Objectives for reform**

- 2.2 Speed and predictability are important in the context of an efficient competition regime, but one of the key objectives should be that of procedural fairness, on the basis that many competition law interventions are significant, often quasi criminal investigations imposing considerable and sometimes far reaching sanctions on the parties involved, yet (apart from the cartel offence) fall outside the criminal justice system and, in some respects, do not offer the full protection available in ordinary civil litigation. Improving procedural fairness should therefore be an important objective of the proposals, and this should not be compromised by speed and efficiency.
- 2.3 The proposals should also aim to reduce unnecessary regulatory burdens on businesses so as not to affect competitiveness of the UK economy on the whole and on the regulators in order to allow them to focus their limited resources on those cases most likely to have an adverse impact on competition.
- 2.4 In our view, success of the regime should not be measured by the number of cases but by the impact of the investigations undertaken and the quality of the decisions. There needs to be a focus on outcome, rather than undue focus on output.

### **Q2 – creation of a single Competition and Markets Authority**

- 2.5 As for the proposal to merge the competition functions of the OFT and the CC to establish a single Competition and Markets Authority, we are not convinced that it will result in better or more cost effective outcomes. Our response is based on the assumption that it is the Government's intention to move ahead with this proposal, and as such we recommend that care is taken to ensure that there remains a clear separation of power in respect of phase 2 merger and market investigation decisions in order to minimise the risk of confirmation bias. In addition, it is important that phase 2 decisions within the CMA are made by senior and experienced officials to which the companies under investigation have access.

## 3. CHAPTER 3 – A STRONGER MARKETS REGIME

### General Comments

- 3.1 The markets regime is a useful tool that allows the regulators to focus on issues at market-wide level in order to ensure that markets work well for consumers. The regime is seen as being at the forefront of global best practice, due to its quality of analysis, expertise, flexibility and transparency and also because of its ability to implement structural changes or legally binding behavioural remedies following an investigation. Its success should however not be measured by the number of investigation references that have been made, but by the quality of the process and outcomes achieved. It is much more important for the CMA to focus on targeting references on key markets, which should produce more efficient outcomes rather than aim to increase the number of investigations.
- 3.2 We support some of the proposals aimed at streamlining the regime, in particular proposals to introduce a statutory timescale for phase 1 market studies, but would like to emphasise the need to ensure that due process is not compromised in exchange for faster decisions. We would therefore not support a shortening of the phase 2 market investigations timeframe and would urge that the CMA is allowed to take the necessary time to consider appropriate and proportionate remedies, in particular where divestment is being contemplated.

### Q3: Proposals for strengthening the markets regime

#### *Enabling investigations into practices across markets*

- 3.3 The Government is proposing enabling the CMA to carry out market investigations into practices across markets, on the basis that some practices may be an issue in more than one market but that the CC cannot investigate them unless multiple markets are referred to them. Although this may at first sight seem an attractive option, there are a number of drawbacks and on balance we would therefore not support this proposal.
- 3.4 There may be different reasons as to why certain practices are common in certain markets and their analysis will be dictated by the circumstances specific to each market. In addition, remedies will need to be considered in the context of a particular industry and appropriate remedies will vary from market to market. Carrying out a market investigation that involves different sectors would also result in a large number of parties and large quantities of data which could end up making the investigation too complex and unmanageable. Where actually appropriate, parallel references heard wholly or partially together, or a widening of the terms of reference (both possible under current law) can be used.

#### *Enabling the CMA to provide independent reports to Government*

- 3.5 The Government is considering whether to make public interest interventions in the markets regime similar to those under the current merger regime. This would mean that the Secretary of State could invite the CMA to consider public interest issues alongside competition issues. The Government considers one of the key benefits of this would be that it may negate the need to create ad hoc independent inquiry bodies. We believe that market investigations should be primarily competition based and that issues of public interest in markets should be addressed by Ministers and Parliament as opposed to the competition authorities. The CMA does not have the necessary resources do deal with

# Herbert Smith

public interest issues and would need to recruit relevant qualified experts to the market investigation panel which would add further costs. On this basis we do not support these proposals.

## *Extending the super-complaint system to SME bodies*

- 3.6 The Government is proposing that bodies representing SMEs are added to the list of consumer bodies that can bring super complaints, thereby providing a speedier mechanism to address issues that may significantly harm the ability of SMEs to compete. We do not believe that there is a need to give such special rights to SMEs as a class. SMEs are able to make a complaint to the CMA in the same way as other companies are and there is a risk that the proposal could create the impression that SMEs have special status and should be encouraged to complain against large companies.

## *Streamlining the Markets Regime*

- 3.7 **Reducing timescales:** we support proposals for the introduction of a six month statutory timescale for phase 1 market studies which would increase the regime's efficiency and may reduce the burden on businesses under investigation. We do however not support proposals for a reduction of phase 2 market investigations from 24 months to 18 months. Recent experience from our involvement in market investigations has demonstrated that where the CC has tried to accelerate the timetable it has subsequently been necessary to agree extensions to a more realistic period, in view of the large volume of information generally involved in this type of investigation.
- 3.8 **Information gathering powers at phase 1:** we support proposals for the introduction of information gathering powers at the phase 1 market study stage, which will assist the CMA in completing its investigations within the newly proposed six month period.

## *Increasing certainty and reducing burdens*

- 3.9 The Government is seeking views on whether there should be a clearer statutory definition of a market study and a statutory threshold for initiation of a market study. Market studies are currently covered under section 5 of the Enterprise Act which refers to the OFT's powers to obtain and keep under review information relating the carrying out of its functions. We would support greater clarification as to the scope and objectives of the CMA's powers to launch a market study. In view of the burden and cost implications for businesses involved in these investigations, a statutory definition and statutory threshold would be more appropriate. This is particularly the case if a statutory timescale and formal information gathering powers are introduced for phase 1 investigations.
- 3.10 We support proposals, set out in more detail in the City of London Law Society submission, for a distinction to be made between 'market studies' for long-term reports, where the exercise of competition powers is not envisaged and 'phase 1 market investigations' which would be competition based. This distinction would allow for the flexibility of the current regime under which the CMA can pro-actively carry out market studies to be maintained while at the same time providing greater clarity and certainty for parties involved in a phase 1 market investigation. A statutory threshold for launching a phase 1 market investigation would need to be adopted and this would have to be set at a lower standard than that for making a reference under section 131 of the Enterprise Act.

## *Improving interaction between market investigation references and antitrust enforcement*

- 3.11 If the CMA is given new information gathering powers under phase 1 market investigations, careful thought would need to be given to the issue as to how that information can be used in the context of a Competition Act investigation.
- 3.12 The opening of a Competition Act investigation should in any case be the subject of a new separate regulatory procedure.

## *Ensuring remedies are proportionate and effective*

- 3.13 Remedies adopted in market investigations can be far reaching, this is particularly the case when divestments are imposed, and it is important to ensure that sufficient procedural safeguards are in place in those circumstances. An investigation by a single authority with no appeal mechanism is likely to raise concerns and may not be compliant with Article 6 ECHR on the right to fair trial. There should therefore be a right to a full merits appeal available to the parties where the remedy involves divestment.
- 3.14 The Government is proposing to amend Schedule 8 of the Enterprise Act to enable the competition authorities to require parties to appoint and remunerate an independent third party to monitor and/or implement remedies. We agree that this may be a useful remedy, but it is also one that can be very burdensome on companies and there should therefore be a sufficiently high threshold for the CMA to consider this. The CMA should have a duty to consider a less burdensome alternative and should be under a duty to regularly review the need for it to continue.

## **4. CHAPTER 4 – A STRONGER MERGER REGIME**

### **General comments**

- 4.1 Merger control is one of the most successful aspects of the UK competition regime and the UK merger regime has consistently been rated very highly in international surveys.
- 4.2 The Government's key reasons for considering reform of the merger control regime are prompted by concerns that the current voluntary regime may be missing a number of anti-competitive mergers and that a large proportion of in-depth investigations relate to completed mergers, which can make it difficult to apply appropriate remedies.
- 4.3 Assuming that a number of anti-competitive transactions do indeed slip through the net (for which there does not seem to be any evidence), this problem will not be addressed by the introduction of a mandatory regime. In order to operate a workable mandatory regime, the jurisdictional threshold would need to be set at a realistic level, so as not to overburden the competition authorities and businesses alike. This means that a number of transactions which might be of concern, and which can easily be picked up under the voluntary regime, would not be caught under a mandatory system. The Government admits in any case that this is not a serious failing of the current regime, and that it has already been addressed in recent years through improvement of the OFT's merger intelligence function by increasing its resources and taking a more targeted approach.
- 4.4 As for the problem with completed mergers and the difficulty to apply appropriate remedies, we believe this can be addressed under the current voluntary regime, under the

proposals set out for strengthening interim measures, without requiring a major overhaul of the merger regime. The creation of the CMA, which will bring together the OFT and CC's expertise in dealing with hold separate undertakings, will also be helpful in this respect.

- 4.5 Other proposed areas for improvement relate to streamlining the process, which again is best achieved under the current voluntary regime. In our opinion, phase 1 is a well managed process and we are concerned that more rigid timeframes at this stage could result in lengthy pre-notification talks which would in practice draw out the process to a longer total time. This unsatisfactory feature of many other regimes should be avoided.

## **Q5 and Q6: Proposals for strengthening the mergers regime and approach to notification**

### *Voluntary versus mandatory regime*

- 4.6 In order to achieve its objective of strengthening the regime by improving the speed and robustness of its decisions, and to address the shortcomings it has identified, the Government is consulting on three main options:
- improving the voluntary notification regime by strengthening the interim measures powers
  - introducing a mandatory notification regime requiring businesses to notify all mergers where the turnover of the target in the UK exceeds £5million and the worldwide turnover of the acquirer exceeds £10 million
  - adopting a hybrid system under which mergers would need to be notified where the value of the UK target exceeds £70 million turnover and where the CMA would in addition retain the ability to initiate investigations and take action for mergers that fall below this turnover threshold but are caught by the "share of supply" test.
- 4.7 We strongly support the option of maintaining the current voluntary notification system. Although most of the developed economies operate a mandatory merger regime, the UK's voluntary regime is very highly regarded because of its flexible nature and most of its benefits compared to other regimes would be lost if the Government were to replace it with a mandatory regime.
- 4.8 The main advantage of a voluntary regime lies in its flexibility, both for the parties involved and for the regulator. The parties are free to apportion the risk between them and the regulator has the flexibility to choose the transactions it investigates taking into account all information available rather than being restricted by size and thresholds of the transaction.
- 4.9 There are timing and financial advantages for unproblematic mergers and costs both for the regulator and the merging parties are generally much lower. In most mandatory regimes more than 90% of notified cases do not give rise to competition issues, which means that the majority of resources are spent on investigating mergers that do not present any risks. A voluntary regime therefore allows for a better allocation of resources and allows the regulators to concentrate resources on those transactions most likely to raise substantive issues.
- 4.10 The current system has sufficient built in safeguards to ensure that anti-competitive transactions do not slip through the net. The OFT has up to four months to refer a

completed merger to the CC or longer if the transaction has not been given sufficient publicity. The OFT increased its monitoring capacity with the appointment of a dedicated mergers intelligence officer responsible for monitoring merger activity in the UK and third parties also have a vested interest to complain and bring a potentially anti-competitive transaction to the OFT's attention.

- 4.11 The proposals for a mandatory regime on the other hand create a serious dilemma. The proposed jurisdictional thresholds are currently set at such low level that the option becomes unworkable, but if the thresholds are significantly increased, a number of potentially problematic transactions which can currently be reviewed by the regulators will fall outside the scope of the regime. We believe that the majority of completed mergers investigated by the CC in recent years have qualified for investigation only on the share of supply test, some being very small indeed, and some involving business rescue purchases.
- 4.12 The proposed hybrid mandatory regime is too complex and would not solve any of the concerns identified by the Government. The system would impose a notification burden on unproblematic mergers where the thresholds are met and would also not remedy the problem of unscrambling completed mergers which meet the share of supply test.
- 4.13 The Government is also seeking views as to whether there should be changes to the jurisdictional thresholds in the UK's voluntary regime. Our view is that the current thresholds work well and we would advocate retaining the share of supply test as the importance of the role it plays in capturing problematic mergers has been sufficiently demonstrated. We would strongly oppose the proposal to replace the current test with the ability for the CMA to have jurisdiction over all mergers except for mergers falling under the small merger exemption, which would result in an unnecessary increase in the regulatory burden without adding any benefit to the regime.

### *Strengthened interim measures*

- 4.14 The government's concerns over the difficulty to apply appropriate remedies for completed mergers and the issues with unscrambling should therefore be addressed through a strengthening of the existing voluntary regime, in particular by improving the interim measures regime, so as not to lose the benefits of the current regime.
- 4.15 The Government is considering two potential options in this respect: a statutory restriction on further integration that would apply as soon as the CMA starts an inquiry into a completed merger, or giving the CMA the ability to trigger these powers in its phase 1 investigation to suspend all integration steps pending negotiation of tailored hold separate undertakings.
- 4.16 In our view the second option would be preferable, as it allows for a more targeted approach, therefore resulting in a more flexible and sophisticated regime. Automatically preventing further integration for all transactions, even those which raise no competition concerns, would be disproportionate and could be damaging in cases where a failing firm is being rescued. It would be akin to the introduction of a mandatory regime (with all the disadvantages set out above), as more buyers would refuse to take the risk of completing without clearance if they were in any case unable to integrate pending a phase 1 decision.
- 4.17 Provided sufficient guidance is made available as to the criteria under which this discretion would be exercised under the second option, this option would maintain the flexibility of a voluntary regime while at the same time ensuring that more potentially problematic transactions were notified.

# Herbert Smith

- 4.18 The Government is also considering clarifying the legislation to make clearer the type and range of measures that the CMA could take, including in phase 1, in order to prevent pre-emptive action. This would include the ability to require reversal of action that had already taken place and to prevent further pre-emptive action notwithstanding the existence of any contractual obligations on the part of the merged entity.
- 4.19 We support proposals for any such clarification as well as for a strengthening of the CMA's powers to take pre-emptive action, but would emphasise the importance for any such measures to be used in a proportionate and appropriate manner, in particular as regards the imposition of reversal measures in phase 1, which should only be used in exceptional circumstances. Guidance should also be available on when the restrictions will cease to apply.
- 4.20 Any strengthening of the interim measures powers will also require a sufficient number of experienced officers in order to negotiate and monitor these restrictions as well as the individual hold separate undertakings.
- 4.21 We would not object to the proposal to introduce financial penalties for breach of hold separate undertakings, provided the undertakings are sufficiently clear, and as long as the CAT is given unlimited jurisdiction to review the imposition and the level of such penalties.

## **Q7: streamlining the merger regime**

### *Statutory timescales*

- 4.22 In our opinion, phase 1 is a well managed process and we are concerned that proposals to introduce more rigid frameworks at this level could result in a lengthy pre-notification process which would draw out rather than reduce the overall timetable.
- 4.23 Under a mandatory regime, a deadline of 30 working days may be over-ambitious, particularly in light of the inevitable increase in the number of notifications that would result from this option. It may be necessary to allow the CMA a 10 day extension period.
- 4.24 Under a voluntary regime, which is our preferred option, the proposed 40 working days may be appropriate if combined with the information gathering and stop the clock powers set out below. The current option of using the merger notice with guaranteed time period of 20 days extendable by a further 10 working days should remain available.
- 4.25 The 24 week period for phase 2 should not be reduced as this would affect the quality and robustness of the decisions. We would support the introduction of a statutory timescale of 12 weeks, extendable by a further six weeks, on phase 2 remedies implementation between the publication of the final report and acceptance of undertakings by the parties, or the making of an order by the CMA.

### *Information gathering and stop the clock powers*

- 4.26 We support proposals to align the powers to obtain information from main and third parties in phase 1 with those currently applied in phase 2. This should include powers to stop the clock if the main parties do not comply, and the power to impose penalties on the main parties, but such penalties should not be imposed on third parties. These powers need to be used in a proportionate manner, having regard to the phase in which they are being used. In particular in phase 1, it is important that the authorities do not request so much information that this phase cannot be completed in the normal timescale. There should be

# Herbert Smith

a duty on the CMA to act proportionally in relation to its information request and the phase under which it is used.

## *Anticipated mergers in phase 2*

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

## *Enable CMA to consider remedies earlier in phase 2*

- 4.28 Allowing the CMA to consider remedies in phase 2 without having to decide whether the merger has or will result in a SLC would provide greater flexibility and allow for shorter phase 2 investigations in appropriate cases. Concerns that this may reduce the incentive on parties to agree undertakings in lieu at phase 1 are unfounded because the cost and delay of a phase 2 investigation is inevitably very large and there can be no certainty of an early resolution in phase 2 if a conclusion in phase 1 is foregone.

## **5. CHAPTER 5: A STRONGER ANTITRUST REGIME**

### **General comments**

- 5.1 We believe that some type of reform is necessary to the existing regime for the following reasons:

#### *Duration and throughput of cases*

- 5.2 It is a widely held view that the OFT's prosecution of cases, when combined with a full merits appeal to the Competition Appeal Tribunal ("CAT"), is overly lengthy and uncertain<sup>1</sup>. This is not only undesirable in terms of contributing to a paucity of precedent, but also may lead to an over-reliance on the use of early resolution procedures where this may be expedient, but not necessarily optimal in terms of economic and social efficiency<sup>2</sup>.

- 5.3 It is difficult to speculate at the causes of the delay within the OFT, but a significant contributing factor would seem to be the often unfocussed nature of investigations. This is reflected in theories of harm appearing to change, sometimes drastically, during the lifetime of a case, which is often manifested in several rounds of Statements of Objections ("SO")<sup>3</sup>. This lack of focus may have been caused by insufficient senior input and legal input, or a change of case team at key stages.

#### *The risk of confirmation bias*

- 5.4 The consultation paper acknowledges the concept of so-called confirmation bias - i.e. the risk of an initial set of investigators with an interest in having their original concerns about

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<sup>1</sup> See most recently, for instance, the National Audit Office ("NAO") report of 22 March 2010 *Review of the UK's Competition Landscape*, and comments made by the Chief Executive of the OFT in his speeches *UK Competition Policy: the first decade*, 11 May 2011, and *The future of the competition regime: increasing consumer welfare and economic growth*, 25 May 2011.

<sup>2</sup> See the NAO report, cited above.

<sup>3</sup> See, by way of example, the recent *Tobacco* decision, where the concept of "illegal indirect contact" was dropped after the initial SO stage.

# Herbert Smith

an infringement confirmed in a final decision. It is uncontroversial that the current OFT investigatory, prosecutorial and adjudicatory structure gives rise to the risk of confirmation bias.

- 5.5 Whilst steps have been recently implemented by the OFT to reduce the risk of confirmation bias<sup>4</sup>, the system is fundamentally prone to confirmation bias.

*Lack of access to the decision-maker*

- 5.6 We believe that a major defect in the current decision-making process is that the defendants do not have the right or indeed the opportunity to face their decision-maker at important stages of the investigation.
- 5.7 It is a fundamental tenet of criminal law that a defendant may face his accuser. It is uncontroversial that OFT antitrust proceedings are criminal in nature for the purposes of human rights law, and the lack of any formal process whereby the parties under investigation may present their arguments and defence to the actual decision-maker is a serious defect<sup>5</sup>.
- 5.8 We believe that an undoubted strength and success story of the current regime is the availability of a full appeal on the merits to a specialist independent court, namely the CAT. The thoroughness of the CAT's reviews has undoubtedly contributed to a significantly higher standard of decision-making at the OFT level<sup>6</sup>. We believe that it is crucial that this merits appeal mechanism remains intact and unchanged following any reform. The consequences of an adverse infringement decision<sup>7</sup> are such that anything less than a full merits based appeal would be an inadequate safeguard of a defendant's procedural rights and the rights of individuals liable to disqualification as directors or to loss of employment as a consequence of the decision. This is particularly the case given that the OFT's procedure is prone to confirmation bias.
- 5.9 In terms of addressing the above-mentioned deficiencies in the current regime, we believe that the most efficient solution is to retain the OFT's existing procedures, but to incorporate robust procedures to ensure a less protracted decision-making process – i.e. Option 1.

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<sup>4</sup> See OFT publication OFT 1263 of March 2011 *A guide to the OFT's investigation procedures in competition cases* (the "Guide"). Steps taken include the introduction of defined roles within a case team such as a "Team Leader" dedicated to running the day to day aspects of the case; a "Project Director" directs the case and is accountable for delivery of high quality timely output; and a "Senior Responsible Officer" ("SRO") is accountable for delivery of the case.

<sup>5</sup> The Guide notes that at the SO stage it will "generally, but need not be, the SRO" who will decide whether to issue an SO, but it is not clear who takes the final infringement decision. The ability to put a defence directly to the actual decision makers is a particular strength of the Competition Commission procedure, but it is lacking at the OFT stage of an antitrust investigation.

<sup>6</sup> This is acknowledged by the Chief Executive of the OFT in his 11 and 25 May 2011 speeches, noted above.

<sup>7</sup> This is both in terms of very high fines and the potential to deprive an individual of his or her livelihood by means of the directors' disqualification procedures which can flow from an adverse antitrust finding. In respect of the former, it is notable that the fines imposed by the OFT for antitrust infringements have often dwarfed those imposed under other regimes, such as for instance Health & Safety legislation.

## Q 8 - options for reform

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

- 5.10 We believe that the above-listed defects in the current system can be adequately addressed by means of "tinkering" with the system rather than incorporating a wholesale systemic change. We broadly agree with the views expressed by the Chief Executive of the OFT to the effect that any more radical approach may involve another lengthy period of "bedding down", whilst the OFT gets to grips with an unfamiliar and untested regime. The UK competition landscape has only relatively recently undergone a radical regime change in the form of the Competition Act 1998 and the Enterprise Act 2002, and, by its own admission, the OFT is only now starting to get fully to grips with this, a decade or more down the line<sup>8</sup>. It would be undesirable to effectively "lose" another decade by implementing a wholesale change at this stage.
- 5.11 In terms of the necessary changes to be made to the current system we applaud the steps taken recently by the OFT as set out at paragraphs 5.24-5.26 of the consultation. The two main further changes required are (i) a clear identification of, and full access to, the decision-maker; and (ii) binding administrative timetables, perhaps extendable only with the leave of the CAT.

### *Access to an identified decision-maker(s)*

- 5.12 As noted above, there is currently no clarity as to who is the final decision-maker(s) in any given case. We suggest that there is no valid reason why defendants should not be informed, at an early stage, and certainly at the stage of the SO, who will be the final decision-maker. If a case is sufficiently strong that an SO can be issued, then a final decision is "on the cards" and the ultimate decision-maker should be sufficiently involved at that crucial stage. Furthermore, we suggest that defendants should have the opportunity to rebut allegations made against them before the final decision-maker, rather than having their arguments conveyed through the prism of case-team members. The current approach magnifies the already clear problem of confirmation bias and whilst access to the final decision-maker would not fully remedy this, it would certainly assist.
- 5.13 Defendants have full access to the decision-makers in Competition Commission ("CC") procedures. The potential consequences of an adverse antitrust finding are frequently more severe than the outcome of most decisions issued by the CC.
- 5.14 In terms of achieving relevant access, perhaps the defendants could be notified as to who will be the final decision-maker on or shortly before the issue of the SO, and of their rights to put their arguments and defences directly to the relevant decision-maker(s). At least one hearing before the full committee of decision-makers should be feasible in proceedings which often last many years<sup>9</sup>.

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<sup>8</sup> This is acknowledged by the Chief Executive of the OFT in his 11 and 25 May 2011 speeches, noted above.

<sup>9</sup> We note recent steps by the European Commission to be more open and transparent in their administrative procedures, such as offering regular state of play meetings and the opportunity to meet with the relevant Commissioner – see the Commission's Consultation Guidelines, *Best Practice on the Conduct of Proceedings concerning Articles 101 and 102 TFEU*, January 2010, and a recent speech by Vice President Almunia, *Fair Process in EU competition enforcement*, 31 May 2011.

# Herbert Smith

## *Binding administrative timetables*

- 5.15 We believe that an injection of some form of timing discipline into administrative cases would help to reduce the inordinate and unsatisfactory duration of proceedings. This could either be in the form of non-binding guidance or statutory time limits.
- 5.16 Non-binding guidance should at least serve to focus the mind of case teams and serve as a guide as to the time by which milestones should generally be reached. By way of analogy, the non-binding 40 working day administrative timetable for OFT merger decisions is not always met by the OFT, but it serves as a useful disciplinary measure.
- 5.17 A formal, statutory time limit within which a case must be brought to completion would clearly have the advantage of certainty for all concerned. The OFT may consider that, given the varying nature of cases, any fixed time limit may be procrustean in nature, however this could be addressed by some form of appeal mechanism. For instance, if the CMA felt that a given case merited a longer investigation period, it could apply to the CAT for leave to have the statutory timetable extended, perhaps subject to directions from the CAT.
- 5.18 In sum, we believe that the administrative body should be, in some guise, held to account for the length of its investigations.

## *Option 2: develop a new administrative approach*

- 5.19 We believe that the creation of an Internal Tribunal within the single CMA which will act as a form of Devil's Advocate review body to guard against confirmation bias is a potentially attractive option. Any form of independent review of the administrative body's investigation is welcome.
- 5.20 However, this is not our preferred option for three principal reasons:
- First, there is a danger that the new system will take years to "bed down", and so any benefits would be seen only many years down the line.
  - Second, inserting a further layer of review will inevitably lead to further delays in decision-making.
  - Third, and most important, we are totally against any form of watering down of the CAT's full appeal on the merits. As noted above, the CAT's appeal function has been an undoubted success story of the UK competition regime. Any change to this would be change for change's sake and the system would be weaker for it and would not, we believe, meet the requirements of Article 6 ECHR.

## *Option 3: A prosecutorial system*

- 5.21 This amounts to the most radical change. Under this option, the single CMA or sector regulator would not decide on infringement of penalty but would 'prosecute' cases before the CAT, which would decide both matters.
- 5.22 This is a superficially attractive option, given that the defendant would face the ultimate decision-maker at an earlier stage, and the CMA would effectively only ever be involved in one process, rather than issuing a decision, and then defending this before the CAT on appeal, which could lead to an increase in case output.

# Herbert Smith

5.23 However, we believe that, on balance, the prosecutorial approach is not our preferred option for the following reasons:

- First, the above-mentioned "bedding down" time-lag will be even more acute given the fundamental nature of the regime-change involved.
- Second, it is not clear that an increased case output would follow. Indeed, whilst OFT decisions are currently appealed more often than not, under the prosecutorial system, the CMA would face the CAT in all cases and this may make it even more cautious in the cases it decides to prosecute.
- Third, we share to some extent the OFT's concerns that if the competition authority were to lose its role as the decision-maker, there is a danger that UK competition policy would become court-driven. We agree that some form of separation of powers in this respect is desirable.
- Fourth, we note that the Chief Executive of the OFT is against this system, and he has had direct experience of such a system during his tenure at the Irish Competition Authority<sup>10</sup>.

5.24 If however the CAT were not to retain its full merits review, the prosecutorial system would be the only option to meet the ECHR requirements.

## **Q9 - changes to antitrust and investigative and enforcement powers**

5.25 We have noted above the desirability of incorporating administrative or statutory deadlines into the OFT's procedures.

5.26 We also believe that it would be desirable to afford the CAT jurisdiction to hear 'stand alone' actions<sup>11</sup>. We have noted above the admirable role played by the CAT in the UK competition regime to date. We believe that its specialist nature makes it well suited to deal with such claims.

5.27 We do not believe that the OFT should be afforded further powers to impose financial penalties on parties who do not comply with the OFT's investigatory requirements<sup>12</sup>. We believe that the current system whereby the OFT's investigatory powers are backed up by criminal exposure for non-compliance are more than adequate to focus the mind of responding parties. We suggest that, for the most part, the failure to respond to information requests is often caused by the setting of unrealistic deadlines, rather than any wilful failure. Indeed, it is very often the case that the parties do not hear back from the OFT for many months after having responded to information requests which the OFT have required to be turned around in a matter of days. As discussed below, good practice dictates that parties should be kept informed of progress in document review and as to the next steps.

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<sup>10</sup> See the speech of the Chief Executive of the OFT dated 25 May 2011.

<sup>11</sup> See paragraph 5.52 of the consultation.

<sup>12</sup> See paragraph 5.55 of the consultation.

## **Q10 - further ideas**

### *Confidentiality rings*

- 5.28 We understand that a cause for delay in process cited by the OFT is the need constantly to redact confidential information from documents to ensure that this does not flow between the defendants. It is clearly vital that confidential information is not inadvertently disseminated amongst the parties. However, there may be less resource-intensive methods of ensuring this is achieved, such as, for instance, establishing a confidentiality ring, as is the case for the Appellants before the CAT.

### *Scheduled State of play meetings/ calls*

- 5.29 We applaud the OFT's recent efforts to appoint named team leaders in relation to specific cases and to offer state of play meetings. However, we believe that there should be some form of regular state of play meeting/ call – for instance a scheduled call every month to confirm the status of the case would assist the parties in terms of forward planning. Even if the calls are to confirm "nothing new", this would be helpful

### *Indication as to size of penalty at the SO stage*

- 5.30 We believe that it would be helpful for the parties to have an indication of the level of the penalty to be imposed at the SO stage. This would be consistent with similar planned changes to the administrative system at the EU level<sup>13</sup>.

## **6. CHAPTER 6: THE CRIMINAL CARTEL OFFENCE**

### **General comments**

- 6.1 The consultation proposes a substantial reform of the criminal cartel offence introduced by section 188 of the Enterprise Act 2002 through the removal of the requirement to prove dishonesty that is presently included in the offence. Given the comparatively short period during which the criminal cartel offence has been publicly enforced, and the limited evidence therefore available on which to judge the efficacy of the criminal cartel offence, we are concerned that such a significant reform would be premature. Moreover, on the evidence available we are not persuaded that reform is merited, nor are we convinced that the options for reform proposed by the BIS would necessarily result in the meaningful improvement of the competition enforcement regime.
- 6.2 Given that we favour retention of the dishonesty element, we will not comment in detail on each of the reform options advanced by the BIS. Instead we set out below our reservations in respect of reform and the broad arguments supporting the retention of the criminal cartel offence in its present form.

### *Application of dishonesty to cartels*

- 6.3 The proposals made by the BIS are premised on the notion that the "dishonesty" requirement, and in particular the test to establish dishonesty established by *R v Ghosh*,<sup>14</sup>

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<sup>13</sup> See the recent speech by Vice President Almunia, *Fair Process in EU competition enforcement*, 31 May 2011.

# Herbert Smith

"seems to make the offence harder to prosecute", with "cases disproportionately difficult to prove."<sup>15</sup> In support of these contentions it is observed that two criminal cartel cases have to date been brought to trial, of which only one case resulted in convictions.

- 6.4 In response we note that the *Ghosh* test is applied often and effectively by juries in a range of other contexts. Jurisprudence exists to provide guidance on the application of dishonesty, and judges are familiar with giving juries direction on its proper application. We have not seen compelling evidence to suggest that during trial proceedings, where the gravity of the conduct at issue is explained and emphasised, the concept of dishonesty is either too complex or nebulous for juries to grasp and apply to cartels. To the contrary, prior to the statutory drafting of the Enterprise Bill the inclusion of dishonesty in the criminal cartel offence was considered carefully and recommended precisely because "capable of being understood by juries".<sup>16</sup> Furthermore, a test based on a finding of dishonesty was intended to protect lay juries from "unmeritorious arguments based on economic and other considerations." Simply deleting dishonesty from the language of the criminal cartel offence, one of the options proposed by the BIS, would result in the creation of a strict liability offence, shifting the focus to the effects of the relevant cartel arrangement, meaning juries would have to consider and assess detailed, complex and often conflicting economic evidence adduced by the parties.
- 6.5 With only two criminal cartel offence cases having been brought to date it is difficult, and potentially unwise, to draw conclusions on the basis of available precedents. Nonetheless, it is striking that neither case appears to support the contention that dishonesty is a practical impediment to prosecution. The circumstances of *R v Whittle, Allison and Brammer*,<sup>17</sup> resulting from the *Marine Hose* cartel, mean that it is of limited probative value, the defendants having effectively pleaded guilty to the criminal cartel offence as a result of plea bargain arrangements concluded with US authorities. The second case, *R v George*, (a case arising from the *BA/Virgin* fuel surcharge cartel) failed for a variety of reasons not apparently linked to any difficulty in applying the concept of dishonesty to cartel activity. Given that existing case law does not clearly support the proposition that dishonesty has inhibited prosecution, the argument put by the BIS appears to rest not on positive evidence but instead on the modest number of completed cases. As explained above, this fact is not necessarily attributable to the dishonesty element of the criminal cartel offence. The broader purpose and scope of the criminal cartel offence inherently limit the number of cases that are likely to be brought.
- 6.6 On balance, having regard to the considerations above, we are of the view that arguments for the inclusion of dishonesty in the criminal cartel offence made in advance of the Enterprise Act 2002 remain of merit and recommend the retention of the dishonesty element.

## *Limited prosecutions*

- 6.7 As noted in the preceding section, concerns over the dishonesty element appear to derive primarily from the paucity of cases and convictions to date. In this regard it bears emphasis that the criminal cartel offence exists to punish individual participation in only

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<sup>14</sup> [1982] 2 ALL ER 689.

<sup>15</sup> Consultation, page 61 and paragraph 6.5.

<sup>16</sup> "Proposed Criminalisation of Cartels in the UK: A Report prepare for the Office of Fair trading by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM", November 2001 (OFT 365).

<sup>17</sup> [2008] EWCA Crim 2560.

# Herbert Smith

the most egregious forms of cartel activity. The scope of the offence is limited to only "hard-core" activities: price-fixing; limitation of supply or production; market-sharing, and bid rigging. Consistent with the broader scheme of the offence, a dishonesty test was included with the express intention of establishing a high threshold for prosecution, commensurate to the severe penalties resulting from conviction.<sup>18</sup>

- 6.8 While the BIS has expressed concern over the few cartel cases brought to date, it is important to recognise that it was never envisaged that criminal cartel cases would be brought often or that a high number of successful prosecutions would be achieved. This same point was made by the OFT when it described its future enforcement strategy, with the agency stating "[w]e will select carefully the cartels for criminal prosecution, concentrating on the serious ones. We expect that there will be a relatively small number of prosecutions."<sup>19</sup>
- 6.9 In light of these observations, the scarcity of cases and convictions is not remarkable. It is consistent with the scheme and intended purpose of the criminal cartel offence. Other circumstances have also acted to restrict the number of cases. First, the criminal cartel offence has only applied since June 2003 and does not have retrospective effect. Second, since June 2003 there have been very few Competition Act 1998 decisions relating to hard-core cartel activities. There have therefore been very few candidate cases for potential prosecution. It is notable that since 2010 the OFT is on record as having launched three new criminal investigations, involving the automotive and agricultural sectors and commercial vehicle manufacturers.

## *Impact on deterrence*

- 6.10 Of prime concern to the BIS is the possibility that "[t]he deterrent effect of the cartel offence is weaker than was intended because there have been so few completed cases to date."
- 6.11 We would respectfully submit that this concern risks overstating the correlation between rate of prosecution and deterrence. We would submit that the deterrent effect of the criminal cartel offences derives in large part from the severity of its sanctions and the very fact that it is individuals rather than companies that are penalised, not simply the frequency of prosecution. This fact was recognised during deliberations in advance of the introduction of the criminal cartel offence.
- 6.12 In support of its position the BIS makes reference to the 2007 research report by Deloitte on the deterrent effect of competition enforcement, asserting that the reports shows "*bringing more criminal cases will be a key way to significantly increase deterrence.*"<sup>20</sup> It is notable that the Deloitte report concluded that "*the deterrent effect of the criminal provisions on cartel behaviour would increase significantly after there had been a successful prosecution.*"<sup>21</sup> We agree with this conclusion, which in our view commends

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<sup>18</sup> This objective was noted during the passage of the Enterprise Bill, the Government rejecting the substitution of other terms for dishonesty and explaining "*the Bill provides for a definition based on dishonesty in order to create a tightly defined offence*" (see Hansard, House of Lords Standing Committee, 18 April 2002, cols 135 and 136).

<sup>19</sup> "*Key Challenges in Public Enforcement: A Speech to the British Institute of International and Comparative Law*", Margaret Bloom, 17 May 2002.

<sup>20</sup> Consultation, para. 6.5.

<sup>21</sup> "*The Deterrent Effect of Competition Enforcement by the OFT: A report prepared for the OFT by Deloitte*", November 2007 (OFT 962), at paragraph 5.110. It also bears mention that in terms of general deterrence

discerning case selection and continued development of prosecutorial expertise by the OFT (or any agency that might succeed the OFT). Nonetheless, for the reasons set out in the preceding paragraphs, we do not believe on the basis of the evidence available that the dishonesty element of the criminal cartel offence is a bar or obstacle to a successful prosecution.

## 7. CHAPTER 7 - CONCURRENCY AND THE SECTOR REGULATORS

### General comments

7.1 The current position in relation to sector regulators does generally not achieve efficiency or consistency in the application of competition law in the UK. We are also concerned that the fusion of the OFT and the CC into the proposed CMA will further complicate issues unless the relationship between the CMA and the sector regulators is reformed. Sector regulators have control over Competition Act cases in their sector, but do have an understandable preference for the use of regulatory powers which explains the relative paucity of competition cases in the regulated sectors. They are able to carry out preliminary market studies, but detailed market investigations would need to be referred to the CMA. It will also be necessary to consider what will happen to the current non-competition functions of the CC (review of price cap determinations). Given that these functions were placed with the CC because it has the economic skills and resources to carry out those functions, they should pass to the CMA.

7.2 The key concern of any reforms in relation to concurrency should be a drive to ensure that there is consistency of relationship between the CMA and each of the sector regulators, in order to improve efficiencies and to ensure that the competition law regime is coherent in its operation and fit for purpose when compared with those of other countries where concurrency is not as widespread as it is in the UK. It is important to strike the right balance between the effective use of regulatory tools and ensuring that competition law is effectively and consistently applied.

### **Q14: Should sector regulators retain their antitrust and MIR powers concurrently with the CMA?**

7.3 We consider that concurrency should be retained, but that the CMA should be the senior body on competition matters. This is particularly important given that around half of the economy falls within concurrent regulation and that the area is likely to grow if these powers are extended as contemplated.

7.4 As regards MIRs, we support the status quo under which the sectoral regulator can carry out the initial market study, and if it has concerns, refers to the CMA for an in-depth market investigation, as only the CMA will have the necessary competition, economic and legal resource available required for this type of in-depth investigation.

7.5 As regards mergers, sector regulators do not have concurrent powers and we do not believe it would be appropriate to extend concurrency to the area of merger control.

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effect Deloitte's survey evidence ranks more highly than criminal prosecutions (1) greater education and publicity to develop awareness of competition issues, (2) steps to encourage private damages actions; and (3) faster decision making by the competition authorities.

# Herbert Smith

- 7.6 As regards anti-trust cases (the UK Competition Act prohibitions and Articles 101 and 102 TFEU), it is probably more efficient in terms of flexibility in use of knowledge and resources to maintain concurrency, provided however that the CMA is given the senior role and is not inhibited from acting at all in the regulated sectors. The CMA should have oversight of the sector regulator's cases and the right to call in cases or to commence cases in sector areas (e.g. where the sector regulator does not appear to be addressing competition concerns or where issues of case management mean that the CMA is more suited to lead the case management). This approach would be similar to the relationship between the European Commission and the national competition regulators under Regulation 1/2003. If the prosecutorial regime is adopted it would be essential to concentrate resources in the CMA for all cases, including those investigated by the sector regulators, so as to achieve efficiency and consistency in prosecution.
- 7.7 In the event that the sector regulators remained the prime investigatory body, the CMA should have the right to approve the following steps in relation to any anti-trust cases:
- initial opening of an investigation;
  - any on the spot investigation;
  - the Statement of Objections and its content; and
  - any decision on liability and penalties and its content.
- 7.8 This should help to promote consistency of the decision making, but would not address the case where a sector regulator decided against the use of competition powers altogether.

## **Q15: Proposals for improving the use and coordination of concurrent competition powers**

### *Strengthening the primacy of competition law over sectoral regulation*

- 7.9 We would not support proposals introducing an obligation on all sector regulators to use their competition powers in preference to their sectoral powers wherever legal and appropriate. There will often be circumstances where regulatory solutions will be quicker and more effective to prevent further anti-competitive conduct and the regulatory process will also generally be more cost effective. The key issue is to ensure that the best suited tool is used to address the specific circumstances of each and every case.

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

- 7.10 We do not support proposals for more resource sharing between the regulators and the CMA under which the CMA would become a central resource available to the sector regulators. The CMA will already be the senior regulator in other areas (mergers, MIRs, non-competition price reviews) and cannot at the same time operate with its resources at the beck and call of the sector regulators. This creates a confused system that lacks clear lines of control and does not achieve efficiency or consistency.

### *Giving the CMA a bigger role in the regulated sectors*

- 7.11 This would be our preferred option in order to produce consistent and effective decision taking, reduce duplication and inefficiency and allow the CMA to operate as an effective national competition regulator. The CMA should have a clear role in all cases and should have the clear right to decide to run or take over anti-trust/competition investigations in

regulated sectors. This would create a consistent relationship between the sector regulators and the CMA across all competition areas.

## **8. CHAPTER 8: REGULATORY REFERENCES AND APPEALS AND OTHER FUNCTIONS OF THE OFT AND CC**

- 8.1 The CC currently has jurisdiction under sector specific legislation, for example to hear licence modification references for regulated entities, Energy Code modification appeals and price determination appeals for regulated utilities. We agree that, following the merger of the OFT and the CC into the single CMA, these functions should be transferred to the CMA.
- 8.2 The processes that the CC is required to follow in carrying out regulatory inquiries vary and the number and variety of processes it is required to follow have increased. Some of these differences may result from the uncoordinated way in which the regimes have developed, resulting in unnecessary regulatory complexity, and we would therefore support proposals aimed at creating model regulatory processes setting out the core requirements for regulatory references and appeals processes.
- 8.3 To the extent that there is limited scope for harmonisation, because of certain EU obligations and due to the nature of the sectoral regimes, we support proposals for a more limited reform under which model processes are introduced setting out the high level procedural requirements that would be expected to apply.

## **9. CHAPTER 9: SCOPE, OBJECTIVES AND GOVERNANCE**

- 9.1 See Chapter 2 above.

## **10. CHAPTER 10: DECISION-MAKING**

### **General comments**

- 10.1 We consider it essential that any reform of decision-making models takes into account the importance of placing accountability for decisions at the highest appropriate level. In particular, there are certain decisions that should be made only by the Executive Board on the recommendation of the CEO and of the mergers/market investigation panel, where relevant. These are: decisions to issue Statements of Objections and final decisions in antitrust cases; phase 2 references and final decisions in market investigations; and final merger decisions.
- 10.2 The Government should ensure that the ultimate decision-maker is close enough to those directly involved in the case to make informed decisions about the substance of the case. This means that if the CMA structure were to comprise a level between CEO and head of case team (e.g. head of mergers, head of markets etc.) then it may be that those people should attend some or all of the hearings in their area and adopt a formal position on decisions in order to be able to make a recommendation to the CEO. Alternatively, these

# Herbert Smith

people should have no role in phase 2 enquiries and case team recommendations should go straight to the CEO.

- 10.3 We believe that, from the outset of the case, there should be greater transparency as to precisely who the ultimate decision-maker is. The opportunity to talk to the decision-maker is of great importance to affected parties, who should be able to engage directly with the decision-maker.
- 10.4 We feel that the value of consistency of case team members, throughout the course of a case, should be mentioned here. This is vital in allowing parties to build up a relationship with the case team and the ultimate decision-maker. While we appreciate that it is not always possible to ensure that team members are available throughout the entire course of a case, we would like to see added emphasis on this point.
- 10.5 We consider it highly desirable that the phase 1 and phase 2 decision-makers remain as separated and independent of each other as is practically possible. The Government should consider, in this context, the possibility that the merger of the OFT and the CC into a single body may result in diminished independence of the phase 2 process due to the inevitability of increased contact between phase 1 and phase 2 decision-makers.
- 10.6 We do not consider that the appeals processes for any of the tools need reform. This view is based on the maintenance of the separation between phase 1 and phase 2 decision-makers. An exception to this is appeals on market investigation remedies to dispose of property held before the commencement of the investigation. We believe there should be the right to a full merits appeal by the CAT in such cases. Should the Government's reforms significantly diminish the independence of phase 2 decision-makers, a review of the appeals process may be necessary and a move to full merits appeal may be preferable. With regards to antitrust cases, we firmly believe that full merits appeal should be retained.

## **Q22 - Arguments on model options and costs and benefits**

### *Mergers and markets*

- 10.7 For both the mergers and markets regimes, we regard the "base-case" models as the most appropriate models put forward, as these models maintain the separation of the phase 1 and phase 2 processes. We consider that this is vital, given the severe consequences of an adverse finding for the parties. A clear structural and cultural divide should be put in place to preserve phase 2 independence within the CMA, as the risk of confirmation bias may increase over time with the likelihood of increased interaction between phase 1 and phase 2 decision-makers.
- 10.8 In light of the importance of the independence of the phase 2 process, we do not think that the proposal that both phase 1 and phase 2 merger decisions be taken by different senior members of the Executive board is appropriate. For the same reasons, we would not support any transfer of phase 1 decision-makers to the phase 2 process for mergers. We note that the arguments for such a transfer may be stronger for market investigations, where there may be more operational benefits.
- 10.9 We are not in favour of the more prosecutorial approach put forward by the Government whereby the phase 2 panel does not act as an investigatory panel but, instead, 'hears' the evidence and merely adjudicates. It is not clear what advantages this change would bring; we cannot see that it would enhance the independence of the phase 2 process and there may

# Herbert Smith

be some disadvantages in terms of time spent adjusting to and refining a very different review method.

## *Antitrust*

- 10.10 For antitrust cases, we again support the Government's "base-case" model. As mentioned above, we firmly believe that a full merits appeal is essential as the imposition of penalties is a quasi-criminal process and it would be contrary to the basic principles of justice if there were no right to a full merits appeal.

## **Q23 - Appropriate composition of decision-making bodies, in particular, the appropriate mix of full-time and part-time members**

### *Mergers and Markets*

- 10.11 Phase 1 decision-makers should be senior members of the Executive Board.
- 10.12 Phase 2 decision-makers should sit in a panel with economic, legal and business expertise provided by people who were not involved in the phase 1 process. We believe that the panellists should be engaged full-time or on a regular part-time basis, in order to enhance consistency in decision-making. There may be a small number of "ad hoc" appointments of people drawn from panels with specific industry expertise where necessary.
- 10.13 We do not see any advantages in changing the current method of appointing panel members. We believe that the use of fixed appointment terms should be retained as they safeguard the independence and quality of the panellists.

## *Antitrust*

- 10.14 Decisions on the conduct of antitrust investigations should be taken by an individual case-leader with an internal appeal process. We note that the OFT is currently trialling such a process.

## **Q24 - Alternative decision-making structures**

### *General suggestions*

- 10.15 We consider that there should be more flexibility to hear dispositive points first in order to make the CMA's processes more focussed and less cumbersome.
- 10.16 There could be more formal requirements to consider whether decisions will be cost-effective.
- 10.17 We consider that there should be a formal obligation to take decisions based only on facts disclosed to the parties (rather than facts not disclosed due to confidentiality requirements). This is particularly important where decisions can entail severe economic consequences for parties that have committed no infringement (as in MIRs) and is a basic requirement for criminal or quasi-criminal processes .

## *Cartel offence*

- 10.18 We consider that it may be appropriate for the new Economic Crime Agency to prosecute potential criminal cartel conduct. This is a complex area and the prosecuting body must have the necessary prosecutorial and case preparation skills.

## 11. CHAPTER 11 - MERGER FEES AND COST RECOVERY

### *Merger fees*

#### **Q 25: Merger fee options**

- 11.1 We do not support proposals for full cost recovery under the UK merger control regime on the basis that this would be far too onerous for the parties and could ultimately have a detrimental effect on the UK economy. Merger control does not exist in the interest of the parties to a merger, but in the wider interest of society and should therefore, at least in part, be covered by public funding.
- 11.2 The level of fees currently proposed (options 1 and 2 under a voluntary regime) are excessive and are much higher than those charged in other jurisdictions around the world. Merger investigations are expensive for the parties involved, regardless of the fees, and excessive merger fees may have the effect of discouraging certain transactions altogether, which is not consistent with the Government's agenda for economic growth.
- 11.3 High fees will also have a disproportionately greater impact on smaller companies, as transactions between large companies are much more likely to be caught under the EUMR regime, which does not impose any merger fees.
- 11.4 Under a mandatory regime, an option which we strongly oppose, the introduction of a flat fee where each notified merger pays the same amount also discriminates against smaller companies and should the Government decide to adopt such a regime we recommend that there should be a differentiation of fees by turnover.

### *Power to reclaim costs of antitrust investigations*

#### **Q 26 - 31: The principle of recovering costs in antitrust investigations**

- 11.5 Fines imposed in an infringement case should more than cover the costs of an investigation and we would therefore resist proposals for the CMA to recover the costs of antitrust investigations from companies that have breached the competition rules. In order to maintain the full benefit of immunity and leniency applications, it would in any case be necessary to ensure that leniency applicants are not faced with the costs of the investigation, as this would represent an important deterrent from making such applications.
- 11.6 If the Government nevertheless decides to adopt a cost recovery approach, the additional element for costs when a fine is imposed should go into the Government's consolidated fund rather than to the competition authority so as to avoid the risk that the authority would be financially incentivised to reach infringement decisions rather than prioritising cases on the merit, impact and assessment of consumer detriment.
- 11.7 Also, if cost recovery is introduced, this should apply on a reciprocal basis and companies subject to an investigation should be able to recover their costs from the Government where the CMA either abandons the investigation, adopts a non-infringement decision or an infringement decision is quashed on appeal.

## **Q 33: CAT recovery of costs**

- 11.8 Under the current regime the CAT has the power to award costs to parties following an appeal but does not have the power to recover its own costs. We do not support proposals to give the CAT powers to recover its own costs as this is likely to act as a deterrent for a number of potential appellants, in particular smaller companies, and would therefore adversely affect access to justice.

**Herbert Smith LLP**

**June 2011**

# Hogan Lovells

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

**RESPONSE OF HOGAN LOVELLS INTERNATIONAL LLP**

**1. PART 1: INTRODUCTION**

- 1.1 This is the response of Hogan Lovells International LLP to the BIS Consultation Paper "*A competition regime for growth: a consultation on options for reform*" (the "Consultation Paper").
- 1.2 We welcome the opportunity to respond to the Consultation Paper. This is particularly so given its wide remit and the variety of options for change that are put forward, a number of which would necessitate a significant overhaul of the current UK competition regime, with potentially far-reaching consequences.
- 1.3 In the light of the expansive scope of the Consultation Paper, we have not sought to address every proposal that is put forward. Rather, we have focused our comments on those areas that are, in our view, of key importance to the future development of the UK regime, and/or those on which we have particular views stemming from our experience as "users" of the current system. This response therefore addresses the following main areas<sup>1</sup>:
- (a) the creation of a single Competition and Markets Authority (Part 2);
  - (b) the antitrust regime (Part 3);
  - (c) the merger regime (Part 4), and
  - (d) the markets regime (Part 5).

**THE NEED FOR A WELL-FOUNDED CASE FOR CHANGE**

- 1.4 By way of preliminary observation we would, above all, caution against an approach of "change for change's sake" in the context of the UK competition regime. In other words, interference with the current regime should only be considered where it is justified by clear and significant benefits, which more than offset the upheaval caused by the implementation of the measures in question.
- 1.5 This is a particularly pertinent consideration in relation to the proposal to create a single Competition and Markets Authority ("CMA"). As will become apparent from the detailed comments below, our experience suggests that the current two institution system generally works well in the case of the merger and markets regimes (with the inevitable caveat that there is always room for some improvement). In relation to antitrust enforcement under the Competition Act 1998 ("CA98"), which is currently within the sole ambit of the OFT, we agree that many cases have taken too long, and that there have been too few decisions overall. That said, it needs to be borne in mind both that the antitrust regime is still relatively young, and that measures aimed at improving its

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<sup>1</sup> Where relevant, these sections also include comments on issues that are raised in separate chapters of the Consultation Paper (for example, cost recovery and merger fees).

operation have been (and continue to be) implemented.<sup>2</sup> It is, moreover, far from clear that a single CMA is a pre-requisite to further improvement.

- 1.6 It would, therefore, be regrettable if the UK's largely well-functioning competition regime were to be radically overhauled without a clear need, and without full appreciation of the potential adverse consequences in terms of disruption and loss of momentum.

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<sup>2</sup> See Philip Collins' speech on 2 March 2011 introducing the Competition Act procedures guidance, in which he observed that *"The Competition Act 1998 has now been in force for just over a decade. This may seem a long time, but I suggest that for a major piece of legislation that fundamentally changed the UK competition regime, it is little more than a period of 'bedding-in'".*

## 2. PART 2: CREATION OF A SINGLE COMPETITION AND MARKETS AUTHORITY

### OVERVIEW

2.1 The Consultation Paper fails to put forward a compelling case for the creation of a single CMA. This is so regardless of whether the proposal is considered from the perspective of furthering Government's overarching aims, or from the perspective of the detailed proposals for change that are put forward in respect of the markets, merger and antitrust regimes. Moreover, when (i) the significant disruption involved in the creation of the CMA, and (ii) the fact that most, if not all, of the changes proposed could be implemented within the current structure are also taken into account, the balance falls very clearly in favour of the maintenance of the two institution system.

### WILL A SINGLE CMA FURTHER GOVERNMENT POLICY OBJECTIVES?

2.2 At their highest level, the proposals put forward in the Consultation Paper are intended to further Government's overarching objective of securing competitive markets and promoting productivity, innovation and economic growth. Against this background, the Consultation Paper proposals have three expressed aims: first, to improve the robustness of decisions and strengthen the regime; secondly, to support competition authorities in taking forward high impact cases; and thirdly, to improve speed and predictability for business.<sup>3</sup>

2.3 These are all positive and laudable aims, and, as such, are to be supported. Our concerns arise in relation to the perceived pivotal importance of a single CMA to achieving those aims.

2.4 The Consultation Paper states that the creation of a single CMA is "*central to the vision of an improved competition regime*". In particular, it is claimed that the CMA will (i) provide increased flexibility, (ii) enable more efficient use of resource, (iii) and create a single powerful advocate for competition, in Europe and internationally.<sup>4</sup>

2.5 At the same time, however - and importantly given the expansive remit of the Consultation Paper - Government stresses that it intends to focus on those reforms:

*"which can be implemented as soon as possible and without significant uncertainty and risks to the momentum and effectiveness of the regime."*<sup>5</sup>

2.6 Before even considering the necessity of a single CMA in terms of the detailed changes that are proposed, a clear tension therefore arises at a policy level between, on the one hand, the expressed "*central importance*" of a single CMA to the "*vision*", and, on the other, the competing objective of implementing change swiftly and with as little disruption as possible. There can be no doubt that the extent of reorganisation and upheaval involved over a lengthy period in the creation of the CMA will inevitably cause significant disruption and uncertainty both to the personnel of the authorities involved (not least, to the authorities' ability to recruit high-calibre staff), and to "users" of the regime in the form of business and their advisers.

2.7 It is not evident that this substantial downside is outweighed by the perceived "necessity" of a single CMA. On the contrary, it is far from clear that the creation of a single CMA is a pre-requisite to achieving the desired improvements to the current regime at all. In some cases, we would even suggest that a single CMA would risk undermining areas that are currently operating effectively. Three illustrative examples are set out below.

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<sup>3</sup> Consultation Paper, Executive Summary.

<sup>4</sup> Consultation Paper, paragraph 1.10.

<sup>5</sup> Consultation Paper, Executive Summary (emphasis added).

- 2.8 First, the general thrust of the Consultation Paper is in favour of retaining the two phase approach to mergers and markets investigations, recognising that these are widely regarded as key positive features of the UK regime ("*the current regime is noted for the objectivity enshrined in the two phase system in markets and mergers*"<sup>6</sup>). In this context - and accepting that there is some room for streamlining the current system<sup>7</sup> - it is counter-intuitive to promote the creation of a single CMA within which a (currently largely effective) two phase system will need to be "recreated", where such recreation clearly risks lessening the independence and objectivity of the current system.<sup>8</sup> It is notable that in relation to antitrust enforcement, proposals are put forward that would involve the *creation* of a two phase-type administrative procedure - a further recognition of the benefits of this structure. Whilst we are not arguing that a two phase system cannot be implemented effectively within a single authority, we do question the sense in breaking up and recreating the current structure in the manner proposed.
- 2.9 Secondly, whilst we recognise that the CC's "reactive" role in merger and markets investigations may cause difficulties in terms of the efficient and flexible allocation of resource, this is an area that could largely be addressed through improved liaison between the OFT and CC, and use of secondments - indeed, a number of suggestions in this regard are put forward in the Consultation Paper itself, in considering how the relationship between the CMA and sectoral regulators could best function.<sup>9</sup>
- 2.10 Thirdly, the Consultation Paper itself notes that the UK regime is "world class" and highly regarded internationally, with both the OFT and the CC recognised by *Global Competition Review* as being among the top five agencies worldwide.<sup>10</sup> It is also widely recognised that the UK authorities are frequently in the vanguard of international policy debate.<sup>11</sup> Against this background, there appears to be no clear need to form a single CMA to act as a stronger competition advocate internationally. In the domestic context, where we agree that the OFT's competition advocacy role would benefit from strengthening, the most obvious way achieving this would be to slim down and refocus the currently disparate range of responsibilities of the OFT - a move which is already under consideration, and which does not require the creation of a single CMA.<sup>12</sup>
- 2.11 We do not, therefore, favour the creation of a single CMA. This measure would be, at best, neutral and, at worst, counter-productive in terms of achieving Government's desired aims. Most aspects of the UK regime currently function effectively - albeit with room for incremental improvement - and would not benefit in any obvious sense from being brought under the auspices of a single authority. The creation of the CMA is not, in our view, "*central to the vision*" of an improved UK competition regime. The Consultation Paper does not argue convincingly otherwise.<sup>13</sup>

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<sup>6</sup> Consultation Paper, paragraph 10.2.

<sup>7</sup> See Parts 4 and 5 for detailed comments on these areas.

<sup>8</sup> It is instructive to note that when a proposed merger of the OFT and CC was considered in 1997, an eminent review group headed by Lord Borrie recommended the maintenance of the two tier structure, noting the desirability (inter alia) of the "*separate, independent, adjudicatory*" role of the (then) MMC. See Borrie "*Lawyers, legislators and lobbyists - the making of the Competition Act 1998*", *Journal of Business Law* 1999, page 205.

<sup>9</sup> Consultation Paper, Chapter 7.

<sup>10</sup> Consultation Paper, paragraph 1.4.

<sup>11</sup> See, for example, the major role played by the OFT in advocating a stronger system for private enforcement of competition law within the EU.

<sup>12</sup> See Consultation Paper, paragraphs 9.30 and 9.31 in relation to the proposal to transfer the OFT's consumer enforcement functions to Trading Standards authorities.

<sup>13</sup> In setting out the detailed proposals for reform in relation to the antitrust, merger and markets regimes, the Consultation Paper assumes that they will operate under the auspices of a single CMA. The comments set out in Parts 3 to 5 of this response therefore make the same assumption, albeit that (as set out in this Part) we consider that most, if not all, of the changes proposed could be implemented within the current system.

### 3. PART 3: A STRONGER ANTITRUST REGIME

#### OVERVIEW

- 3.1 There is considerable room for improvement to the present system of antitrust enforcement. As the Consultation Paper recognises, antitrust investigations often take too long, particularly at the investigation/decision stage. Reform to the system is both timely and necessary. However, that reform need not be revolutionary. There is much to be valued in the present system, and any reforms should therefore be focused on those elements of the system that do not work, with those elements of the system that do work well being preserved and built upon.
- 3.2 In considering any possible changes to the current system, it is important to identify those areas that genuinely require improvement. In this context, it is clear that the major delays in antitrust investigations have largely occurred at the administrative stage (i.e. the OFT stage), rather than at the judicial stage. Any changes to the system aimed at remedying those delays and improving the process should therefore be principally aimed at the administrative stage of the process.
- 3.3 At the same time, in seeking to make antitrust enforcement more efficient at the administrative stage, it is of key importance that the procedural requirements are not "relaxed" at the expense of the robustness of antitrust investigations, or the rights of defence of those under investigation.
- 3.4 Moreover, one element of the current system of particular value is the full merits jurisdiction of the Competition Appeal Tribunal ("CAT"). The ability to appeal an antitrust decision on the merits to an independent, separate, tribunal is an important safeguard which is valued by those under investigation. Any proposal that would remove or otherwise limit this safeguard should be rejected.
- 3.5 For these reasons, of the three options for potential reform that are put forward in the Consultation Paper, Option 1 is preferred, as it captures enforcement experience gained to date, whilst providing scope for incremental improvements to the current system. There is much perceived merit in Option 3, although the radical nature of the changes required are likely to inhibit antitrust enforcement in the short to medium term, such that Option 3 is not likely to meet the stated aim of increasing the throughput of cases. Option 2 is the least likely to improve antitrust enforcement: on the contrary, it is likely to result in significant further delays to antitrust enforcement. It also removes one of the key assets of the present system (i.e. a full merits review by an independent tribunal).
- 3.6 Each of these options is considered in further detail below. We then go on to address a number of the subsidiary issues that have been raised.

#### OPTIONS FOR STRENGTHENING THE ANTITRUST REGIME

##### *Option 1 – Retain and enhance the OFT's existing procedures*

- 3.7 The OFT has, since March 2000, gained significant enforcement experience. Whilst there is still room for improvement, the CMA should be given an opportunity to absorb and build on that experience.
- 3.8 In this context, the improvements that the OFT has recently put in place to streamline its procedures are generally welcome. In particular, an increased willingness to narrow the scope of its investigations at an earlier stage, and a more sophisticated approach to information-gathering, are positive developments that should streamline the investigative process. Greater transparency as to the identity and role of the decision-maker in any given case is also a particularly welcome development.

- 3.9 However, the procedural improvements introduced by the OFT, including those contained in the recently published procedures guidance<sup>14</sup> have not been fully tested. Before any significant changes to the antitrust enforcement regime are considered, it would be prudent to allow those improvements to the current system be fully implemented, tested and assessed. This will require the CMA at the very least to be cognisant of the OFT's past experience, and to retain an open mind as to further improvements.
- 3.10 There are also other immediate improvements that could be made to the present system of enforcement. For example:
- (a) There should be greater engagement between the CMA and those under investigation on the substance of a case ahead of the Statement of Objections ("SO"). The SO stage should not be the first time that a party becomes aware of the nature of the substance of the CMA's case. Earlier engagement could significantly reduce the length of an investigation. It could also lead to settlement ahead of the SO, or to abandonment of the whole or part of the case prior to the SO.
  - (b) There should be greater willingness on the part of the CMA to abandon investigations, irrespective of how long a particular matter has been investigated. Too often, the amount of time and resource that the OFT has devoted to an investigation appears to have prevented the OFT from deciding to drop a case at a later stage.
  - (c) The CMA should develop a clear, transparent and unambiguous approach to early resolution. Clear guidance on this issue could lead to more cases being settled at an earlier stage.

*Option 2 – A new administrative approach*

- 3.11 The proposed changes to the administrative approach outlined at Option 2 would not improve the efficiency of the antitrust regime. On the contrary, those changes are likely to lead to significant further delays to antitrust investigations.
- 3.12 Furthermore, the proposal to remove the right to have the full merits of a case heard by the CAT would constitute an unjustified removal of an important, and highly valued, safeguard.

*Internal Tribunal*

- 3.13 The main proposal is for an "Internal Tribunal" to be created within the CMA to adjudicate on cases following a phase I decision, with the phase I investigation including the process up to the point of issue of the SO. Any appeals from the Internal Tribunal would be by way of judicial review only.
- 3.14 It is possible that such an innovation may reduce the scope (and therefore the length) of appeals before the CAT. However, it is unlikely that the creation of an Internal Tribunal will result in the potential procedural efficiencies outlined at paragraph 5.35 of the Consultation Paper, but will instead lead to lengthy delays and a diminution in the protection afforded to parties under investigation.
- 3.15 In particular:
- (a) One of the key reasons why antitrust investigations are subject to delays under the present system is because the OFT fails to engage effectively with parties on the substance of its case until it issues an SO. In many cases, the OFT's case

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<sup>14</sup> A guide to the OFT's investigation procedures in competition cases, March 2011

has been dropped, narrowed or otherwise changed once it has received responses to an SO, i.e. once that process of engagement has taken place.

- (b) As presently formulated, the introduction of an Internal Tribunal at the SO stage would put the parties and the CMA case team "in combat" at an earlier stage of the process. This is likely to result in the case team's position becoming entrenched ahead of any engagement with the parties on substantive issues, and reduce the scope for effective cooperation.
- (c) Irrespective of the safeguards put in place, the Internal Tribunal will lack the necessary appearance of independence if it forms part of the CMA. It is for this reason that the independent CAT replaced the Competition Commission Appeal Tribunal when it was given review functions in relation to decisions of the CC made under the Enterprise Act 2002 ("EA02").
- (d) As recognised in the Consultation Paper<sup>15</sup>, the nature and seriousness of the issues raised in antitrust cases are likely to result in an intensive form of judicial review by the CAT (see, for example, the intensity of the review conducted by the CAT in the context of judicial reviews of merger and market investigation decisions under the EA02). That is likely to be the case whether or not the applicable standard for review is the European standard applied by the General Court in EU cases. As a result, the lengths of cases before the CAT are unlikely to be significantly reduced.

3.16 Furthermore, although the Consultation Paper recognises the need for any Internal Tribunal procedure to comply with Article 6 ECHR (in the event of a move away from full merits review by the CAT), and suggests a number of safeguards aimed at ensuring the independence and impartiality of the Tribunal, no further details are provided.<sup>16</sup> The vagueness of the suggestions put forward does not allow for a proper assessment of whether the Internal Tribunal would, in practice, be Article 6 compliant. Further details of the precise form of those safeguards will therefore be necessary to allow informed consideration of this point.

#### *Phase I and phase II investigations*

3.17 It is also suggested that decision-making in antitrust cases could follow the same process as phase II merger or market investigations.<sup>17</sup> It is understood that this would involve the following:

- (a) An investigation would be initiated (i.e. the CMA would decide that it would have "*reasonable grounds for suspecting*" that an infringement has been committed, in accordance with section 25 CA98).
- (b) The case team would conduct a preliminary investigation (phase I) and decide whether the case should be referred to a panel of independent office holders for a phase II investigation (where there is "*reasonable belief*" that an infringement has been committed).<sup>18</sup> Presumably, as in merger and market investigation cases: (i) the case team would engage with parties on substantive issues before any such decision is made; and (ii) a decision whether or not to refer a case to a phase II review would be appealable to the CAT both by parties and third parties.
- (c) The panel of independent office holders would then conduct a more detailed phase II investigation. Before reaching a final decision, the CMA would

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<sup>15</sup> Consultation Paper, paragraph 5.35.

<sup>16</sup> Consultation Paper, paragraph 5.33.

<sup>17</sup> Consultation Paper, paragraphs 5.38 and 5.39.

<sup>18</sup> Consultation Paper, paragraph 5.38.

presumably be required to put the totality of its case to the parties, and give the parties an opportunity to make detailed representations, before a final decision is made.

- (d) A final decision would be taken, which would be appealable (on either a full merits or judicial review basis) to the CAT. (For the reasons set out at paragraph 3.19 below, it is submitted that a full merits review would be necessary if this option were to be followed.)

3.18 Although any mechanism whereby weak or unsuitable cases are "weeded out" at an early stage would be welcomed, it is apparent that this proposal would not streamline antitrust enforcement. Indeed it would likely lead to lengthier, more protracted, investigations. We therefore agree with the suggestion<sup>19</sup> that this proposal would in fact be more resource intensive than the current process.

3.19 We also consider that it would not provide sufficient separation between investigation/prosecution and decision making to allow appeal by way of judicial review. That is particularly the case as the bulk of any investigation would take place at the phase II stage. The decision to refer a case to phase II would be made on the basis of "a reasonable belief", which is: (i) significantly below the "strong and compelling" standard currently required to make an infringement finding<sup>20</sup>; but (ii) similar to the statutory "reasonable grounds for suspecting" threshold that must be satisfied before an investigation is initiated. As a result, the bulk of an investigation is likely to be conducted at the phase II stage (as it is in merger and market investigations conducted by the CC under the EA02): any appeal should therefore be a full merits appeal against the findings of the panel.

#### *Option 3 – A prosecutorial system*

3.20 There would, *prima facie*, be considerable merit in adopting a prosecutorial system of antitrust enforcement. In particular, such a system would:

- (a) avoid duplication;
- (b) mean that the CMA would not have the dual role of prosecutor and adjudicator;
- (c) subject the CMA's case to full, independent, judicial scrutiny at an early stage (assuming the CMA is able to bring prosecutions within a reasonable timeframe);
- (d) allow those prosecuted to recover from the OFT the costs of a failed prosecution (whereas under the present system the OFT can investigate a case for many years, at considerable expense to those under investigation, without any reference to the cost involved); and
- (e) be likely to result in an greater emphasis on early settlements.

3.21 However, it is not clear that the introduction of such a system (which would require substantial legislative change) would bring any improvements in the short to medium term. Moreover, in practical terms, the introduction of a prosecutorial system would result in the enforcement experience garnered to date being largely lost, and in particular would:

- (a) require a "sea-change" in the enforcement of antitrust law, which would inevitably take time to become fully established;
- (b) require the appointment of specialist prosecutors to replace the current body of administrative case handlers; and

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<sup>19</sup> Consultation Paper, paragraph 5.39.

<sup>20</sup> See *Napp* [2002] CAT 1.

- (c) require significant modifications to the approach taken to date on issues such as leniency and early resolution.

- 3.22 It is also likely that a prosecutorial system would result in large, lengthy (and therefore expensive) trials, and it is unlikely that a prosecutorial system would result in a higher throughput of cases, at least initially. The CMA would have to devote significant resources before launching a prosecution, which could act as a disincentive to bring cases, particularly if allied to a shortage of specialist expertise and/or a perception that the CMA would be "starting from scratch" in dealing with a new model of enforcement.
- 3.23 Having spent 11 years building up experience in relation to one system, it would be regrettable if that system were to be replaced with something so radically different that the value of that experience would be lost. Therefore, although there is merit to Option 3, it is considered that in the context of the current CA98 regime, Option 1 should be preferred over Options 2 and 3.

#### **OTHER PROPOSALS**

- 3.24 We briefly address below a number of the additional proposals raised in the Consultation Paper which are of particular concern.

##### *Timetables*

- 3.25 The Consultation Paper seeks views on the scope for introducing statutory or administrative deadlines for antitrust cases.<sup>21</sup>
- 3.26 Effective timetables would be expected to result in cases being dealt with at a faster pace than has been experienced to date. They could also potentially act as a "discipline" on case teams, particularly during the early stages of investigations, in terms, for example, of delineation of scope, to ensure that investigations are limited to what is manageable.
- 3.27 In practice, however, it is not clear that meaningful timetables could be introduced in antitrust cases.
- 3.28 In particular, any timetables would have to be sufficiently flexible to accommodate the great variation in the types and complexity of antitrust cases. On the one hand (for example) there are straightforward cases involving clear evidence, clear law and leniency applications, and on the other hand there are complex factual cases where the law is not clear and the parties vigorously contest liability. Any statutory or administrative timetables would have to accommodate both types of cases - the need for this flexibility may render statutory timetables unworkable or meaningless in practice.
- 3.29 Strict timetables would also give rise to a risk that the CMA would impose unreasonably short deadlines on those under investigation to (for example) respond to a detailed information request to compensate for internal delays.

##### *Offences under CA98 and EA2002 for non-compliance*

- 3.30 The Consultation Paper proposes that legislation be amended to allow the CMA to impose financial penalties on parties who do not comply with the CMA's investigatory powers.<sup>22</sup> We do not agree that the CMA should be given such powers.
- 3.31 No evidence has been put forward to suggest that the OFT has any particular difficulty in getting parties to comply with its investigatory powers. We are aware that there have been occasions where parties have not been able to comply with (for example) a request

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<sup>21</sup> Consultation Paper, paragraph 5.48.

<sup>22</sup> Consultation Paper, paragraph 5.55.

for information within the given time period, which has given rise to conflict with the OFT. However, such conflicts have often been the result of unfocused information requests: the improvements recently introduced by the OFT (for example, prior discussions with parties about the scope of requests) should help to avoid such conflicts going forward.

- 3.32 Furthermore, although the OFT has generally adopted a sensible approach to the setting of deadlines for compliance with its investigatory powers, the OFT has on occasion acted in an arbitrary way and imposed impossible or unreasonable deadlines. If daily penalty payments were to be introduced, they should be accompanied by safeguards similar to those accorded to parties at the EU level. In particular, the OFT should be required to issue a formal, reasoned decision imposing a daily penalty, and that decision should be fully appealable to the CAT.

*Cost recovery by the CMA*

- 3.33 The Consultation Paper also raises the question of whether the CMA should be able to recover the costs of an investigation from a party found to have infringed competition law.<sup>23</sup> We would regard any such move as unfair, unjust and unnecessary.

- 3.34 In particular:

- (a) Such a development is likely, directly or indirectly, to skew the incentives of the CMA to pursue investigations that it would otherwise have dropped. That would be the case irrespective of whether recovered costs went directly to the Government's consolidated fund, rather than the CMA directly. (If, for example, the CMA was considering whether to drop an intensive and lengthy investigation, it is conceivable that it would factor the likely reaction of the Treasury into its deliberations.)
- (b) There is no reason why antitrust investigations should be treated differently to any other administrative investigations in this respect. It is not clear why a party found to have infringed competition law should be required to pay the costs of a lengthy (and possibly unreasonably drawn out) investigation.
- (c) Such a move would effectively amount to double recovery. The OFT imposes significant fines on parties found to have infringed one of the CA98 prohibitions. Those fines, once paid, go to the consolidated fund, and more than cover the costs of the OFT's antitrust functions. By way of illustration, in April 2010 the OFT imposed fines of £225 million following its decision in the *Tobacco* case.<sup>24</sup> Given the OFT's estimated spend on antitrust investigations of £11.7 million in 2008-2009, if upheld, those fines would fund antitrust investigations for almost 20 years.
- (d) A distinction would have to be made between cases dealing with egregious infringements of competition law, and those cases where there is genuine legal uncertainty. In the latter case, it should not be for parties under investigation to fund "test cases" brought by the OFT. In practice, drawing such distinctions is unlikely to be workable.

- 3.35 If cost recovery were to be introduced, it should at the very least operate in both directions. Parties under investigation incur considerable costs in responding to requests for information or SOs. In a number of cases, the OFT has only abandoned its case at a late stage, even though it could have dropped a case much earlier, by which time those under investigation had incurred considerable expense in clearing their names. If the CMA is able to recover the costs of successful investigations, parties subject to failed

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<sup>23</sup> Consultation Paper, paragraphs 11.16 to 11.20.

<sup>24</sup> See OFT press release 39/10, 16 April 2010.

investigations should be able to recover their costs also, either from the CMA or (if appropriate) from complainants.

*Cost recovery by the CAT*

3.36 It is further suggested that the CAT should be able to recover its costs, "*except where the interests of justice dictate the costs should be set aside*".<sup>25</sup> Again, we disagree with any such move:

- (a) Parties under investigation have a legitimate right to appeal infringement decisions to the CAT. No steps should be taken that would disincentivise parties from exercising that legitimate right.
- (b) The costs of bringing an appeal against a decision of the OFT are already expensive. The risk of a costs award that covers the cost of the CAT could act as a disincentive to potential appellants to exercise their legitimate right to bring an appeal, irrespective of the merits of their case.
- (c) There would be a real risk that the CAT would not recover costs from the CMA, on the basis that it would not be in the interests of justice to do so.
- (d) The levels of fines imposed by the OFT are sufficiently high to cover the costs of all aspects of the antitrust enforcement regime (see paragraph 3.34 above). It is not necessary to impose further burdens on parties under investigation in order to fund antitrust enforcement.

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<sup>25</sup> Consultation Paper, paragraphs 11.51 to 11.56.

#### 4. PART 4: A STRONGER MERGER REGIME

##### OVERVIEW

- 4.1 Chapter 4 of the Consultation Paper begins by recognising that the UK merger regime:
- (a) was ranked second in the world;
  - (b) has significant strengths; and
  - (c) generated overall general benefits in recent years of £310m.
- 4.2 However, the remainder of chapter 4 goes on to question almost every aspect of that merger regime. In particular it outlines two key concerns on the part of Government:
- (a) **the CMA having to unpick completed mergers** - we consider that this is overstated and in any case addressable by measures to limit implementation of completed mergers rather than introduction of a system of mandatory notification with extreme cost implications;
  - (b) **the CMA not being aware of mergers which might have led to a substantial lessening of competition ("SLC")** - again, this appears to be a minor issue and none of the proposed alternatives appears likely to address this in any significant way, unless by an unwarranted expansion to require notification of even very small transactions.
- 4.3 We agree with the positive assessment of the UK merger regime, and do not consider that substantial reform of the UK merger control regime is necessary or desirable. For this reason, we consider that the existing voluntary regime should be retained as the basic structure for UK merger control, rather than replacing it with a mandatory or hybrid regime.

##### IMPROVING THE VOLUNTARY NOTIFICATION REGIME

- 4.4 The Consultation Paper notes that a voluntary regime may mean that mergers which might have led to an SLC will not be reviewed. We note the Deloitte study cited<sup>26</sup> which suggests that there may be a relatively significant number of such cases, but that the overall impact of these cases is unlikely to be significant. From our own experience, we consider that the Deloitte study, if anything, over-estimates the number of such cases that there are and the impact which they may have.
- 4.5 Even the best-designed merger notification regime will miss some transactions. We consider that the Consultation Paper places too much weight on trying to avoid such an inevitable residue of type II errors, without proper consideration of cost or proportionality.
- 4.6 Against this background and noting the overall positive outcome of the UK regime, our preference would be to maintain the voluntary regime with some of the additional safeguards to strengthen interim measures.<sup>27</sup> We would also welcome some of the proposals to tighten up timing of merger reviews.

##### *Implementation safeguards*

- 4.7 We would be in favour of either of the options to prevent implementation of completed mergers at phase I.<sup>28</sup> These are either an automatic suspension of implementation once the OFT begins investigation of a completed merger or powers to allow the OFT to act quickly on its discretion to prevent such implementation.

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<sup>26</sup> Consultation Paper, paragraph 4.4.

<sup>27</sup> Consultation Paper, paragraphs 4.12 to 4.16.

<sup>28</sup> Consultation Paper, paragraph 4.13.

- 4.8 Our preference would be for the latter option. It seems unlikely that the very short delay which might arise in that option compared to an automatic ban on implementation would lead to any significant level of further integration. It would also leave the OFT with the continued flexibility to allow integration in some completed transactions, for example, where it was highly unlikely that any SLC would arise or where there was a very clear remedy which would exist if such an SLC was found to arise.
- 4.9 We note the suggestion that the single CMA might be able to require reversal of an action which has already taken place.<sup>29</sup> Where this is an action which can be reversed simply within the acquiring party, this seems appropriate and probably not very different to the sort of action which the OFT can currently require via undertaking or order. If this instead implies that the CMA would be able to take actions which would impact upon the rights of third parties (for example, to require a seller of an enterprise to re-acquire that enterprise for an interim period), this seems wholly inappropriate.
- 4.10 Finally, we agree with the principle of the suggestion that parties breaching interim undertakings or orders should be subject to financial penalties, where such a breach takes place intentionally or negligently.<sup>30</sup> However, the suggestion in the Consultation Paper is that such penalties should be of up to 10% of the aggregate turnover of the enterprises concerned. This would put the potential penalties into the same category as the worst cartel offences. Notwithstanding that individual penalties imposed might well be below such a maximum level (and we would very much hope that the CMA would issue guidelines to make this clear), such a maximum level seems inappropriate and would send the wrong message about the relative undesirability of the two types of infringement. We would suggest that a cap at 1% or indeed a substantially lower monetary amount would be sensible, particularly since, if there is in fact harm to any party as a result of such an infringement, that party would (and should) remain free to seek civil damages.

#### *Timing proposals*

- 4.11 The Consultation Paper proposes that the CMA would, in phase I, have compulsory powers to gather information from main parties and third parties. This would be backed up by financial penalties for failure to comply, with accompanying powers to stop the clock on a transaction at phase I where the main parties do not comply with an information request.
- 4.12 All of this seems desirable in either enhancing the existing regime or in any mandatory or hybrid alternative. It would bring the OFT's powers in line with those of the CC today at phase II and with those of most merger control authorities - notably the European Commission - in their phase I investigations.
- 4.13 The Consultation Paper proposes that even in a voluntary regime the 40 working day phase I deadline would move from being an administrative target to a binding statutory deadline.<sup>31</sup> We do not agree with this proposal. There is already a statutory deadline within one UK merger notification option, the formal merger notice. This process is little used in any situation which may raise real competition issues and provisions to extend its deadline are routinely applied. The main concern is that a strict deadline, taken with the phase I reference test, means that if doubt remains as the deadline expires then a reference would have to be made. This is also an issue which arises fairly commonly in other jurisdictions with binding phase I deadlines. Unnecessary phase II cases are better avoided by allowing flexibility to add a few days to phase I if needed to avoid months of further investigation.

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<sup>29</sup> Consultation Paper, paragraph 4.15.

<sup>30</sup> Consultation Paper, paragraph 4.16.

<sup>31</sup> Consultation Paper, paragraph 4.43.

- 4.14 The Consultation Paper suggests more significant changes to timing in phase II<sup>32</sup>:
- (a) **Introduction of a deadline for implementation of phase II remedies.** In principle this seems sensible, although we would urge further consultation on the detail to avoid either excessive remedies being imposed or gaming by parties as the deadline approaches.
  - (b) **A power for the clock to be stopped for 3 weeks before a phase II process begins in the case of anticipated mergers, for the parties to consider whether they actually wish to proceed with phase II.** This seems a positive idea given that for many deals referred to phase II are abandoned. We would suggest that further consultation would be required on how this period of pause could be triggered: it seems that the trigger must lie with the parties to the transaction rather than with the CMA; however, the time of a reference can be a testing one for relations between parties to a transaction and it would not seem appropriate for such a period to be used eg to extend the overall time to implement a transaction so that implementation within an agreed timetable became impossible.
  - (c) **Remedies could be accepted in phase II without the need for a formal finding of an SLC.** This might have real attractions in some specific factual scenarios. However, most of these are scenarios where a party will have had a "near miss" in offering remedies at phase I. In general, it would seem preferable in such cases to deal with them by a more flexible approach to reference, for example by a relaxation of the one-shot nature of phase I remedies and a broader application of the near miss concept to such remedies, rather than moving into phase II at all. It seems likely that any such remedies, even if considered by a single CMA team at phases I and II, would need to be extremely comprehensive to ensure that they covered not only the concerns that arose in phase I but also those which might have later arisen during phase II. This raises what is both legally and economically an unattractive prospect of parties offering remedies which are far in excess of those needed to address any SLC which may in fact arise as a result of the concentration and potentially destroying some of the pro-competitive reasons for the transaction in the first place.

#### *Jurisdictional thresholds*

- 4.15 The Consultation Paper discusses whether, in a voluntary notification regime or a hybrid regime, the CMA's jurisdiction should be extended to all mergers, not just those meeting the share of supply test (and turnover test).<sup>33</sup>
- 4.16 We would suggest that the CMA would be better to stick to the existing tests. Any horizontal merger which is likely to generate an SLC will almost certainly be caught by the share of supply test. Applying that logic the other way, while the share of supply test can be applied very flexibly, it provides some level of safe harbour from OFT review for parties to small transactions which are very unlikely to produce any anti-competitive effect. UK advisors are well experienced in advising on whether parties could realistically rely upon such a safe harbour.
- 4.17 There are of course non-horizontal mergers which could in theory produce an SLC and which would not meet the share of supply test but these are rare. It is particularly unlikely that such a merger would not also meet the turnover test (or other mandatory notification thresholds in a hybrid notification regime).

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<sup>32</sup> Consultation Paper, paragraphs 4.46, and 4.50 to 4.52.

<sup>33</sup> Consultation Paper, paragraphs 4.38 and 4.39.

- 4.18 Separately, we note that for any non-mandatory notification the Government proposes to retain the same lowest level of control, ie material influence, in considering whether a qualifying merger arises.<sup>34</sup> We agree with this approach. Again, UK advisers are well able to advise on whether a particular set of circumstances gives rise to material influence over a target business.
- 4.19 The Consultation Paper considers replacing the existing *de minimis* exception to the OFT's duty to refer with a "small merger" exemption from the merger control rules, in either the existing or hybrid systems.<sup>35</sup> As a matter of principle, this is welcome. It would give certainty to parties to such small mergers, which are very unlikely to cause a SLC.
- 4.20 The small merger threshold currently proposed is the same as the suggested filing thresholds under the mandatory option, ie target turnover of no more than £5m in the UK and worldwide turnover of the acquirer of no more than £10m worldwide. We would suggest that it would be preferable to adopt the simpler threshold of target turnover of no more than £5m in the UK, as proposed by the CBI.<sup>36</sup> Small mergers should be excluded as a matter of policy because they are unlikely to lead to a SLC, not because the parties involved are small businesses. As described below, the £10 million acquirer turnover threshold has no direct relationship to the chance of an SLC; the statistic quoted in paragraph 4.41 that there is less chance of a SLC if this threshold is added just reflects cutting down the sample size and would be replicated by any arbitrary threshold, for example, only considering transactions where the acquirer's name began with a letter in the first half of the alphabet.

#### **OPTIONS FOR A MANDATORY NOTIFICATION REGIME**

- 4.21 The Consultation Paper identifies as the main advantages of the mandatory notification regime an ability to identify problematic mergers and to reduce the proportion of completed cases investigated.<sup>37</sup> As noted above, it does not in fact appear that there is a significant problem with failure to identify problematic mergers. Further, we consider that any issue that there might be with dealing with completed mergers could be more proportionately dealt with by the sort of changes to interim measures proposed.
- 4.22 Set against these possible benefits, the Consultation Paper notes the regulatory and cost burdens which a mandatory regime would impose upon business and Government.
- 4.23 In outline, we consider that the options put forward for a mandatory regime (or a hybrid regime) substantially underestimate the costs involved and overestimate the benefits involved. We consider it likely that any mandatory/hybrid regime would involve a many-fold increase in the number of notifications which the OFT would receive and that the very large majority of such notifications would be of transactions which raised no competition issue whatsoever and came nowhere close to the OFT's reference test of a realistic prospect of an SLC.
- 4.24 The fact that costs to Government could be passed on to business, for example, by higher merger fees, does not change this analysis. There is no reason that regulation should be expanded beyond the necessary level, whoever bears the costs.
- 4.25 Our view is also that direct costs to business are downplayed. The costs set out in Table 16 to the Impact Assessment accompanying the Consultation Paper - though barely dealt with in the main document - are at the low end of what might really be expected.
- 4.26 Much is made in the Consultation Paper of the limits to such costs which could be achieved by use of a short form notification process. Our experience of the EU Merger

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<sup>34</sup> Consultation Paper, paragraph 4.36.

<sup>35</sup> Consultation Paper, paragraphs 4.40 to 4.42.

<sup>36</sup> Consultation Paper, paragraph 4.41.

<sup>37</sup> Consultation Paper, paragraph 4.18.

Regulation suggests that such savings would not be significant, at least as regards notifying parties. A notification under the Merger Regulation using the short form notification process is not intrinsically quicker or easier than using the long form of the Form CO. This is in large part because the Commission - reasonably - requires a substantial amount of information just to be sure that a given transaction falls within the short form notification criteria. The savings to the Commission are largely administrative: for example, not needing to produce a reasoned decision and not needing to conduct market tests with third parties.

- 4.27 A short form process could be run differently, for example a merger found to be eligible for short form notification could be automatically cleared at that point. This would certainly save costs both of the authority and the notifying parties. However, inevitably, such a system would mean that at least a small number of mergers which would otherwise have been reviewed and found to potentially lead to an SLC would instead be cleared. This is at odds with the hyper-vigilance suggested in the Consultation Paper for such marginal cases and we assume this is not on the table for any UK mandatory regime.
- 4.28 The Consultation Paper discusses whether or not a mandatory/hybrid regime would include a suspensory obligation and penalties for parties which infringe that obligation.<sup>38</sup> We cannot see such a regime working without such provisions. It is however worth noting that these elements of a mandatory regime are not costless: suspension of completion delays pro-competitive transactions, often damaging all parties involved during the uncertain period of a review; the threat of penalties for failure to notify is needed to make a mandatory system work, but actual imposition of such penalties on parties to pro-competitive transactions is simply a regulatory excess and an administrative fine on parties which have harmed no one.
- 4.29 The Consultation Paper proposes that if a mandatory notification regime were to be introduced, a control threshold would be bought in of "*acquisition of control of policy of the target*", broadly equivalent to decisive influence within the meaning of the EU Merger Regulation.<sup>39</sup> This seems the right sort of level for a mandatory notification and we would strongly discourage Government from introducing mandatory notification at any lower level. From a practical point of view, it seems that if this change is being made there would be much to be said for directly adopting the decisive influence test applied not only under the Merger Regulation but under the merger control regimes of many EU Member States.

*Option 1 - full mandatory notification*

- 4.30 The first option put forward by the Consultation Paper is for a pure mandatory notification system based on thresholds of target turnover of in excess of £5m in the UK and turnover of the acquirer in excess of £10m worldwide.
- 4.31 If mandatory notification thresholds are to be introduced, we would strongly recommend that these are both high enough and sufficiently related to a UK nexus that they do not overburden parties and Government with unnecessary notifications.
- 4.32 We suspect that we are in the company of most practitioners in viewing the proposed thresholds as a huge mistake. Our view is that their likely effect would be to paralyse the OFT/CMA with a huge number of notifications, the overwhelming majority of which will be of transactions with no or minimal impact upon competition, and to expose the UK to a certain degree of ridicule amongst the international antitrust community.

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<sup>38</sup> Consultation Paper, paragraphs 4.18 to 4.22.

<sup>39</sup> Consultation Paper, paragraph 4.36.

- 4.33 Moreover, the thresholds suggested fall outside the recommendation of the International Competition Network ("ICN") in its "Recommended Practices for Merger Notification Procedures". Recommendation I.C. is that,

*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.*

- 4.34 Comment 2 to that recommendation is that,

*To the extent that the "local nexus" requirement can be satisfied by the activities of the acquired business alone, the requisite threshold should be sufficiently high so as to ensure that notification will not be required for transactions lacking a potentially material effect on the local economy.*

- 4.35 Our view is that the proposed thresholds very clearly fail to meet this standard.

- 4.36 There is a clear class of merger which will be repeatedly notified to the CMA if these changes are made: acquisition by a non-UK company of what is broadly a non-UK company but with sales to UK customers somewhere in excess of £5m. Almost by definition such transactions will raise no competition issue.

- 4.37 More than this, it is highly unlikely that a business with £5m turnover in the UK would be acquired by a company with worldwide turnover of less than £10m. The second part of this threshold therefore adds almost nothing. To the extent that it does restrict in any way the number of notifications which are made, this will be arbitrary, reflecting nothing about the possible nexus of the transaction with the UK and its impact on a UK market.

- 4.38 If Government is determined to introduce a mandatory notification regime, we would suggest that a better starting point would be the existing turnover test with its £70m target turnover threshold (and which the Consultation Paper takes as its own starting point for a notification threshold in a hybrid option). A sensible development of such thresholds might then see mandatory notification where each of at least two parties had UK turnover of £70m. Such thresholds would not be significantly out of step with the national regimes in EU Member States where merger thresholds are in line with the ICN good practice (see, for instance, France and Belgium). If Government is not happy with such high thresholds, then we would suggest that this is an argument against a mandatory regime, not an argument for very low thresholds.

*Option 2 - hybrid mandatory notification*

- 4.39 We understand Government's concern that moving to a mandatory notification regime, particularly one with sensibly-set thresholds rather than those currently suggested for Option 1, would not capture some mergers. The Consultation Paper suggests is that this could be addressed by the hybrid mandatory notification proposal. This would see mandatory notification above a specified level (the Consultation Paper suggests the existing turnover test level) and voluntary notification/residual CMA jurisdiction below that threshold.

- 4.40 We note that there are a significant number of jurisdictions where, in addition to a mandatory notification process above bright line thresholds, competition authorities retain a residual power to investigate transactions which may lead to an SLC (or equivalent). It appears here that what is proposed is not such a residual power, to be used rarely by the CMA, which might be appropriate in allowing flexibility in any mandatory system. Instead, it appears that the CMA will continue to spend substantial efforts monitoring the markets for transactions which it may wish to investigate.

- 4.41 We think that it is likely that this scheme could offer all of the disadvantages of a voluntary regime without any of the advantages of a mandatory regime.
- (a) The mandatory filing element of this hybrid regime appears unlikely to allow the CMA to capture any extra problem transactions which are not captured by the OFT today: very large mergers are those which are most likely to come to the OFT's attention under the current system (and indeed where parties are currently most likely to wish to approach the OFT to obtain certainty through notification).
  - (b) The CMA would continue to be obliged to monitor transactions to see whether it should investigate them under its voluntary powers and so would make no significant saving.
  - (c) Parties would have no enhanced certainty where a merger did not meet the notification threshold, while being required to make notification of an increased number of transactions which had no competition impact whatsoever.

#### *Timing issues*

- 4.42 The Consultation Paper suggests that under a mandatory/hybrid regime the OFT's deadlines would be subject to a statutory timetable.<sup>40</sup> In contrast to our view expressed above on changes to the existing system, we consider a statutory deadline a vital part of a mandatory regime with a suspensory effect.
- 4.43 There is a proposal also that the phase I timetable ought to be reduced in length from the existing 40 working days to 30 working days under a mandatory regime. While we would of course welcome quicker decisions in phase I, we question whether it is really feasible to ask this of the CMA. Our impression is that various internal procedural hurdles and limited staffing mean that the OFT is already working hard to meet its 40 day timetable, despite making increasing use of pre-notification contacts. Combining this with the much-increased number of notifications which are expected under a mandatory system, we cannot see how the CMA could cope.
- 4.44 We consider that any deadline must be realistic if it is not to push the CMA into making wrong decisions in one direction or another at the end of phase I. Being realistic means that it must be generated by a "bottom up" process of working out how long each element of a phase I process will take and where time can be cut, rather than a "top down" process where the process is simply required to fit an arbitrary time.

#### **DECISION-MAKING PROCEDURES**

- 4.45 Chapter 10 of the Consultation Paper considers various possible decision-making models which could apply to phase I and phase II of a single CMA's merger review, whether voluntary, mandatory or hybrid.
- 4.46 The "base case"<sup>41</sup> is effectively the status quo, although at two levels within a single CMA rather than by a separate OFT and CC. We consider that there are real advantages to this system which should not be thrown away lightly.
- 4.47 The change of staff and, particularly, decision-maker between phase I and phase II means that phase I decisions do not provide a momentum to cases which might prevent parties from getting a fair hearing at phase II. Equally, the calibre of panel members serving at phase II brings a real rigour to the phase II process which could not be duplicated by another system. Direct access to those panel members and their

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<sup>40</sup> Consultation Paper, paragraph 4.45.

<sup>41</sup> Consultation Paper, figure 10.2.

involvement at key points throughout the process is a vital part of testing the views both of parties and of CC (or CMA) staff.

- 4.48 All of these benefits would be lost in what is the main alternative articulated by the Consultation Paper.<sup>42</sup> This would see the phase II decision-maker being a different person but of the same type to the phase I decision-maker, ie a CMA executive.
- 4.49 The Consultation Paper suggests that there are similarities between this main alternative and the process used, for example, in EU Merger Regulation reviews. However, the Merger Regulation has a key difference in that all decisions are taken on a collegiate basis by the Commission. It has also developed, or been forced to develop, various safeguards like the continued involvement of the legal service throughout the decision making process. A decision-making process which establishes these checks and balances as part of its structure rather than as a corrective mechanism seems preferable.
- 4.50 Two further alternatives are suggested<sup>43</sup>:
- (a) **Including a panel as a phase II decision-maker but only at what would effectively be an internal decision-making hearing at the very end of the phase II process.** We have very significant concerns with this proposal. Access to the decision maker (at phase I and at phase II) is a key part of the review process and ensuring the correct outcome. This is not simply a chance for lawyers to advocate their clients' position, but involves the on-going education of decision-makers, particularly panel members who are drawn from a wide range of professions, who cannot be expected to be expert in the workings of any particular market if they are not exposed to discussions of that market over the course of an investigation. This option also presents a practical difficulty of what happens if the panel disagrees at the last minute with the phase II case team's conclusions: if they feel that a further theory of harm or other element needs to be investigated, then there will be very little time to do so; if they identify a possible SLC where the case team had suggested to the parties that there was not one, then the case team and parties would need to move more quickly than might be feasible to come up with remedies.
  - (b) **A variation on the base case with the phase I case team moving through to form part of the phase II case team.** Although this mechanism does not have quite the same benefits as the base case of a full, independent review of the merger, we can see attractions to this in terms of maintaining knowledge established during phase I. It would be important that those knowledgeable phase I civil servants moving to phase II were however subject to proper supervision and testing of their theories both within the executive of the phase II CMA structure and by a panel.

## FEES

- 4.51 The Consultation Paper discusses different options for merger fees.<sup>44</sup> The different options will have an impact on the costs of running the regime and so the size of any fees; this is merely noted in passing in the Consultation Paper.
- 4.52 Most importantly, the proposed mandatory regime would lead to an increase in the number of mergers which need to be reviewed per year from fewer than 100 to well over a thousand (on the estimates in the Impact Assessment, Table 16). On the face of it, this would mean that the mergers branch of the OFT would need to hire proportionately more staff and face proportionately more costs. This is summarised in the Consultation Paper

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<sup>42</sup> Consultation Paper, figure 10.4.

<sup>43</sup> Consultation Paper, paragraph 10.39.

<sup>44</sup> Consultation Paper, paragraphs 11.7 to 11.15.

as "*mandatory notification may increase the cost of merger control to the single CMA*".<sup>45</sup> No account is taken of such extra costs in the fee estimates in the Paper, which assume that all options will cost £9 million per year.

- 4.53 We consider it too early for Government to assess options for merger fees until the fundamental structure of the merger control regime is decided and a proper assessment made of what the costs of the regime will be.

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<sup>45</sup> Consultation Paper, paragraphs 11.14 and 11.15.

## 5. PART 5: A STRONGER MARKETS REGIME

### OVERVIEW

#### 5.1 Chapter 3 of the Consultation Paper states:

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

5.2 We broadly agree with this assessment, and with the consequent proposition that fundamental changes to the markets regime are not necessary. To that end, the Consultation Paper puts forward a number of proposals for relatively minor improvements to the markets regime. Detailed comments on a number of those proposals are set out below.

5.3 We have two additional general observations on the treatment of the markets regime in the Consultation Paper:

- (a) First, we take issue with the suggestion in the Consultation Paper that there have been "*insufficient market investigation references*" when compared to the number originally anticipated.<sup>46</sup> It is not evident upon what basis the original "target" of four references per year was arrived at, and there may be many extraneous reasons why this "target" has not been met, in any event. Moreover, market investigations are an intrusive, resource-intensive tool, and are not to be undertaken lightly. The focus of any reform should be on improving and streamlining the procedure, rather than on increasing reference numbers *per se*.
- (b) Secondly, in the context of the fundamental structural reform currently under consideration, it is not obvious that a combined CMA would help in achieving any improvement to the markets regime, particularly given that the Consultation Paper indicates that the current two phase system is to be retained.<sup>47</sup> In our view, none of the proposals contained in Chapter 3 of the Consultation Paper would be made more effective by the establishment of the CMA. Indeed, the inevitable upheaval involved could well undermine the improvements that these minor changes aim to bring about.<sup>48</sup>

### MODERNISING THE MARKETS REGIME

#### *Enabling investigations into practices across markets*

5.4 The ability for the CMA to investigate practices that span several economic markets would give some added flexibility to the markets regime, although situations where this ability would be useful are likely to be quite rare, not least because there are well-established competition law rules relating to the most obvious harmful practices. There was a similar power under section 78 of the Fair Trading Act 1973 (now repealed), whereby the Secretary of State could refer practices to the Monopolies and Mergers Commission, but in practice this was rarely used.

5.5 In circumstances where there is a specific, discrete practice that is harmful for consumers across several markets, and that is not already covered by the competition law rules, this ability might avoid the need to initiate several market investigations at once. However, it should be borne in mind that the companies affected by the investigation would be likely to argue that the specific practice needs to be viewed in its full context in each market. As

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<sup>46</sup> Consultation Paper, paragraph 3.5.

<sup>47</sup> Consultation Paper, paragraph 3.6.

<sup>48</sup> See also Part 2 of this response in relation to the rationale for a combined CMA.

a consequence, the CMA could find itself in practical difficulties in terms of keeping the scope of the investigation manageable. It could also be at risk of judicial review if the scope is not clearly framed in each case. Moreover, if the scope of the investigation is not carefully and robustly framed, the CMA might effectively be pushed into conducting several parallel market investigations at once. This could potentially render the new power useless in practice.

#### *Extending the super-complaint system to SME bodies*

- 5.6 There are currently relatively few super-complainants, and there is an argument that the system is being underutilised, such that broadening this function is generally to be welcomed. Certainly, the super-complaint system is a useful way in which the OFT can be made aware of potentially harmful practices (and required to assess them within the relatively short period of 90 days).
- 5.7 Moreover, in a wider sense, the UK competition regime places considerable reliance on businesses engaging constructively with the competition authorities (for example, by notifying them of illegal conduct, responding to information requests, or responding to invitations to comment on mergers). Engagement with the competition authorities and awareness of the competition rules should be promoted wherever possible by the competition regime. In that context, an extension of the super-complaint procedure to cover a section of the business community is a positive development, albeit that, as the Consultation Paper points out, in order for this proposal to be successful, it will be important to define carefully which bodies are eligible for super-complainant status.<sup>49</sup>
- 5.8 Government should not, in our view, put too much emphasis on the concern that the CMA would receive a large number of baseless super-complaints from less-efficient competitors, and that this would use a disproportionate amount of the CMA's resources. If a super-complaint is clearly baseless, the CMA's report would be simple to prepare, requiring little or no in-depth analysis in order to dismiss it. If, on the other hand, it is not clear within 90 days that a super-complaint is baseless, then arguably the matter deserves greater attention. In any event, according super-complainant status on a clearly defined basis should in itself provide a "first screen" against the submission of baseless complaints.
- 5.9 We consider, therefore, that the broader benefits to be derived from encouraging businesses to engage with the CMA's work through the extension of the super-complaint procedure are likely to outweigh the concern that the CMA would receive too many baseless super-complaints.

#### **STREAMLINING THE MARKETS REGIME**

##### *Reducing timescales*

- 5.10 As the Consultation Paper points out, the CC has already been taking steps to reduce market investigations from 24 to 18 months.<sup>50</sup> Given this developing practice, we consider that some reduction of statutory phase II timetables (and, similarly, the introduction of timetables at phase I) is an achievable aim. In implementing such a measure, however, it will be important to consider very carefully which aspects of the process can be shortened or omitted. Aspects of the process that businesses particularly value should be retained. For example, in the present system, face-to-face hearings between the Panel and the main parties to a market investigation are time consuming for the CC. It might be tempting to curtail these on the basis that they merely repeat the parties' paper-based arguments. Businesses believe, however, that it is important to have the opportunity to

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<sup>49</sup> Consultation Paper, paragraph 3.15.

<sup>50</sup> Consultation Paper, paragraph 3.18.

Speak directly with the decision-makers, and a withdrawal of this opportunity may significantly lessen their belief in the robustness of the process as a whole.

#### *Market studies*

- 5.11 The OFT's use of market studies has been subject to a considerable amount of criticism, which is in no small part due to the "nebulous", ill-defined nature of the tool (see also paragraph 5.14 below). At the same time, it is important that any reform of the market study process should improve on the current lack of clarity and increase the rigour of the process without compromising the CMA's ability to take a flexible approach. The OFT has made some of its more tangible achievements through voluntary agreements with certain sectors (see for example, its work with banks relating to credit card fees and current account switching), and businesses have benefited from avoiding the expense of a market investigation in these cases.
- 5.12 In light of the above, we consider that the market study tool would benefit from a more certain statutory footing, including the introduction of statutory timescales. In principle, it would also seem appropriate to introduce formal information-gathering powers to assist the CMA in meeting those timescales, although (given, in particular, the potential sanctions for non-compliance) there would need to be some sort of defined "threshold" at which such powers become available (akin, for example, to the section 25 threshold in CA98 cases), with the scope of the investigation also clearly set out. In practical terms, the introduction of a formal information-gathering power ought not materially to add to the burdens on businesses, given that in practice most businesses currently comply with the OFT's informal requests.
- 5.13 With these considerations in mind, Government could (for example) impose a six month statutory timeframe for the decision on whether or not to refer the matter to a market investigation,<sup>51</sup> but at the same time the market study could (if appropriate) continue past that date, on the understanding that no market investigation reference would be possible for a certain subsequent period (perhaps two years).

#### **INCREASING CERTAINTY AND REDUCING BURDENS**

##### *Introducing statutory definitions and thresholds*

- 5.14 For the reasons set out in paragraph 5.11 above, the introduction of a statutory definition of a "market study" would be desirable, not in order to limit the (currently flexible) scope of the tool as such, but, rather, in order to provide greater clarity to parties under investigation, particularly in terms of delineating when formal information-gathering powers are available to the CMA.

##### *Ensuring remedies in mergers and market investigations are proportionate and effective*

- 5.15 The Consultation Paper suggests changes to Schedule 8 to the EA02, in order to enable competition authorities (i) to require parties to appoint and remunerate an independent third party to monitor and implement remedies, and (ii) to require parties to publish certain non-price information.<sup>52</sup> In our view these are both sensible suggestions that would improve the effectiveness of remedies available to the CMA under Schedule 8.
- 5.16 The Consultation Paper also proposes that the threshold for review of remedies is revised to ensure that remedies operate as intended.<sup>53</sup> If a remedy is not operating how it was envisaged, but there has been no specific "*change of circumstances*", we agree that it is

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<sup>51</sup> See Consultation Paper, footnote 21: the OFT has committed to a six month timetable to the point of consulting on a reference.

<sup>52</sup> Consultation Paper, paragraphs 3.31 and 3.32.

<sup>53</sup> Consultation Paper, paragraph 3.36.

not currently clear that the remedy can be varied or abolished. However, it is not obvious in practice why it would ever be necessary to review a remedy when no circumstances have changed whatsoever, unless the remedy was inappropriate in the first place. Moreover, whilst the ability to review remedies even where there has been no change of circumstances may give added flexibility to the CMA, it would lead to uncertainty for businesses. At the very least, therefore, in the absence of a change of circumstances, we suggest that such review should only be initiated with the consent of the affected businesses. Genuine mistakes could thereby be rectified, without giving the CMA a second opportunity to impose remedies post-investigation.

*Clarifying powers following remittals or mergers and markets*

- 5.17 The current law does not adequately cater for the process that should be followed after a decision has been remitted to the OFT or CC. A pragmatic approach has hitherto been adopted, but it would be desirable to set out the process for remittals (including the timeframe) in legislation.

**Hogan Lovells International LLP**

**8 June 2011**

**Incorporated Society of British 5 Xj YfhgYfg**

June 1<sup>st</sup>, 2011

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

Dear Mr Lawson

**ISBA RESPONSE TO BIS CONSULTATION – ‘A COMPETITION REGIME FOR GROWTH’**

INTRODUCTION

ISBA, the Incorporated Society of British Advertisers, represents well over 400 companies including the majority of the United Kingdom’s leading advertisers.

ISBA has been involved in most if not all of the competition cases and regulatory enquiries involving media companies in recent years. These include television merger cases, especially the merger of Granada and Carlton to form ITV plc, and the subsequent creation and review of the contract rights renewal (CRR) system; cinema mergers and acquisitions; outdoor advertising mergers; the Yell investigation and most recently the OFT’s investigation into the out-of-home advertising market and Hearst Magazines’ acquisition of Lagardere’s titles in the UK.

We therefore have extensive experience of working with the Office of Fair Trading, OFCOM and the Competition Commission.

We do not have detailed comments on each of the questions raised in the response form but such as we have are set out below. First, though, we give our general views.

GENERAL COMMENTS

- 1 What we and our members wish for above all is clarity and certainty in the regime and how cases are going to be handled. We are concerned that in every media case the subject of market definition comes up and is often analysed from basic principles. We believe that a more coherent and consistent approach to market definition in media, particularly as new media and electronic methods of delivery are changing the industry landscape very rapidly, is urgently required. We have put this point to both the OFT and DCMS recently and at a senior level.

Given the large number of cases involving media mergers (and other media cases) over the last ten years, we believe there should be ample scope for pulling together the key issues and developing guidance to inform future cases, for the benefit both of the authorities and for industry players.

- 2 We give our views on the proposed Competition and Markets Authority (CMA) below but our key comment is in relation to duplication and resources. We deal on a regular basis with three different authorities, the OFT, OFCOM and the Competition Commission. Many cases, such as the review of the CRR regime, involved all three authorities in extensive work. We strongly believe that this process should be streamlined to avoid duplication and to speed up regulatory processes.
- 3 Thirdly, we would like to make one positive comment: we have been struck on many occasions by the high quality, diligence and perspicacity of Competition Commission panels. Whatever regime emerges from the consultation, we would strongly support the retention of panels of experts from a number of different fields coming together to review both market investigation and merger cases.

#### ANSWERS TO CONSULTATION QUESTIONS

##### *Questions 1-2 Objectives of reform*

In principle, we believe that it would be beneficial to merge the Office of Fair Trading and the Competition Commission into a single Competition and Markets Authority for the following reasons:

- i. This would enable resources to be pooled and targeted at the most important cases;
- ii. Duplication should be avoided;
- iii. Cases should be dealt with more quickly and
- iv. There should be more consistency between cases.

This said, we have one specific comment to add here. The advertising industry's well-established and highly-effective and -applauded system of self-regulation of advertisement content relies in part on the presence of two 'backstop' statutory regulators. For broadcast advertising, the backstop is Ofcom; for all other channels, the OFT.

Whilst these backstops are very seldom needed or invoked, their very presence acts as a useful last-ditch deterrent. We therefore believe great care should be given to maintaining an appropriate 'ultimate sanction'. However, we have very little confidence in deed in suggestions that such powers should be transferred to the complicated and sometimes inconsistent and incoherent network of Trading Standards Office(s).

##### *Questions 3-4 Strengthening the markets regime*

ISBA believes that the market investigation regime is a useful feature of the UK competition regime, enabling markets to be investigated where there are market imperfections without having to target individual companies or practices. This system may be used shortly to review the television advertising sales regime, as recommended by the Competition Commission and by the Department of Culture, Media & Sports. It is a natural corollary of our support for this mechanism that we would favour streamlining of the process resulting from the merger of the OFT and CC. This should both improve the quality of the outcome and also the speed of investigations.

We believe there is merit in enabling the CMA to cross-fertilise experience from cases in other sectors rather than always examining issues de novo in relation to the sector under investigation.

In addition, we strongly believe that in cases where the competition authorities do not have the requisite powers, they should be encouraged to provide independent reports to government on public interest issues (paragraph 3.10 of the consultation).

#### *Questions 5-7 Mergers*

Apart from the comment made above about market definition, we have few comments on this section of the consultation. We were heavily involved, as leading third party intervener, in the Granada/Carlton merger. We believe that in that case we, and others, were hampered by the fact that the ultimate decision rested with the then Secretary of State rather than with the Competition Commission.

This emphasises the merit of the CC (and in future the CMA) having full remedy as well as investigation powers. We would therefore also urge the Government to review the powers of the CMA to impose remedies in all cases. It is apparent from the grocery market investigation that the CC was not able to put its desired remedy into place because it lacked sufficient powers to appoint an ombudsman. Similarly, if a case such as Granada/Carlton were to be considered in the future under the Enterprise Act powers we wonder whether the CMA would have power to appoint an enforcer like the CRR Adjudicator, which has, in our view, been an extremely successful, light touch, regulator.

The convoluted way in which News Corporation's bid to (re-)acquire the remaining 61% of BSkyB which it does not already own has been handled is an illustrative case. This is not the place for comment on the acquisition itself - we simply believe there is no reason why this case should not have been reviewed in the normal way by the competition authorities.

Media companies may or may not themselves be large by corporate standards, but most have disproportionate political influence which they can and do seek to leverage. A statutory body is both the most appropriate channel by which to review such cases, and is also relatively immune to such influences in a way which it is not safe to assume that elected politicians will be.

#### *Questions 8-10, Anti-Trust regime & questions 11-13, Cartels*

No comments

#### *Questions 14-16 Concurrency*

As mentioned above, we favour the proposed merger of the Office of Fair Trading and the Competition Commission. The question arises why the Government is not also consulting on the merger of other regulators with competition powers, including OFCOM. We believe that this opportunity should be taken of considering how better use can be made of resources by avoiding the inevitable duplication that takes place between the OFT and OFCOM in relation to competition matters.

We would support the development of competition guidelines that apply across the board to all sectors, including the regulated sectors.

We also believe that the CMA should in principle be the sole body investigating and deciding on competition matters, albeit in appropriate cases taking the clear lead role in consultation with the relevant industry regulator if they are to continue as stand-alone agencies. Generally, we are concerned at the enormous cost to business in time and money in dealing with multiple regulators. This is an important opportunity to cut red tape and improve efficiency for British industry.

*Questions 17-39*

We have no further comments on these questions.

We would be happy to discuss any of our comments with you in more detail if this would help.

Yours sincerely

**Bob Wootton**

*Director of Media & Advertising*

# **In-House Comp Lawyers' Association**

**DEPARTMENT FOR BUSINESS INNOVATION & SKILLS**  
**A COMPETITION REGIME FOR GROWTH: A CONSULTATION ON OPTIONS FOR**  
**REFORM**

**ICLA'S RESPONSE TO THE CONSULTATION**

**13 JUNE 2011**

**Introduction**

1. ICLA (the In-House Competition Lawyers' Association) is an informal gathering of in-house competition lawyers across Europe. There are currently 93 members in nine countries. This paper represents the view of some of the UK members only. The association meets quarterly to discuss matters of common interests as well as to share competition law knowledge. Membership is open to all lawyers who are responsible for competition law in their own company.
2. External speakers are invited regularly. In the last few months both BIS and the Competition Commission ('CC') have accepted our invitation for a meeting to discuss the Government's *Consultation on Options for Reform* ("**the Consultation**"). ICLA believes that there is scope for improving the UK competition regime and this is an excellent opportunity to do that.
3. Because of their role, in-house competition lawyers have a clear interest in a regime that works properly, minimises costs, and has appropriate safeguards of due process. Such a system can be expected to lead to fully reasoned, promptly reached and high quality decisions.
4. ICLA has concentrated its submission on the following, limited areas of particular significance to in-house counsel:
  - a) the need to ensure that, if the merger of the OFT and CC is to take place, possible negative consequences are avoided;
  - b) the desirability of retaining the present, much-admired system of voluntary notification of mergers;

- c) the need to improve case selection and minimise the length and costs of investigations, and the way this might be achieved through a move to a prosecutorial approach;
- d) procedural fairness; and
- e) the need, in ICLA's view, to retain 'dishonesty' as an essential element of the cartel offence.

#### **A. Avoiding the downsides of merging OFT and CC.**

5. While supporting a more robust and streamlined competition regime, ICLA believes that many of the benefits the Government seeks could be realised without the proposed merger of the OFT and CC into a single Competition or Market Authority ("**CMA**"). If the merger is to go ahead, ICLA considers that it should be able to deliver benefits: but is also concerned that it may introduce significant institutional complexity at the expense of efficiency and procedural fairness. In particular, rather than focusing immediately on more effective anti-trust enforcement, there would likely be a period of several months or even years before the CMA's personnel, working methods and priorities could be said to have truly bedded down. ICLA therefore suggests that, if the merger is to happen, Government keeps the efficiency and fairness of the new authority under close review.

#### **B. The present system under which mergers are voluntarily notified should be retained.**

6. The present system has real advantages which are much valued by many in-house lawyers. It allows businesses to self-assess whether their proposed transactions are likely to have an anti-competitive effect; and, if a business concludes (with the benefit of in-house or external counsel, as the case may be) that no such effect can be expected, the costs and delays of a merger notification can be avoided. It seems to ICLA that this is precisely the sort of cost-efficient, mature and admired feature of the existing regime that the Government should be looking to retain. It would be counter-productive if a series of reforms that were intended to enable the UK regime to promote growth and competitiveness

7. ICLA is not blind to the downsides of the present system, but considers that the costs of change are greater than the benefits. In particular, ICLA recognises the concern that some completed mergers may ultimately be found by the CC (or CMA, as the case may be) to cause a substantial lessening of competition. However this situation of problematic completed mergers has materialised only in a very small number of cases (14 cases at phase 2 since 2004/5). ICLA's members are at the front line of ensuring that their business clients are advised as to the risks; and consider that the 'problem' of completed mergers can best be dealt with in a more proportionate way. This should, in ICLA's submission, be by continued advocacy by Government and the competition authorities of the risks of completing where there is any prospect of a competition issue.

**C. Moving to a prosecutorial system for antitrust enforcement will help manage length and costs of antitrust investigations**

8. Like the Government, ICLA is concerned about the length of competition proceedings, which cause a considerable burden to business in relation to costs and by creating considerable commercial uncertainty.
9. So far as the markets regime is concerned, the process of market study, followed by market investigation, followed possibly by an appeal and remittal before remedies are finalised, can take over five years to complete. Many markets change quite substantially in that period. ICLA therefore supports the introduction of statutory timeframes for all phases of market investigations, including the initial market study phase and the drafting and implementation of remedies. ICLA also suggests that an appropriate statutory threshold should be introduced before a phase 1 market investigation can be initiated. In ICLA's experience, companies almost invariably wish to comply with 'first phase' (i.e. OFT) market study information requests and ICLA doubts that statutory powers to compel production are needed until phase 2. In addition, ICLA does not believe that the current 24 months timescale for phase 2 investigations should be reduced; the current

10. A similar problem is evident with antitrust investigations. ICLA believes that the Government is right to be concerned with the length (over 30 months on average) of such investigations. Members of the associations have experience of cases lasting more than 7 years. However, ICLA does not believe that the creation of an internal tribunal within the CMA would help address this concern. Indeed, the introduction of a new level of administration might only lengthen proceedings, particularly when the additional safeguards that would likely be needed to address procedural fairness concerns (as discussed below) are factored in. ICLA recognises that the OFT has already begun introducing transparent administrative timetables to increase the speed of antitrust proceedings, and ICLA welcomes these procedural improvements. Time could be better saved by eliminating the deliberative role of the CMA entirely through the proposed prosecutorial approach.
11. ICLA is therefore in favour of the suggestion that there be a prosecutorial style approach to Competition Act cases, with the decision on infringement and penalty lying with the CAT and with the possibility of a subsequent further appeal to the High Court or Court of Appeal on judicial review principles. A prosecutorial system can be expected to lead to more focused and effective enforcement while preserving rights of defence and ICLA believes this would import greater efficiency and high standards of evidence collection into the process. ICLA does not think that such a system would be workable for other types of cases such as market inquiries; and considers that the merger regime is operating well (as discussed above) and therefore there is no strong case to be made for moving to a prosecutorial system in those aspects of the regime.
12. ICLA would support other moves to reduce the costs of the UK competition regime. As outlined above, this should mean not introducing mandatory notification of mergers – and certainly not increasing the merger filing fees. In addition:

- only market studies raising important competition law questions should be referred for full investigation, with the final decision taken by an executive board with the ability and expertise to challenge the proposal of the case team and / or Panel;
- once in a phase 2 market investigation, periodic “exit reviews” should be mandated in order to encourage an early end to the investigation. ICLA suggests that, no later than nine months into a phase 2 investigation, the CMA should be required to fully explain its theories of harm and give companies under investigation the opportunity to offer undertakings;
- information gathering powers should be used more carefully so as to avoid the cost and complexity of gathering unnecessary and irrelevant information which creates additional costs for the regulatory authorities as well as for the companies under investigation. The CMA should be encouraged to discuss draft information requests with the companies in question before finalising them; and
- ICLA advocates abandoning the proposal for companies found to have committed antitrust infringements to be liable for the CMA’s investigation costs. The ability to recover investigation costs would create the wrong incentives for the authority, for companies subject to an investigation (who could be encouraged to settle when no actual wrong-doing is believed to have occurred), and for competitors (who could be encouraged to initiate complaints about practices that may not warrant regulatory scrutiny in an attempt to burden their competition with additional costs). It also raises the question whether the CMA should be liable for companies’ costs of investigation should an investigation be concluded without any infringement finding. The goal of punishing offenders and deterring future violators is already accomplished through fines for antitrust violations.

13. Underlying ICLA’s concerns with cost-recovery measures is a concern as to the Government’s rationale for proposing them. The Government wishes to create a

#### **D. Procedural fairness requires the retention of the CAT and better access to decision-makers**

14. It is clearly important that the competition authority (whether it is a new CMA or a retained OFT/CC) should be seen to make transparent and independent decisions. The Government wants the new competition regime to meet the objectives of robust and speedy decision making without sacrificing the right of companies under investigation to a fair hearing. ICLA agrees with this objective.
15. The independent and impartial tribunal required by Article 6 of the European Convention on Human Rights (“**ECHR**”) ought to be structurally independent from the bodies responsible for investigating the companies concerned. This role is already filled by the CAT, which has shown itself capable and competent to handle both cartel and abuse of dominance investigations as well as exercising judicial review over market and merger investigations. The CAT is well respected by the competition community: ICLA submits its overall role should be retained (and, in the case of antitrust investigations, enhanced by making the CAT the arbiter of whether the prosecution’s case has been made out). It is also important that the CAT retains the right to robustly interrogate merger and market investigation decisions on judicial review principles.
16. By contrast, the proposal to create an internal tribunal within the CMA would result in longer investigations, more periods of frustration and uncertainty when parties do not know what the authority is contemplating, and in ICLA’s view would not satisfy the ECHR. A more welcome reform would be to ensure that parties to merger, market or antitrust investigations have adequate access to decision-makers and greater visibility of the advice and work product being provided by the case team.

**E. Dishonesty should be retained as an essential element of the cartel offence**

17. Businessmen and women who are convicted of the cartel offence face the loss of their livelihood, reputation and liberty. The seriousness of this means it is inappropriate for Government to take the view that the burden of securing convictions should be lowered in order to drive up conviction rates. Further, the proposed alternative concept of 'secrecy' is vague and untested, and would risk capturing a wide number of agreements that are legitimately 'secret' in the sense that they are commercially confidential. Dishonesty, by contrast, is a well-established criminal law concept that plays an important role in distinguishing hard core cartels from other anti-competitive activity. ICLA therefore submits that 'dishonesty' is a concept that should be retained; and that if more successful prosecutions are a policy goal, Government should instead focus on improving the resources and prosecutorial expertise of the CMA.

**F. Public interest issues should not play any greater role in the new regime**

18. The Consultation seeks views on whether the CMA (or OFT/CC) should be asked to provide independent reports on public interest issues alongside competition issues. In ICLA's view this would be a retrograde step. The removal (with appropriate and limited exceptions) of broader public interest considerations from competition law processes was a major achievement of a succession of Governments in recent years. It is right and proper that independent expert bodies should judge and enforce competition law policy while ministers and Parliament take a more direct responsibility for issues of public interest.

## Conclusion

19. For the reasons set out above, ICLA:

- would urge the Government to closely monitor any merged entity, to ensure that the benefits of the proposed merger outweigh the costs;
- advocates retention of the existing system of voluntary notification of mergers;
- supports measures to reduce the length and costs of investigations and believes that a prosecutorial system can deliver those improvements;
- considers that the role of the CAT in antitrust investigations should be enhanced by giving it the decision-making role, and that its ability to review merger and market investigation decisions on JR principles should be retained;
- believes that 'dishonesty' should be retained as an essential element of the cartel offence; and
- considers that the role of public interest issues in the UK competition law regime should not be widened further.

ICLA would be very willing to discuss these views further.

For further information, please contact the chairman of the association, Paolo Palmigiano, at [info@competitionlawyer.co.uk](mailto:info@competitionlawyer.co.uk)

**International Chamber of Commerce UK**

# “A Competition Regime for Growth: Consultation on options for reform”

Response from the International Chamber of Commerce UK (“ICC UK”)

## **ICC UK Response to the Consultation:**

### **“A competition regime for growth: consultation on options for reform”**

#### **1 Introduction**

- 1.1 The International Chamber of Commerce (“ICC”) is a global business organisation which works to support international trade and investment through the promotion of open markets, sound regulation and the rule of law. Our members in the UK include 17 of the top 20 FTSE companies, many other multinational firms, business associations and SMEs. These comments are based on consultations with the membership of ICC in the UK.
- 1.2 ICC UK welcomes BIS’s Consultation in relation to reform of the UK competition regime. Though the current competition regime has many desirable features, we do believe that there is room for improvement.

#### **Key messages**

- 1.3 The business community seeks certainty, predictability, consistency and confidence in the competition regime.

We believe that there are a number of possible improvements that might be implemented along these lines with a view to enhancing the attractiveness of the UK as a centre for international business and economic growth. In this connection, ICC UK recommends that the guiding principle of any reform should be to ensure and, wherever possible, improve:

- a. The quality of decision-making and
- b. Due process.

- 1.4 To the extent that, within these parameters, processes can be streamlined and made more efficient (including reducing the time taken in investigations), that would be welcome.
- 1.5 The proposed reform should aim to reduce unnecessary regulatory burdens, both on business in the UK and on the competition authorities, which should focus their limited resources on important cases. ICC UK noted with some dismay the focus in the Consultation on the number of competition cases as a measure of agency effectiveness. In ICC UK’s view the mere number of cases being pursued is not a good measure for the quality or effectiveness of the competition regime. Government should instead focus on the quality of case selection and robustness of decision-making as the measure of success.
- 1.6 We believe that there are certain areas of the Consultation, such as mergers (where the UK already scores highly by international standards) and the cartel offence that require less intense reform, bearing in mind the guiding principle described above. Other areas, such as antitrust enforcement, market investigations and concurrency, are in much greater need of

reform.

- 1.7 We agree with the Government that the cases under investigation have taken too long. Recent developments<sup>1</sup> indicate that this may be changing, but there is a lack of confidence within business based on previous experience that this will be sustained if the competition regime is not reformed. There is also room for improvement with regard to targeting of cases at initiation and prioritisation, as it is not always clear why the OFT suddenly decides to close an investigation that may have been running for some time.<sup>2</sup>

### **Creation of a single Competition and Markets Authority**

- 1.8 Government appears to assume in the Consultation that a single Competition and Markets Authority (“CMA”) will be created. ICC UK questions whether the aims of reform could be achieved without a radical overhaul of the current regime, although our members do accept that some benefits could flow from a single CMA in terms of avoiding duplication of efforts and possibly in reducing cost to business (depending on the structure adopted).
- 1.9 Notwithstanding any perceived benefits of reform, we are very concerned that there is a real risk that confirmation bias would be an inevitable feature of any single agency. In the merger control field, in particular, we believe that much of the international recognition for the UK system has been generated by the independent, thorough, “fresh pair of eyes” approach of the Competition Commission (“CC”). There have been numerous cases where the Office of Fair Trading (“OFT”) and the CC have had strikingly different points of view, such as in recent cases, *Zipcar/Streetcar* and *Stena/DFDS*. Such contrasting opinions are rarely seen in systems with a single agency (e.g. the European Commission), mainly because confirmation bias will always be an inherent feature of such systems.
- 1.10 We therefore urge the Government to think carefully about how due process and the benefit of a “fresh pair of eyes” will be preserved (and confirmation bias avoided) in a single authority. In our view, in order to preserve independence and ensure transparency, it would be appropriate in Competition Act cases for a single authority to be required to argue its cases before the CAT i.e. a prosecutorial model should be considered and we have endorsed this model in other sections of this response.
- 1.11 If a single authority is created without a prosecutorial model, we welcome the proposals in Chapter 10 of the Consultation that Phase 2 decisions should be made by different individuals from those carrying out the Phase 1 investigation in mergers and markets cases, as currently with the CC. If a single CMA is chosen as the way forward, we would support the creation of an independent panel at Phase 2 (for both mergers and market investigations) with its own staff. However, it should be noted that if all members of the

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<sup>1</sup> For example, the recent OFT case relating to the exchange of information in the motor insurance sector.

<sup>2</sup> For example, the closure of an investigation into suspected price coordination involving a number of retailers and suppliers in the UK grocery sector on grounds of administrative priority; see also *Cityhook Ltd v OFT* [2009] EWHC 57 (Admin).

independent panels and the Executive Board (within which Phase 1 investigations are carried out) are accountable to the (same) Supervisory Board, such a structure is unlikely to effectively remove the risk of confirmation bias.

- 1.12 If a single authority is created, we are also concerned that there will be a period of significant upheaval (including uncertainty over roles and potential internal turf wars) during which the restructuring will affect the work of the competition authority. It will also have an impact on any ongoing investigations/matters and appropriate transitional measures will therefore need to be carefully thought through.

## Summary of ICC UK viewpoints

### Key points:

- We understand the Government's intention to increase efficiency and to cut duplication and support the Government's intention to improve areas of the UK Competition Regime, but we question whether some of the benefits sought could be achieved without such a radical reform.
- We encourage Government to ensure and further improve the quality of decision making and due process in any reform of the current regime.
- We also encourage the Government to focus on those areas in Competition which require more intensive reform (i.e. antitrust investigations, market investigations, concurrency), than those which are already highly regarded by international standards (mergers, the legal test for the cartel offence).

### *CMA*

- We have serious concerns regarding the creation of a single authority especially with regard to confirmation bias, the lack of a fresh pair of eyes approach which currently exists in merger and market investigations. We have highlighted our concern in more detail below and suggested solutions for preserving this feature in a single authority.

### *Merger regime*

- We believe that the current voluntary merger notification regime works well and is recognized throughout the world as one of the leading merger control regimes in terms of rigour and outcomes. We therefore do not believe that significant changes are necessary or desirable beyond our concern that the independence of the Phase 2 review be retained in any merged competition authority.
- We oppose the suggested hybrid model as a merger regime as suggested in the Consultation as it results in more bureaucracy, less certainty and higher costs for business.

### *Antitrust investigations*

- We prefer a single clear procedure for all Competition Act cases and would encourage the Government to improve due process in antitrust investigation procedures and with the prosecutorial model in our view being the best model to achieve this aim.

### *Market investigations*

- Market investigations are too costly and burdensome to business. The system is interventionist, not competition focussed but public policy focussed, and its remedies are overly harsh and do not contribute to economic growth. If the system is to be retained, we would suggest:
  - streamlining the regime;
  - establishing clear statutory triggers (see section 2 below) (and possibly statutory directions as to which markets should be looked at);
  - ensuring that the same markets are not repeatedly subjected to disruptive market investigations;
  - introducing remedies which should be prosecuted before the CAT.

### Further points:

#### *Super-complaints*

- We strongly oppose extending super-complaints for SMEs.

#### *Cartel offence*

- We feel that the existing cartel offence needs longer to bed down and as such, we do not support any of the four options set out in the Consultation.
- However, if the Government is nevertheless minded to reform the existing offence, we think there would be merit in considering a simple offence coupled with firm statutory guidance (rather than the options set out in the Consultation).

#### *Concurrency*

- We believe that sectoral regulators should be stripped of their competition enforcement role which is not currently used effectively - perhaps due to the lack of competition expertise within the sectoral regulators.

### *Cost recovery*

- We are deeply concerned about the proposal to allow the CMA to recover its full costs in Competition Act investigations. In our view this would be contrary to the principle of access to justice and create inappropriate incentives for parties under investigation.
- We are also concerned about the proposals to allow the CAT to recover its costs - the costs of the CAT currently are only around £4 million which is not a significant burden on the taxpayer for a service which is of great value to the competition regime. It would be entirely inconsistent with procedure in other UK courts and the principle of access to justice for parties to be potentially liable for the costs of the CAT.
- However, we note the Government's proposal to allow the CAT to exercise its discretion as to whether or not costs should be set aside in a particular case. We would like to have guidance on the types of circumstances where the interests of justice dictate that costs should be set aside, and we would not object to the CAT recovering reasonable costs, such as for photocopying, postage etc by way of e.g. court fees.

## 2 Chapter 3 – A stronger Markets Regime (Market Investigations)

- 2.1 Members generally feel that the markets regime is not necessarily required and has proven to be excessively interventionist and burdensome. There is no comparable system globally and there is a real risk of shifting the regime from one which has competition law enforcement at its centre to a model of centralised market regulation. We believe that the market investigations system requires radical review. However, if it is retained, the regime needs to be (i) streamlined; (ii) have clear statutory triggers as discussed below (and possibly statutory directions as to which markets should be looked at); and (iii) remedies should be prosecuted before the CAT. We discuss these points in more detail below in respect of the specific proposals by the Government.
- 2.2 In our view, increased regulation and imposition of market investigation remedies is not an appropriate means of achieving economic growth. To date, there have been too many cases (often duplicative) with too few tangible results and a more targeted approach is required.
- 2.3 The outcomes of most market investigations have been heavily public policy focussed rather than competition-based<sup>3</sup>. In a few instances the remedy imposed has been harsh, even draconian, such as the BAA Airports investigation, which required significant divestments. The issues in the BAA Airports case were arguably more a result of the failure of privatisation and regulatory limitations, and could have been better dealt with through legislation rather than the MIR process.
- 2.4 If the markets regime is retained, in our view, the most punitive remedies such as divestments (especially those involving public policy issues) should be decided by ministers who are accountable to Parliament or by Parliament itself. If not, a possible alternative would be to have an independent panel decide on remedies, or better yet, all remedies should be put before the Competition Appeal Tribunal ("CAT").
- 2.5 We consider that the system would benefit from a statutory threshold. This would increase certainty for businesses - at present the OFT has a general duty to obtain and keep under review information relating to the carrying out of its functions under section 5 of the Enterprise Act 2002, which is a somewhat vague test. We would therefore welcome the introduction of a generalised test similar to the test of the EU sector inquiries (Art.17(1) 1<sup>st</sup> paragraph of Council Regulation 1/2003 reads: "*Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors.*") or a variant of the test for a market investigation reference to the Competition

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<sup>3</sup> For example, in *Store Card Credit Services* the CC required store card providers to publish full information about interest payments on statements, to publish warnings where annual interest rates exceed 25% APR, to unbundle insurance offerings and to allow direct debit payment facilities; in *Northern Irish Personal Banking* the CC required banks to use simpler language, to provide explanations of levels of charges and interest rates, to provide more information on statements and to give advance notice before taking charges from accounts.

Commission (section 131 of the Enterprise Act 2002 states that "*the OFT may... make a reference to the Commission if the OFT has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.*").

### **Enabling investigations into practices across markets**

- 2.6 We do not consider that the competition authority should have the power to carry out in-depth investigations into practices across markets. We disagree that such power could improve efficiency. On the contrary, such powers would involve a huge number of parties in different markets which would render the investigation unwieldy. We believe that cross market investigations would be burdensome and costly to business without any clear countervailing benefits. In our experience, the authorities are not well-equipped to deal with such large numbers of parties and the result would either be a much slower investigation (at the OFT - or Phase 1 - stage) or a less rigorous investigation following a MIR where the statutory timetables would still apply. This flies in the face of the Government's aim of improving efficiency and streamlining cases.
- 2.7 Furthermore, different markets are likely to require different assessments and subsequently different remedies. As such, cross-market investigations are unlikely to be appropriate to effectively address any competition concerns.

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

- 2.8 As BIS points out, a key strength of the UK regime is that it is clearly focussed on competition. If the competition authority were able to provide independent reports to the Government on issues of public interest, this would run counter to the Government's aim of creating a centre of competition law excellence, and the agency would lose competition focus. We believe that issues of public interest, which are policy decisions, should be left in the hands of ministers who are accountable to Parliament.

### **Extending the super-complaint system to SME bodies**

- 2.9 In our view the super-complaints system has not resulted in significant tangible benefits to date and we do not consider there is any case for extending the system to SMEs.
- 2.10 The purpose of a competition regime is to protect consumer welfare through the proper functioning of competitive markets. The competition regime is not designed to protect competitors and allowing SMEs to have super-complainant status is inappropriate. In our view, allowing SMEs to have such status risks sending the wrong message that they, rather than consumers, are especially likely to be the victims of anti-competitive conduct. By implication, this would send out the wrong signal to SMEs in terms of deterrence and encouraging competition compliance.

- 2.11 A more appropriate option would be for the competition authority to continue the excellent work of the OFT currently in an advocacy role to keep SMEs informed and raise awareness of how competition law can help them. It is likely that most SMEs would have the ability and resources to submit a complaint to the competition authority, without the need for super-complainant status.
- 2.12 Another option could be to impose an obligation on/recommend to the competition authority that it consults the ICC and/or other similar business organisations to try to identify markets/areas where there is potential harm to competition. Perhaps the competition authority could work with the ICC or similar business bodies to canvass the opinion of businesses in relation to particular markets of "economic importance" to try to identify areas of concern.

### **Reducing timescales/streamlining**

- 2.13 We would strongly recommend that the Government does not compromise on due process in order to attempt to speed up the investigation process. As indicated above, the main aim should be to improve case selection and so improve the robustness and quality of decision-making.
- 2.14 As a general point, we welcome identified timetables for competition investigations as these give parties under investigation greater certainty, and we welcome the suggestion that the statutory timescale for Phase 2 investigations should be shortened to 18 months from the current 24 months. However, we believe caution should be exercised in reducing the duration of the remedy implementation stage, in view of the far-reaching consequences and complexity of many remedies. We would also support the proposal to introduce a statutory timetable for Phase 1 "market studies" and would suggest a timeframe of 6 months. It would also offer greater certainty and credibility to the regime if a MIR could only occur following a 6 month market study, and this process not be short-cut (as the OFT apparently is in the process of doing in respect of the Audit market).
- 2.15 As indicated above, we recommend that all remedies be argued before the CAT unless the parties under investigation offer remedies voluntarily. A prosecutorial approach to imposition of remedies in market investigations would improve transparency, lend greater credibility to the regime and possibly reduce the number of appeals. If this approach is not adopted, we consider that the more draconian remedies (such as divestments) should at least be decided upon by an independent panel.

### **Information gathering powers at Phase 1**

- 2.16 The extent of the powers currently available to the competition authorities seems appropriate and we do not recommend that they are extended. In our view, it would be inappropriate to increase the authority's powers to compel the provision of information when there is no threshold to start a market investigation similar to section 25 of the Competition Act 1998. The key differentiator of market investigations is that these are

investigations where companies are not seeking clearance for a merger or are suspected to have breached competition rules - they are simply market participants in a market in which competition may not be functioning effectively. In this context, it is not appropriate for the competition authority to be able to make very broad information requests requiring significant business and adviser resource to respond, and be able to impose harsh penalties if imposed deadlines are not satisfied. The incentive to cooperate in Phase 1 is there for business which will want to avoid the burden of a possible Phase 2 investigation - but the scope and detail of requests companies can receive from the OFT in this context is such that companies should not be compelled to respond within very tight timelines or face punitive sanction.

### **Facilitating prompt referrals to Phase 2**

- 2.17 We consider that the competition authority should have the ability to resolve all competition issues during Phase 1, rather than trying to expedite a Phase 2 investigation.

### **Improving interaction between market investigation references and antitrust enforcement**

- 2.18 We do not think that evidence gathered for the purpose of a market study should be subsequently used in an antitrust investigation. Companies provide a large amount of sensitive information for the purpose of market investigation references, and the manner in which they respond to an information request for a market investigations references is likely to be materially different to the way in which they would respond to an information request in the context of an antitrust investigation. It would therefore be inappropriate for the competition authority to use the information that it has collected for market investigation references in an antitrust investigation.

### **Ensuring remedies in merger and market investigations are proportionate and effective**

- 2.19 As indicated above, we would welcome a prosecutorial approach relating to remedies.
- 2.20 If a prosecutorial approach before the CAT is not adopted, we would not object to the proposal for the competition authority to require parties to appoint and remunerate independent third parties to monitor and/or implement remedies.
- 2.21 Further comments regarding mergers are contained below.

### **Clarifying powers following remittals of mergers and markets**

- 2.22 We welcome the proposal to clarify the powers available to the competition authority following remittals as this would increase certainty and avoid delays.

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

- 2.23 We would welcome the proposal to remove the need to consult on decisions to make a market investigation reference and agree that such consultations can impose an

unnecessary procedural burden on the competition authority, leading to delay and uncertainty.

### **Consumer protection**

- 2.24 Given the Government's Consultation on consumer protection has not yet been published, we feel that it is too early to take a position on consumer protection powers for the competition agency in MIRs.

### **3 Chapter 4 - A Stronger Merger Regime**

- 3.1 Members of ICC in the UK recognise the current merger regime as a well functioning regime of high standard and which is recognized throughout the world as such. We therefore believe that the system should not be changed unless there is a clear and demonstrable need. UK is concerned that both of these features be retained as best possible in the current reforms.
- 3.2 The Government's Consultation proposes two types of changes to the merger system, the institutional change resulting from the proposal of merging the current two authorities (OFT/CC) into one single CMA; and a suggested change to the merger control regime which can be considered independently from a merger of the authorities.
- 3.3 With regard to the proposed change to the merger control regime—i.e. the introduction of a mandatory notification regime and a suspension obligation—we understand that Government wishes to address especially two potential shortcomings of the current regime: (i) early completion and (ii) lack of transparency (mergers escaping the review).
- 3.4 As an initial comment, we would however question the need for a mandatory regime in order to address these two issues.
- 3.5 For example, with regard to the issue of early completion, members questioned the seriousness of the problem of “unscrambling” issues. Our consultations with members suggest there have been very few exceptional cases over the past decade in which parties specifically implemented a merger in the full knowledge that unscrambling was an issue. In such cases, the cost and difficulty of unscrambling a merger in any event falls upon the parties involved in the event of a prohibition. Accordingly we believe that any perceived problem of completed mergers could be resolved by other means than radically changing a merger regime that largely works well. In any event such an issue can be achieved through means other than a mandatory regime - such as more effective use of hold separate undertakings.
- 3.6 In addressing the second issue raised by the Government (lack of transparency), we think that it is counterintuitive to suggest that mergers which have a real negative impact on a market of any significance would not be subject to complaints from customers/competitors—and, moreover, would not be detected by OFT's mergers intelligence unit. In this connection, our members consider the number provided by the Impact Assessment and the Deloitte report to be overestimated and believe that the systems in place to spot potential damaging mergers are well functioning.
- 3.7 We would like to highlight the need to ensure that any changes are in line with OECD/ICN best practices in this area.

## **Mandatory notification regime**

3.8 The majority of members consider the UK as very fortunate in having a voluntary notification system. On this basis, we consider it preferable to improve the voluntary system compared to introducing a mandatory notification regime.

3.9 Nevertheless, if a mandatory notification system is to be introduced, the ICC would only support it on the following basis:

- Adoption of clear and appropriate turnover based thresholds, and the removal of the material influence and share of supply tests;
- Exemption for small mergers;
- Simplified procedure where no competition issues, including the possibility of a short form filing and early termination of the review period;
- No filing fees;
- Clear time table for review.

3.10 In any mandatory regime, the following four key issues need to be considered carefully:

(i) Case load

We recognise that there will be a necessary trade off between the burden of increased notifications (both for the authorities and for business) and the aim of capturing harmful mergers.

Too many notifiable cases will entail a risk of failing to detect harmful mergers. The UK would need an authority that can handle the process both in terms of volume and in terms of ability to identify non-problematic cases speedily and efficiently. Failure to do so would harm the credibility of the authority particularly in an international context.

Moreover, aside from considering the dominance of a business after a merger, the impact of a merger on the economy as a whole should also play a vital part in the consideration as there is a trade off between the cost of investigating against the impact (or lack thereof) on the wider economy/consumers.

(ii) Threshold issues

We believe that the current threshold of £70m is working well. We do not believe that any significant harmful mergers are missed because of the voluntary nature of the regime.

We would advise Government not to set the threshold too low as too many notifiable cases will also entail a risk of failing to detect harmful mergers. The reviewing authority would need to be able to handle the process both in terms of volume and in terms of ability to identify non-problematic cases speedily and

efficiently. Failure to do so would harm the credibility of the authority particularly in an international context.

More importantly, ICC UK is concerned that there is insufficient focus on the “substantial” element of the SLC test and consideration of the impact of mergers on the economy as a whole. The BIS Impact Assessment assumes that any ‘anticompetitive’ merger ought to be caught by the system without debating the trade off between the cost of investigating vs. impact (or lack thereof) on the wider economy/consumers. BIS’s extrapolates<sup>4</sup> that each undetected ‘problematic’ merger below the £5m threshold would cost the economy £31m. Whilst BIS accepts that it is likely to be an overestimation it is difficult to conceive a scenario where £5m turnover can lead to a £31m overcharge over a reasonable period of time, say 10 years.

The turnover levels as currently proposed under a mandatory regime are below those in Germany which is widely regarded as capturing too many ‘no issues’ mergers. Annex A contains an overview of thresholds (a) EU countries of a similar size and GDP and (b) smaller EU countries with a similarly mature merger control system. High-level analysis shows that essentially all are based on a two-tier turnover system (i) combined turnover of buyer and target on a worldwide or national basis and (ii) individual turnover of both buyer and target. Levels range from €30m to €60m (i.e. £5m-£70m) with Germany being the lowest requiring one party with €25m and one with €5m. It shows that the current £70m threshold, while at the upper end, is not out of kilter with other countries. There is currently no suggestion that significant mergers are missed in those countries.

By way of cross-check, the current *de minimis* regulation for chapter I and chapter II cases provide for immunity from fines in an abuse case where the dominant undertaking achieves turnover of less than £50m. We therefore believe that if there is no public interest in imposing a fine on a company of that size, there would equally be no public interest in a Phase 2 investigation or prohibition of an acquisition featuring companies of similar size.

In line with other countries we propose that if a mandatory test is to be adopted (which we suggest should not be the case) to set the threshold by reference to the turnover of at least two of the merging undertakings and this would tie in with the need to exempt transactions involving SMEs whether buyer or target. In connection to this, the share of supply test as well as the material influence test would need to be abandoned as too complex and difficult to assess under a mandatory regime.

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<sup>4</sup> Para 142ff

(iii) Simplified process

We would recommend introducing a simplified process in case a mandatory notification regime is to be introduced. Clearly non-problematic cases need to be cleared speedily to free the authority's capacity for serious cases and an early termination procedure such as that used in the US or Canada would be helpful. We believe that a short form notification should be introduced for non-problematical mergers, and the merger review timetable should allow for early termination of the review period if the merger does not give rise to competition problems.

(iv) Other side effects

A full mandatory system introduces a greater rigidity of deal timetable given the timing implications of a notification and suspension. In addition, most of the antitrust deal risk is being shifted to the seller whereas a voluntary or non-suspensory regime by contrast allows the parties more freedom to allocate the antitrust/deal risk between them.

### **Hybrid System**

- 3.11 The proposed hybrid system which seeks to introduce a mandatory regime for transactions that fall above the current turnover threshold and a voluntary regime for all other merger or for those fulfilling the current share of supply thresholds combines the worst of both worlds. Given that we doubt that there are any significant mergers that are missed we do not believe that there ought to be jurisdiction to investigate mergers below the filing threshold. Given the comments above regarding the threshold we recognize that a full mandatory system might therefore want to see thresholds in the region of £50m UK turnover for the target, but we do not see the need for any lower thresholds. In particular any thresholds should not simply target combined UK turnover leading to companies with high UK turnover having to notify transactions where the target has little or no UK activity (as is the case in certain other jurisdictions).

### **SME exemption**

- 3.12 An exemption from merger control for transactions involving small businesses under either a mandatory or voluntary regime would address not only the problem of regulatory burden on small businesses but also the danger of over-enforcement in small cases with limited effect on competition and the wider economy.
- 3.13 We would therefore highlight the necessity of binding exemptions in order to increase legal and commercial certainty. As regards the mandatory regime we have outlined above the thresholds that members believe would be meaningful. The same considerations apply for both the mandatory and voluntary regimes.

- 3.14 Moreover, the Commission's current definition of SME for state aid and other issues sets a turnover threshold of €50m.<sup>5</sup> Again this provides a useful cross-check to the thresholds proposed. Given the requirements for certainty and predictability and given that most merger regimes base thresholds on turnover we do not believe that the employee number or balance sheet value would add to any definition of SME.
- 3.15 In addition to an SME exemption members also believe that there would be merit in a small markets exemption (irrespective of the size of the merging undertakings) given that it is unlikely that there would be a significant welfare loss even if prices were to rise. The threshold of £10m (as is currently in place with regard to the OFT's discretion to refer to the CC for Phase 2) would seem appropriate.

### **Creation of a single authority: merger control**

- 3.16 Although it is argued that the creation of a single CMA out of the current two institutions may reduce the regulatory burden to a certain extent, the majority of ICC members believe, that any potential upside in speed of decision making may be outweighed by a potential loss in robustness of outcomes. The Government needs to consider very carefully whether improvements might be achieved without a radical overhaul of the entire regime.
- 3.17 We outline below views regarding the benefits and drawbacks of (i) the single agency and (ii) preserving the status quo.
- 3.18 Single agency
- Some efficiency gains by reducing duplication in the institutional infrastructure.
  - Some procedural efficiency gains by streamlining parts of the review processes and de-duplicating parts of the review itself.
  - Complete fresh pair of eyes, combined with institutional independence of Phase 1 and Phase 2 authorities significantly reduces vested interests in achieving particular outcomes in Phase 2 that are formed by views that have emerged during Phase 1.
  - Losing the very robust fresh pairs of eyes system is therefore likely to result in more errors.
  - Re-creating such a system through additional 'safety measures' within a single CMA to address the loss of the "fresh pair of eyes" and avoiding confirmation bias undermines the reason for changing the system in the first place.

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<sup>5</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996H0280:en:HTML>, and [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm)

### 3.19 Status quo

- The current two authority system is not identified as having significant institutional shortcomings by members, although the duration of UK Phase 2 investigations in comparison to those elsewhere was noted as a concern. Merger control is aimed at the largest mergers that would cause a negative effect on the UK economy. Phase 2 is aimed at the most complex of those large mergers i.e. those that are both problematic and where the problems cannot be solved easily.
- The fact that the system does not cater well for 'small mergers' that end up in Phase 2 is more indicative that the thresholds for investigation and referral may not work as well as they should than a sign of weakness of the system as a whole.
- There is scope for gradual improvement in the existing system without the costs of creating the single CMA:
  - Reduction of the extent of the CC review and report.
  - More use of the streamlined referral process to Phase 2 for complex or obviously difficult transactions to reduce Phase 1 resource requirement.
  - Earlier consideration of remedies in Phase 2 where the parties consider it appropriate.
  - More direct involvement of the panel in the earlier stages of the enquiry.
  - A shorter statutory timeline for review, forcing the CC to accelerate its processes.

### **Statutory time limits**

- 3.20 In comparison with other European member states (see Annex B), the UK is in the upper quartile in terms of duration of both Phase 1 and Phase 2. The longer Phase 2 duration can be explained as a mixture of having two separate authorities, the panel system and the detail of the report itself. In complex cases the length of the case is viewed as a necessary trade-off with the robustness of the outcome.
- 3.21 In most of our members' view, shortening the Phase 1 process is likely to lead to increased use of informal pre-notification contacts and is unlikely to reduce overall duration in complex cases. However, it is suggested that a simplified process for unproblematic cases could reduce overall workload/duration. Moreover, an early termination option for clearly non-problematic cases similar to that adopted in the US and Canada would be helpful.
- 3.22 Increased use and formalisation of the fast track referral process is seen as helpful where a Phase 1 outcome is unlikely (either because remedies are not possible or unlikely to be

offered). This, however, makes less sense in a unitary authority system, where the same case team reviews the case in Phase 1 and Phase 2.

### **Review process**

- 3.23 Simplified procedure. In the context of a mandatory or hybrid system with some form of mandatory notification it would be necessary to allow for unproblematic cases to be identified and closed speedily.
- 3.24 The current EU simplified procedure is simplified in terms of the authority's processes but involves little simplification for the notifying parties (either in terms of information required or in terms of speedy outcome).
- 3.25 Formal information gathering powers in Phase 1 are unlikely to have any impact on the main parties but could possibly have a marginal upside in third parties providing necessary information to the OFT.
- 3.26 Undertakings in Lieu ("UIL") vs. early Phase 2 remedies. Early Phase 2 remedies can be helpful where the parties have run out of time in Phase 1. Agreeing early Phase 2 remedies is likely to be more difficult in the current institutional structure given that the Phase 2 authority may not be sufficiently advanced in its analysis to allow it to agree remedies—although the ICC would not welcome a system where the Phase 2 review team in a unitary CMA does not re-examine the evidence afresh upon a referral. In any event time for such negotiations can be achieved by allowing for the clock to stop pending negotiations of UILs (whether in a unitary or two tier authority structure).

### **Time extensions/stopping the clock**

- 3.27 The issue that this seeks to address is that a significant number of small mergers which were referred to the CC were abandoned because the regulatory burden imposed by a full CC reference. This is arguably an issue that should be addressed by setting the jurisdictional and referral thresholds at a more reasonable level.
- 3.28 If it is likely that the parties will abandon their merger plans following a Phase 2, it clearly makes sense to establish the parties' intentions before dedicating significant case team resources.

### **Appeals**

- 3.29 The CAT has proved to provide efficient and effective checks and balances to the current competition and regulatory system. In mergers in particular the CAT has been able to provide judicial decisions in a time frame necessary to make them an effective constraint on the authority.

- 3.30 By contrast, the current appeals process for EU merger cases to the General Court in Luxembourg provides noticeably less effective procedural or substantive control over the reviewing authority.
- 3.31 We would therefore be concerned if any of the proposals put forward by Government were to reduce the CAT's powers, scope of review or independence.

### **Fees**

- 3.1 Members of ICC UK are aware that a case can be made that merger control is a public service and therefore ought to be financed through public funds. In any event, the UK merger regime is already levying some of the highest fees internationally to investigated parties (irrespective of whether they have notified or not). We believe that filing fees ought to be removed if the UK is to move to a mandatory merger filing regime.
- 3.2 A comparison with other jurisdictions (Annex C) shows that 8 jurisdictions (including the EU) charge no filing fee at all and a further 9 charge a flat fee of below €5,000. Four jurisdictions base the fee on whether it is a Phase 1 or a Phase 2 case and one jurisdiction (Germany) decides on the fee level individually in each case. By comparison the UK fees are amongst the highest single fees.
- 3.3 ICC UK would highlight its concern regarding considerations of further significant increases in fees, given the already high level of fees.

We believe that key considerations for any fees regime should be:

- (i) The need for a simple, practical and transparent system.
- (ii) Structured pre-set fees seem preferable to post-assessment fees.
- (iii) Phase 1/Phase 2 fees should reflect the additional workload and could be structured so that Phase 1 cases do not subsidise Phase 2 investigations.

#### **4 Chapter 5 - A stronger antitrust regime**

- 4.1 The Consultation paper sets out a number of problems with the current regime, however, as mentioned in the introduction, we do not agree with the Government's view that the fact that there are too few cases should of itself be considered a problem. We would like to encourage the Government not to assess the regime on the number of cases but rather focus on the quality and timeliness of the agency's decision making. .
- 4.2 ICC UK recognises and applauds the recent efforts of the OFT to improve the decision making process by the introduction of a number of procedural measures (such as the introduction of an Adjudicating Officer). However, there are a number of ways in which the regime can be further improved<sup>6</sup>. The longevity of cases is a problem that the Government has correctly identified and we agree that reducing the length of investigations should be a key priority of this reform. Similarly, there is room for improvement with regard to prioritisation and the targeting of cases at the case initiation stage.
- 4.3 Above all, we believe that the guiding principle of this reform ought to be to ensure that the regulator's priorities are quality of decision-making and due process. Therefore, the aim should be to streamline and speed up the processes to the extent possible within these parameters. The perception of fairness in the decision-making process of the regime is paramount in this reform: "justice should not only be done, but should manifestly and undoubtedly be seen to be done".<sup>7</sup>
- 4.4 The current Consultation therefore provides a welcome opportunity to review and reconsider the best approach to antitrust enforcement. The goal of antitrust enforcement in the UK must be deterrence of hardcore anticompetitive behaviour; clear and transparent procedures that engender trust in the regime from companies; and swift resolution of cases not only to increase deterrence through having infringement decisions not too far removed from the conduct in question, but also to minimise the burden on business of the investigative process.
- 4.5 Recent appeals before the CAT against OFT decisions on penalties under the CA98 prompt the question as to whether penalty guidelines would be better devised and applied from the top down. In particular, in our view consideration should be given to a new approach to

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<sup>6</sup> Recent appeals before the CAT against OFT decisions on penalties under the CA98 prompt the question as to whether penalty guidelines would be better devised and applied from the top down. Consideration should be given to a new approach to penalty policy by analogy with the sentencing guidelines system used in criminal cases, especially if the prosecutorial approach is adopted.

<sup>7</sup> Lord Hewart, *Rex v. Sussex Justices*, 1 King's Bench Reports 256, at 259 (1924). Please see also the ICC's paper on Due Process in EU Antitrust Proceedings available at <http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/ICC%20EU%20Due%20process%20paper%2008%2003%2010%20FINAL.pdf>.

penalty policy by analogy with the sentencing guidelines system used in criminal cases, especially of the prosecutorial approach is adopted.<sup>8</sup>

- 4.6 Our view is that there are potential advantages and disadvantages to each option set out in the Consultation paper, and that the detail will be crucial in determining which approach is favoured. We note that Government has been considering hybrids of the various options with for example a separate track for cartel cases and more “complex” dominance cases where it is suggested there is more need for detailed economic review which is not suited to prosecution before the CAT. In this respect, ICC UK’s view is that a single, clear procedure for all Competition Act cases would be preferable to ensure business is able to more clearly understand the CMA’s processes. As a general point, clarity, simplicity and transparency are to be encouraged in the redesign of the competition regime.
- 4.7 Another key cause of concern in OFT investigations has been the lack of resource which has led to frequent turnover of staff on longer running cases and insufficient resource to push cases through more quickly. ICC UK’s view is that Government should have the resource issues firmly in mind in considering the competition law reforms. Whether increased resource can be justified in the current climate is a difficult question, but the wider economic benefits of a strong competition regime have been calculated by the OFT as greatly in excess of their costs, while fines generated through successful investigations ensure that the OFT has also been directly revenue generating in recent years. A well paid and resourced competition authority is far more likely to produce good outcomes in terms of antitrust enforcement.
- 4.8 With our focus on analysing the three options as presented in the Consultation paper within the context of the problems with the current regime, we believe that the best suited option would be whichever enhances the quality of decision-making and ensures due process. Thus we address the potential advantages and drawbacks of each below.

### **Option 1**

- 4.9 Option 1 proposes maintaining the status quo but 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 radical enough to address the problems with the current procedure.
- 4.10 If the reform is to improve quality of procedure and therefore reduce the lengthiness of the enforcement process, ICC believes change must be made to enforce a limitation period on Competition Act investigations, and to have binding deadlines within the process.

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<sup>8</sup> While an amendment may be required to the CA98 to remove the obligation on the OFT to adopt statutory penalty guidelines, the current provisions reflect the EU approach to penalty guidelines adopted for European Commission administrative decisions which reflect the EU legal system’s inability to adopt a political or judicial system of sentencing guidelines. At the EU level this also perhaps explains why the EU Court of Justice has never applied its plenary power of review of fines in the same way as the CAT, although it arguably has the same powers on an appeal against fines

Similarly, given the importance of ensuring due process and that businesses are protected by Article 6 ECHR, transparency must be a key focus with this reform as an efficient system of tackling anticompetitive behaviour must not only do so, but also be seen to do so.

- 4.11 Option 1 would effectively maintain the current administrative model. The vast majority of OFT cases are appealed, this may be because parties feel it is only before the CAT that they get a fair hearing. On this basis, ICC feels it would be a missed opportunity not to reform the system more significantly to address its shortcomings.

### **Option 2**

- 4.12 Option 2 proposes to develop a new administrative approach by creating an internal tribunal in the newly formed CMA. Although the Government considers that the Article 6 ECHR requirement of an independent and impartial tribunal is satisfied under this option, there is a genuine question as to whether such an internal tribunal within the same body that investigates and adjudicates would indeed satisfy the ECHR requirements if the right of appeal to the CAT were diluted to only a judicial review standard. We would also point out that reducing recourse to the CAT on JR grounds rather than a full merits appeal does not reduce cost for business. That said, there are some attractions of the internal tribunal. This would create an opportunity to introduce the experience and expertise of current Competition Commission members to the Competition Act regime. This might help ensure more robust decisions emerge from the new CMA and that these are less frequently appealed. However, it is not clear that such an innovation would lead to cases moving more quickly (a key Government concern) and ICC would be deeply concerned if there were to be any reduction in the right of appeal to the CAT as a consequence of introduction of an internal tribunal. The independence and expertise of Competition Commission members is generally welcomed under the current regime, but if they are located within the same institution as the preliminary investigators of a case there is a real concern that this independence might be compromised in a single CMA with an internal tribunal, and that undue pressure (direct or indirect) might make them feel a need to support the case team's position against that of the parties.
- 4.13 We do not believe that the safeguards suggested in the Consultation paper (such as imposing certain conditions regarding the terms and process of appointment of tribunal members and implementing a policy on conflicts and bias) would be sufficient to ensure due process or to satisfy the requirements of Article 6 ECHR given the criminal nature of antitrust offences and the possible imposition of hefty punitive fines. Therefore, it must be clear externally that the ultimate decision-maker - even if only on appeal - is wholly independent from the investigator.
- 4.14 A severe limitation on Option 2 compared with Option 3 is that the "panel" will not qualify as a court or tribunal (any more than the OFT does to-day) that may make a reference to the EU court of Justice under the CA98.

### **Option 3**

- 4.15 ICC UK submits that Option 3's proposal of adopting a prosecutorial approach may be the most suited to achieving the goals of this reform. Allowing the CAT to be the decision-maker so that the CMA's role would be to prosecute and thus taking away the adjudicatory burden might improve efficiency and lead to faster processing of cases. In this context the CMA would have to focus carefully on case selection. We note that the OFT itself appears to have improved its processes somewhat, and recent cases appear to be progressing faster than a number of the legacy investigations, while also focussing on more clearly anticompetitive conduct rather than pursuing more novel theories of harm. This approach is strongly endorsed by the ICC: a competition regime which consistently and successfully prosecutes clearly anticompetitive behaviour will have a far stronger positive effect on the economy than one which seeks to pursue novel cases on the fringes of the legal definition of anticompetitive, and where the evidence of actual consumer harm is less obvious. ICC believes that a prosecutorial model would serve as a helpful tool in ensuring this outcome.
- 4.16 Above all, Option 3 would ensure due process, as the requirements of Article 6 ECHR are clearly met. The CAT is noted for its independence and robust decision-making. This in part can be attributed to its unique composition. Although in name a "tribunal" rather than part of the High Court, its chairmen include the judges of the Chancery Division and the CPR apply where the special CAT rules are silent or expressly adopt them. It follows that the unique status of the CAT should continue to be recognised by treating it as a Court rather than treating it as if it were like any other "tribunal". There is a concern, however, in relation to the initial 'bedding in' period of implementing this system. It is submitted that certainty over roles and over the practicalities to ensure a smooth transition to this system needs to be given very careful consideration prior to implementation.

### **Timetables**

- 4.17 As above and as recognised by Government, there is a concern within business about the duration of Competition Act investigations and about due process. Given the extensive powers available to demand information and the ability to make inferences where information is not provided, the ICC does not see why a clear limitation period on Competition Act cases could not be introduced. The European Commission has a five year limitation period on investigations and this does not appear to have had any adverse effect on its investigations. The ICC would welcome the introduction of a limitation period and also of published timetables for investigations as the Competition Commission uses in its merger reviews and market investigations. In addition, a long stop date should be introduced which would provide a time within which an investigation is to be completed or the case closed. It is not acceptable for investigations to drag out for many years, and this is something that does need to be addressed.

### **Powers of investigation and powers of entry**

- 4.18 The proposal to introduce fines on parties who do not comply with the requirements of an investigation appears to be non-controversial. However, if such a measure is to be introduced, there would need to be safeguards in place to ensure that such an offence is well defined. Given that there may be difficulty in identifying the correct and appropriate individual and/or company to penalise, there must be no ambiguity over the criteria for such an offence to arise. However any fine should clearly be proportionate to the failure to provide information.
- 4.19 The Government's approach of repealing unnecessary laws and regulations in relation to intrusive state powers is welcomed, however, it seems that the existing powers of entry are appropriate and need not be changed.

## 5 Chapter 6 –The Criminal Cartel Offence

- 5.1 It is generally accepted that personal criminal sanctions constitute one of the most effective means by which the competition laws can be enforced and are one of the most effective deterrent to corporate infringements. This finding was reinforced by the findings of the *Deloitte report* commissioned by the OFT on deterrence of anticompetitive behaviour.
- 5.2 Whilst chapter 6 of the Consultation points out that there have been only two prosecuted cases since 2003, on balance, it is felt that the existing cartel offence needs longer to bed down and as such, we do not support any of the four options set out in the Consultation.
- 5.3 In this context, one of the key concerns for the authorities to consider is the degree to which the reliance on whistle-blowers and the leniency regime for cartel cases creates inappropriate incentives as regards dishonesty. It is a fundamental concern that whistle-blowers may be tempted to “admit” dishonesty in order to secure immunity from prosecution, if that “dishonesty” is then used as evidence of the dishonest intent of other parties to the same conduct.
- 5.4 While the concern about dishonesty in relation to leniency applicants might suggest a strict liability test - or variant on the current test - is appropriate, ICC UK members are concerned that the test under which individual executives could face criminal sanctions including imprisonment should not be one which requires recognition by a jury that they have acted in a way of which society at large would disapprove. The *Ghosh* test for dishonesty satisfies this concern, and thus ICC UK members are reluctant to see it removed without further evidence to justify such action.
- 5.5 In this context, we would suggest that it may be more appropriate to reassess the effectiveness of the existing cartel offence in, say, five years, by which time it should be possible to more fully consider the proper-functioning (or otherwise) of the system. We note that reform of the cartel offence need not be contemporaneous with other changes to the competition regime, and we also note that the OFT has the power to deter individuals through the use of director disqualification powers which it has also to make significant use of since they were introduced in 2003, albeit that it has announced that it intends to do so moving forward.
- 5.6 However, if Government is nevertheless minded to reform the existing offence, we think there would be merit in considering a simple offence coupled with firm statutory guidance (rather than the options set out in the Consultation). Please see in more detail below:
- 5.7 In this connection, it is our view that the options set out in the Consultation are (well intentioned) efforts to square circles. Taking each of the options in turn:
- 5.8 *Option 1:* ICC UK generally agrees that dishonesty is inappropriate but, as the Consultation correctly recognises, “intention” would remain. We disagree that this would make the offence “too broad.” It simply means that no “dishonesty” is needed, as the term is

understood in *Ghosh*, and that the individuals concerned must have intended the natural consequences of their actions, broad or narrow. In effect therefore the substantive offence is left unchanged.

- 5.9 It is argued that it would be absurd for an undertaking to be fined when “intention” (or negligence) is present but a lower standard for liability to apply in the case of the individuals responsible. Very few hard core cases of price fixing or market sharing have any hope of exemption and we have difficulty understanding the Consultation’s concern that this is ever going to be a problem.
- 5.10 *Option 2:* ICC UK members believe that this seems to anticipate a problem which should not exist and merely adds a further layer of complexity where none should exist.
- 5.11 It is thought that classification of agreements by type may be somewhat regressive as to the extent that it is the effect of agreements which typically should be examined not the manner in which they are couched. It is feared that this approach would constitute an invitation to creativity. “Object” is just shorthand for those species of agreement which constitute infringements even in the absence of proven actual or potential effects.
- 5.12 *Option 3:* secrecy is often associated with subterfuge and evasion of the law and may well constitute evidence of intent. We doubt, however, if it should constitute part of the substantive offence. It is anticipated that problems in creating an acceptable definition of secrecy occur, and once again we doubt the need for such a proxy.
- 5.13 *Option 4:* Again, members feel that the stress on having to prove that an agreement was not made “openly” adds an unnecessary layer of complexity. It is a further proxy for “intent” but a worse one than “secrecy”. What does “overt” mean in a world where it is legitimate for many commercial arrangements to remain confidential? It is worth noting that this finding of “overt” agreements cannot relieve the undertaking of liability. We anticipate a good deal of unnecessary creativity in “informing” consumers and if an industry wide cartel is involved it is hardly realistic to expect consumers to shop around to a supplier not involved in the cartel. It would be a very ineffective cartel if they could.
- 5.14 In this context, should the Government ultimately be minded to reform the cartel offence at the current time, we think that there may be merit in a simple offence of intentionally committing the offences set out in section 188 and leaving matters to juries. The real issue is prosecutorial discretion. There must be a read-across between the seriousness of any infringement and the decision to prosecute, and the circumstances in which a prosecution is likely must be set out in advance. Secrecy, clandestine arrangements or openness and transparency, should be matters which govern the decision to prosecute.
- 5.15 We would welcome firm statutory guidance on the matters on which prosecutions are likely to be brought in order to inject some certainty so that proper advice can be proffered. If there are complex economic issues, which we think will be rare, those issues go to the liability of the undertaking not the individual, but, given the regime which has been

adopted, we see little choice but to assume the risks of a hard fought prosecution, with or without economic evidence. Such situations are unlikely to arise, however, and policy should not be governed by the extreme or rare case.

## 6 Chapter 7 – Concurrency and the sector regulators

- 6.1 As a general proposition we do not believe that the present concurrency regime can be said to have worked effectively. As a result, we consider that there are good reasons for stripping the various regulators of their competition enforcement role:
- (i) With the exception of Ofcom, it is no exaggeration to state that the sectoral regulators have in general failed to use (or have misapplied) their competition enforcement powers over the last decade. For example, the only notable case to reach the CAT in connection with the water industry involves an appeal brought by a third party in circumstances where the relevant regulator, Ofwat, had failed to act;<sup>9</sup>
  - (ii) The notable exception is Ofcom which, is under a statutory duty to use its competition act enforcement powers before its regulatory functions in order to address issues of competition.<sup>10</sup>
- 6.2 We ascribe this reluctance on the part of sectoral regulators to utilise competition enforcement powers to a number of factors. These include:
- (i) The fact that the sectoral regulators generally speaking have a “regulatory mindset” rather than a “competition mindset”;
  - (ii) The perceived risks (cost and reputational) of bringing competition enforcement actions which may be appealed with cost consequences;
  - (iii) Lack of experience and resources in carrying out pro-active competition enforcement investigations and, ultimately, bringing infringement decisions;
  - (iv) A broader culture of addressing issues through “soft” regulatory intervention, in the context of complex working relationships built-up between the sectoral regulator and industry incumbents over many years.
- 6.3 Were the competition enforcement powers to be confined to the CMA, we believe that this would result in a more pro-active and effective enforcement regime. The CMA would not suffer from the issues noted above, whilst it should be possible to recruit relevant sectoral expertise and deliver a cohesive regime through sensible co-operation and communication between the CMA and the relevant sectoral regulators.

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<sup>9</sup> See *Albion Water Limited and another v Water Services Regulation Authority and others* [Case No. 1046/2/4/4] [2006] CAT 23.

<sup>10</sup> See Section 317 Communications Act 2003.

## **Views on the proposals for improving the use and co-ordination of concurrent competition powers in particular**

6.4 On the basis that the present concurrency regime is maintained, ICC UK would make the following recommendations:

- (i) First, that the sectoral regulators should be under a similar statutory duty to that which currently applies, for example, to Ofcom to use their competition enforcement powers ahead of their regulatory powers in order to remedy competition issues;
- (ii) The CMA should itself appoint officers and/or convene sectoral working committees with specific expertise and responsibility for each sector concerned;
- (iii) The OFT's present "*Concurrency Guidelines*", which specify that cases will generally be investigated by the authority which is best placed to undertake the investigation, have not been a success. In practice, the resource constraints upon the OFT have generally left the OFT disinclined to take on cases. The resulting "default" position has almost invariably resulted in the sectoral regulator "sector specific" examining the problem using its regulatory functions.<sup>11</sup> We suggest that these guidelines are replaced by a binding framework which requires all relevant matters and/or complaints within the sector concerned which meet a specified threshold criteria to be referred to a meeting of the CMA sectoral committee (or some similar function as noted above) attended also by officers of the sectoral regulator concerned. That combined committee shall be required to determine (i) whether the matter requires to be addressed using competition enforcement powers and (ii) which is the best placed authority to act, with the CMA's views taking precedence over that of the regulator:
- (iv) It may also be sensible to ensure that an officer of the relevant sectoral regulator is appointed as a "*liaison member*" for any case team set up by the CMA to investigate a matter in the relevant sector, and vice versa for sectoral regulator case teams:
- (v) We note the Consultation paper's analogy drawn with the introduction of a "*European competition network type model*", in which the CMA would have a case allocation and oversight role. We question how far this would address the concerns set out above, unless the CMA was given a power to require the sectoral regulator to act in specified circumstances (or to require the sectoral regulator to refer the matter to the CMA). In particular, to address the "*regulatory inertia*" at the sectoral regulator level in circumstances where the CMA's own resource constraints left it disinclined to take direct action itself.

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<sup>11</sup> The case of *City Hook Limited v Office of Fair Trading* [2009] EWHC 57 provides a good demonstration of the lack of pro-active case allocation and/or management pursuant to *Concurrency Guidelines*.

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

- 6.5 We agree with the Consultation paper's comments about the potential effectiveness of the MIR process for conducting broad reviews of the competitive structure of a regulated market. The expertise and resource to carry out a market investigation (as currently found in the CC) should be of at least an equivalent level in the new CMA.
- 6.6 We consider that the relevant sectoral regulator should hold the general power to conduct an "issue based" market study in connection with a particular aspect of competition in its sector and, where the relevant thresholds were met, to make an MIR reference to the CMA. The power to conduct a preliminary market study should also be held by the CMA, with the rights to make an internal reference for a full (Phase 2) investigation. The ability of both sectoral regulator and CMA to carry out the preliminary study is necessary to overcome, respectively, an anticipated institutional reluctance on the part of the CMA to increase its own workload and the reluctance of a specialist regulator to turn matters under its own jurisdiction over to an alternative regulator for independent review.

## 7 Chapter 8 - Regulatory appeals and other functions of the OFT and CC

- 7.1 We agree that the CMA is the body with the appropriate expertise, resources and processes. It would probably be counter-productive and inefficient to transfer responsibilities.
- 7.2 There are disagreements about the appropriate standard of review in regulatory references/appeals and it may be that the standard of review is influenced by vesting responsibility with a body that is inquisitorial/investigative by nature. At the same time, though, the standard of review in telecoms appeals is an issue in respect of proceedings before the fully adversarial CAT at least as much as before the CC. Our view is that if the standard of review is considered to be too intensive then it would be more appropriately dealt with through modification of the statutory test for appeals than through shifting responsibility for determining the appeals.

### **Creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have**

- 7.3 We agree, in principle, that it is sensible for learning and best practices in one area to be adopted in other areas. There is also some value in harmonisation or, at least, consistency, given that there will be some overlap between the panel members and practitioners dealing with the different types of proceedings.
- 7.4 At the same time, though, we agree that there will be limits as to the extent of the harmonisation that can be achieved consistent with European obligations and the requirements of particular sectors. We also agree that it is not likely to be worthwhile to amend primary legislation unless there is an identified problem (i.e. rather than simply to achieve consistency across sectors). With this latter point in mind, we are unsure to what extent it will actually be possible to include in any model process the elements that are listed in paragraph 8.12 of the Consultation. To take the example of telecoms price control appeals:
- 7.5 The initiation process is set by Sections 192(3) and 193(1) of the Communications Act 2003 ("2003 Act");
- (i) The possibility of a filter is probably ruled out by Article 4 of the Framework Directive, given effect through the 2003 Act;
  - (ii) The "approach" has arguably been set by the Framework Directive and 2003 Act but is certainly the subject of Tribunal decisions; and
  - (iii) The appeal route against the CC's determination is set by Section 193(6) and (7).
- 7.6 Of the matters referred to in paragraph 8.12 of the Consultation, the only matters that arguably could be varied in the case of telecoms price control appeals without primary legislation would be:

How the CMA should deal with remedies;

- (i) Who takes decisions on confidentiality; and
- (ii) Cost recovery arrangements.

7.7 We are not convinced that these are matters where there is a real need for action to harmonise different processes.

7.8 A more appropriate objective might be to try to adopt guidelines on procedural matters that are similar across different subject areas. In this regard, the CC's recently published guidance on telecoms price control appeals might be a good starting point.

## **8 Chapters 9 and 10 - Governance and Decision making**

- 8.1 As has been addressed above, one of the strongest features of the current UK competition regime is the complete independence of the CC from the OFT ensuring the concern of confirmation bias in merger and market investigations is minimised. One of the main concerns with the current antitrust regime is that there is no such “fresh pair of eyes” examining the evidence and consequently the OFT’s decisions are seen as lacking discipline (i.e. in terms of duration) and rigour (in terms of being successfully challenged and arguably not selecting the correct cases to pursue).
- 8.2 In both the antitrust and mergers sections above we have addressed in some detail our concerns with preserving a separation of powers of investigator and decision-maker, and in the combination of the CC and OFT into a CMA this is the primary concern. We have also suggested that in the merger and markets contexts, preservation of the existing two authority system is attractive for reasons of avoiding confirmation bias.
- 8.3 Our understanding is that Government is committed to a unitary CMA, and on this assumption we would strongly state our concern that the detail of the rules for this new authority should be careful to preserve independence of the decision maker from the investigator as far as possible. We also believe it is fundamental to the integrity of the system that a full merits appeal to the CAT be preserved in order to incentivise rigour in the decision making of the CMA.

## **9 Chapter 11- Merger Fees and Costs Recovery**

### **Costs of antitrust investigations**

- 9.1 ICC UK strongly objects to the suggestion that parties who are subject to antitrust investigations should be liable for the costs of the investigating authority. This will create inappropriate incentives for parties to seek to settle matters or accelerate CMA processes in a desire to avoid potential cost liabilities, rather than to seek to make full and proper representations to the CMA on the evidence and in defence of their conduct.
- 9.2 In ICC UK’s view such a requirement would be a serious concern with regard to the proper rights of defence of companies under investigation, and would place the UK regime at odds with those of other countries while seriously compromising the perceived fairness of the regime: the incentives for the CMA to encourage parties to forego access to file or otherwise take steps to reduce the CMA cost burden would be utterly inappropriate in the context of a review that is designed to improve due process and ensure that justice is not only done, but seen to be done.

**Full costs recovery by CAT except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives:**

- 9.3 We are deeply concerned that allowing the CAT to recover its full costs would be contrary to the principle of access to justice as potential appellants may be deterred from exercising their rights of appeal if they may have to cover the costs of the CAT, and therefore are opposed to cost recovery.
- 9.4 However, we note that the Government proposes to allow the CAT to exercise its discretion as to whether or not costs should be set aside in a particular case. Some guidance on the types of circumstances where the interests of justice dictate that costs should be set aside would be helpful. In any event, we would not object to the CAT recovering reasonable costs, such as for photocopying, postage etc by way of e.g. court fees.
- 9.5 The Government has not addressed how interveners in appeals would be dealt with in terms of cost recovery. The role of interveners appears to be changing as a result of a recent Court of Appeal judgment causing them to take a more active role.<sup>12</sup> The judgment implies that there is a greater onus on interveners to advance more substantive cases, which means that they are likely to cause more costs to be incurred. There would be unfairness in requiring an appellant to bear costs caused by an active intervention but, at the same time, there would be potential unfairness in requiring an intervener to bear costs where their involvement is the result of an appeal which they did not initiate and because the Court of Appeal has effectively required them to take the lead role in defence. Interested parties may be more reluctant to intervene for fear of being exposed to the risk of paying the CAT's costs.

**Telecoms price control**

- 9.6 We cannot see any reason why telecoms should be treated differently from other regulatory appeals and it would be useful to fully understand the justification for the current inconsistency.

**10 Chapter 12 - Overseas information gateways**

- 10.1 We strongly oppose any extension of the right to share information without the consent of the parties in mergers and markets cases. Parties will usually disclose highly sensitive information to the competition authority in such cases. The present gateway provides an important safeguard for parties in protecting the confidentiality of such information and should be retained.

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<sup>12</sup> *British Telecommunications Plc v Office of Communications & Ors* [2011] EWCA Civ 245; para.86.

## **Contact**

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## **Annexes:**

Annex A: Jurisdictional Thresholds

Annex B: Merger Timetables

Annex C: Merger Filing Fees

## ANNEX A

### Jurisdictional Thresholds

Country	Combined Worldwide	Combined National	Individual National	Other
France Germany Spain Italy	€150m and €500m and	€240m and €472m or	2x €50m 1x €25m and 1x€5m 2x €60m Target achieves €47m	<i>de minimis</i> : <€10m combined or <€15m market or 30% market share
Belgium Ireland Netherlands	2x individual €40m and €113.45m and	€100m and	2x €40m 1x €40m and 2x €30m	both carry on business in IRL

## ANNEX B

### Merger Timetables

	Phase I	Phase II
Austria	4 weeks	5 months
<b>Belgium</b>	<b>55 WD</b>	80 WD
Bulgaria	45 WD	4 months + 40 WD
<b>Cyprus</b>	<b>1 month 14 days</b>	4 months
Czech Republic	30 days	5 months
<b>Denmark</b>	<b>4 weeks</b>	3 months from notification
Estonia	30 days	4 months
<b>EU</b>	<b>35 WD</b>	125 WD
<b>Finland</b>	<b>One month</b>	5 months
<b>France</b>	<b>60 WD</b>	130 WD
Germany	1 month	4 months from notification
Greece	1 month	2 months
Hungary	70 days	180 days
Ireland	1 month	4 months from notification
Italy	30 days	75 days
<b>Latvia</b>	<b>1 month</b>	4 months from notification
Lithuania	1 month	3 months from notification
<b>Luxembourg</b>	<b>n/a</b>	n/a
Malta	2 months	5 months
Netherlands	4 weeks	13 weeks
Poland	2 months	n/a
Portugal	30 WD	100 WD
Romania	30 days	5 months
Slovakia	60 WD	90 WD
Slovenia	40 days	75 days
Spain	1 month 10 days	2 months 15 days
Sweden	<b>35 days</b>	3 months
UK	40 WD	32 weeks

*WD = Working days*

**ANNEX C**

**Merger Filing Fees**

	<b>Single Fee</b>	<b>Phase I</b>	<b>Phase II</b>
Austria		€ 1,500	€ 30,000
<b>Belgium</b>	<b>No fees</b>		
Bulgaria	€1,000 - €30,000		
<b>Cyprus</b>	<b>No fees</b>		
Czech Republic	€ 4,100		
<b>Denmark</b>	<b>No fees</b>		
Estonia	€ 1,900		
<b>EU</b>	<b>No fees</b>		
<b>Finland</b>	<b>No fees</b>		
<b>France</b>	<b>No fees</b>		
Germany	€3,000-€100,000		
Greece	€ 1,050		
Hungary		€ 15,000	€ 45,000
Ireland	€ 8,000		
Italy	€3,000 - €60,000		
<b>Latvia</b>	<b>No fees</b>		
Lithuania	€ 1,330		
<b>Luxembourg</b>	<b>No fees</b>		
Malta	€ 163.06		
Netherlands		€ 15,000	€ 30,000
Poland	€ 1,276		
Portugal		€7,500-€25,000	50% of Phase I fee
Romania	€ 680		
Slovakia	€ 3,319		
Slovenia	€ 850.80		
Spain	€1,530-€24,000		
Sweden	<b>No fees</b>		
UK	€17,000 - €51,000		

*ECB Rate May 2010 where applicable*

**Joint Working Party of Bars & Law Societies**

**Department for Business Innovation & Skills**

**A Competition regime for growth  
A Consultation on Options for Reform**

**Comments of**

**The Joint Working Party  
of the Bars and Law Societies  
of the United Kingdom  
on Competition Law**

**June 2011**

# A Competition regime for growth A Consultation on Options for Reform

## Comments of the Joint Working Party

### 1. INTRODUCTION

- 1.1 The JWP<sup>1</sup> is pleased to have this opportunity to comment on the Consultation Paper issued by the Department for Business Innovation & Skills ('BIS') "*A Competition regime for growth: A Consultation on Options for Reform*" ('Consultation Paper').
- 1.2 The JWP agrees that there is scope to improve the current regime and welcomes the debate on this issue launched by the Consultation Paper.
- 1.3 The Government acknowledges that "*it has inherited a competition regime which has been independently assessed as world class*"<sup>2</sup>. There is nothing in this assessment to suggest that there is a case for major reform of the current regime; indeed, quite the contrary. In the circumstances it is surprising that the Consultation Paper should include such a large number of wide-ranging options for changing the current regime.
- 1.4 The most important of these is the proposal to merge the competition functions of the Office of Fair Trading ('OFT') and the Competition Commission ('CC') to establish a single Competition and Markets Authority ('CMA')<sup>3</sup>. The Paper also includes:
- a number of proposals for significant changes, especially to the operation of the Markets, Merger and Antitrust Regimes and to the substance of the Criminal Cartel Offence; and
  - a range of other proposals to the current regime: some of these are significant, whereas others are minor refinements to the current regime.
- 1.5 As regards the proposal to merge the competition functions of the OFT and CC, the JWP understands the perceived attractions of a single CMA, in terms of its institutional simplicity. However, the merger is not expected to achieve any material cost savings; and, although there is potential for a single CMA to deliver efficiencies of the kind mentioned in the Consultation Paper, the JWP is very doubtful about the scale of such benefits. More importantly, the JWP sees a real risk that the benefits of the merger will in practice be more than outweighed by the loss of the benefits of independent decision-making by separate organisations; by serious disruption to the OFT and CC during the merger process with high-level resources being diverted away from 'case work' to planning and implementing the merger; and by the time taken by the CMA to establish itself and develop and bed down new systems and processes. The scale of these risks is such that the JWP is not persuaded of the case for a single CMA.
- 1.6 The JWP considers that the benefits of independent decision-making in phase 2 are of critical importance to the success of the current Merger and Market Regimes. Thus, if there is to be a single CMA, the JWP is of the view that the current phase 2 processes for those regimes should be replicated so far as possible. Indeed, unless appropriate phase 2 processes were adopted, the JWP would feel unable to support a single CMA.

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<sup>1</sup> The Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law. Members of the JWP comprise barristers, advocates and solicitors from all three UK jurisdictions with particular experience and expertise in competition law; it includes those in private practice and in-house. There is extensive collective experience within the JWP of all aspects of UK competition law. The JWP has not sought to include comment in this paper on issues that may be particular to Scotland or Northern Ireland.

<sup>2</sup> Consultation Paper, at para 1.5.

<sup>3</sup> For ease of reference this paper refers to the CMA where relevant in commenting on the proposed reforms, following the approach taken in the Consultation Paper.

- 1.7 As regards the Markets Regime, the JWP accepts that there is some scope for improvement, especially in identifying appropriate markets for investigation, the use made of Market Studies and the time taken in phases 1 and 2. By contrast, the Mergers Regime is ranked second internationally behind the US regime and the JWP sees little reason to change it and limited scope for improving it. In particular the JWP does not support a mandatory notification regime; such a regime would impose an unnecessary and disproportionate burden on business in order to deal with relatively minor shortcomings in the current voluntary regime.
- 1.8 As regards the Antitrust Regime, the JWP agrees with the Government that it is not as effective as it should be. The JWP believes that effective antitrust enforcement is of the utmost importance for the effective deterrence of anti-competitive conduct -- which should be a core goal of the UK competition regime. The JWP considers that antitrust enforcement is a key area for reform. However, the CC has no role in antitrust enforcement at present, nor any institutional expertise in it, so that a merger of the OFT and CC will not address current concerns. The JWP believes that the core problem is shortage of staff (at all levels) with the required experience and expertise in sound antitrust enforcement and effective case management. Delivering more effective antitrust enforcement depends, to a considerable extent, upon satisfactorily addressing this skills shortage; unless it is addressed, none of the suggested Options for reform (or indeed any other measures) will resolve the current problems.
- 1.9 This raises a more general issue about the current use of OFT resources. The JWP is concerned that the OFT may have too many responsibilities at present and that its resources are too thinly spread. It considers that there is a case for reducing the scope of the OFT's responsibilities for consumer affairs, so as to enable it to develop a sharper focus on competition issues and enforcement. The JWP considers that this issue can only properly be considered in the context of the Government's separate Consultation on the Consumer Protection Regime, which has yet to be published. However, the extent of the CMA's remit is clearly a critical element in ensuring that it will be capable of delivering a more efficient, competition focused regime, consistent with the objectives set out in the Consultation Paper.
- 1.10 In view of the number of proposals in the Consultation Paper, the JWP has focussed on those proposals that appear likely to involve the most important and significant changes to the current regime. The JWP comments on those proposals in this Paper as follows:
- Section 2 : A Single CMA
  - Section 3 : Markets Regime
  - Section 4 : Merger Regime
  - Section 5 : Antitrust Regime
  - Section 6 : Criminal Cartel Offence
  - Section 7 : Other Issues
- 1.11 Overall, the JWP does not consider that change on the scale envisaged in the Consultation Paper is necessary or desirable.
- 1.12 The JWP would be pleased to discuss the views in this Paper with BIS officials. The JWP also looks forward to participating actively in further stages of the current review.

## 2. **A SINGLE CMA**

2.1 The Consultation Paper describes the creation of a single CMA as being "*central to the vision of an improved competition regime*" which the Government expects will:

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

*... A single CMA will also enhance predictability and consistency, eliminate overlaps between current processes and provide a strong focus for competition expertise and capability".*<sup>4</sup>

2.2 It is notable that the Consultation Paper does not suggest that the merger would achieve significant savings; instead, it seeks to justify the merger on the basis that it would improve existing processes.

2.3 It is assumed that these process improvements are expected to be derived from the ability of a single CMA to address the perceived shortcomings of two separate organisations mentioned in the Consultation Paper:

*"The in-depth investigation and rigour of analysis within the regime is a key strength. However, the time taken to deliver cases, and the need for business to engage separately with two entirely distinct teams with different processes, have been criticised by some commentators as imposing too high a burden on the public purse and on the parties involved in cases. Although the focus of the regime quite rightly should be on outcomes and the robustness of the decisions taken, long timescales reduce the efficient throughput of cases, delay the implementation of remedies, and risk diluting the deterrent effect of decisions. ... On average the time taken for cases to go from start to completion is lengthy; this is the case for all the tools used in the regime."*<sup>5</sup>

2.4 The JWP understands the perceived attractions of a single CMA, in terms of its institutional simplicity. The JWP also recognises that there is potential for a single CMA to achieve efficiencies of the kind mentioned in the Paper. However, it is important to assess the scale of those benefits and to weigh them against the potential costs and risks.

2.5 For its part, the JWP is doubtful about the scale of the benefits deliverable by a merger (at least relative to the potential costs and risks), especially if the current two phase decision making process for mergers and markets is replicated in the CMA, as the JWP considers it should be. The JWP also considers that many of the expected benefits are not merger specific and could be achieved by other means.

2.6 The JWP has particular concerns that:

- attempting to improve processes that are already operating well (as is generally the case with the merger and market regimes) is an inherently difficult task and involves a greater than usual risk that change may fail to deliver the expected benefits, especially where (as here) it is sought to improve processes by means of a major structural change.

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<sup>4</sup> Consultation Paper, at paras 1.10 and 1.11.

<sup>5</sup> Consultation Paper, at para 10.3.

- the OFT and CC have different cultures and working practices reflecting the different responsibilities of the two organisations in the two phase system; retaining the separate strengths of each within a single CMA will pose a considerable challenge.
- the CMA will have to adopt a new management structure with a requirement for new systems and internal procedures; it will also need to develop new internal and external procedures for handling cases. Planning and implementing these changes will inevitably divert attention and significant high-level resource away from 'case work' for what may be a lengthy period.
- more generally, the process of change will create considerable uncertainties within the OFT and CC and both bodies are likely to experience difficulties during this period retaining and recruiting staff of the requisite calibre.
- even if efficiencies are achieved, it may be some years from now before they are apparent and, in the meantime, the effectiveness of the regime may well suffer and there will be uncertainties for users, especially during what is likely to be a complex transitional phase.

2.7 In the JWP's view the current separation of responsibilities between the OFT and CC in mergers and markets generally works well and is one of the key reasons why phases 1 and 2 of the merger regime and phase 2 of the markets regime are so well regarded. That said there is undoubtedly scope to improve the operation of phase 1 of the markets regime and also to reduce the time taken in both phases of the regime. But in the JWP's view this could be achieved by way of incremental improvement to the current regime; it does not justify major institutional reform.

2.8 Indeed, there appears to be an inherent contradiction between establishing a single CMA and the recognition in the Consultation Paper of the importance of *"the independence of decision-making achieved by decisions being taken by separate organisations"*<sup>6</sup>. This may explain why much of the Consultation Paper appears to be directed towards finding a satisfactory answer to the question: *"How does one re-create within a single CMA the effective two phase processes that exist for market and merger investigations under the current regime"*? Self-evidently, this question only arises because of the proposal to merge the OFT and CC. It highlights a significant risk that a single CMA might reduce the robustness of decisions, a consequence that would be contrary to one of the overarching objectives of the reforms.

2.9 In the JWP's view, there is a strong case for trying to improve the antitrust regime and for addressing the main concerns that cases take too long and the quality of decisions is variable. However, as the CC has no role or institutional expertise in antitrust cases, there is no obvious reason why a merger of the OFT and CC should be expected to address these concerns.

2.10 For the above reasons, the JWP is not persuaded that the case for a single CMA is made out.

#### ***Structural issues within a Single CMA***

2.11 If a single CMA is to be established, the JWP regards the phase 2 decision taking process as a key feature of the current merger and market regimes. Companies under investigation attach considerable importance to the fact that the CC panel system brings a *'fresh pair of eyes'* to the investigation, thereby avoiding confirmation bias; that it gives them an opportunity to put their case direct to decision takers; that the decisions are taken by independent persons (not administrators) whose judgments and decisions are informed by experience and expertise in

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<sup>6</sup> *"The current regime is noted for the objectivity enshrined via the two phase system in markets and mergers, the independence of decision-making achieved by decisions being taken by separate organisations under that structure and by the oversight of the OFT non-executive directors in the phase 1 process and the role of independent CC panel members in phase 2. These factors, taken alongside the rigour of the in-depth analysis undertaken at each stage are core components which deliver a well respected regime". See Consultation Paper, para 10.2.*

business, economics, finance and the law; that they have real familiarity with the facts of the case; and, critically, the panel members and their decisions are perceived to be free from political interference. This last aspect is an especially important safeguard in an administrative process that can have potentially serious consequences -- with enforced divestment of assets as one possible outcome. The JWP considers that these features are of such importance that it is firmly of the view that a CMA should adopt a similar structure for phase 2 decision taking in merger and market investigations; and should limit the involvement in the phase 2 process of any Senior Executives involved in the phase 1 process.

- 2.12 Even so, it should be recognised that panel members within a single CMA are unlikely to be perceived as being as independent as those of the CC. This is because phase 1 and phase 2 decision takers will be members of the same organisation and they may have (or risk being perceived as having) a tendency to support decisions taken by the organisation -- e.g. in order not to damage its reputation and standing. Thus it is likely to be necessary to create systems within a single CMA to safeguard the perceived independence and impartiality of its decisions, something that is guaranteed at present by the institutional separation of the OFT and CC.
- 2.13 In general, the JWP considers that the CMA will need a degree of flexibility in establishing and evolving appropriate management structures and would not wish to be unduly prescriptive about the structure of the CMA. If necessary, the efficiency and effectiveness of the structures could be made subject to regular review. That said, the JWP is of the view that:
- if there is a Supervisory Board, it is important to ensure that it includes a majority of persons who have sufficient expertise and experience of the range of competition tools employed by the CMA to ensure that the Board is able to establish appropriate policy objectives and priorities for the CMA and to monitor them effectively;
  - likewise if there is to be a separate Executive Board, it should include appointees from the various competition functions of the CMA (i.e. mergers, markets, antitrust etc), as well as representative panel members, in order to ensure that decisions of the Executive Board are fully informed;
  - there may be scope to appoint some panel members who are prepared to devote more time to the CMA (than CC panel members currently do). However, the JWP would not favour extensive use of full time panel members, because of the risk that such persons would lack (or be perceived as lacking) independence;
  - there is likely to be scope for some phase 1 staff to join phase 2 teams in order to provide input and continuity in merger and market investigations. However, the JWP would wish to see a restriction on the numbers of phase 1 staff used in this way, in order to guard against confirmation bias.
- 2.14 In view of the importance that it attaches to the benefits of independent decision-making in phase 2 for merger and market investigations, the JWP is firmly of the view that a single CMA should replicate the current phase 2 processes for those regimes so far as possible. Indeed, unless appropriate phase 2 processes were adopted, the JWP would feel unable to support a single CMA.
- 2.15 Finally, the JWP would wish to see a CMA with fewer responsibilities for consumer affairs than those of the OFT at present, so as to enable the CMA to develop a sharper focus on competition issues and enforcement. Although this issue can only be properly considered in the context of the Government's separate Consultation on the Consumer Protection Regime (which has yet to be published), the extent of the CMA's remit is an issue that needs to be properly addressed if it is to be capable of delivering a more efficient, competition focused regime, consistent with the objectives set out in the Consultation Paper.

### 3. **THE MARKETS REGIME**

#### **BIS VIEWS ON THE REGIME**

- 3.1 The Consultation Paper acknowledges that the current market regime is "*seen as being at the forefront of global best practice, excelling in the quality of [its] analysis, expertise, flexibility and transparency*"; and also that it has delivered considerable benefits to consumers.
- 3.2 However, the Consultation Paper notes a number of potential areas for improvement identified by commentators, namely:
- whether the OFT (and Sector Regulators) are making a sufficient number of MIRs;
  - whether MIRs are being used to investigate the right markets (and, in particular, whether there should be a stronger focus on markets with structural deficiencies in competition);
  - the duplication and complexity of the two phase process, especially where a Market Study results in a MIR; and
  - the length of time taken to achieve a final decision.
- 3.3 The Consultation Paper includes three proposals for modernising the scope of the current regime, together with a number of proposals aimed at streamlining (or otherwise improving) the processes employed in market investigations.

#### **JWP HEADLINE VIEWS**

- 3.4 Although the markets regime works reasonably well -- the CC being especially well regarded for its phase 2 work on MIRs -- there are a number of concerns about the regime. In particular:
- it is an intrusive tool and, as such, it should be used sparingly in markets where its use can be shown to be justified;
  - the OFT's use of extended Market Studies in preference to MIRs; and
  - the overall duration of the OFT and CC processes.

#### ***Phase 1***

- 3.5 The criticisms of phase 1 appear to stem from a lack of clarity in the Enterprise Act about the scope and objectives of the market regime:
- it was originally envisaged that, in phase 1, the OFT would undertake a quick review of a market in order to determine whether it was appropriate to make a MIR. In fact the OFT has developed the practice of undertaking a (sometimes lengthy) Market Study before making a reference decision; and the OFT uses Market Studies, not simply as a means of determining whether to make a MIR, but as a tool that encompasses its consumer and competition responsibilities<sup>7</sup>. In practice the OFT has undertaken many more Market Studies than originally expected, and has seemed to prefer to undertake Market Studies rather than to make MIRs to the CC.
  - the reference test is a low one and there is no further guidance in the Act about the kinds of market and market shortcoming that are likely to justify a MIR; and
  - the OFT is not subject to any time constraints in reaching decisions in phase 1.

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<sup>7</sup> These include: improving the quality and accessibility of information for consumers; encouraging businesses in the market to self-regulate; making recommendations to Government to change regulations or public policy; and taking competition or consumer enforcement action.

- 3.6 Thus the OFT has complete flexibility in deciding which markets to investigate, the time frame for its investigation, and what action it takes following a Market Study. The OFT has issued guidance about its use of Market Studies and the making of MIRs; and, more recently, has stated that it will aim to consult within six months when it is considering a MIR as a possible outcome when launching a Market Study. Even so, the flexibility allowed to the OFT means that it is difficult at the outset of an OFT investigation for parties and their advisers to make a realistic assessment of the likely implications and outcomes of an investigation, or of the length of time it can be expected to take.
- 3.7 That said, the flexibility within the system does enable the OFT to resolve some issues successfully at phase 1 by securing voluntary changes to business behaviour; the OFT can also make recommendations to Government. The OFT's ability to do this in phase 1 is clearly welcomed in some quarters.
- 3.8 The JWP considers it is important to examine the incentives in the current competition regime -- and to address the way that they appear to encourage the OFT to undertake Market Studies which use staff resources that could otherwise be devoted to antitrust enforcement. In the JWP's view this imbalance needs correcting. Market Studies clearly have their place in the overall tool kit of a Competition Authority and, if undertaken, need to be adequately resourced; however the JWP is firmly of the view that they should be accorded a lower priority than antitrust enforcement.

### **Phase 2**

- 3.9 There are few criticisms of the phase 2 process -- apart from the time it takes.
- 3.10 The comment in the Consultation Paper about the high quality of the "*analysis, expertise, flexibility and transparency*" of the regime reflects a widely held view about the phase 2 work undertaken by the CC. It is a view shared by the JWP. The success of the CC's role in phase 2 seems to be acknowledged by the Government's statement that "*a two phase process for markets should be retained, even in a single CMA, as it is essential to ensuring that the regime is proportionate, flexible and commands confidence*". The JWP strongly endorses the Government's view on this point.
- 3.11 Concerns have been expressed that the existence of two phases results in unnecessary duplication of effort by the parties and the Authorities. The JWP recognises that this has been a concern in the past, especially where a lengthy Market Study has then led to a MIR. However, the JWP is hopeful that there will be less cause for concern on this score in future, now that there is a six month time frame for the OFT to consult on a MIR.

### **Length of MIRs**

- 3.12 There is some criticism of the length of MIRs. The JWP is not convinced that this criticism is always justified, but does accept that it would be desirable to reduce the statutory time allowed for MIRs -- provided that this can be achieved without impairing the quality of the decisions, or respect for due process. It appears from previous investigations and the current timetable issues in ongoing market investigations (*Local bus services* and *Movies on Pay TV*) that it may prove challenging to reduce the current statutory timescale, due to the demanding nature of a MIR investigation. That said, the CC's stated aim is to complete a typical MIR within 18 months and, where possible, to complete straightforward investigations in around 12 months. This suggests that there may be scope to reduce the phase 2 timetable as proposed (from 24 months to 18 months) -- provided that there are adequate powers to extend the timetable where this is justified.

### ***The number of MIRs***

- 3.13 It was originally envisaged that there would be four MIRs per year, three from the OFT and one from a Sector Regulator. The actual number of MIRs has been much lower. In part this has been due to the OFT's preference for undertaking Market Studies itself, rather than making a MIR to the CC<sup>8</sup>. As regards the number of MIRs, the JWP would note that:
- it is not clear that the original estimate of four MIRs per year was robust; and
  - by no means all of the OFT's Market Studies would have been appropriate for investigation by way of a MIR.
- 3.14 For its part, the JWP is not of the view that increasing the number of MIRs should be an objective in itself; the key is to identify the right markets for investigation -- not to determine *ex ante* the number of MIRs that should be undertaken in any one year. It is clear that MIRs impose significant burdens on the companies involved; moreover, they can entail interventions that themselves cause market distortions. For these reasons, the JWP considers that MIRs should be used sparingly to investigate economically important markets that appear to exhibit serious impediments to effective competition and significant consumer detriment. A coherent set of criteria should be developed in order to identify such markets; and the criteria (and the application of them) should be subject to regular review.

### ***Sector Regulators***

- 3.15 Sector Regulators currently prefer to use their regulatory powers rather than asking the CC to undertake a MIR. The NAO has found that the main disincentives against referral by Sector Regulators are "*a loss of control over the outcome and the remedies imposed by the Competition Commission, the length of the process, and the uncertainty created in the industry*"<sup>9</sup>. The JWP would not expect these incentives to change for the better if there were a single CMA; indeed, there may be greater potential for institutional rivalry between Sector Regulators and a single CMA, making Sector Regulators even less inclined to make MIRs.
- 3.16 Although the use of regulatory powers may be an expedient way for Sector Regulators to deal with certain issues, the JWP considers that there may be a case for occasional use of MIRs, especially considering the importance of the regulated markets to the economy as a whole and the origins of the markets as state-owned monopolies. The JWP is of the view that this issue merits further detailed consideration.

### **JWP VIEWS ON SPECIFIC PROPOSALS**

- 3.17 This section sets out more detailed views on the main proposals in Section 3 of the Consultation Paper.

#### **Modernising the Markets regime**

- ***Enabling investigations into practices across markets***
- 3.18 If such a power were to be adopted, the JWP would not expect it to be widely used in practice.
- The Secretary of State had power to refer anti-competitive practices for review by the Monopolies and Mergers Commission under the Fair Trading Act 1973 (FTA), but only three references were made under this provision during the 26 years it was in force; and in one of those cases, the MMC in fact restricted itself to investigating a small number of markets in order to limit the scale of its task; the reference still took four years to complete.

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<sup>8</sup> As regards the lack of references by Sector Regulators, see 3.15.

<sup>9</sup> NAO Report, March 2010.

- Some years ago, potentially unacceptable market conduct and practices might have been considered suitable subjects for cross market investigations under the FTA<sup>10</sup>. Nowadays, as a consequence of experience gained from "effects-based" analysis and application of EU and UK competition law, general principles are reasonably well established and understood and there is extensive guidance about them from the EC Commission and OFT. Where difficulties arise, they are more likely to be market specific e.g. whether (and, if so how) well established principles should be applied to markets for products with rapidly evolving technologies.

- **Enabling the CMA to report on public interest issues alongside competition issues**

3.19 The Consultation Paper suggests that a power might be created under the markets regime enabling the SoS to invite the CMA to consider public interest issues alongside competition issues. The CMA would not have remedial powers in relation to public interest issues. This would mimic the powers that exist at present under the merger regime. The Consultation Paper points out that this would *"negate the need to create ad hoc independent inquiry bodies, such as the Independent Commission on Banking, and enable the CMA to take a core competition role in investigations in the future"*.

3.20 Whilst it understands the attractions of this proposal for Government, the JWP has a number of reservations about it:

- a key feature of the changes introduced by the Enterprise Act was the removal of the requirement for UK Competition Authorities to make public interest assessments, save for exceptional mergers that raise defined public interest issues. As a matter of principle, the JWP would prefer to avoid the competition focus of the current regime being diluted by the addition of a new public interest remit.
- the fact that a power exists under the merger regime for the CC to consider public interest issues does not imply that a similar power should exist under the markets regime. Assessing public interest issues in relation to a merger is a discreet, manageable task; and there is a clear requirement to assess such issues in the same time frame as the competition issues. It is likely to be much more difficult for a competition body to assess public interest issues in the context of a wide ranging MIR; and the case in a market investigation for assessing public interest issues in the same time frame as the competition issues is likely to be less compelling.
- the implicit suggestion in the Paper that the Government might have used this power (had it existed in 2010) in preference to setting up the Independent Commission on Banking, is an indication of the scale of the task that could face the CMA if this proposal were to be adopted; and the potential resourcing and funding issues that it could face.

- **Extending the super-complaint system to SME bodies**

3.21 It is not clear to the JWP that it is necessary to extend the super-complaint system to SME bodies. SME businesses are able to, and do in fact, complain to the competition authorities; and the OFT is aware of the issues faced by smaller businesses, takes their complaints seriously, and has sought to facilitate actions by SMEs.

3.22 Furthermore, in the JWP's view:

- there is a risk that this power could distort the competition regime, by giving enhanced rights to a specific class of business.

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<sup>10</sup> See for example, *Full-Line Forcing and Tie-in sales*; and *Discounts to Retailers*.

- the CMA needs to be free to determine efficient investigation priorities based on identifying market distortions that cause significant consumer detriment. There is a risk that this proposal would impair the CMA's ability to do that.

### **Streamlining the Markets regime**

#### **• Reducing timetables**

- 3.23 The Consultation Paper contains proposals (1) to reduce the statutory timescales for phase 2 MIRs from 24 months to 18 months; and (2) to introduce statutory timescales (a) for phase 1 Market Studies and (b) for implementing remedies following a phase 2 MIR.
- 3.24 *Statutory timescales for phase 2 MIRs*: the JWP's views on this proposal are set out at 3.12 above.
- 3.25 *Statutory timescales for phase 1 Market Studies (or those where a MIR is envisaged)*: whilst there may be superficial attractions to introducing a statutory time limit for Market Studies, it is not clear to the JWP that it is practical or desirable to do so:
- the lack of a statutory time limit creates uncertainty for those involved in the industry, but this concern should be reduced as a consequence of the OFT's recent statement about consulting within six months when it is considering a MIR as a possible outcome when launching a Market Study.
  - there are circumstances where lack of a statutory time limit can be an advantage, because it may enable the OFT to resolve issues at phase 1 without the need for a lengthy MIR process before the CC.
  - parties have an incentive to agree voluntary undertakings in phase 1 while they remain subject to the threat of a MIR; that incentive would cease to exist on the expiry of a statutory time limit.
  - if there were to be a time limit it would be necessary to identify a "trigger point" at which the clock would start to run, e.g. from formal announcement of a Market Study. However, unlike the merger regime (where, in effect, the parties' transaction acts as the trigger date) under the market regime any trigger date is likely to be under the control of the CMA/OFT which may lessen the effectiveness of any mechanism for starting the clock.
  - if there is a single CMA, any delay occasioned at present through "institutional rivalry" between the OFT and CC would be removed thereby facilitating an earlier move from phase 1 to phase 2.
  - As regards the suggestion that statutory timescales might be adopted for phase 1 Market Studies *only* where a MIR is envisaged, it is possible for the OFT to accept such a commitment in an administrative timetable, but the JWP expects that it would prove difficult to impose a statutory obligation of this kind on the CMA.
- 3.26 Overall, the JWP suspects that removing uncertainty on timing in phase 1 is now less important (in the light of the OFT's statement) than allowing the OFT time to resolve an issue without a MIR; and that it may be sufficient (and preferable) to rely on an administrative timetable of the kind issued by the OFT. However, compliance with the target timetable should be kept under review and might be included as a factor in assessing performance.
- 3.27 *Statutory timescales for remedies after phase 2 MIRs*: in view of differences in the type and complexity of remedies that may be under consideration in phase 2, the JWP does not favour introducing statutory timescales for the remedies phase.

- ***Introducing formal information gathering powers at phase 1***

- 3.28 The JWP does not favour formal information gathering powers in phase 1 until a stage is reached when there is sufficient evidence of a genuine competition problem in the market. The JWP would note that: the markets regime applies in the absence of any infringement of competition law; and that in practice most businesses comply with informal information requests made during the Market Study stage in order to present their case. It is also relevant to note that a threshold exists under the antitrust regime: the OFT must have reasonable grounds for suspecting an infringement before it can exercise its formal powers of investigation under the Competition Act 1998. In the circumstances, it would seem difficult to justify the absence of a threshold in phase 1 of a market investigation.
- 3.29 The JWP is of the view that the current practice of relying on informal requests in the initial phase 1 stages should be maintained; and that any formal information gathering powers (if they are granted) should only be exercisable after an appropriate threshold is reached.
- 3.30 The JWP accepts that formal information gathering powers would be necessary if a statutory timescale were to be adopted for phase 1 Market Studies. However, the JWP views this as a further reason not to introduce statutory time scales in phase 1.

**Increasing certainty and reducing burdens**

- ***Introducing statutory definitions and thresholds***

- 3.31 Views are sought on whether there should be a statutory definition of a Market Study and a statutory threshold for initiation of a Market Study. The JWP favours providing greater clarity about the phase 1 process. That said, the JWP suspects that it would be very difficult to devise a definition and threshold that provided useful clarification, without at the same time unduly constraining the ability of the OFT or CMA to investigate markets. The JWP suggests that this issue would be better dealt with by addressing the current incentives for undertaking Market Studies and by the adoption of a coherent set of criteria for identifying markets for review.

- ***Improving the interaction between MIRs and antitrust enforcement:***

- 3.32 The Consultation Paper notes that the CC does not have power to investigate breaches of competition law as part of its market investigation. In the JWP's view, this is not a shortcoming of the current markets regime; it is merely a reflection of the need to have different procedures for addressing, on the one hand, general market conditions and, on the other, potentially unlawful behaviour of one or more companies.
- 3.33 The Consultation Paper also suggests that the absence of this power deters MIRs where the authorities consider there may be evidence of such breaches, and encourages the CC to identify remedies other than the enforcement of the competition law prohibitions. The JWP recognises that it is not possible for a MIR to be made in relation to conduct that is already subject to investigation under the Competition Act 1998 and that there are occasions in the past when this has caused a difficulty. However, the JWP is not aware of the further problem mentioned in the Consultation Paper and is doubtful that it is a significant problem in practice.
- 3.34 The JWP recognises that if a single CMA is established, it may be expected to improve the interaction between MIRs and antitrust enforcement as it would no longer be necessary to transfer a case/part of a case from one body to another. That said, given the serious nature of an antitrust investigation, and the consequences for the companies involved, it would be very important to maintain due process around the initiation and conduct of such investigations if they were being transferred within a single CMA.

#### 4. **MERGER REGIME**

##### **BIS VIEWS ON THE REGIME**

- 4.1 The Consultation Paper acknowledges that the current regime *"is highly regarded internationally and, out of nine merger regimes, was ranked second behind the US. Its strengths include its technical competence, independence from the political process, transparency, accountability and robustness of decisions."*
- 4.2 The Government is said to be *"proud of this record"* but considers that there are opportunities to build on this strength, in particular by improving the ability *"to identify potentially problematic mergers and make merger remedies more efficient and effective"*.
- 4.3 The Consultation Paper identifies two specific drawbacks to the current voluntary notification regime:
- the risk that some anti-competitive mergers escape review; and
  - the investigation of a large proportion of completed cases to which it is difficult to apply appropriate remedies where they are found to be anti-competitive.
- 4.4 To address these issues the Consultation Paper proposes *"a continuum of options ranging from strengthening the voluntary notification regime to adopting a full mandatory notification regime."*
- 4.5 The Consultation Paper also identifies certain other areas for improving the merger regime. In particular, it argues that UK procedures are slow relative to international peers and could be accelerated.

##### **JWP HEADLINE VIEWS**

- 4.6 The JWP endorses the view that the UK currently enjoys a world class merger regime. The JWP 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 clearly made out. In the JWP's view, that case is not made out.
- 4.7 The JWP is opposed to the adoption of a mandatory notification regime; such a regime would impose an unnecessary and disproportionate burden on business in order to deal with relatively minor shortcomings in the current voluntary regime. The JWP is equally firmly opposed to the hybrid regime; such a system would not only lack proportionality, but would also fail to address the perceived shortcomings in the current regime.
- 4.8 The JWP favours retaining the current voluntary system.
- 4.9 The JWP considers that the comment about the time taken by the UK regime relative to international peers does not properly reflect the realities. As the Consultation Paper does not suggest shortening phase 2, the criticism is directed at the length of phase 1. It is correct that under the EU regime, the statutory phase I timetable is shorter than in the UK; but in reality the EU process tends to take much longer due to extensive pre-notification.
- 4.10 The JWP considers that there may be a case for some refinement of the powers to prevent integration of businesses where a merger has completed. It does not favour the blanket approach in Option 1 in the Consultation Paper; but it does consider that a variant of Option 2 may be workable.

## **JWP COMMENTS ON THE MAIN PROPOSALS**

### ***Adopting a mandatory notification regime***

- 4.11 The Consultation Paper notes that some anti-competitive mergers escape review under the current regime, but comments that *"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"*. Thus, the case for adopting a mandatory notification regime appears to be largely based on the view that a large proportion of mergers referred to the CC are completed mergers and raise SLC issues to which it is difficult to apply appropriate remedies.
- 4.12 Whilst it is true that such mergers account for a significant *proportion* of the merger references to the CC, the *actual number* of such references is small. Moreover, the authorities have powers to prevent business integration that appear to work reasonably well at present; and while those powers may not provide a perfect solution to every situation, it is not clear to the JWP that shortcomings in the current powers have in practice created significant problems for the CC in devising appropriate remedies. Indeed, the Impact Assessment concedes that this problem has affected only a handful of cases.
- 4.13 None of this suggests that the shortcomings in the current voluntary regime are of sufficient gravity to justify moving from a voluntary to a mandatory regime.
- 4.14 As against the limited benefits that it would deliver, a mandatory notification regime would have a number of serious disadvantages. In particular:
- it would impose a significant regulatory burden (and extra cost) on business by requiring a large number of additional mergers to be notified that raise no competition issues; it would have a particular impact on smaller businesses;
  - a mandatory notification regime would have significant resource implications for the CMA (even if a number of mergers were processed on a short-form basis<sup>11</sup>) and would inevitably increase the overall cost of operating the merger regime;
  - unless additional resources were to be made available to the CMA, these extra costs would have to be funded by an increase in merger fees, or by allocating resources from the CMA's other areas of responsibility, both of which would be patently undesirable.

It is difficult to square such consequences with the Government's stated objectives of improving efficiency and reducing burdens for business, especially smaller businesses.

- 4.15 For these reasons the JWP is opposed to the adoption of a mandatory notification regime.

### ***Jurisdictional thresholds in a mandatory regime***

- 4.16 If a mandatory regime were to be adopted, the current *'share of supply'* test could not be maintained because it does not provide the degree of certainty required in a mandatory regime, given the serious implications of a failure to notify. A simple turnover test is widely used in other mandatory regimes and the JWP can see no reason for adopting a different test in the UK.
- 4.17 The Consultation Paper includes two options for a mandatory regime; as noted above the JWP opposes both options:

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<sup>11</sup> In fact, experience with the European Commission suggests that short-form notifications are not as effective in reducing the burden as might be expected, because arguments frequently arise about whether a particular deal is eligible for short-form treatment.

- Option 1 - full mandatory notification: regardless of the merits of a mandatory regime, the turnover thresholds proposed are far too low. They would result in a massive increase in the number of mergers processed in phase 1 and in all likelihood have a chilling effect on benign mergers, especially among mid-sized companies. That would clearly be undesirable. On the other hand, if the thresholds were increased to "workable" levels, the lack of a share of supply test would result in a large number of mergers avoiding review -- and some of those mergers could be expected to create significant market shares with anti-competitive effects that merited investigation (e.g. in regional or smaller markets). That would be equally undesirable.
- Option 2 - hybrid mandatory notification: using a turnover threshold set at the level in the current regime would clearly limit the increase in the number of mergers that would have to be notified. However, if the CMA were to have jurisdiction over mergers below the turnover threshold which satisfied the share of supply test, that would effectively mean retaining the existing voluntary regime for the small and mid-sized market, without addressing the perceived shortcomings in the current regime. That would be a perverse outcome, especially as most references are currently made to the CC on the basis of the share of supply test. The main consequence of this system, therefore, would be to add a layer of cost and complexity to the existing regime.

#### *Material influence and mandatory notification*

- 4.18 The Consultation Paper acknowledges that it would not be possible to maintain the "*material influence*" concept in a mandatory notification regime, because of the lack of certainty about the types of arrangement that it catches. However, the Consultation Paper suggests that the "*CMA would continue to have jurisdiction over transactions that give rise to material influence of one enterprise over another and such mergers could be notified voluntarily*". In the JWP's view, to allow the CMA to have jurisdiction in these circumstances would introduce an unnecessary and undesirable element of complexity and uncertainty into the mandatory regime. The JWP does not support this proposal.

#### ***Improving the voluntary notification regime***

##### *Strengthened interim measures*

- 4.19 As noted above, the JWP understands that a only small number of completed mergers have in fact caused problems for the CC. That said, the JWP has the following comments on the Options suggested in the Consultation Paper for alternative, more proportionate mechanisms for dealing with problems created by such mergers.

##### Option 1: *a statutory restriction on integration that would apply as soon as CMA commences an inquiry into a completed merger*

- 4.20 This restriction would apply to all completed mergers investigated by the CMA, whether or not the merger gave rise to any competition issue, or a likelihood that interim undertakings would be required. The JWP considers that such a blanket provision would be disproportionate and does not support it.
- 4.21 The Consultation Paper argues that this would prevent harm caused by integration while interim undertakings are being negotiated. However, no evidence is provided to suggest that problems occur whilst undertakings are being negotiated. The JWP doubts that this is much of a problem in practice; and if parties deliberately drag their feet on negotiating interim undertakings, the OFT currently has power to make interim orders. It should be sufficient for the CMA to have the same powers.

- 4.22 Furthermore, as the Consultation Paper rightly acknowledges, the existence of this restriction might simply discourage parties from notifying until they had integrated.

**Option 2:** *clarifying the powers of CMA to prevent pre-emptive action, including at phase 1*

- 4.23 In principle the JWP does not oppose the proposal to "*clarify the legislation to make clearer the type and range of measures that the single CMA could take ... in order to prevent pre-emptive action*". However, there is an issue about how the legislation should be clarified.
- 4.24 In this regard, two aspects of the proposal in the Consultation Paper are of concern to the JWP. First is the proposal that the CMA should be able "*to require reversal of action that had already taken place and to prevent further pre-emptive action notwithstanding the existence of any contractual obligations on the part of the merged entity*". Second is the proposal that the CMA should have power to take measures in phase 1.
- 4.25 The JWP considers that an essential feature of a voluntary regime is that parties should be free to complete without risk of the entire transaction being '*reversed*'. Otherwise the seller would face "*uncertainty as to the validity and enforceability of the transaction*" of a kind that the Consultation Paper itself recognises would be unacceptable in a voluntary regime.<sup>12</sup> Thus, any clarification of the powers of the CMA needs to focus on tightening "*hold separate*" obligations and should not extend to '*wholesale reversal*' of the transaction
- 4.26 Against this background, the JWP accepts that, if deficiencies in the current hold separate arrangements are identified, it would be appropriate to see if the arrangements can be appropriately clarified; and that this might extend to reversal by the *buyer* of integration actions that it had already undertaken. However, the JWP considers that such powers should be exercisable in phase 1 only in limited circumstances and where their use was clearly justified and proportionate to the risks; and that in no case should the powers extend to requiring the *vendor* to take action (because of the concerns noted above). The JWP holds the same view as regards any action that would require the merged entity to disregard the "*existence of any contractual obligations*", given the potential impact on third parties.
- 4.27 It is for consideration whether these matters are better dealt with by guidance issued by the CMA, or by legislation. However, if by guidance, the JWP considers that limitations on the powers of the CMA (of the kind mentioned above) should be included in the legislation.

*Penalties*

- 4.28 The JWP accepts that it would be appropriate to allow penalties to be imposed for integration in breach of hold separate obligations.
- 4.29 The Consultation Paper proposes fines of up to 10% of annual turnover, which is in line with the level of equivalent EUMR penalties. As such it may be acceptable as a statutory maximum. However, any penalties would need to be proportionate; and clear guidance would need to be provided about the assessment and imposition of penalties in practice.

*Small merger exemption in a voluntary regime*

- 4.30 The JWP believes it is appropriate to address the issue of whether some mergers are simply too small for it to be in the public interest to subject them to the rigours and costs of the merger review process. In principle, the JWP considers that this should be the case.

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<sup>12</sup> See Consultation Paper, at para 4.11.

- 4.31 The difficulty is to determine what the appropriate thresholds should be, recognising that whatever thresholds are adopted, the consequence will be that some anti-competitive mergers in small markets will escape scrutiny.
- 4.32 The JWP recognises that, ultimately, the thresholds need to be determined as a matter of policy. However, the JWP points out that the threshold for the worldwide turnover of the acquirer would have to be significantly higher than the £10 m suggested in the Consultation Paper if the exemption were to be of much use in practice.

### ***Streamlining the current regime***

#### *Introducing statutory timescales*

- 4.33 The JWP is not persuaded that a fair comparison of UK procedures with those of its international peers would show them to be generally slower, at least, not materially so.<sup>13</sup>
- The Consultation Paper does not propose any shortening of the 24 week time limit for Phase 2. It is assumed, therefore, that the criticism is directed at the length of phase 1.
  - It is correct that under the EU regime, the statutory phase I timetable is shorter than in the UK. But in reality the EU process tends to take much longer due to extensive pre-notification discussions; on occasion these can last many months.
  - If a statutory time limit were adopted in the UK for phase 1, the JWP expects that this would simply result in more extended pre-notification discussions. The end result would be little reduction (if any) in the overall time taken to process notifications in phase 1.
- 4.34 For this reason the JWP does not favour a statutory time limit in phase 1.
- 4.35 The JWP is doubtful about the wisdom of introducing statutory time limits for undertakings in lieu (UIL) and remedies implementation stages in phases 1 and 2. The JWP is of the view that parties normally have a major incentive to conclude UILs and remedies in order to enable their transaction to proceed; the JWP is doubtful that a statutory timescale would materially enhance those incentives. The issue, therefore, is whether it would be reasonable to impose a statutory time limit on the CMA in order to accelerate agreement on UILs and remedies. The JWP is not persuaded that this would be conducive to proper consideration and implementation by the CMA of potentially complex remedies, especially in cases that involved behavioural rather than structural solutions, where third party views may be especially important.

#### *Information and stop the clock powers*

- 4.36 The JWP supports enhanced information-gathering powers at phase I, including power to stop the clock and to impose fines on the main parties. The JWP is not persuaded that there is a case for imposing penalties on third parties in phase 1.
- 4.37 The JWP agrees that it would be useful to allow the CMA to stop the clock in phase 2 in order to see whether a merger is going to be abandoned.
- 4.38 The JWP also agrees in principle that the CMA should have power to curtail phase 2 early on by accepting undertakings. Presumably, in doing so, the CMA would have to apply the phase I standard of proof, as it would not have made an SLC finding at that stage.

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<sup>13</sup> Many of these regimes are likely to operate with more discretion in phase 1, not being subject to a statutory "duty to refer".

## 5. **ANTITRUST REGIME**

### **BIS VIEWS ON THE CURRENT REGIME**

5.1 The Consultation Paper states that *“The Government is concerned that antitrust cases take too long and result in too few decisions, thus having less deterrent effect on anti-competitive activity than they should. This may be in part due to the overall weight of procedural requirements.”* Hence, the Government is seeking views on three *“options to lighten these requirements by shortening either the investigation/decision stage or the appeal stage, while still retaining fairness and robustness of decisions.”*<sup>14</sup>

5.2 The three options are:

- **Retain and enhance the OFT’s existing procedures (Option 1)**

This option builds on *“the streamlining and other procedural improvements which the OFT has in hand”*. It retains full merits appeal to the CAT.

- **Develop a new administrative approach (Option 2)**

There are two approaches to this Option. In both of them appeal to the CAT would be by way of judicial review. Under the first approach an Internal Tribunal in the CMA would decide cases from the CMA Executive or sector regulators. The second approach involves a number of variants for *“strengthening procedural safeguards at the administrative phase”* including an “investigatory panel” instead of the Internal Tribunal.

- **Develop a ‘prosecutorial’ approach (Option 3)**

Under this Option the *“CMA and sector regulators would ‘prosecute’ cases before the CAT which would decide on infringement and penalty.”*

5.3 The Consultation Paper also seeks views on other possible changes to the antitrust regime including:

- the scope for introducing statutory or administrative timetables;
- the introduction of powers to allow the CMA to impose financial penalties on parties who do not comply with investigatory measures; and
- whether there is any need to “roll back” the OFT’s powers of entry.

### **THE NEED FOR REFORM: JWP VIEWS ON THE CURRENT REGIME**

5.4 The JWP agrees with the Government that the antitrust regime is not as effective as it should be. The JWP strongly believes that effective antitrust enforcement is of the utmost importance for the effective deterrence of anti-competitive conduct -- which should be a core goal of the UK competition regime. The JWP considers that antitrust enforcement is a key area for reform.

5.5 In the JWP's view there are a number of problems with the current regime:

- At present cases take too long and the quality of decisions is variable. In part this problem is caused by the adoption of the DG Competition civil law enforcement model in a common law system. The OFT acts as investigator, prosecutor and adjudicator, as well as deciding on the penalty; and it does so using EU/civil law investigatory procedures. In a common law system, with its adversarial culture, questions of fact, evidence and proof are often paramount; but the civil law procedures do not readily lend themselves to dealing with these questions in an efficient and effective manner.

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<sup>14</sup> Consultation Paper, at page 45

- A key problem is shortage of staff -- at Board, senior staff and junior staff levels -- with the required experience and expertise in sound antitrust enforcement and effective case management. The delivery of more effective antitrust enforcement depends, to a large extent, upon satisfactorily addressing this skills shortage; unless it is addressed, none of the suggested Options for reform (or indeed any other measures) will resolve the current problems.
- Stronger antitrust enforcement requires, among others aspects, an agency with responsibilities more clearly focused on antitrust enforcement (as part of competition enforcement) and the appropriate targets to reflect this focus.
- The OFT does not have sufficient incentive to use its antitrust enforcement powers

5.6 It is not clear to the JWP whether or not there are too few decisions. It is clear that there have been fewer than originally expected and also that the level of the OFT's antitrust enforcement activity has fluctuated since the Competition Act 1998 came into force in 2000. Moreover, while comparisons with other countries may not be apposite it appears to be striking that the UK makes fewer decisions than the other larger EU member states and even than some of the smaller member states.<sup>15</sup> In addition to the relatively limited number of cartel investigations over the last decade or so, there is a limited track record of Chapter II/Article 102 cases.

**The length and quality of cases : skilled resources are the key**

- 5.7 Delays have arisen principally at the administrative OFT stage, rather than before the CAT on appeal. Clearly, a number of appeals would have been shorter if the CAT had been faced with fewer procedural shortcomings in the administrative stage.
- 5.8 The JWP considers the current administrative regime is procedurally cumbersome and often long-winded. In addition, the substantive quality of OFT decisions is variable. The current administrative procedure can involve too much iteration: Statement of Objections followed by Supplementary Statements of Objections with written and oral representations in respect of each, so that the process risks collapsing under its own weight. In cases which turn on primary fact, the process of gathering and testing of evidence (and in particular witness evidence) is flawed, as highlighted by the CAT in the *Construction* cases.<sup>16</sup>
- 5.9 Successful antitrust enforcement requires procedures for efficient and effective evidence gathering and analysis with the staff to implement them; it requires the involvement of lawyers, skilled in adversarial procedures, from an early stage to ensure that the case as it develops is robust on the facts; and it requires effective case management by senior personnel throughout. The OFT faces a shortage of staff at all levels with the requisite skills and experience to undertake these roles.
- 5.10 The inevitable consequence is that cases generally take far too long to determine, and by the time that the first opportunity for witness evidence to be properly tested arises, at the judicial stage in the CAT, there is a danger that memories will have faded so far that it is no longer possible for the authority to prove its case.

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<sup>15</sup> In part this is probably due to the reaction to the 2005 NAO report discussed at paragraph 5.14.

<sup>16</sup> *Durkan Holdings Ltd v. OFT* [2011] CAT 6 [108]-[110]; *GMI Constructions Holdings plc v OFT* [2011] CAT 12 [74]-[76]; *AH Willis & Sons v OFT* [2011] CAT 13 [66]-[68] and *North Midland Construction plc v OFT* [2011] CAT 14 [32]-[34].

### **Does the OFT have sufficient incentive to use its antitrust enforcement powers?**

- 5.11 Antitrust enforcement is only part of the OFT's responsibilities. The breadth of its responsibilities can lead to diversion of resources to areas where procedural burden and external oversight are lighter, particularly market studies. There is insufficient incentive for the OFT and the regulators to use antitrust enforcement powers given the option of using other 'easier' competition, consumer and/or regulatory powers. Strong potential sanctions require adequate due process safeguards in antitrust enforcement. It would be unacceptable to relax such safeguards sufficiently to provide a real incentive for the OFT and regulators to use the competition powers rather than their other current powers.
- 5.12 There is a need to focus OFT's responsibilities clearly on antitrust enforcement within competition enforcement with a Board and senior staff reflecting this focus; in this connection, it would assist if more of the Board and senior officials had significant experience of directing and/or litigating competition cases, in order to provide a strong institutional awareness of the particular requirements of antitrust enforcement. The JWP welcomes the fact that the OFT's 2011-12 Annual Plan has "*high impact enforcement to achieve maximum compliance with competition and consumer law*" as one of its two overarching themes. This may require resources to be diverted from the market regime to antitrust. Guidance on the interaction between the antitrust and market regimes needs to be revisited with this in mind.
- 5.13 While such a focused agency should be able to deliver more effective antitrust enforcement the JWP recognises that this would be at the expense of the OFT's current ability to take a more holistic approach to markets, applying a mix of competition and consumer powers. Some JWP members value the OFT's ability to take a holistic approach, while others take the view that this detracts from a focus on antitrust enforcement.
- 5.14 The JWP notes the view expressed by the OFT that competition enforcement is one of a number of tools to achieve effective competition outcomes.<sup>17</sup> While accepting that there are other tools available, as noted above the JWP believes that effective antitrust enforcement is of the utmost importance for the effective deterrence of anti-competitive conduct – which should be a core goal of the competition regime. In this connection, the OFT's reaction to the 2005 NAO report, closing down a large number of cases outside of hard-core cartels, while well-intentioned, is regarded by many to have gone too far and to have had a negative impact on deterrence. The OFT has recently shifted back towards greater enforcement, in particular in the Chapter II/Article 102 area, but it will take time to establish a "track record" of decisions in this area. The choice of model and resources allocated should be sensitive to the damaging effect that any further swing away from competition enforcement would have.
- 5.15 It is worth noting that, if there is sufficient incentive within the CMA to pursue tough enforcement cases, this could make the CMA a more attractive employer for those wishing to pursue a successful career in antitrust.

### **What other key improvements are required?**

- 5.16 Some problems have already been resolved, e.g. the CAT has narrowed the scope of reviewable non-infringement decisions (*Cityhook*) and some, albeit limited, procedural and organisational improvements by the OFT are starting to bear fruit e.g. greater use of confidentiality rings at the OFT stage.

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<sup>17</sup> See for example *The future of the competition regime: increasing consumer welfare and economic growth*, John Fingleton, 25 May 2011. Available at <http://www.of.gov.uk/news-and-updates/speeches/2011/1011>

5.17 However, other key process improvements are needed including:

- **Evidence:** it is essential to make cases robust on the facts. Evidence gathering needs to be improved together with better processes for testing the evidence. Better processes are required in relation to witness statements. The OFT may also need powers to compel witnesses to answer questions;
- **Case management:** cases require improved direction, supervision and control by senior lawyers and/or by independent senior lawyers. There is a marked contrast between the control and direction of cases at the OFT and those run by practitioners for their clients. The latter are closely directed by senior, experienced lawyers;
- **Transparency:** greater transparency of decision making is required;
- **Oral hearings:** further thought needs to be given to enhancing the role and utility of oral hearings, e.g. as a mechanism for establishing facts that are in dispute;
- **Early resolution and settlement:** improved, clearer procedures need to be adopted for early resolution and settlement.

#### **JWP VIEWS ON THE THREE OPTIONS FOR REFORM**

5.18 As noted above, the delivery of more effective antitrust enforcement depends, to a large extent, upon satisfactorily addressing the current shortage of staff with the required experience and expertise in sound antitrust enforcement and effective case management. Unless this issue is addressed, none of the suggested Options for reform (or indeed any other measures) will resolve the current problems.

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

5.19 Option 1 would enable the OFT to continue incremental improvements, based on actual enforcement experience. The proposed procedural improvements are in general to be welcomed, as is greater transparency around the identity and role of the decision maker.<sup>18</sup> The Sector Regulators should be encouraged to follow a consistent approach where possible.

5.20 The Consultation Paper states that Option 1 "*may not be sufficiently radical to bring about significant improvements in the speed and throughput of antitrust decisions.*" The JWP considers that Option 1 will not deliver effective antitrust enforcement unless it includes the key improvements outlined above. Structural change is not necessary to secure these improvements. But material improvements in the processes used in antitrust enforcement, including effective case management, are essential; as is the need to address the shortage of those with the requisite skills to undertake these roles. If these improvements are made under Option 1 it is likely to be the least intrusive way to improve the regime.

#### **Option 2: Develop a new administrative approach**

5.21 Option 2 involves an enhanced administrative procedure and a reduced CAT appeal. The enhanced administrative procedure involves either an adjudicatory Internal Tribunal or other variants including an "investigatory panel".

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<sup>18</sup> See *UK Competition Policy: the first decade*, John Fingleton, 11 May 2011, for a summary of the current and proposed changes at the OFT to improve the speed and delivery of cases. Available at <http://www.of.gov.uk/news-and-updates/speeches/2011/0911>

- 5.22 If Option 2 is to deliver effective enforcement it must introduce the key improvements described above. The changes in Option 2 would be more disruptive than Option 1 and would take some time to bed down – but less so than Option 3.
- 5.23 The Consultation Paper states that an important part of achieving a faster process under Option 2 is the reduced CAT appeal. However, it is far from clear to the JWP that ‘judicial review’ would reduce the scope of appeal to the CAT. The JWP assumes judicial review is a reference to the process before the European General Court and not to English law judicial review before the Administrative Court (as used in review of Competition Commission decisions). The standard of review before the General Court allows, in principle, for appeal on the facts.<sup>19</sup> The reason why the General Court appeals do not in practice involve a full ‘trial’ of the facts is not because such an appeal is not allowed in principle, but because of the civil law approach to procedure for fact-finding in the General Court (e.g. no disclosure, no or very limited oral evidence/cross-examination). There is no guarantee that the CAT would wish, or be able, to shut out the common law approach to disclosure and witnesses.
- 5.24 On the other hand, if appeal to the CAT on the facts were to be reduced, the outcome would be likely to be fact finding which is less robust, and ultimately, a result which is less just. It is also questionable whether this would be compliant with Article 6 of the ECHR as given effect through the Human Rights Act 1998. There is a risk of less protection of rights of defence, due to weakening of the CAT review and potential ambiguity over the role of the Internal Tribunal.
- 5.25 As the Consultation Paper comments, Option 2 risks prolonging cases if they need to be remitted back to the CMA for decision. There are benefits of the CAT having decision making powers. Some extreme cases of delays have involved cases being remitted back to the original authority, rather than a new CAT decision, (e.g. *Freeserve*), and/or were reviews of non-infringement findings (e.g. *Albion Water*, *Floe Telecom*).
- 5.26 If, as outlined in paragraph 5.38 of the Consultation Paper, an “investigatory panel” was substituted for the Internal Tribunal, and the same process was followed as in phase 2 of mergers and markets cases, at no stage would there be a full adversarial process for fact finding in cases concerning past conduct giving rise to the possibility of fines. Under such a system, additional safeguards would be required in order to ensure full respect of the rights of defence.<sup>20</sup> The question of Article 6 ECHR compatibility would also arise. Such panels would not appear to be an advantage unless they could ensure that cases progress more rapidly than currently.

### **Option 3: Develop a prosecutorial approach**

- 5.27 Option 3 has a number of important advantages:
- It would avoid the current unsatisfactory structure under which the OFT acts as investigator, prosecutor and adjudicator and also imposes the penalty.
  - Evidence is gathered and tested once only. This should save time. It would require the CMA to gather evidence rigorously for presentation at trial. Oral evidence would be heard and tested sooner, avoiding the problems of fading memories. It should lead to more robust results. A prosecution model would be likely to provoke more settlements (‘guilty pleas’) as company executives realised that they would be cross-examined in court on their stories. Full Article 6 ECHR rights would be available if a case proceeded to trial.

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<sup>19</sup> 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 para. 5.41 BIS Paper).

<sup>20</sup> See e.g. *Sports Direct International Plc v. Competition Commission* [2009] CAT 32 [58].

- Prosecution is more consistent with the objective of leniency policy, because it is possible to limit the extent of public disclosure of admissions (narrow guilty plea, rather than detailed, reasoned decision), thereby not prejudicing the position of immunity/leniency applicants in relation to civil claims. It is also more suited to dealing with issues in multi-party cases, such as confidentiality and representations on representations.
- A 'big bang' approach is more likely to change the 'institutional DNA' towards enforcement.

5.28 But Option 3 also involves greater challenges, relative to Options 1 and 2:

- It would involve a very substantial re-write of UK antitrust enforcement practice and procedures.
- There could be a lengthy enforcement hiatus, as the CMA moved from an administrative to a prosecutorial approach, with the need to staff up with the requisite prosecutorial skills.
- Once prosecutions started, the system would be likely to take a period of time to bed down, as courts decided points of principle.
- There would be onerous trials in those cases that did not settle. This would increase the involvement of lawyers (and cost) at least initially. This could be a particular issue for smaller businesses and unduly encourage them to settle rather than fight a case. On the other hand, costs may be awarded to a successful defendant while they are not available in the administrative procedure.
- The UK's role in the European Competition Network (ECN) would be a challenge. Under Article 11(4) of Regulation 1/2003, draft decisions are required to be sent to the European Commission before adoption. Would the CAT be required to send a draft judgment? The CMA might carry less weight within the ECN if its role was restricted to prosecution, since almost all the other EU national authorities have powers to make full decisions.
- It is open to question whether Option 3 would lead to more cases being brought. Indeed, there is a risk that the CMA would bring fewer cases if it perceived prosecution to pose an even tougher challenge; and that might happen if the CMA were unable to acquire staff with the requisite skills and experience.

5.29 There are some authorities elsewhere that operate as successful prosecutors, typically in the common law world. The DOJ is the best example. It regularly prosecutes criminal cartel cases, most of which are plea bargains. It also brings high profile civil cases for injunctive relief e.g. *Microsoft*. The Irish Competition Authority brings criminal and civil proceedings before the High Court, but cannot seek fines in civil cases (though this is currently under review by the new Irish government in response to pressure from the European Commission).

5.30 Various other issues have been raised in relation to the prosecution model:

- Some have questioned whether the CAT is equipped to deal with complex economic issues. The JWP is doubtful about this concern. The CAT has managed to deal with such issues in cases to date. It would have adequate expertise available (both through expert witnesses and its own tribunal members). However, it is possible that perceived difficulties of this kind might lead the CMA to focus on cases that are easier to prove in court.
- Another issue that has been raised concerns the role of the CMA in setting policy in relation to cases. It is not clear whether this would be a problem. The CMA could decide, in its discretion, which cases to 'prosecute' before the CAT. Some JWP members also consider

that the CMA could place arguments of policy before the CAT; and that hard-edged questions of infringement of prohibition should be decided on the basis of the application of law to fact, and should not turn ultimately on policy (or even political) considerations.

- The CAT could be statutorily bound to apply or have regard to penalty guidelines. The guidelines could also make provision for leniency cases where the prosecution is satisfied that this is warranted. Detailed consideration would be required as to how leniency and early resolution/settlements by the CMA would operate and the need for involvement of the CAT.

5.31 In principle, the Option that would best address the current problems may well be the prosecutorial approach (Option 3); however, ensuring that there would be an effective prosecution system would pose significantly greater challenges than implementing either of the other two Options.

## **JWP VIEWS ON OTHER CHANGES TO THE ANTITRUST ARRANGEMENTS**

### **Timetables**

5.32 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 of benefit. 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.<sup>21</sup>

### **Offences under CA98 and EA02 for non-compliance with an investigation**

5.33 The ability of the CMA to impose financial penalties on parties for failure to comply with requirements seems sensible, provided that the details of the legislation allow for the various practical issues involved. There may be due process issues here arising from the direct imposition of such fines by the CMA; there should be a right of appeal to the CAT. However, parties generally do their best to comply with OFT timetables and the OFT adopts a reasonable approach in setting deadlines. Delays are more likely to arise during periods when the OFT is considering the information that has been provided to it, rather than when it is waiting for it to be provided.

### **Powers of investigation including powers of entry**

5.34 The JWP does not see any reason to make any changes in relation to the current powers of investigation including powers of entry.

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<sup>21</sup> Note that the OFT is already offering indicative case timetables in case initiation letters, though it is too early to tell how reliable these will prove in practice.

## 6. **CRIMINAL CARTEL OFFENCE**

### **BIS VIEWS**

- 6.1 The Consultation Paper notes the suggestion in the Deloitte Report that *"the cartel offence has begun to have the desired effect"* but argues that *"the deterrent effect of the cartel offence is weaker than was intended, because of the small number of completed cases to date: only two cases have so far reached trial stage and only one of them resulted in convictions"*. The Consultation Paper cites the Deloitte report for the proposition that *"bringing more criminal cases will be a key way to significantly increase deterrence"*.
- 6.2 The Consultation Paper goes on to state that *"One of the reasons that has been suggested for the small number of cases is that the definition of the offence, and particularly the need to prove dishonesty on the part of defendants, may artificially limit the scope of cases that can be brought and make those cases disproportionately difficult to prove"*.
- 6.3 The Paper identifies three aims behind the original decision to include the 'dishonesty' element in the offence, namely:
- to ensure that the offence did not apply to agreements that would be lawful under the civil antitrust prohibitions;
  - to reduce the likelihood that conviction would depend on judgments taken on detailed economic evidence; and
  - to provide juries with a test that they would recognise and to signal the seriousness of the offence and correspondingly weighty penalties – so as to enable the offence to have maximum deterrent effect
- 6.4 The Consultation Paper accepts that *"It was recognised at the time that the dishonesty element was an imperfect means of achieving these objectives"* but argues that *"The evidence now suggests that having a dishonesty element in the offence may no longer be the best way to meet [these] three aims"*.
- 6.5 The Consultation Paper includes four possible Options for reforming the 'dishonesty' element in the offence.

### **JWP VIEWS**

#### **Overview**

- 6.6 The JWP does not consider that the need to prove dishonesty is likely to have been a major reason for the small number of cases to date. It considers that more likely reasons are:
- that there has been a relatively small number of investigations of hard core cartel activity in the UK since the entry into force of the offence in June 2003; and
  - that the OFT is not adequately resourced to undertake criminal prosecutions.
- In these respects, the reasons reflect more general problems experienced with the OFT's antitrust enforcement activity (as described in Section 5 above).
- 6.7 The JWP agrees that there may be a problem with the 'dishonesty' ingredient of the offence. However:
- a clear majority of the JWP considers that the limited experience of prosecuting the cartel offence to date is not sufficient to conclude that the dishonesty element is a material obstacle to successful prosecution, or that the definition of the offence needs to be changed

at this time. The majority considers that it would be better to wait and see whether experience shows that such a change is justified; and that this would also avoid the problems likely to be associated with making a significant change in the substantive legislation at the same time as undertaking major institutional change;

- a minority of the JWP acknowledges the lack of experience of prosecuting the offence, but is of the opinion that there is a sufficient likelihood of the dishonesty element being an obstacle to successful prosecution that it is appropriate to consider amending this element of the offence now.

6.8 There is general agreement within the JWP that there is not an obviously better alternative to the dishonesty test. However, if the current definition is to be amended, of the Options suggested in the Consultation Paper, the JWP favours Option 3.

#### **Lack of prosecutions**

6.9 In the JWP's view, the Government should not assume that there are cases in recent years which have merited criminal prosecution of the individuals involved, but which have been frustrated owing to the hurdle of the "dishonesty" ingredient.

6.10 The Consultation Paper does not itself point to examples of conduct involving contraventions of the Competition Act 1998 where the enforcement authorities decided not to carry out a criminal investigation; let alone to examples of cases where the main reason for the decision was the hurdle presented by the dishonesty element.

6.11 The public record shows as follows:

- Since the offence was introduced in June 2003, there have been three successful prosecutions, *R v Whittle, Allison and Brammar* (2007-08) arising out of the *Marine Hoses* cartel and four unsuccessful prosecutions, *R v George, Crawley, Burns and Burnett* (2008-10) arising out of the *BA fuel surcharge* case.
- The OFT website states that there are currently three criminal investigations under way involving the Automotive Sector, the Agricultural Sector and Commercial Vehicle Manufacturers. Each was commenced in 2010.
- There have been very few investigations of hard core cartel activity in the UK since the entry into force of the offence in June 2003. Apart from the *Marine Hoses* and *BA* cases, only 12 Competition Act 1998 decisions have been adopted by the OFT since 2003 which could be described as potentially falling within the scope of conduct criminalised by the Cartel Offence (although the Construction bid rigging case did cover more than a hundred separate cases of cover bidding).<sup>22</sup> However, apart from the three most recent decisions, all of these concerned conduct that had been terminated before June 2003; and of the other three, two (*Tobacco* and *Construction bid rigging*) included conduct much of which was before June 2003. Also, fines in two of the three decisions (*Construction Recruitment Form* and *Construction bid rigging*) have recently been very substantially reduced by the CAT on appeal and the CAT only considered that "compensation payment" cases were really serious; whilst the other decision (*Tobacco*) is currently on appeal to the CAT. There is little in this experience to suggest that the authorities should have sought to impose criminal sanctions on the individuals involved in these cases, let alone that they would have done so but for the obstacle presented by the dishonesty test.

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<sup>22</sup> Tobacco 2010; Construction Recruitment Forum (2009); Bid rigging in the Construction Industry in England (2009); Aluminium Spacer Bars (2006); Stock Check Pads (2006); Flat Roof and Car Park Surface Contracts (2006); Felt and Single Ply Roofing Contracts in Western Central Scotland (2005); Mastic Asphalt Flat-roofing Contracts in Scotland (2005); Felt and Single Ply Flat-roofing Contracts in the North East of England (2005); Flat-roofing Contracts in the West-Midlands (2004); Argos, Hasbros and Littlewoods (Toys) (2003); Football kit price fixing (2003).

- 6.12 The JWP is therefore doubtful that a case for change can be made out on the basis of what is available in the public domain as to the OFT's enforcement track record.
- 6.13 The JWP agrees that increasing the number of criminal cases can be expected to increase the deterrent effect; and that the greater the number of such cases, the more powerful that deterrent effect is likely to be. However, it is by no means clear to the JWP that it would be realistic to expect a large flow of such cases. It may well be that, as in the *Marine Hoses* case, the most fruitful source of such prosecutions in future will be cases of international cartels in which individuals in the UK have played a significant role, brought to light by the European Commission as well as by the UK authorities.

#### **Problems with the dishonesty requirement**

- 6.14 The Consultation Paper identifies a number of problems with the dishonesty requirement. The relevant paragraphs (6.12 to 6.15) are set out below with the JWP's comments on them.
- 6.15 Paragraph 6.12 of the Consultation Paper states:

*"6.12 In relation to the first aim [to avoid catching agreements that would be lawful under the civil antitrust prohibitions], while including a dishonesty element clearly narrows the category of agreements captured by the offence, it does so in a way that introduces significant lack of certainty – especially for businesses and their executives on whom the offence bites. Defining the offence by reference to dishonesty is not the only way to carve out potentially beneficial agreement."*

The JWP considers that this objection has some force. This is because the line that divides permitted contacts between competitors from unlawful (and potentially criminal) contacts is difficult to draw, even for competition lawyers. It is lawful for business people from competing undertakings to meet and discuss business in general terms (e.g., at trade fairs, in trade associations etc), but if their conversation strays into mentioning specific issues which can influence their future pricing to customers, or other competitively sensitive matters, then the line is crossed. The lack of clarity about where to draw the line between lawful and potentially criminal behaviour was an issue that may well have been significant at the final trial in the *BA/Virgin* case, had it not collapsed for other reasons.

- 6.16 Paragraph 6.13 of the Consultation Paper states:

*"6.13 In relation to the second aim [to reduce the likelihood that conviction would depend on judgments taken on detailed economic evidence], the pre-trial rulings in the British Airways/Virgin criminal case suggest that evidence of effects, including economic evidence, would be relevant to the issue of dishonesty. The courts recognised the likelihood that defendants might contend that they were not dishonest because an arrangement had or was believed to have had no detrimental effect on consumers."*

The JWP considers that this objection is also worthy of consideration. The preliminary ruling given by the Crown Court Judge in the *BA/Virgin* case in July 2009 was that: *"Evidence as to whether the alleged agreement could or did have an appreciable effect on competition is plainly relevant to the issue of dishonesty."* Contrary to the hopes of the framers of the cartel offence, this raised the likelihood, in that case, of complex economic evidence having to come in as part of the criminal trial. Some have raised concerns that this would baffle the jury, and lead to the highly unsatisfactory situation that questions of guilt and innocence could have to be decided on the basis of fine economic judgments. Others take the view that juries "know dishonesty when they see it" and are unlikely to have the wool pulled over their eyes by economic evidence, noting that juries have to deal with complex financial matters in commercial fraud cases.

6.17 Paragraph 6.14 of the Consultation Paper states:

*"6.14 Criticism of the Ghosh test has persisted and intensified and in the field of cartels specifically a 2007 report found that only around six in ten people in Britain believe that price-fixing is dishonest and two in ten people believe that it is not. This suggests, in relation to the third aim [providing juries with a test that they would recognise and to signal the seriousness of the offence], that there is only moderate support for a criminal cartel offence defined around dishonesty – and that juries may not be as ready to convict for an offence based on dishonesty as was originally hoped."*

In the JWP's view, this objection, which is based on the evidence of a UEA survey carried out through an online YouGov poll, is inconclusive.

- As an initial observation, the survey does not compare like with like. An online poll is not capable of putting respondents in the same position as jurors hearing evidence and argument in a specific case, and so the survey appears to be of very limited value (if any) in predicting views that jurors would form in the circumstances of a trial.
- In so far as the survey can be given any weight, it would appear to provide support for the current regime. Contrary to the conclusion drawn in the Consultation Paper, the survey could be said to support the view that juries are capable of understanding that the touchstone is that the cartelists have engaged in behaviour which has "ripped off" the public. The YouGov survey reported that a majority of the public surveyed did regard cartel conduct as dishonest.
- The survey also reported that: *"The survey indicates that the majority of Britons (73%) recognise the harmful effects of price-fixing. They understand that colluding competitors will set prices so as to maximise their collective profits to the detriment of their customers. They also recognise the need for such behaviour to be punished, and do not feel that crisis cartels for the protection of employment or small businesses should be exempt."*

The JWP therefore does not regard the YouGov poll as evidence to support a change in the law.

6.18 Paragraph 6.15 of the Consultation Paper states:

*"6.15 In addition, though this is yet to be properly tested, proving dishonesty in criminal cartel cases may be particularly difficult because cases may not always involve an individual who is clearly motivated by personal gain. Arguably, in the context of cartels, dishonesty would be better considered as a factor in determining whether to prosecute a case in the first place or in determining the severity of the penalty on conviction rather than being an element in the offence itself. There is a risk that the dishonesty element in the criminal cartel offence may be impeding the ability of prosecutors to deliver maximum deterrence against the most serious forms of anti-competitive activity."*

As the Consultation Paper acknowledges, this objection is currently untested at trial in cartel offence cases. It may or may not pose a problem in establishing dishonesty.

### **Comparisons with other jurisdictions**

6.19 The Consultation Paper notes that:

*"The UK is unusual in having an express requirement to prove dishonesty built into its criminal cartel offence. Other common law jurisdictions such as the USA, Canada, and Australia do not approach the cartel offence in this way. [Fn 93: Nor is 'dishonesty' an*

*element of the offence in other EU member states.] Legislators in Australia expressly considered and rejected the inclusion of dishonesty as a requirement in the new Australian cartel offence precisely because they were concerned that it would make the offence harder to prove".*

6.20 This is true, but it is important to remember that none of these other common law jurisdictions to which the Consultation Paper refers faces the same challenge that the UK faces, namely to ensure that any cartel offence which it draws is consistent with the civil antitrust prohibitions under EU law. It would be unacceptable for the UK criminal offence to criminalise behaviour that is lawful under the EU prohibitions or their equivalents in national law (the Chapter I and Chapter II prohibitions under the Competition Act 1998). Therefore, any solution which the UK arrives at must effectively eliminate the scope for criminalising behaviour that EU law permits.

6.21 It is also important to appreciate that:

- dishonesty is a commonly used test in criminal trials and *Ghosh* can fairly be said to have stood the test of time; and
- removing dishonesty carries with it the danger that judges will regard the offence as less serious and be less inclined to hand down custodial sentences. This would represent an unfortunate downgrading of the cartel offence.

6.22 Set out below is a brief commentary on the foreign jurisdictions mentioned in the Consultation Paper. From this it will be seen that, although proof of dishonesty is not an element, each of those other jurisdictions does have a *mens rea* element. None of those other jurisdictions has a strict liability criminal offence, as appears to be proposed in the Options suggested in the Consultation Paper.

#### USA

In the US, *mens rea* is required as set out in *United States v. United States Gypsum Co*<sup>23</sup>. This is an intent based approach. The Supreme Court held "*Action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws.*" Intent can be shown by proving either (i) that the challenged conduct had such an anticompetitive effect and was undertaken with knowledge of its probable consequences, or (ii) that the conduct was undertaken with actual anti-competitive purpose<sup>24</sup>. Note also that the US has a Grand Jury filter on prosecutions which is absent in the UK.

#### Canada

The Canadian Supreme Court held in *Nova Scotia Pharmaceutical Society*<sup>25</sup> that there were two elements of *mens rea* under section 32 of the Combines Investigation Act 1970. The headnote to the report states:

*Here, the offence set out in s. 32(1)(c) requires the proof of two fault elements: one subjective, the other objective. To satisfy the subjective element of the offence, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. To satisfy the objective element, the Crown must prove that on an objective view of the evidence adduced the accused intended to lessen competition unduly – i.e., that the evidence, viewed by a reasonable business person, establishes that the accused was aware or ought to have been aware that the effect of the agreement entered into would be to prevent or lessen competition unduly.*

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<sup>23</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed.2d 854 (1978), at page 445.

<sup>24</sup> See D Baker, Ch 18 in *Procedure and Enforcement in EC and US Competition Law*, Sweet & Maxwell 1993, at p 149.

<sup>25</sup> *Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606.

### *Australia*

Australia's criminal regime for cartel activity was introduced by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*. The Australian legislature has chosen to use a *mens rea* element of intention combined with knowledge and belief as a fault element rather than dishonesty. This is largely *sui generis*. Although only recently adopted (unlike the US and Canadian legislation), the Australian legislation is not a model that the JWP would recommend for adoption in the UK. A recent work on the topic described these provisions as suffering "from undue complexity, technicality and prolixity. They have multiple layers, intricate cross relationships, and hidden definitions."<sup>26</sup> In his Foreword to the work, the former Federal Judge, the Hon Peter Heerey QC, observes "Judges attempting to formulate intelligible directions and juries attempting to understand and apply those directions, have had their tasks made more difficult by the structure and form of this legislation." Moreover, as the authors explained "To date, there has been no adequate consideration of how exactly a judge should convey the elements of the cartel offence to juries".

### **JWP VIEWS ON THE FOUR OPTIONS**

- 6.23 The Consultation Paper includes four possible Options for amending the dishonesty element in the current cartel offence. The JWP's views on these Options are as follows.

Option 1: removing the 'dishonesty' element from the offence and introducing guidance for prosecutors.

- 6.24 The JWP does not regard this Option as being either workable or sensible. The Cartel Offence applies to four principal categories of horizontal agreement: market-sharing, restricting output, bid-rigging and price-fixing. Such restrictions can sometimes be found in legitimate commercial agreements, particularly joint venture and consortium agreements. To make the legality of the conduct of those involved in negotiating such agreements dependent entirely on prosecutorial discretion would be unacceptable (and possibly contrary to Article 7 ECHR as given effect by the Human Rights Act 1998).

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

- 6.25 The JWP considers that this Option is unlikely to be workable. The European Commission has moved away from its practice in the 1980s of including white-listed restrictions in EU block exemptions because many legitimate agreements fell outside the white lists and this created uncertainty for business. While that was the case under the civil prohibition at EU level, the same policy consideration applies to this proposal, and it is all the more significant given the penal consequences involved.

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

- 6.26 The JWP considers that this Option, supported by the important definition of "secrecy" at paragraph 6.41 of the Consultation Paper, is potentially workable and effective. This definition refers to secrecy arising "where the persons who make the agreement take measures to prevent the agreement or the intended arrangements becoming known to customers or the public authorities." It would be sensible to adjust this definition so that secrecy is defined as arising only where the persons who make the agreement take the measures identified. The aim is to ensure that lawful confidential arrangements are not accidentally caught by the definition.
- 6.27 The advantage of the concept of "secrecy" is threefold:

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<sup>26</sup> "Australian Cartel Regulation" by C. Beaton-Wells and B. Fisse, (Cambridge University Press, Australian Branch, 2011).

- First, it limits the coverage of the criminal offence in a way that means the prospect of inadvertently criminalising behaviour that is lawful under EU law is vanishingly small. As one of the leading textbooks on competition law says "*it seems inconceivable that a covert price-fixing agreement would fulfil the requirements of Article [101]3, whatever the situation in the industry*"<sup>27</sup>.
- Second, it isolates the key element of deception inherent in the offence, namely that the cartelists have concealed their agreement from customers (and the authorities), with the result that customers can be presumed to have ended up buying goods or services under the false assumption that they have been priced competitively.
- Third, it is workable: the concept of secrecy (as defined) is simpler to apply and it will not involve the need for complex economic evidence to be led at a jury trial.

6.28 The Consultation Paper expresses a possible concern that "*arguably, requiring the prosecution to show active secrecy might make the offence too difficult to prove and would not make sense in policy terms*", while "*a threshold based on passive secrecy ... arguably ... would not provide enough clarity for business and it could criminalise potentially benign agreements which businesses did not see a need to announce...*"<sup>28</sup>.

6.29 For its part, the JWP considers that there is a case to be made for imposing a requirement to show "active secrecy". This would not make the offence "too difficult to prove", nor fail to meet the policy objectives underpinning the legislation. A cursory consideration of the recent cartel decisions of the EU Commission in recent years shows that many of them have involved active secrecy of the plainest kind (e.g., *Marine Hoses*, *Paraffin Wax*, *Gas Insulated Switchgear*). These are precisely the sorts of behaviour at which the criminal offence should be targeted. The offence would have "bite", and would avoid the risks of being overbroad in what is a difficult area given the need for consistency with EU law.

6.30 However, there are important disadvantages.

- First, "active secrecy" is not a concept encountered anywhere else in criminal or civil law and so would introduce considerable uncertainty for business. There is a danger of falling back on paraphrases (e.g. wilful concealment) which would further confuse rather than clarify. By contrast, dishonesty is routinely applied in criminal trials and carries with it a strong moral underpinning absent from a nebulous concept such as "active secrecy".
- Second, there is a risk that it might catch legitimate commercially confidential agreements. It is not obvious that these would fall outside the proposed test of secrecy as the essence of commercial confidentiality may well be to ensure that the agreement or the intended arrangements do not become known to customers or the public authorities. There is a danger that it could catch price-fixing or market-sharing activity that would be economically beneficial, and lawful under EU antitrust law. An answer to this problem that would fall back on the use prosecutorial discretion to draw such a distinction is plainly unacceptable for the reasons given in relation to Option 1.

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

6.31 This is the preferred Option in the Consultation Paper. The JWP recognises that it has the advantages of simplicity and certainty. However, it is clearly over-inclusive. Even more than Option 3, there is a danger that it could catch price-fixing or market-sharing activity that would be economically beneficial and lawful under EU antitrust law.

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<sup>27</sup> Bellamy & Child "European Community law of competition" (6th ed., (2008)) at para 5.028.

<sup>28</sup> Consultation Paper at para 6.46.

*Conclusion*

- 6.32 As noted above, a clear majority of the JWP does not favour change at this time. If there is to be change, there is some support in the JWP for adopting Option 3. However, the general consensus is that Option 3 is not entirely safe and that it would be a less satisfactory element in the offence than '*dishonesty*'. This conclusion is further influenced by a view that, for policy reasons, the balance of advantage lies in favour of drawing the dividing line in a way that avoids a risk of over-criminalising competition law; and also that, even if Option 3 were to be adopted, it is very likely that the prosecution would have to be able to prove '*dishonest actions*' in order to obtain a conviction.

## 7. OTHER ISSUES

7.1 Of the issues raised in other Chapters of the Consultation Paper, the JWP sets out brief comments below on issues related to the Mergers and Antitrust Regimes on which the JWP has commented in Sections 4 and 5 above, namely Merger Fees and Cost Recovery and Overseas Information Gateway.

### **Chapter 11 : Merger Fees and Cost Recovery**

7.2 The JWP is opposed in principle to the proposals to increase merger fees and to recover costs in antitrust proceedings and CAT appeals.

- **Merger fees:** the Consultation Paper includes various suggestions for amending the current merger system. One of the suggestions, a mandatory notification regime, would in all likelihood lead to a very significant increase in the number of notifications, the resources required to handle them and the costs of doing that; the same is true (though to a lesser extent) of the suggested hybrid regime. Changes to the current basis for charging merger fees (and the amount of them) cannot be assessed until a decision is taken on the nature of the future regime.
- **Cost recovery by the CMA:** the JWP has a number of concerns about this proposal:
  - It is suggested that there is precedent for this proposal, but no details are provided in the Consultation Paper. For its part, the JWP is not aware of any other administrative body that seeks to recover its investigatory costs from those it investigates.
  - Such a proposal could distort administrative decisions by the CMA about pursuing (or dropping) particular investigations.
  - Parties found guilty of an infringement would face a form of “double jeopardy” i.e. being liable to pay fines and also repayment of the CMA’s costs.
  - Any such system of cost recovery would raise a large number of difficult issues: for example, how would the investigatory costs be calculated; would there be some cap on recoverable costs (e.g. for lengthy cases); how would costs be allocated in multi-party proceedings; would the costs be subject to challenge (e.g. if an investigation were unnecessarily delayed, or included unnecessary actions); if so, what would be the process for challenging them? Resolution of such issues could give rise to unproductive satellite litigation.
  - Similar issues arise in relation to the possibility of recovering the cost of appeals
  - The OFT’s estimated expenditure on antitrust investigations in 2008/9 was around £12 million; that figure is dwarfed by the level of fines imposed by the OFT since the beginning of 2010. This does not suggest that cost recovery would be justified.
- **Cost recovery by the CAT:** the JWP is concerned that a policy of seeking to achieve full recovery of costs is likely to impede access to justice. In particular, such a measure would discourage parties from exercising their right to appeal, regardless of the merits of their case; and this risk would be greatest for smaller, financially weaker potential appellants.

**Chapter 12 : Overseas Information Gateway**

7.3 The Consultation Paper does not contain any evidence about the current operation of the Overseas Information Gateway (OIG) or about the need for change and the JWP is not itself in a position to comment on how well it is operating. However, the JWP would make two observations about the proposal to extend the scope of the OIG:

- The JWP considers that there are important distinctions between, on the one hand, disclosing information secured during an investigation under the Competition Act 1998 for the purpose of civil and criminal antitrust cases in another jurisdiction; and, on the other hand, disclosing information obtained during mergers and market investigations. The former involves disclosing information about behaviour that is *prima facie* unlawful under UK competition law for use in similar circumstances in another jurisdiction. By contrast, there is no such implication of unlawfulness in relation to merger or market investigations; and, critically, it is not clear for what purposes such information would be disclosed to -- or could be used by -- an authority in another jurisdiction.
- The JWP understands that authorities in other jurisdictions are generally unable to disclose such information without the consent of the parties concerned. If that is correct, the JWP does not understand the basis on which the proposed "reciprocity" would operate.

7.4 Neither of these observations suggests that it would be appropriate to extend the scope of the OIG as suggested.

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