

BIS | Department for Business
Innovation & Skills

**GROWTH, COMPETITION AND
THE COMPETITION REGIME**

**GOVERNMENT RESPONSE
TO CONSULTATION**

MARCH 2012

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Foreword

Competition is a key driver of growth and one of the pillars of a vibrant economy. A strong competition regime ensures the most efficient and innovative businesses can thrive, allowing the best to grow and enter new markets, and gives confidence to businesses wanting to set up in the UK. It drives investment in new and better products and pushes prices down and quality up. This is good for growth and good for consumers



The UK's competition regime enjoys a strong reputation globally, with the result that the UK is rightly seen as having markets which work well and which are open and fair. The OFT estimates that the competition regime benefited consumers by almost £689 million in 2010/11.

The Government's consultation on competition reform has confirmed that many aspects of the UK's competition regime continue to be seen as world class. However it has also highlighted some significant challenges for how the system in the UK works at present. For example, the length of time taken over market studies, market investigations, merger cases and anti-trust enforcement.

By boosting the efficiency of the regime, our proposals will enable the competition authority to take forward more high impact cases, increasing deterrence and benefiting new and innovative business and thus the consumer.

At the heart of our proposals is the creation of the Competition and Markets Authority (CMA) which will provide an opportunity to ensure our reforms are fully embedded and underpinned by the right statutory powers and duties. It will enable us to eliminate inefficiency, duplication and overlap in our markets and mergers regimes and ensure that we have a single authority with the right powers and flexibility to use the best processes in tackling competition problems. The CMA will build on the best of the OFT and CC to become a world-leading competition authority, advocating competition both at home and abroad. It will have a greater role in ensuring competition in regulated sectors is being addressed, as co-operation and information sharing between itself and sectoral regulators will be enhanced. Resource allocation will be improved, and business will benefit from having just one streamlined organisation to deal with.

These are far-reaching reforms, aimed at creating a competition regime that delivers better outcomes for business, consumers and the economy. Through these reforms we will ensure that markets are operating in a way which drives growth and innovation, and empowers consumers.

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

Executive Summary

Why Reform the Competition Regime?

Competition between businesses benefits consumers through providing greater choice, better quality products and services and helps to keep prices lower. Strong competition policy and its effective enforcement also have a strong impact on productivity and growth, with the institutional and antitrust elements having the strongest impact.¹

The UK competition regime is highly regarded internationally, but the Government believes that there is scope to improve the effectiveness of competition enforcement and streamline processes. The Government's policy objectives for reform are to:

- Improve the quality of decisions and strengthen the regime.
- Support the competition authorities in taking forward the right cases.
- Improve speed and predictability for business.

One of the Government's key proposals was to create a single Competition and Markets Authority (CMA). A number of respondents, such as the Office of Fair Trading (OFT), Competition Commission (CC) and Confederation of British Industry (CBI) supported the creation of the CMA. Other respondents were supportive in principle but were concerned about the new decision making arrangements or the impacts of transition on the current case work. Other respondents were opposed to the merger, with some questioning whether the Government's objectives could be delivered without institutional change.

The Government has decided to create a new CMA and transfer the functions of the CC and the competition functions of the OFT to it. The benefits of this will include:

- Greater coherence in competition practice and a more streamlined approach in decision making, through strong oversight of the end-to-end case management process.
- More flexibility in resource utilisation to address the most important competition problems of the day and better incentives for sector regulators to use antitrust and markets tools to deal with competition problems.
- Faster, less burdensome processes for business.
- A single strong centre of competition expertise, which can provide leadership for the sector regulators on competition enforcement and a single authoritative voice for the UK internationally.

¹ <http://econstor.eu/bitstream/10419/48605/1/663605695.pdf>.

- Increased accountability and transparency in public bodies and lead to savings in corporate governance and back office costs.

Taken together, these benefits will lead to benefits for consumers and long run improvements to UK productivity and growth.

A Stronger Markets Regime

The consultation considered a number of options to modernise and streamline the markets regime. Reform will ensure that the competition authorities make good use of this powerful tool for improving competition in markets in a way that does not cause prolonged uncertainty in markets and delivers faster results for consumers.

The great majority of respondents who commented welcomed streamlining measures, and identified the following weaknesses in the current regime:

- The markets regime is too complicated and there is too much duplication.
- The end-to-end process takes too long.
- Disjointed working between the phase 1 (market study) and phase 2 (market investigation).

Views were mixed on giving the CMA the power to conduct market investigations into practices across markets. **The Government has decided CMA will have the power to investigate practices across markets**, as this could lead to a more targeted approach to tackling recurring sources of complaint.

Given that the proposals to extend the super-complaint mechanism to SME bodies did not receive significant support, and in the absence of evidence of the type of issue that may be brought to the CMA, **the Government has decided not to extend the super-complaint mechanism to SME bodies**.

Opinion on proposals to enable the CMA to provide independent reports to Government on public interest issues was divided. The Government has decided that the Secretary of State will have the power to request the CMA to **investigate public interest issues alongside competition issues** as this can put the competition regime at the heart of inquiries currently undertaken by ad hoc 'commissions'. This approach is designed to enable faster implementation of competition remedies than an ad hoc inquiry. This will also bring the public interest markets regime in line with the public interest mergers regime where CC panels can be required to consider certain public interest issues alongside competition issues.

The great majority of respondents broadly favoured statutory time limits at all stages of a markets case to ensure greater certainty and reducing the burden to business from investigations, provided they are accompanied by safeguards and retain flexibility to resolve issues early.

The Government has therefore decided to:

- **Require the CMA to consult on making a Market Investigation Reference (MIR) within 6 months of launching a market study**, where such an outcome is being considered, and **conclude all studies within 12 months**. New information gathering powers will also be provided to the CMA for market studies.
- **Reduce statutory time limits for market investigations from 24 months to 18 months**, with powers to extend these by 6 months in complex circumstances.
- **Introduce 6 month statutory time limits for the CMA to implement phase 2 remedies**, with powers to extend these by 4 months.

The Chancellor announced in the 2011 Budget a 3 year moratorium to exempt micro businesses and start-ups from new domestic regulation. **Micro businesses and start-ups will therefore not be subject to the CMA's new information gathering powers for markets and merger cases before 1 April 2014.**

The Government has also decided to improve the remedies processes for mergers and markets. This includes enabling the CMA to require parties to appoint an **independent third party to monitor and/or arbitrate on the implementation of remedies** and giving the CMA the power to require parties to **publish certain non-price information**. **The Government sees the advantages of moving to a single stage process for the review of remedies, with new statutory time limits, and clarifying that the powers of investigation and requirements relating to timelines apply if a decision of the CMA is quashed and remitted back to it, but these reforms are not high priorities at this time. The Government will not amend the current 'change of circumstances' threshold for the review of remedies.**

Finally, the great majority of respondents supported revisions to the duty to consult on making an MIR. **The Government has decided to remove the duty of the CMA to consult on decisions not to make an MIR unless any person has expressly asked for a reference to be made.** The CMA will have a duty to consult on decisions to make an MIR.

A Stronger Mergers Regime

The consultation looked at a spectrum of options to address the current weaknesses in the voluntary notification regime. These are the risk that some anti-competitive mergers escape review and that a large proportion of cases are completed, which are more difficult to investigate and apply appropriate remedies. It also looked at ways to streamline the merger regime through introducing statutory time limits and strengthening information gathering powers. It also considered introducing an exemption from merger control for transactions involving small businesses.

The majority of respondents were strongly against the introduction of mandatory notification. They argued that there was insufficient evidence to justify this substantial change and that such a change would substantially increase costs to both business and the competition authority. **The Government believes that the notification regime needs strengthening. It has also decided that the CMA should have the discretion to trigger a power to suspend all integration steps and to clarify in legislation that the CMA can reverse integration steps that have already taken place.**

The majority of respondents were in favour of an exemption for transactions involving Small Businesses from merger control, however, they felt that the Government's proposed exemption did not go far enough. The Government has not been persuaded to adopt a broader exemption as that would unduly increase the possibility that too many anti-competitive mergers would be exempt from scrutiny. **The Government sees the advantage of introducing an exemption from merger control for small businesses, in particular where the target's UK turnover does not exceed £5 million and the acquirer's worldwide turnover does not exceed £10 million. This reform is not, however, a high priority at this time.**

Views were mixed on introducing statutory time limits on different parts of the merger review process. The Government believes that the benefits of introducing statutory time limits for all parts of the merger review process outweigh the disadvantages. The Government has decided to:

- Introduce a 40 working days statutory time limit on phase 1 (capable of extension when the CMA has stopped the clock because it is waiting for information).
- Make no change to the phase 2 statutory time limit of 24 weeks.
- Introduce statutory time limits and amend the process for undertakings in lieu (UILs) to make it more transparent.
- Introduce a 12 week statutory time limit from the publication of the final report in phase 2 cases for implementation of remedies (capable of extension where the CMA has stopped the clock because it is waiting for information or by 6 weeks for special reasons).

As noted above, **micro businesses and start-ups will not be subject to the CMA's new information gathering powers for merger cases before 1 April 2014.**

A Stronger Antitrust Regime

The consultation document identified a range of options for improving the enforcement of the antitrust prohibitions, directed in particular at ways in which the overall procedural weight of the process could be lightened. In particular, there were options around enhancing the current administrative approach, perhaps linked to amending appeal rights, and developing a

prosecutorial approach under which the CMA and sector regulators would prosecute cases before the Competition Appeal Tribunal (CAT).

Many of those who responded on the antitrust regime felt that the system was not working well. There were particular concerns in relation to the time cases take and the quality and robustness of administrative decision-making. There was a spread of views on which option provided the best solution. Some businesses and a number of law firms in particular recommended solutions based around the current administrative system but most organisations representing business and the legal profession as well as some individual firms advocated a move to a prosecutorial system, in some cases with an acknowledgement that there would be some challenges and risks involved.

The Government has decided to **embed an enhanced administrative approach to antitrust enforcement, involving improvements to the speed of the process and the robustness of decision-making, addressing perceptions of confirmation bias**. The Government expects the OFT to consult shortly on proposed procedural changes to antitrust enforcement under the current regime. In the legislation for the CMA the Government will make **specific provision enabling the statutory procedural rules to cover such important principles as those responsible for final decisions on a case being different from those who carried out the investigation**. The Government has no plans to amend appeal rights but will **legislate that financial penalties should reflect the seriousness of the infringement and the need for deterrence and that the CAT must have regard to the statutory guidance on the appropriate amount of a penalty**.

The Government gave careful consideration to the option of moving to a prosecutorial approach, and indeed sees many potential advantages in such a system. However, in the light of the support of the competition authorities for an administrative approach, assurances from the OFT about the potential for improvement in the current system, the further proposals outlined above, and the possibility of antitrust enforcement being disrupted by a fundamental change to the system at a time when the need to support growth is essential, the Government decided not to proceed at this stage with a change of that nature.

However, the Government has decided to put in place **a performance framework to ensure the improvements to the administrative approach will be fully delivered and will prove effective in practice, together with a process for review of progress and report to Parliament**.

As well as the statutory provisions needed to support this administrative approach, the Government has decided to **legislate for: the competition authorities to have powers to impose civil financial penalties (in place of criminal sanctions) on parties who do not comply with certain formal requirements during investigations; for applications for a warrant authorising entry to premises by force to be made to the CAT; for a power to require a person to answer questions during antitrust investigations, subject to certain safeguards; and for absolute privilege**

from defamation to attach to a notice by a competition authority regarding the existence of an antitrust investigation. The Government has also decided to lower the threshold before interim measures can be imposed.

The Criminal Cartel Offence

The criminal cartel offence helps to deter the most serious and damaging forms of anti-competitive conduct: hard core cartels, but there have been only two cases prosecuted since 2003 and this weakens the offence's deterrent effect. The consultation noted that the 'dishonesty' element in the offence seems to make the offence harder to prosecute and consulted on options to remove or replace the 'dishonesty' element of the offence. The Government expressed a preference for removing the 'dishonesty' element from the offence and defining the offence so that it does not include agreements made openly.

Nearly half of the formal consultation responses commented on the criminal cartel offence proposals. The views expressed formally and informally were mixed. The OFT, other prosecutors and overseas competition authorities generally favoured reform, as did a number of academics and some members of the competition bar. Businesses, members of the criminal law bar and law firms with competition practices, on the other hand, mostly did not support the proposed change.

Supporters of removing the 'dishonesty' requirement argued: whether or not the parties acted dishonestly is irrelevant to the harm caused; other economic offences, such as insider dealing and bribery, carry a similar or higher maximum sentence, and do not rely on dishonesty; and the concept of 'dishonesty' in the context of business conduct is inherently uncertain and makes the offence more difficult and costly to investigate and prosecute.

Those objecting to the removal of the dishonesty element argued that: the case for change has not been adequately made out and the cartel offence is already having a deterrent effect; the small number of prosecutions is likely to be due (at least in part) to the OFT's inexperience, procedural flaws and the paucity of suitable examples of hard core cartel activity that could be prosecuted; and the *Ghosh*² test for dishonesty works perfectly well in a wide range of offences.

The Government's view is that it is likely that the inclusion of the 'dishonesty' element in the cartel offence is in fact inhibiting the prosecution of cases. Therefore the **Government has decided to introduce legislation to amend section 188 of the Enterprise Act 2002 (EA02) to remove the 'dishonesty' element of the offence. Instead, the offence will not be made out if the parties have agreed to publish details of the arrangements before they are implemented. Publication would need to take place in a suitably**

² *R v Ghosh* [1982] 2 All ER 689 [1982].

accessible form in a medium specified in the legislation, for example the London Gazette. The Government considers that removing the ‘dishonesty’ element from the criminal cartel offence will improve enforceability, and increase deterrence, bringing levels closer to what was intended when the offence was introduced. The Government recognises that without the ‘dishonesty’ element, the offence still needs a clear mental element which, in combination with the physical elements of the offence, is sufficiently serious to merit custodial sentences on conviction of up to the existing maximum of five years. As such, the offence will still require proof of the mental elements of intention to enter into an agreement and intention as to the operation of the arrangements in question.

Concurrency and the Sector Regulators

Sectoral regulation and enforcement of licence conditions is often the most appropriate way of dealing with competition issues in regulated sectors. There have, however, been very few antitrust cases or MIRs in these sectors, and the Government is concerned that general competition law may not be being enforced as proactively as it could be, and that the cases that are brought may not always be managed as well as they should. The Government therefore proposed to enhance the primacy of antitrust law, make the CMA a proactive central resource for the sector regulators, and give the CMA a bigger role in the regulated sectors

Most respondents who commented supported the sector regulators maintaining their concurrent powers, but they generally agree that the regulators have not always applied their general competition powers to as high a standard as they should. **The Government has decided to retain concurrent competition powers.** This will allow the continued integrated application of sectoral and competition law powers.

The majority of respondents did not want a positive duty on regulators to use general competition law whenever they have a choice between sectoral regulation or competition law to promote competition. **The Government has however decided to strengthen the primacy of general competition law, so that the sector regulators are more clearly required to consider whether the use of their antitrust powers is more appropriate before using their sectoral powers to promote competition.** This should lead to some increase in antitrust cases over time, especially when taken together with the other reforms.

Those respondents who commented on enhanced cooperation generally thought it would be a good idea. **The Government will ask the CMA and sector regulators to work together more closely.** One way it will do this is through the proposed ‘strategic steer’ for the CMA. Greater sharing of expertise or secondments will improve case management and bring a wider competition perspective to the sector regulators.

The majority of respondents who commented on the power of the CMA to provide strategic direction on the use of competition law and the power to take cases from regulators thought these were good ideas. Support was stronger for enhanced exchange of information. **The Government has decided to require greater information sharing about antitrust cases, oblige the competition authorities to consult each other about case management decisions involving the concurrent sectors, and give the CMA the power to take antitrust cases from the sector regulators** in certain circumstances. Greater information sharing will make cooperation more effective, by giving it structure and making clear that the competition authorities have a duty to share information about cases and consider the advice of other bodies with relevant expertise. The Government expects the power to take cases will be rarely used, but it will provide a backstop if the other proposals to improve the operation of concurrency do not work.

The Government has decided that the CMA will be obliged to report annually on the use of concurrent competition powers across the landscape of competition authorities, but will not be required to carry out a rolling programme of market reviews in the regulated sectors.

Taken together, these measures will enhance the incentives on and ability of sector regulators to make better use of their competition powers and bring more cases.

Regulatory References and Appeals and Other Functions of OFT and CC

The CC has functions under sector specific legislation with respect to licence modification references and appeals, Energy Code modification appeals, and price determination appeals for regulated utilities. It also has other ancillary competition functions.

The great majority of respondents who commented agreed with the Government that the reference and appeals functions of the CC should move to the CMA. **The consultation document set out the Government's view (which is now confirmed) that the CMA should perform the CC's functions relating to regulatory references and appeals.** The CMA will have the expertise, resources and procedures in place to handle a highly variable regulatory caseload and there should be synergies from its competition expertise.

The Government has also decided that the potential benefits from harmonisation of the regulatory appeals and reference regimes are likely to be outweighed by the transition costs of developing new statutory regimes, and that **it would be more appropriate to develop model appeals processes instead of harmonising regulatory processes.**

There are a number of ancillary functions of the CC and OFT which provide further mechanisms for the promotion of competitive markets.³ **The Government has decided these will also be transferred to the CMA.**

The power of Secretaries of State under section 11 of the Competition Act 1980 to ask the CC to investigate various public bodies predates the establishment of the sector regulators and privatisation of many of the bodies previously within scope. **The Government therefore intends to repeal these provisions.**

Scope, Objectives and Governance

The overall scope, objectives and governance of the CMA will set the context for its operation, remit and ultimately how its success is judged. The Government is committed to ensuring that the arrangements deliver a framework which is coherent, robust and transparent. The consultation document invited views on statutory objectives for the CMA. The consultation also asked for comments on the related issue of the scope of the CMA. Most respondents did not address these questions directly. Of those that did, the majority supported a legislative remit for the CMA, a strong competition focus and that the governance arrangements should ensure the CMA's independence.

The Government has therefore decided to give the CMA a **primary duty to reflect the role the Government sees for it in promoting effective competition in markets, across the UK economy, for the benefits of consumers**. This duty will set the high level mission and rationale for the CMA and guide its work and its prioritisation of resources. The primary duty will underpin the competition focus of the CMA and its role in ensuring that markets as a whole are operating effectively. The CMA will also have duties in respect of its roles in regulatory appeals, references and ancillary functions set out in chapter 9. The Government's consultation document on consumer landscape reform⁴ asks whether the CMA should play a role in national consumer enforcement and the extent to which it should have consumer enforcement powers. The Government will respond to this shortly. The Government recognises and values the close relationship between competition and consumer activities. The primary duty and the functions of the CMA mean that it will have the ability to tackle market problems that have a mixed consumer and competition element, in particular where a structural market problem may cause consumer detriment.

It is vital that the CMA is independent and is seen to be independent. The Government has therefore decided that the CMA will be constituted as a Non

³ Under the Legal Services Act 2007, Legal Services (Scotland) Act 2010, Financial Services and Market Act 2000, Payment Services Regulations 2009, Transport Act 2000 and Transport (Scotland) Act 2001.

⁴ Consultation on Institutional Changes for the provision of consumer information, advice, education, advocacy and enforcement, Department for Business Innovation and Skills, June 2011.

Ministerial Department (NMD). This status will ensure that the CMA is free from influence from Ministers, whilst also ensuring transparency of decision making and sound accountability. As an NMD the CMA will be free to prioritise its own resources and annual plans of activity. However it will be accountable to Parliament, and will be required, publically, to set out and consult on its annual plan for the coming year. It will also have to report at the end of the year on how it has performed. The Government is keen to increase transparency in the way in which it engages with the CMA. As such, when it is established and once a Parliament the Government will consult on, and publish, a high level strategic steer for the CMA to have regard to. This steer will outline the long term goals of the Government in relation to competition and growth and provides an open and transparent statement which the CMA can reflect upon, but is not bound by – in no way will the steer seek to reduce the independence of the CMA or dictate its day to day work.

The consultation document set out a number of options for the internal governance and decision-making arrangements. The Government has considered the most appropriate internal governance arrangements and **decided to legislate for the establishment of a CMA Board**. The CMA Board will be responsible for overall strategy, performance, rules and guidance. It will also be responsible for Phase 1 decisions, although it will have the power to delegate these, except for decisions on MIRs, to executives and senior staff. Phase 2 mergers and markets decisions and regulatory appeals will be taken by independent panels.

Decision-Making

The Government considers that the decision-making processes and governance structure of the CMA should be both efficient in carrying out its functions and arrive fairly at robust evidence based decisions. The current regime is highly regarded, including for the objectiveness of its decision-making processes. In creating the CMA the Government will ensure that the current regime's strengths are not lost. 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. The creation of the CMA will deliver a decision-making process which provides for robust decisions and greater speed.

The majority of respondents who commented on decision making favoured retaining the current separation of decision-making structures for mergers and markets cases, with some form of executive decision-making at phase 1 and an independent panel based decision-maker at phase 2. There were some differences in views as to the composition of the panels and the time commitment that they should be expected to make.

The Government has decided that the separation of phase 1 and phase 2 decision making in mergers and markets cases, and ring fencing of regulatory appeals, will be provided for in legislation.

Legislation will provide for phase 1 decisions in mergers and markets cases to be the responsibility of the Board. Mechanisms for delegation of decision making at phase 1 (except for on decisions on whether to make a market investigation reference) will be provided for in legislation to allow the CMA flexibility to adapt its decision-making processes over time to meet changing demands.

As is currently the case, **legislation will require phase 2 decisions and decisions in regulatory appeals to be taken by panels of experts**, will set out the maximum terms of appointment of such panellists and will provide mechanisms for their appointment and removal. However, the CMA will be able to determine the extent to which panellists carry out a part time or full time role.

To ensure that there is sufficient transparency in decision-making, the CMA will be required to prepare and publish procedural rules and guidance describing its procedures and decision-making structures.

Merger Fees and Cost Recovery

The current funding arrangements for the competition regime impose significant costs on taxpayers. The Government therefore consulted on ways of recovering a greater proportion of the costs of the merger regime through fees, as well as ways to improve incentives and recovery of costs from those found to have broken the law.

Of those who commented, the majority accepted that increased cost recovery could be appropriate in some of these areas. There was, however, a wide divergence of opinion as to which of the options should be taken forward.

Businesses were strongly against any increase in merger fees, disputing the principle that merger control should be funded wholly through merger fees. Businesses also argued that a substantial increase in merger fees would lead to a chilling effect on merger activity. Although the Government recognises the strength of feeling against increasing merger fees, it also believes the cost on taxpayers should be reduced. It will therefore **increase fees to achieve a greater level of cost recovery to approximately 60% cost recovery** from 6 October 2012.

After carefully considering the responses, **the Government has decided that it will not introduce cost recovery in antitrust investigations**, given the strong opposition and arguments advanced against it by the great majority of those who expressed an opinion, many of whom argued on principle that it is not appropriate for a party found to have infringed to be forced to pay for the costs of the investigation.

The majority of respondents supported the proposal for recovering the costs of telecoms price appeals, as they could see no reason why telecoms should be treated differently from other regulatory price appeals. Telecoms

companies opposed the proposal, citing the inherently complex and finely balanced nature of telecoms price appeals. The Government has decided to **introduce a system of one-way cost recovery**, in which appellants (and third parties intervening in such appeals) are liable for the CMA's cost to the extent that their appeal or arguments are unsuccessful.

The majority of respondents who commented were opposed to the recovery of the CAT's costs. Some argued that courts (and tribunals) performed a public function; others raised concerns about access to justice. **The Government has therefore decided on a policy of optimal cost recovery in which costs are recovered from the majority of parties but where the CAT has discretion to waive these in the interests of access to justice.** The Government will consult separately on the detailed arrangements for how this cost recovery will be achieved.

Overseas Information Gateways

The consultation asked for comments on the case for extending the overseas information gateways to mergers and markets. Business responses were strongly against any change to the overseas information gateways. The OFT argued that the overseas information gateway could be streamlined to make its operation more efficient. The Government agrees with business respondents that there is no persuasive case for change and has **decided not to make any changes to overseas information gateways.**

Next Steps

A number of the proposed reforms will be subject to changes in primary legislation. Where this is the case, the reforms will be subject to Parliamentary timing and approval. The Government will work in parallel with the competition authorities and other stakeholders to implement those other reforms that are not subject to Parliamentary approval. The consumer scope of the CMA is dependent on the outcome of the consumer landscape consultation. The Government will also consult further on the recovery of CAT costs.

1. The Consultation Process

- 1.1 The Department for Business, Innovation & Skills published a consultation document and accompanying impact assessment on 16 March 2011 entitled '*A Competition Regime For Growth: A Consultation On Options For Reform*'. The consultation period ran for 12 weeks, closing on 13 June 2011. The consultation document was sent to a range of relevant key stakeholder organisations and was posted on the BIS website.⁵
- 1.2 The consultation document set out the Government's proposals for reforming the competition regime and creating a single Competition and Markets Authority (CMA) and transferring to it the competition functions of the Office of Fair Trading (OFT) and the Competition Commission (CC). The Government's key objectives were:
- Improving the robustness of decisions and strengthening the regime.
 - Supporting the competition authorities in taking forward high impact cases.
 - Improving the speed and predictability of the competition regime for business.
- 1.3 The questions the Government asked are at Appendix 1.

Engagement with stakeholders

- 1.4 Ministers and officials from the Department for Business, Innovation and Skills have taken part in a large number of discussions and events to canvass views from a wide range of individuals and organisations. These have informed the development of the policy and have included meetings with competition and consumer bodies, businesses, academics, lawyers and other interested parties. Examples include:
- The Minister for Competition & Consumer Affairs, Edward Davey, speaking to the European Policy Forum in March and the annual Chatham House Competition Policy Conference in June.
 - Senior officials' discussions at the Jevon's Institute of Competition Law at UCL in January, a meeting in June with the Scottish Competition Law Forum; and, more recently participation in the Regulatory Policy Institute and City University *Annual Competition and Regulation Conference*.
- 1.5 Appendix 2 contains a list of the main stakeholder events in which BIS Ministers and officials participated.

⁵ <http://www.bis.gov.uk/Consultations/competition-regime-for-growth?cat=closedwithresponse>.

- 1.6 A number of organisations, including the competition authorities and representative organisations in particular, held additional events to discuss improvements to the competition regime.
- 1.7 This paper sets out the issues that were consulted on, a summary of respondents' views, the Government's analysis of responses, and its decisions. It is published alongside an updated Impact Assessment.⁶
- 1.8 The Government would like to thank all those who contributed to the consultation. Engagement with stakeholders will continue through the final policy development stages and legislative process.
- 1.9 A paper copy of the consultation document can be obtained from:

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

Tel: 0207 215 2956
E-mail: cma@bis.gsi.gov.uk
Fax: 0207 215 0480

⁶ <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/12-644-competition-regime-for-growth-final-impact-assessment>.

2. Responses Received

Number of responses received

- 2.1 The Government received 115 formal written responses from a variety of organisations including SMEs and large enterprises, representative organisations, local and central Government organisations, legal and academic bodies and other interested parties and individuals. A summary of key points made by respondents can be found in chapters 3 to 14, and a list of those who provided written responses is at Appendix 3. We have published all of the responses, except those where respondents requested confidentiality. These can be found on the BIS website along with this document.⁷
- 2.2 The table below provides a break down of written responses by type of responding organisation.

Table 2.1 Break down of responses by type of organisation

| Type of Organisation | Responses |
|--|------------|
| Small and Medium Enterprise (SME) | 2 |
| Representative organisation (excluding legal) and interest group | 29 |
| Large Enterprise | 20 |
| Trade Union | 0 |
| Local Government | 2 |
| UK Government body | 8 |
| International Government body | 3 |
| Legal | 30 |
| Legal representative group | 7 |
| Academic | 8 |
| Consultants | 3 |
| Other | 3 |
| TOTAL | 115 |

⁷ <http://www.bis.gov.uk/Consultations/competition-regime-for-growth?cat=closedwithresponse>.

Responses on the areas for reform

- 2.3 Not all the respondents commented on all the areas for reform, with representative organisations and government bodies generally providing the broadest responses. The different areas for reform attracted varying numbers of substantive written responses.

Table 2.2: Break down of substantive written responses by chapter of the consultation document

| Chapter of the Consultation Document | Responses |
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| Why Reform the Competition Regime? | 65 |
| A Stronger Markets Regime | 69 |
| A Stronger Merger Regime | 62 |
| A Stronger Antitrust Regime | 45 |
| The Criminal Cartel Offence | 49 |
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3. Why reform the competition regime?

Summary of the Government's decisions

The Government has decided:

- To create a new **Competition and Markets Authority** and transfer the functions of the CC and the competition functions of the OFT to it.

The Issue and Proposals

- 3.1 Competition between businesses is a key driver of productivity and growth both within and across firms. Competition forces firms to improve management techniques and to innovate, and it also encourages improvements in the resource allocation between firms. It ultimately benefits consumers through providing greater choice, better quality products and services and helps to keep prices lower.
- 3.2 Market forces can sometimes fail to deliver effective competition, for example, if mergers lead to a high degree of concentration or if high barriers to entry prevent new and innovative companies from accessing markets. By setting the market frameworks, the Government can help to ensure markets actively promote productivity and growth. Strong competition policy and its effective enforcement therefore also have a strong impact on productivity growth, with the institutional and antitrust elements having the strongest impact.⁸
- 3.3 The aim of the competition regime is to benefit consumers and the rest of the economy by supporting and enhancing the process of competition. Its main elements are:
 - *Market studies and market investigations*: examining markets which may not be working well, with powers to impose remedies.
 - *Merger control*: protecting competition in markets by regulating mergers between businesses.
 - *Antitrust*: enforcing legal prohibitions against anti-competitive business agreements (including cartels) and the abuse of a dominant market position.
 - *Competition Advocacy*: promoting the virtues of competition and challenging barriers to competition, for example Government regulations.

⁸ <http://econstor.eu/bitstream/10419/48605/1/663605695.pdf>.

- 3.4 The UK competition regime is highly regarded internationally, in particular for: the clarity of analysis and decision making; transparency and the open and fair way in which the CC consults; business awareness of policy; effectiveness of legislation; technical competence; and political independence. In *Rating Enforcement 2011* the Global Competition Review (GCR)⁹ awarded the CC its highest rating of 5 stars and the OFT 4.5 stars. The merger regime is particularly highly regarded and was assessed by KPMG in its *2007 Peer Review of Competition Policy* as being the world's second best. The World Economic Forum in its *2011-12 Global Competitiveness Report* also recently assessed the UK regime as being in joint third place for the effectiveness of anti-monopoly policy.
- 3.5 The Government nevertheless has specific concerns about key elements of the regime. These are:
- In the **market regime**, the relationship between market studies and market investigations. For example, where market studies result in references, there can be duplicative requests for information and prolonged uncertainty in markets about the outcome of any investigation. Overall, the markets regime has not been used as much as its designers intended.
 - The voluntary nature of notification requirements in the **merger regime** can make it difficult to deal with the anti-competitive effects of a completed merger or allow anti-competitive mergers.
 - Difficulties in successfully prosecuting **antitrust cases** at reasonable cost and in reasonable time, including by the sector regulators with concurrent powers, which means that the decisional case law is too thin and precedents too few, reducing the deterrent effect of the prohibitions.
 - The dishonesty element of the **criminal cartel offence** makes it harder to prosecute, weakening its deterrent effect.
 - Whether the use of general competition law has been sufficiently proactive in the regulated sectors, and whether the operation of powers **concurrently** by the OFT and the sector regulators can be improved.
 - The scope for delivering more streamlined and consistent **decision-making** processes.
- 3.6 In addition, the Government is committed to reducing the number and cost of public bodies, and to reduce the burden that such bodies impose on the businesses with which they deal. Having two wholly separate competition bodies imposes some additional costs, and more importantly for the economy, prevents more flexible allocation of resources across the competition regime. It is right that the

⁹ <http://www.globalcompetitionreview.com/surveys/survey/516/Rating-Enforcement/>.

Government considers whether the institutions can be rationalised to the benefit of the regime and to reduce the cost to the taxpayer.

Policy objectives

- 3.7 The Government supports and will build on the basic principles that underpinned the historical direction of reforms to the regime: that competition issues should be decided by independent, expert competition authorities, equipped with effective powers to investigate and remedy problems, conducting fair processes and taking decisions on the basis of rigorous economic analysis of the facts of cases.
- 3.8 To guide this process, the Government adopted the following high level policy objectives for reform:
- To improve the quality of decisions and strengthen the regime.
 - To support the competition authorities in taking forward the right cases.
 - To improve speed and predictability for business.
- 3.9 Beyond this, we have also adopted several supplementary objectives in support of the overall objectives. These are:
- The decision-making of the CMA is demonstrably independent of the Government and accountable to Parliament.
 - Competition decisions are high quality, transparent and robust.
 - There is coherence and predictability in competition practice and decision-making.
 - Competition processes are efficient and streamlined on the one hand and fair and rigorous on the other.
 - Reform should wherever possible reduce the cost to business and the public purse and improve the efficiency of the regime.
 - The new regime should have the right legal powers and tools to address competition problems in the interests of consumers and the economy.
- 3.10 The Government will implement reforms which can deliver benefits to competition, consumers and economic growth. Some of these can be implemented without legislation relatively quickly and without significant uncertainty and risks to the effectiveness of the regime. For the reforms as a whole, however, to provide the greatest possible benefits to the UK, there will need to be legislative changes. These will take longer to implement and bed down but will have a significant impact on structural impediments to growth.

The Questions

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.

Summary of Responses

- 3.11 Views on the proposal to create a single Competition and Markets Authority were mixed. A number of respondents, such as the OFT, CC and Confederation of British Industry (CBI), supported the creation of the CMA. Other respondents were supportive in principle but were concerned about the new decision making arrangements or the impacts of transition on the current case work. Other respondents were opposed to the creation of the CMA.
- 3.12 The OFT supported the creation of the CMA, with it having a full range of consumer and competition powers. It considered that this could bring a number of benefits, including: greater consistency and predictability for business; more efficient use of resources; and potential streamlining of processes.
- 3.13 The CC also considered that the creation of a single CMA had the potential to enhance the UK competition system. Benefits of its creation could include bringing increased clarity and authority to competition policy and advocacy; better incentives to select the right tools for the right cases; and the ability to deploy a larger pool of expert staff flexibly across the full range of competition tools. The CC considered that the CMA needs to be structured to maintain independence from Ministers, separation between decisions on cases from corporate governance and strategy, and between phase 1 and phase 2 decision making.
- 3.14 The CBI argued that there are substantial economic benefits that can be achieved by creating a single CMA, resulting in more efficient processes and eliminating duplication. They also agreed with the Government that the CMA should have a primary duty to promote competition, and should be a strong advocate for a pro-competition policy across Government, including delivery of public services. The Federation of Small Business (FSB) welcomed the creation of the CMA, and wanted the new authority to be answerable to Parliament in

respect to the Government's growth agenda and the role small business play in economic growth.

- 3.15 Support for the creation of the CMA also came from the sector regulators, representative bodies and some law firms. Ofgem argued that the CMA would be better able to manage peaks and troughs in workloads and would be better placed to select cases. Citizens Advice also welcomed the proposed CMA, but was concerned that the consultation had not addressed what would happen if a purely competition focused body identified non-competition issues.
- 3.16 A number of law firms accepted that the creation of the CMA may create some opportunities, but did not necessarily see an overwhelming case, and their support was conditional on their concerns being addressed. For example, these respondents wanted to ensure it did not undermine the effectiveness of the regime or reduce the independence of decision making. Which? also said that it was not opposed to the creation of the CMA, but that it wanted Government to be certain that reform will not undermine the capability of the existing regime and that the anticipated benefits are achievable.
- 3.17 A number of respondents expressed stronger concerns about the creation of the CMA and did not support it. Notably, the City of London Law Society and the Joint Working Party of the Bars and Law Societies of the UK on Competition Law ('Joint Working Party'), echoed by many individual law firms in their responses, considered the proposed CMA to involve some real disadvantages that outweigh the potential efficiency benefits. They argued the disadvantages include the risk of confirmation bias in the decision-making process, the costs of transition and the impact on current cases, cultural divides within the CMA and questionable cost savings.
- 3.18 Some respondents also questioned whether the Government's objectives could be delivered without institutional change, and whether the CC and OFT could be encouraged to work close together, develop and coordinate their processes, and improve identification and handling of cases.

The Government's Decision

- 3.19 The Government believes that there is a strong case for the creation of a single CMA and that concerns raised by respondents can be mitigated. **The Government has therefore decided to create a new CMA and transfer the functions of the CC and the competition functions of the OFT to it.**
- 3.20 The CMA will have consumer enforcement powers. The scope for using these powers will be subject to the outcome of the consumer landscape consultation which will be announced shortly.

3.21 The benefits will include:

- Greater coherence in competition practice and a more streamlined approach in decision making, through strong oversight of the end-to-end case management process.
- More flexibility in resource utilisation to address the most important competition problems of the day and better incentives to use antitrust and markets tools to deal with competition problems.
- A single powerful advocate to speak for competition across the economy, in Europe, and globally.
- The scope for long term cost savings.

3.22 Taken together, these benefits will be favourable to consumers and lead to long run improvements to UK productivity and growth. The risks associated with the creation of the CMA will be mitigated, in part through the retention of a two phase process for mergers and markets and independent panels for phase 2 and through careful transition planning.

3.23 The creation of the CMA is not expected to result in savings over and above those which need to be achieved as a result of the Spending Review, but will facilitate these.

4. A Stronger Markets Regime

Summary of the Government's decisions

The Government has decided:

- The CMA will have the power to **investigate practices across markets**.
- **Not to extend the super-complaint mechanism to SME bodies.**
- The Secretary of State will have the power to request the CMA to investigate **public interest issues alongside competition issues**.
- To introduce **statutory time limits and information gathering powers** for all stages of the markets process, including:
 - Statutory time limits and information gathering powers for market studies (phase 1). Time limits will require the CMA to **consult on making an MIR within 6 months of launching a market study, where such an outcome is envisaged, and conclude all market studies within 12 months**. The OFT's current criminal penalties will also be replaced with civil penalties for failure to comply with information gathering requirements.
 - **Reducing statutory time limits for phase 2 market investigations (phase 2) from 24 to 18 months**, with powers to extend these by 6 months in special circumstances.
 - **6 Month statutory time limits for the CMA to implement phase 2 remedies** with powers to extend these by 4 months.
- To amend Schedule 8 to the Enterprise Act 2002 (EA02) to enable the CMA to require parties to appoint and remunerate an independent third party to monitor and/or arbitrate on the implementation of remedies; and to require parties to publish certain non-price information.
- To clarify in legislation the type of interim measures that the CMA can take at phase 2.
- **Not to change the current 'change of circumstances' threshold for the review of remedies.**
- **Micro businesses and start-ups will not be subject before 1 April 2014 to the CMA's new information gathering powers for market studies and market investigations remedies implementation.**
- To remove the duty of the CMA to consult on decisions not to make an MIR unless any person expressly asks for a reference to be made. The CMA will continue to have a duty to consult on decisions to make an MIR.
- Not to introduce further legislation to improve the **interaction between MIRs and antitrust enforcement** in a single CMA.

The Issue and Proposals

- 4.1 The consultation considered a number of options aimed at modernising and streamlining the markets regime including statutory time limits at all stages of the markets process; enabling the CMA to carry out market investigations into practices across markets and amending remedy making powers. Reform will ensure that the CMA has the right powers to deliver faster results for consumers and businesses without causing prolonged and undue uncertainty in markets.

The Questions

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.

Summary of Responses

- 4.2 The great majority of respondents who commented welcomed measures to streamline the markets regime. The three most common weaknesses identified in the current regime were:
- **The current two phase regime is too complicated and there is too much duplication.** A number of respondents considered there to be too much duplication between phase 1 market studies and phase 2 market investigations and that engagement with two extensive processes is unnecessarily complex.
 - **The end-to-end markets process takes too long.** A great majority of respondents regarded the process as unnecessarily prolonging uncertainty for business or consumer detriment.
 - **Disjointed working between the phase 1 and phase 2 processes.** A majority of respondents considered that market studies that are to be referred to a phase 2 investigation should be done so promptly, though many would like enough flexibility in the system to resolve issues through voluntary measures at phase 1 and not unnecessarily be referred to phase 2.

Enabling investigations into practices across markets

Summary of Responses

- 4.3 Respondents were divided on whether the CMA should conduct phase 2 investigations into practices across markets. About half of the respondents supported the proposals, suggesting that if scoped carefully, cross-market investigations could add flexibility to the regime, and multiple investigations could be avoided. Some respondents suggested that automatically renewable contracts, early termination charges and additional charges for switching could be subject to a cross-market investigation.
- 4.4 A small number of respondents suggested that such ‘horizontal’ investigations could be unwieldy and considered that unique conditions existing in different markets would make it difficult to analyse practices or implement remedies across markets in a uniform fashion.

The Government’s Decision

- 4.5 **The Government has decided that giving the CMA the power to investigate practices across markets is essential to ensuring that markets work well.** The CC has found some practices to be common across markets. These have included early settlement terms in investigations of Payment Protection Insurance (PPI) and Home Credit; and the sale of secondary products at particular points of sale (in the market investigations on PPI and Extended Warranties).
- 4.6 Giving the CMA additional powers to carry out ‘horizontal’ investigations of practices that affect more than one market will lead to a more targeted approach to tackling recurring sources of consumer complaint. This is important where similar economic characteristics have the potential to affect competition adversely across multiple, distinct markets. It will also allow the CMA to investigate features that do not neatly fit within one market, such as collective licensing of public performance and broadcasting rights in sound recording.
- 4.7 The Government recognises the need to consider practices within the context of their markets, but on balance, the Government considers such an extension can be advantageous. Giving the CMA flexibility to manage the scope of these investigations will, however, be essential.

Extending the super-complaint system to SME bodies

Summary of Responses

- 4.8 The majority of respondents opposed proposals to extend the super-complaint mechanism to SME bodies. Some respondents strongly felt that SMEs should not be given special status over their competitors,

which could allow them to challenge business practices which might be pro-competitive and efficiency-enhancing. Of those respondents that supported the proposals, some were concerned about the scope for SME representative groups to gain super-complainant status and then raise issues that are more properly considered to be commercial concerns rather than competition issues.

The Government's Decision

- 4.9 Given the lack of significant support for this proposal, and in the absence of evidence of the type of issues that may be brought to the CMA as a potential SME super-complaint, **the Government has decided not to extend the super-complaint mechanism to SME bodies.**

CMA reports to Government on competition and public interest issues

Summary of Responses

- 4.10 The Secretary of State currently has the power to 'call in' market inquiries that affect defined public interests. In these cases, the CC reports to the Secretary of State on its findings on the competition issue but does not consider the public interest. The Secretary of State must accept the CC's competition findings but has the power to decide on remedies in light of his own views of the public interest. Opinion on proposals to enable the CMA to provide a report to Government on public interest issues alongside competition issues was divided. Some respondents were attracted to the proposal as it would enable the Secretary of State to consider recommendations from experts on the relevant public interest issue under consideration. Other respondents considered such powers could dilute the CMA's primary competition function and politicise it. A minority of respondents argued that the CMA will lack the appropriate expertise.

The Government's Decision

- 4.11 **The Government has decided that the Secretary of State will have the power to request the CMA to investigate public interest issues alongside competition issues at phase 2.** By utilising the expert competition knowledge of the CMA and supplementing this with specialist public interest expertise to consider, holistically, competition and public interest issues, the Government considers this can put the competition regime at the heart of market inquiries currently undertaken by ad hoc 'commissions'. This approach is designed to enable faster implementation of competition remedies than an ad hoc inquiry.
- 4.12 This will bring the public interest markets regime in line with the public interest mergers regime where CC panels can be required to consider certain public interest issues alongside competition issues. The merger

regime does not provide for the appointment of further public interest experts for this purpose, but the Government considers that such experts may need to be appointed to advise on public interest matters in market investigations because the issues in these can be wider than in merger inquiries.

4.13 The Government is committed to preserving the independence of the CMA and wants to ensure that it retains a strong focus on competition. The Government believes that appropriate checks will preserve the independence of the CMA and guard against excessive use. Specifically:

- The scope of public interest issues that may be considered in a markets case is not being widened by this reform. An affirmative Order from Parliament will be required to add a new public interest consideration to the current list (national security is currently the only public interest consideration specified in the markets regime).
- As now, the competition test will need to be met for the CMA to be able to carry out a market investigation.
- The role of the public interest experts will be limited to providing advice on the public interest issue under consideration.
- The Secretary of State will retain his current decision-making role on remedies where he considers the public interest consideration affects these.

Statutory time limits and information gathering powers

Summary of Responses

- 4.14 The great majority of respondents supported the retention of the two phase market regime and welcomed proposals to streamline it, though there was no consensus on how this should be done.
- 4.15 The great majority of respondents broadly favoured statutory time limits at all stages of an investigation (market studies, market investigation, and phase 2 remedies) to ensure greater certainty and a reduction in the burden on business of an investigation, provided they are accompanied with due process safeguards and ensure flexibility to resolve issues early.
- 4.16 A minority of respondents opposed statutory time limits at the market study stage, arguing that phase 1 ought to act as a filter for phase 2 investigations. Some have also argued against extending phase 1 information gathering powers as they will lead to greater burden on business. Others consider that these costs will not be unreasonably high, as many already provide information voluntarily to the OFT. A few respondents also raised concerns about the capacity of the CMA to conduct phase 2 market investigations in shorter timeframes.

- 4.17 There was broad consensus amongst respondents that the introduction of statutory time limits should not seek to encourage more phase 2 investigations where issues can be resolved at phase one. A small minority of respondents also opposed the introduction of statutory time limits for the implementation of remedies.
- 4.18 A number of respondents regard the use of the OFT's general function in section 5 of the EA02 to be too wide to launch a market study and want a clearer statutory threshold, particularly if information gathering powers extended to the market study phase. Two respondents requested more far reaching changes: to raise the current threshold to initiate a phase 1 market study to that of the higher section 131 threshold for an MIR, and create a new higher threshold to make an MIR. Others have called for closer alignment with the EU 'sector inquiries' test.¹⁰
- 4.19 Some respondents also argued that information gathering powers without a statutory threshold will give the CMA wider information gathering powers for the markets regime, where the competition law has not been breached, than in antitrust cases where currently the OFT must have reasonable grounds for suspecting that there has been an infringement of antitrust legislation law, in order to use its investigatory powers.¹¹

The Government's Decision

- 4.20 The Government has decided to introduce statutory time limits for all stages of the markets process, including:
- **Statutory time limits and information gathering powers for market studies (phase 1)** that will require the CMA to consult on making an MIR within 6 months of launching market study, where such an outcome is envisaged, and concluding all market studies within 12 months. The OFT's current criminal penalties will also be replaced with civil penalties for failure to comply with information gathering requirements.
 - **Reducing statutory time limits for phase 2 market investigations** (phase 2) from 24 months to 18 months, with powers to extend these by 6 months in special circumstances.
 - **Introducing 6 month statutory time limits for the CMA to implement phase 2 remedies** with powers to extend these by 4 months, with appropriate powers and safeguards.

¹⁰ Under Article 17(1) of Council Regulation 1/2003, the European Commission may start and inquiry 'where the trends of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market'.

¹¹ Section 25, CA98.

Statutory time limits for market studies

- 4.21 The CMA will be required to consult on a decision to make an MIR within 6 months where such an outcome is being considered as a result of a market study; and will not be permitted to take longer than 12 months to make an MIR. All market studies reports will be required to be published within 12 months of the launch of the study. These time limits build in flexibility to allow the CMA to use the right tool for competition problems found in the market and to resolve issues through voluntary means and agree undertakings in lieu (UILs). These changes do not impact on current timeframes on responding to super-complaints.
- 4.22 We do not propose additional statutory time limits for the CMA to make an MIR after the consultation. Currently the OFT tends to make a referral within approximately 6 weeks after the consultation period has ended. This will be supported with a power of the Secretary of State to reduce the time frame in the future if it appears that processes have scope to become more efficient. This power already exists for phase 2.
- 4.23 Statutory time limits for all market studies will have a significant impact on those cases that are not referred to CC for a phase 2 investigations. To date, of the 35 market studies conducted by the OFT that have not been referred to the CC, 12 have taken more than 12 months. Statutory time limits will also give greater certainty of timing for those cases that are referred to phase 2; and greater consistency of information provision between the two phases. It will stop anomalies such as Payment Protection Insurance (PPI) which was referred to the CC 17 months after the super-complaint on PPI was received by the OFT.

Additional powers and safeguards

- 4.24 Statutory time limits will need to be supported by information gathering powers to enable the CMA to meet the necessary time limits and prevent businesses employing delaying tactics to avoid an MIR. The OFT currently has limited information gathering powers under section 174 of the EA02, which can be used for the purpose of assisting it in deciding whether to make an MIR. These powers are, however, limited to those situations where the OFT already believes that it has the power to make a reference. As such, there will be few, if any, circumstances where these powers can be used at the beginning stages of a market study.
- 4.25 Statutory time limits will start when the CMA launches a market study. At this point information gathering powers (similar to the current phase 2 powers) will be triggered and last until the market study report is published (no later than 12 months from launch) or, if an MIR is made, information gathering powers will continue into phase 2.

- 4.26 The Government also considered whether to introduce a statutory threshold to initiate a market study. Such a definition, however, would be difficult to construct and subject to the views of Parliamentary Counsel, we do not believe that such a threshold is required. The Financial Services Authority, for example, has general information gathering powers which may reasonably be required in connection with the discharge of its functions.¹²
- 4.27 Safeguards will apply to the use of information gathering powers. Public bodies have a duty to apply their powers reasonably and proportionately. A decision to use the information gathering powers is currently a reviewable decision and as such, the CMA will consider whether use of its powers would be appropriate in the circumstances. Finally any decision to take enforcement action for failure to comply with a formal notice requiring information may only be taken where parties fail to comply “without reasonable excuse” and a decision to impose a penalty is subject to full merits review by the Competition Appeals Tribunal (CAT). Although the CC has made use of its information gathering powers, it has not yet found it necessary to take enforcement action.¹³ Use of information gathering powers will be restricted to market studies and not applied to general research functions of the CMA.
- 4.28 The Government recognises concerns about additional burdens this will place on industry, but does not consider these to be high. To date, the OFT has predominantly relied on voluntarily provided information.

Changes to penalties

- 4.29 Penalties for failure to comply with information requirements at phase 1 will be aligned with the current phase 2 civil sanctions to avoid unnecessary burdens on business. Under the EA02 failure to comply with a section 174 request from the OFT is a criminal offence. This differs to civil penalties that apply in failing to comply with phase 2 investigative requirements, where fixed and/or daily penalties can be imposed (sections 110 to 115 of the EA02).¹⁴

Reducing statutory time limits for market investigations

- 4.30 Phase 2 market investigations have a 24 month statutory time limit. Almost all have taken the full period. The Government will reduce this time limit to 18 months, and give the CMA powers to extend this by 6 months in special circumstances.

¹² Section 165, Financial Services and Markets Act 2000.

¹³ The CC has published a Statement of Policy on Penalties (as it is required to do by the EA02), which sets out the circumstances in which it may take enforcement action.

¹⁴ The penalties imposed may not exceed the amounts specified by the Secretary of State by order. The maximum penalties that may be set out in such an order are: fixed penalty not exceeding £30,000, a daily penalty not exceeding £15,000 per day or a combination of the two. The current maximum penalties are set below this statutory maximum and are an amount not exceeding £20,000 for fixed penalties and an amount not exceeding £5,000 per day for daily penalties.

- 4.31 The Government recognises concerns that shorter time limits will be tight particularly in the case of complex investigations. Based on past experience, however, the CC has recently implemented several measures designed to speed up market investigations and considers that it should be possible to complete less complex investigations within 18 months. The option to extend by a further 6 months ensures that the CMA is able to assess all evidence and engage with parties in more complex cases.

Introducing statutory time limits for the implementation of remedies

- 4.32 The Government has decided to introduce 6 month statutory time limits for the CMA to implement phase 2 remedies (after which parties will implement the remedies). There are currently no statutory time limits on the CC to make orders or accept undertakings following a market investigation. The remedies process following an MIR can take several months, and in some cases years, for the CC to implement. Most of the delays in past cases have been caused by appeals. But the CC's internal process has taken between 4-10 months in most cases and 35 months in one case. A protracted process risks prolonging uncertainty for markets and prolonging consumer detriment.
- 4.33 Government considers that the CMA will need to be able to develop and test the right remedies and will therefore support these statutory time limits with additional safeguards and powers, including:
- The power of the CMA to **extend the statutory time limit by an additional 4 months** where there are special reasons why an Order cannot be made or undertakings accepted within the standard implementation period. This could be modeled on current powers to extend a merger investigation (in section 39 of the EA02).
 - **Information gathering powers for the CMA during the remedy implementation stage**; by extending the current section 109 powers to compel the supply of information and documents.
 - Where such information powers have been invoked there will be **'stop the clock' powers**. In addition to an extension for special reasons, the remedy implementation period can be extended if one of the main parties fails to provide the required information in response to a formal notice to produce within the time stated by the notice.
 - **"Resetting" the clock in the event of an appeal**; where a judicial challenge was unsuccessful, the statutory timescale will start again from the beginning at the conclusion of appeal proceedings.
 - **Reform of the Schedule 8 Order-making powers** to ensure that the CMA has the power to introduce remedies by Order, should this

be necessary. This will ensure that the CMA has sufficient flexibility in its Order-making powers not to be vulnerable to any potential delays caused by parties' willingness or ability to give suitable undertakings (see further below).

Remedies in markets and mergers

Summary of Responses

- 4.34 There is considerable overlap of the provisions relating to remedies in phase 2 mergers and phase 2 markets. Paragraphs 4.35 to 4.44 therefore refer to both phase 2 mergers and markets.
- 4.35 The great majority of respondents supported Government proposals to amend Schedule 8 to the EA02 to enable the CMA to require parties to publish certain non-price information.
- 4.36 Views on extending Schedule 8 to enable the CMA to require parties to appoint and remunerate an independent third party to monitor and/or arbitrate on the implementation of remedies, however, were mixed. A few respondents raised concerns that the costs for paying for a monitoring trustee of such remedies would be a significant burden on business.
- 4.37 Views were mixed on altering the 'change of circumstances' threshold to make clear that remedies can be reviewed, thereby ensuring that they operate as intended. Some respondents supported a change to or greater flexibility in the threshold, whilst a few raised concerns about the risks of remedy creep.

The Government's Decision

- 4.38 **The Government has decided to amend Schedule 8 to the EA02 to enable the CMA to require parties to appoint and remunerate an independent third party to monitor and/or arbitrate on the implementation of remedies; and to require parties to publish certain non-price information.** These amendments will apply to both the mergers and markets regime.
- 4.39 Currently the CC may only require parties to publish non-price information in conjunction with pricing information.¹⁵ There are some instances in which the publication of certain information unrelated to prices may be an effective and proportionate remedy, for example where information is published telling customers how they may switch supplier. Under current legislation, if the CMA were to put in place such a remedy by means of an Order, it would also have to require price

¹⁵ Paragraph 15 of Schedule 8.

information to be published.¹⁶ This can cause unnecessary costs to business, for example, where prices change more frequently than the non-price information that is the main focus of the remedy.

- 4.40 Under Schedule 8 the CC has limited powers to require the appointment and remuneration of an independent third party to monitor and/or arbitrate on the implementation of remedies to ensure their effectiveness. It has successfully implemented behavioural remedies using a third party in a monitoring role in merger cases in situations where firms have been prepared to give undertakings to this effect.¹⁷ However, it may not always be practicable to secure undertakings from all parties to a market investigation, so a change to the Order-making powers of the CMA would be needed to facilitate this type of monitoring arrangement.
- 4.41 Consistent with the changes to the merger regime to clarify the CMA's powers to impose interim remedies, **the Government has decided to clarify the measures that the CC can currently take to prevent and reverse pre-emptive action at phase 2 of markets investigations.**

Review of Remedies

- 4.42 The current two-stage process of review of phase 2 remedies has resulted in a relatively complex and duplicatory review process, which can take between 11-35 months for major reviews. In the past 5 years, 9 reviews on both mergers or markets have fallen in this category, which has resulted in parties having to comply with obsolete remedies for long periods of time. This reform would remove the need for two sets of reviews that are currently carried out by the OFT and the CC for phase 2 remedies and would bring down the average time to conclude a review of remedies from 22 to 9 months for markets and from 20 to 6 months for mergers.
- 4.43 **The Government sees the advantages of moving to a single stage review of remedies process, where the CMA would also be provided with statutory time limits, new information gathering powers, and separate decision makers when reviewing phase 2 remedies (where the CMA considers both whether the threshold for reopening a remedy is met and what needs to be done). The Government does not, however, see this reform as a high priority at this time.**

¹⁶ This is because paragraph 15 of Schedule 8 to the EA02 stipulates that (1) an order may require a person supplying goods or services to publish a list of prices or otherwise notify prices; (2) an order made by virtue of this paragraph may also require or prohibit the publication or other notification of further information.

¹⁷ The Macquarie UK Broadcast Ventures/National Grid Wireless Group inquiry (2008) provides an example where the merger parties undertook to remunerate an adjudicator responsible to the OFT to resolve contractual issues as part of a package of behavioural remedies.

- 4.44 **The Government has decided not to change the current ‘*change of circumstances*’ threshold for the review of remedies.** Responses to the consultation did not provide compelling evidence that merited change. Coupled with the introduction of new information gathering powers at the remedy making stage of a market investigation and the review of remedies the Government considers that changes to the test could place unnecessary burdens on parties.

Exemption from regulation for micro businesses and start-ups

- 4.45 In the 2011 Budget the Chancellor announced a 3 year moratorium to exempt micro businesses and start-ups from new domestic regulation. The moratorium applies to all new domestic ‘regulation’ and amendments to existing regulation which affect business coming into effect from 1 April 2011. This includes legislative requirements and those regulations that have a net beneficial impact on business. Where the moratorium would conflict with existing legislation, the existing legislation takes precedence.¹⁸
- 4.46 The timing of coming into force of the new information gathering powers at a phase 1 market study and the market investigation remedies implementation stage will depend on Parliamentary approval and the CMA set up. In line with the guidance, however, **the Government has decided that micro businesses and start-ups will not be subject to these information gathering powers before 1 April 2014.** A similar exemption will apply to the new information gathering powers in the merger regime.

Clarifying powers following remittals of mergers and markets

Summary of Responses

- 4.47 There was broad consensus amongst respondents supporting proposals to clarify that phase 1 and phase 2 powers of investigation and requirements relating to timelines apply if a decision of the CMA is quashed and the matter is remitted back to it for a new decision.

The Government’s Decision

- 4.48 **The Government sees the advantage of clarifying that phase 1 and phase 2 powers of investigation and requirements relating to timelines apply if a decision of the CMA is quashed and the matter is remitted back to it for a new decision. However, the Government does not see this reform as a high priority at this time.**

¹⁸ <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/g/11-1198-guidance-moratorium-on-new-domestic-regulation>.

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

Summary of Responses

- 4.49 The great majority of respondents supported proposals to revise the duty¹⁹ to consult on decisions as to whether to make an MIR under section 131. Some suggested that this duty to consult should only apply in cases where any person has expressly asked for a reference to be made.

The Government's Decision

- 4.50 **The Government has decided to remove the duty of the CMA to consult on decisions not to make an MIR, unless any person expressly asks for a reference to be made.** The CMA will continue to have a duty to consult on decisions to make an MIR. The Government considers that this change can reduce delay to the outcomes and benefits of markets studies, and unnecessary costs.

Improving interaction between MIRs and Antitrust Enforcement

Summary of Responses

- 4.51 The great majority of respondents that commented on these proposals did not support greater interaction between market investigations and antitrust cases.

The Government's Decision

- 4.52 The Government considers that the single CMA will have powers it needs to take action against breaches of the CA98 and Articles 101 and 102 as well as undertake market investigations. **The Government has therefore decided that there is no need for further legislation to improve the interaction between MIRs and antitrust enforcement.**

¹⁹ Section 169, EA02.

5. A Stronger Mergers Regime

Summary of the Government's decisions

The Government has decided:

- To **strengthen the voluntary notification regime.**
- To **introduce statutory time limits and information gathering powers for all parts of the merger review process.**
- The CMA should have the **discretion to trigger a power to suspend all integration steps** in completed and anticipated mergers.
- To **clarify in legislation the type and range of measures that the CMA could take at phase 1 and phase 2 to prevent pre-emptive action.**
- To introduce financial **penalties which will apply to integration measures** taken in breach of CMA orders, with a maximum penalty of 5% of aggregate group worldwide turnover of the enterprises concerned.
- To **introduce a time limited period after the phase 1 decision where merging parties could offer and negotiate undertakings in lieu of a referral (UILs).**
- **Micro businesses and start-ups will not be subject before 1 April 2014 to the CMA's new information gathering powers at phase 1 and the UIL process of merger inquiries and phase 2 remedies implementation of merger cases.**
- To amend Schedule 8 to the Enterprise Act 2002 (EA02) to **enable the CMA to require parties to appoint and remunerate an independent third party to monitor and/or arbitrate on the implement remedies; and to require parties to publish certain non-price information.**
- **Not to change the current 'change of circumstances' threshold for the review of remedies.**

The Issue and Proposals

- 5.1. The current system of voluntary, rather than mandatory, notification of mergers means that a large proportion of mergers that are reviewed are already completed. It is more difficult to investigate these and apply appropriate remedies. There is also a risk that some anti-competitive mergers escape review. The consultation document proposed a number of options to address these weaknesses in the voluntary notification regime. The options ranged from strengthening the voluntary notification regime to introducing a full or hybrid

mandatory notification regime. The consultation also looked at the jurisdictional thresholds in a voluntary notification regime.

- 5.2. Options for streamlining the merger regime through introducing statutory time limits and strengthening information gathering powers were also proposed, as was the introduction of an exemption from merger control for transactions involving small businesses.

The Questions

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 your 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.

Notification of mergers

Summary of Responses

- 5.3. The majority of respondents were strongly against the introduction of mandatory notification. In general responses argued that there was insufficient evidence to justify a fundamental change to the mergers regime. Responses from businesses and lawyers argued that any type of mandatory notification would significantly increase costs to both business and the competition authorities and this would go against the Government's objectives of promoting growth and reducing regulation.
- 5.4. A minority of respondents were supportive of introducing mandatory notification, arguing that it would address the problems identified in the consultation. However, most of these respondents recognised the difficulty of setting an effective jurisdictional threshold and the trade off involved in setting a pragmatic threshold which would reduce the burden to business but also reduce the jurisdiction of the CMA over mergers.
- 5.5. The majority of respondents were supportive of retaining the voluntary notification regime and strengthening the interim measures. Of these respondents, the great majority favoured leaving it to the discretion of the CMA to trigger the statutory restriction on further integration steps.

They argued that an automatic power would be too blunt and disproportionate and would impact on mergers which were not likely to be anti-competitive.

- 5.6. There was less consensus amongst respondents as to whether the legislation should be clarified as to the type and range of measures that the CMA could take, in order to prevent pre-emptive action. Some respondents argued that there was no need for this reform. Similarly, opinion amongst respondents was divided as to whether financial penalties should be introduced, and the level of these, where parties breached statutory restrictions. On the whole, respondents regard the proposed maximum penalty of 10% of aggregate turnover of the enterprises concerned as too high. Some respondents argued that the proposed level was the same as for antitrust offences, which they considered a much more serious matter.

The Government's Decision

- 5.7. **The Government has decided to retain and strengthen the voluntary notification regime.** This option is the most proportionate response to the problems identified in the consultation and will limit the increased cost to business and the CMA.
- 5.8. The Government agrees that mandatory notification would increase costs to both business and the CMA. We also recognise the problems in setting effective thresholds and the difficulties of full mandatory notification. To have the same scope as a voluntary notification regime, a mandatory notification regime would require very low turnover thresholds. This would be out of step with other jurisdictions and would significantly increase the burden on business and the CMA. However, the alternative option of a hybrid mandatory notification system (where turnover thresholds are used for mandatory notification and the share of supply and material influence tests for voluntary notification) would only partially solve the problem of completed cases. This is because most completed cases qualify on the share of supply threshold and these would still be able to complete without seeking clearance under a hybrid regime.
- 5.9. **The Government has also decided that the CMA should have the discretion to trigger a power to suspend all integration steps and other steps that constitute pre-emptive action in completed and anticipated mergers.** The Government has decided that the power should be triggered by the CMA, as an automatic power could discourage parties from notifying and encourage them to pursue integration before the CMA found out about the merger. This would reduce the ability of the CMA to stop integration. In addition, having a discretionary power will enable the CMA to decide when to apply the power, thus making it more targeted and increasing its effectiveness.

- 5.10. **The Government has also decided to clarify in legislation the type and range of measures that the CMA could take at phase 1 and phase 2 to prevent pre-emptive action.** The intention is to make clear the measures that the CMA could take (including powers to take steps to reverse action that has already taken place – e.g. recreating separate reporting lines or functions within a business) from the outset of a phase 1 inquiry.
- 5.11. **The Government has decided to introduce financial penalties which will apply to integration measures taken in breach of CMA orders.** The primary aim will be to act as a deterrent to companies from taking such action. The Government has decided to provide for a **maximum penalty of 5% of aggregate group worldwide turnover** of the enterprises concerned, which will act as a strong deterrent.
- 5.12. **The CMA will also retain the OFT's and the CC's powers to seek a court order to ensure compliance with breaches of interim measures.** The CMA will therefore be able to choose whether to impose a penalty, seek a court order, or use both mechanisms. The CMA will be required to publish guidance indicating the circumstances in which an order would be sought, when financial penalties would be imposed and on how penalties will be calculated

Jurisdictional thresholds in a voluntary notification regime

Summary of Responses

- 5.13. The Government sought views on whether there should be changes to the jurisdictional threshold in the UK voluntary merger regime. There was no support amongst respondents for replacing the share of supply test and turnover test with a regime in which the CMA has jurisdiction over all mergers except those exempted by the small merger exemption.

The Government's Decision

- 5.14. The Government agrees with the views of respondents that the share of supply test should not be replaced with the ability for the CMA to have jurisdiction over all mergers. **The Government has decided to retain the current jurisdictional thresholds** for both turnover and share of supply as these are working well and there is no case for change.

Exemptions for transactions involving small businesses

Summary of Responses

- 5.15. The majority of respondents were in favour of the proposed exemption for transactions involving small business but they argued that the proposal did not go far enough and that it should be, as proposed by

the CBI, for the target turnover only. A small number of respondents were either against an exemption for mergers involving small businesses or believed that it should operate as a presumption (with the CMA retaining discretion). These respondents argued that all consumers in all markets had the right to be protected from anti-competitive mergers.

The Government's Decision

- 5.16. The Government recognises that the majority of businesses do not think the proposed exemption goes far enough, but it has not been persuaded of respondents' alternatives to the proposal set out in the Consultation Document. The Government remains concerned that the CBI's preferred option of an exemption for mergers where the target's UK turnover is less than £5 million would enable too many anti-competitive mergers to escape review from the CMA.
- 5.17. **The Government sees the advantage of a small business exemption from merger control (the proposal was for an exemption where the target's UK turnover does not exceed £5 million and the acquirer's worldwide turnover does not exceed £10 million). However, the Government does not see this reform as a high priority at this time.**

Streamlining the Merger Regime

Summary of Responses

Statutory time limits and information powers

- 5.18. Stakeholder views on introducing statutory time limits on different parts of the merger review process were mixed. On statutory time limits for phase 1 under a voluntary notification regime, some respondents argued that statutory time limits would be beneficial as it would reduce the length of a case and bring discipline to the process. Others argued that it would not reduce overall time limits as it would lead to longer pre-notification discussions. Some respondents were also concerned that it may result in more phase 2 cases as the CMA would have to refer cases if it ran out of time to finish its investigation in phase 1.
- 5.19. Almost all respondents were comfortable with extending information gathering powers to phase 1, accompanied by stop the clock powers, if main parties did not comply with information requests, as well as powers to impose a penalty if main parties or a third parties did not comply.
- 5.20. Most respondents agreed that the timescale for phase 2 should not be reduced. However, some respondents argued for a reduction in phase 2 time limits, pointing to the length of phase 2 compared to other

countries and that efficiencies from the creation of the CMA ought to reduce this. There was support for introducing statutory time limits for phase 2 remedies implementation.

- 5.21. There was less support for introducing statutory time limits for the undertakings in lieu of reference (UIL) process at phase 1. Respondents argued that merging parties already had sufficient incentives to conclude that part of the process. There was also concern that it might lead to unnecessary phase 2 cases as there could be insufficient time to negotiate UILs.

Early consideration of remedies in phase 2

- 5.22. Opinions of respondents were mixed on whether it should be possible for the CMA to consider remedies in phase 2 without having to decide whether the merger has or will result in a substantial lessening of competition. Some respondents were keen to have this additional flexibility and commented it would naturally lead to shorter phase 2 investigations. Others commented that it would increase complexity and reduce the incentives to offer UILs at phase 1.

Anticipated mergers in phase 2

- 5.23. The great majority of respondents were supportive of introducing a stop the clock power in phase 2 in cases where the CMA believes that cancellation or significant alteration to the merger was likely. However, a small number of respondents noted that it should be done only with the consent of parties and should not be made public until after the merger had been abandoned or if it was not, then until a sufficiently late stage in the review process so as not to create uncertainty in the market.

The Government's Decision

- 5.24. The Government recognises that the arguments for introducing statutory time limits in a voluntary notification regime are finely balanced. However, it is the Government's view that the benefits of introducing statutory time limits for all parts of the merger review process outweigh the disadvantages. Statutory time limits will streamline the process and bring certainty and predictability to business. In deciding the time limits the Government has been conscious of giving both merging parties and the CMA sufficient time so that the quality of decisions is not reduced.
- 5.25. **The Government has decided on the following statutory time limits:**
- 40 working days for **phase 1** (capable of extension when the CMA has stopped the clock because it is waiting for information from

merging parties).²⁰ Accompanied by information gathering powers applicable to main and third parties.

- **No change** to the statutory time limit for **phase 2 (24 weeks** capable of 8 weeks extension in special circumstances).
- **Undertakings in lieu**
 - 5 working days from announcement of the decision for merging parties to offer UILs.
 - 5 further working days for the CMA to consider and decide whether to pursue UILs.
 - A further 40 working days to negotiate the text of the UILs, consult (15 days minimum) and publicise the acceptance of UILs on the internet.
- **Extensions to time limits**
 - The CMA will have the ability to extend the 40 working day time limit for negotiation of UILs by up to 20 working days. In exceptional circumstances it will be able to extend the time limit by another 20 working days. It is envisaged that these extensions might both be needed where there is an upfront buyer. The CMA will issue guidance as to the circumstance in which the extension will be used.
- A **12 week** statutory time limit from the publication of the final report in second phase cases for the CMA to implement remedies i.e. either **make an order or accept undertakings**. The CMA will have the power to extend this time limit by 6 weeks. The CMA will have information powers for main and third parties and stop the clock powers whilst waiting for information.

5.26. At present, parties are able to notify the OFT in anticipated cases using the statutory merger notice procedure, which guarantees the parties a decision on reference within a prescribed time period. The introduction of a new statutory timescale of 40 working days in all phase 1 cases has rendered a separate statutory merger notice notification procedure unnecessary. As a result there will be single notification process of 40 working days. The trigger for starting the statutory timetable will be that the CMA has received satisfactory information to begin its investigation. The Government has decided against enabling an additional extension to the 40 working days statutory timescale. Phase 1 will already have sufficient flexibility as the CMA will decide when to start the clock and the clock can be stopped whilst waiting for information from merging parties.

5.27. The Government has decided to retain the maximum 24 week length of phase 2 investigations as it believes shortening this may reduce the

²⁰ This does not replace the CMA's 4 month statutory period to investigate completed mergers.

quality of the investigation and the robustness of decisions. Many phase 2 investigations are already completed in less than the time, allowed, especially those resulting in clearances.

- 5.28. The Government has decided against enabling the CMA to consider remedies earlier in phase 2 as this would be difficult to implement in practice. The CMA would not have any additional information until the investigation has concluded and discussing remedies earlier will divert CMA resources. The Government has decided instead to amend the way UILs are considered so as to increase transparency in the UIL process.

Undertakings in Lieu of reference

- 5.29. Currently parties can offer UILs in phase 1 immediately after the issues meeting but before the case review meeting (which would normally be between days 26 and 32). The OFT's internal practice is not to consider any offer of UILs until the decision on whether the case meets the test for a reference to the CC has been made internally (and on whether to apply any available exceptions to the duty to refer, including 'de minimis'). This is to ensure that there is no question that the offer of remedies influences the decision on whether the duty to refer arises (i.e. to avoid any possibility or suggestion of 'reverse engineering').
- 5.30. One drawback of the current regime is that merging parties are required, if they wish to offer UILs, to do so without having seen the OFT's decision. This means that these parties offer UILs based on the issues set out in the issues letter, but they do not know what the OFT will conclude on the various concerns set out in the issues letter.
- 5.31. **The Government has decided to introduce a time limited period after the phase 1 decision where merging parties could offer and negotiate UILs.** The same decision-maker for the phase 1 decision on whether the duty to refer had arisen would make the decision on whether to accept UILs as they would have the experience and knowledge of the case in phase 1. This approach will increase transparency as merging parties would have the benefit of the phase 1 decision and would therefore be able to decide whether to offer UILs based on the concerns actually identified. It will avoid the need for parties to make speculative offers to meet concerns that did not actually materialise.
- 5.32. **The Government has decided to have specific time periods for different aspects of the UIL process so as to mitigate against any adverse impact on the markets.** This will ensure the markets will know whether remedies were still a possibility or if the only option was to refer the merger to phase 2. This is important as under this approach there will be a time lag between publication of the phase 1 decision which announces a substantial lessening of competition and the

announcement that either UILs will be considered or the merger will be referred to phase 2.

- 5.33. The Government believes the time limits will be sufficient for merging parties to negotiate UILs, however, it recognises in certain circumstances more time may be needed and has **decided that there should be a possibility of extension**. This extension would work in a similar way to the current phase 2 extensions, i.e. it would operate only in special circumstances and the CMA would need to publish reasons for using the extension. **The Government has decided to have the possibility of a longer extension to cater in particular for cases where the CMA decides that an upfront buyer is needed** as it recognises that this may take longer to arrange.

Exemption from regulation for micro businesses and start-ups

- 5.34 As set out in the chapter 4 on markets, in the 2011 Budget the Chancellor announced a 3 year moratorium to exempt micro businesses and start-ups from new domestic regulation.
- 5.35 The timing of coming into force of the CMA's new information gathering powers at phase 1 and the UIL process of merger inquiries and for phase 2 remedies implementation will depend on Parliamentary approval and the CMA set up. **In line with the guidance on the moratorium, however, the Government has decided that micro businesses and start-ups will not be subject to these powers before 1 April 2014.**

Remedies on markets and mergers

Summary of Responses

- 5.36 There is considerable overlap of the provisions relating to remedies and remittals in phase 2 mergers and phase 2 markets. The governments proposals and respondents' views on both markets and mergers are set out in detail in chapter 4.

The Government's Decisions

- 5.37 The Government's decisions on merger remedies, as set out in chapter 4, are summarised out below.
- 5.38 **The Government has decided to amend Schedule 8 to the EA02 to enable the CMA to require parties to appoint and remunerate an independent third party to monitor and/or arbitrate on the implementation of remedies; and to require parties to publish certain non-price information.**

- 5.39 **The Government sees the advantages of moving to a single stage review of remedies process, with statutory time limits, information gathering powers and separate decision makers when reviewing phase 2 remedies, where the CMA considers both whether the threshold for reopening a remedy is met and what needs to be done. The Government does not, however, see this reform as a high priority at this time.**
- 5.40 **The Government has decided not to change the current ‘*change of circumstances*’ threshold for the review of remedies.**
- 5.41 **The Government sees the advantages of clarifying that phase 1 and phase 2 powers of investigation and requirements relating to timelines apply if a decision of the CMA is quashed and the matter is remitted back to it for a new decision. The Government does not, however, see this reform as a high priority at this time.**

6. A Stronger Antitrust Regime

Summary of the Government's decisions

The Government has decided :

- To **embed an enhanced administrative approach to antitrust enforcement**, involving improvements to the speed of the process and the robustness of decision-making, addressing perceptions of confirmation bias. This will include means of bolstering the separation between investigation and decision-making.
- To put in place **a performance framework to ensure the improvements will be fully delivered** and will prove effective in practice; and a process for review of progress and report to Parliament.
- To take **a power for the Secretary of State to introduce statutory time limits for cases**, to be exercised should reductions in the time cases take not be forthcoming.
- To legislate that **financial penalties should reflect the seriousness of the infringement and the need to deter and that the Competition Appeal Tribunal (CAT) must have regard to the statutory guidance on the appropriate amount of a penalty.**
- To provide for the competition authorities to impose **civil financial penalties on parties who do not comply with certain formal requirements during antitrust investigations** and, in these cases, to **remove the current criminal sanctions** (they would remain for intentionally obstructing entry to premises and for falsifying, destroying documents etc).
- To provide for applications **for a warrant authorising entry to premises by force to be made to the CAT** (as well as the High Court and Court of Session).
- To provide in the case of antitrust investigations, and subject to certain safeguards, **a similar power to require a person to answer questions as exists in relation to the criminal cartel offence.**
- To provide explicitly that **absolute privilege from defamation attaches to a notice by a competition authority regarding the existence of an antitrust investigation.**
- To **lower the threshold before interim measures can be imposed**, so that they would require there to be a perceived need to act for the purposes of preventing significant damage to a particular person or category of person.

The Issue and Proposals

6.1 The consultation document:

- Expressed concern over the low number of antitrust cases, the time they take and the limited deterrence to anticompetitive behaviour that results.
- Identified the overall procedural weight (full administrative investigation, prosecution and decision-making on European Commission lines coupled with full merits appeal) as a potential issue.
- Proposed solutions around the scope for lightening processes, either at the front or the back end, or otherwise improving the process so cases became less protracted.

6.2 The options identified were:

- *Option 1:* retain and enhance the OFT's existing procedures, building on the streamlining and procedural improvements the OFT has in hand, whilst retaining full merits appeal to the Competition Appeal Tribunal (CAT).
- *Option 2:* develop a new administrative approach. Possible variants for a new administrative approach including creating an Internal Tribunal or modelling the UK regime more closely on European appeal arrangements whilst strengthening procedural safeguards, for example by adopting CC-style 'panels'.
- *Option 3:* develop a prosecutorial approach: the CMA and sector regulators would prosecute cases before the CAT which would decide on infringement and penalty.

The Questions

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.*

Summary of Responses

- 6.3 There was considerable interest during the consultation in reform of the antitrust procedures. It was a major subject during the stakeholder events and we also discussed it with, and received private submissions from, a number of competition practitioners.
- 6.4 Although the OFT and the sector regulators emphasised the progress made in antitrust enforcement, there was a widespread view in the responses that the system is not working well; even many of those who supported building on the existing regime under Option 1 considered that significant, evolutionary change was needed. Some respondents considered the system needed more fundamental change; the case for reform of the current administrative approach was described as 'compelling' by the City of London Law Society. Getting the antitrust regime right was widely seen as, in the words of the Joint Working Party, 'a key area of reform'.
- 6.5 A strong theme in the responses was concern over the quality of decision-making and due process: many also saw these as inextricably linked to the low number of cases, the time they take and the costs involved. Views on the importance to be attached to case numbers varied, with a number of respondents noting the difficulties in making comparisons internationally, but several respondents considered the numbers to be low.
- 6.6 Several respondents indicated that the quality of case management, particularly in the early stages, and the legal management and leadership of cases, were key to improving the antitrust process. Some of those who saw a case for radical procedural change (such as the Joint Working Party) underlined the importance of these factors for any option.
- 6.7 However, for some respondents, such as certain law firms, this point supported the argument that, given management and staffing changes, the current regime could be operated to a high enough standard. Others, on the other hand, saw the multiple tasks of an administrative decision-maker as irredeemably conflicting and giving rise to process delays.
- 6.8 Overall:
- The consultation suggested there is a problem with antitrust enforcement, in relation to some or all of the number of cases, the time they take and the quality and robustness of administrative decision-making (including in addressing perceptions of confirmation bias).
 - Many respondents saw the difficulties as linked to EU-style administrative enforcement in the context of the UK's common law legal system and in particular one which guaranteed appeal on the merits to the CAT on certain decisions in any event.

- Some respondents saw case management and insufficient senior oversight of cases by experienced staff, and in a few cases the level of resource available to the OFT, as the fundamental issues.
- 6.9 The Internal Tribunal variant to Option 2 was strongly opposed, on the grounds that it would be difficult to ensure the CMA incorporated the necessary safeguards and there would be the appearance of bias and thus sustained attempts to challenge decisions by way of judicial review. Businesses and their advisers felt strongly that, in the light of the quasi-criminal nature of the antitrust prohibitions, and the severe consequences that may follow from being found to have infringed them, a full right of appeal to the CAT is vital.
- 6.10 There was less consensus over the optimal solution to the problems identified, with respondents split between the options. Numerically the largest number supported Option 1. However, Option 3 was supported by a number of representative bodies who speak for a breadth of interests. Option 2 was least supported albeit it was recommended by one representative body, the City of London Law Society, as well as the CC and some law firms (all on the basis that appeal on the merits would be retained).
- 6.11 Option 1 was supported by the OFT and the sector regulators and some individual law firms and businesses. The OFT emphasised that it has ‘learnt by doing’ and that its latest reforms to its procedures will enable better and swifter decisions such that the historical record is not a good guide to the future. In particular, the OFT urged caution in making international comparisons of cases, and was not convinced that a case has been made for fundamental reform of the investigation of antitrust, which it considered would require further time to bed in, and would give rise to considerable uncertainty for business and significant transition costs.
- 6.12 A number of individual law firms and businesses supported these arguments but also attached importance to the OFT improving its performance within the current arrangements.
- 6.13 Those who supported Option 2 were sceptical of the ability of recent reforms to deliver sufficient improvement to case handling, procedures and decisions. A number of individual law firms and the City of London Law Society favoured imposing separation of functions within the CMA along the lines of the CC panel structure or something similar, to guard against confirmation bias and other risks to good decision-making, whilst retaining full appeal on the merits²¹.
- 6.15 The CC agreed that antitrust enforcement was in need of reform and argued that transposing its own panel system for mergers and markets would improve the antitrust regime, in view of the acknowledged quality

²¹ The Society saw attractions in Option 3 as an alternative, but expressed some concerns on the grounds of access to justice for smaller firms.

of its decision-making and management of investigations, and the consistency it would bring to the CMA's procedures across the range of competition tools.

- 6.16 Option 3 was supported by the Joint Working Party, some law firms, a number of barristers, the CBI and some businesses, the International Chamber of Commerce UK, the UK Competition Law Association and the In-House Competition Law Association. In essence, supporters of the prosecutorial approach believed that it would reduce costs overall, including for smaller businesses, by ensuring that a high standard of evidential proof and transparency was achieved for the initial decision. They argued that a prosecutorial system could be expected to lead to more focused and effective enforcement while preserving rights of defence and eliminating confirmation bias risk, and that this would import greater efficiency and high standards of evidence collection into the process. Some, such as the Joint Working Party and the International Chamber of Commerce UK, accepted however that it would be a radical change and that there would be challenges in implementing it.

The Government's Decision

- 6.17 The Government recognises that the system for the enforcement of the antitrust prohibitions is not working as well as it should. This is illustrated not only by the consultation responses but also by the protracted nature of cases and the strong challenge that is often mounted to decisions on appeal. The Government remains concerned that too few cases are taken forward. Notwithstanding the importance of prioritisation and a focus on impact when selecting cases to take forward, a regime in which the cost and burden of establishing cases is such that relatively few decisions are made will lead to less deterrence and a diluted economic impact than one in which more cases could be run.
- 6.18 The Government sees a need to improve the system's efficiency and fairness. The Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and, therefore, intends that full-merits appeal would be maintained in any strengthened administrative system. Since such a strengthening would involve introducing further checks and balances to buttress the actual and perceived quality and fairness of decision-making, there would need to be a marked decline in the incidence of appeals and of successful appeals if the result were not to be to make the process even more protracted and procedurally heavy whilst still being reliant on appeals to correct mistakes made in the administrative process. A fairer administrative system, apart from being an end in itself, could therefore contribute to procedural efficiency, if it led to less frequent resort to the courts.

- 6.19 A move to a prosecutorial system would likely provide greater efficiency (as well as undoubted fairness) by reducing procedural steps and encouraging earlier settlement of more cases, cutting - even when cases went to court – around 11 months off the time appealed cases take under the current system, according to conservative estimates. The Government considers that there is a good case for moving to a prosecutorial system. However, the Government is conscious that there would be some disruption of antitrust enforcement caused by such a move, and that effective competition is necessary to support the economic growth which is so vital in present circumstances. The Government is mindful too that the OFT, the CC and the sector regulators favour, in some cases strongly, retaining an administrative model. Clearly this must be given some weight since these bodies or their successors will be responsible for implementing the new regime. More generally, it is also the case that there was not a strong consensus in favour of a move to a prosecutorial system.
- 6.20 The Government has therefore considered whether further and sufficient improvements could be made to the administrative model in order to address concerns over fairness and efficiency, and has discussed these issues with the OFT.
- 6.21 The OFT acknowledges that the consultation has given it an opportunity to hear further feedback about its procedures and it accepts that some significant concerns have been expressed by certain respondents. Having digested the consultation responses and reflected further on the lessons to be learnt from recent cases, the OFT considers that there is scope to improve further the administrative antitrust enforcement model, on the foundations of the changes that have already been put in place. Building on its new Procedures Guidance published in March 2011, it has proposed improvements to its procedures, on which it will consult, under the themes of the speed of investigations; the quality and robustness of decision-making; and perceptions about the legitimacy of decision-making. At a high level, these involve:

Speed of the process and improving project management

- The OFT/CMA will publish a case-specific timetable at the outset of an investigation in order to increase public accountability to deliver case timelines.
- An expanded version of the current Procedural Adjudicator role, speeding up the resolution of procedural disputes with parties whilst ensuring that procedural rights have been respected.

Robustness of decision-making (including access to decision makers)

- Improved access to decision makers at a more interactive oral hearing, organised and chaired by the Procedural Adjudicator, providing for a more meaningful dialogue between the parties and the decision makers.

- Greater transparency of the checks and balances provided by lawyers and economists outside the case team, from the OFT's General Counsel's Office and the Office of the Chief Economist and Competition Policy to guard against perceived confirmation bias.
- Providing parties with a copy of the draft penalty calculation either in the Statement of Objections or in a separate penalty statement in order to give an opportunity for parties to make representations on the appropriateness of the penalty before it is imposed.
- Greater use of state of play meetings to improve engagement with the parties on the progress of the investigation.

Perceived legitimacy of the decision-making process (including avoiding perceptions of confirmation bias)

- Changes to decision-making in antitrust cases to increase the robustness of decisions and reduce any perception of confirmation bias by introducing collective judgement in decision-making with separation between responsibility for the investigation of the case and for the final decision.

6.22 It is also noteworthy that the OFT has begun to step up its recruitment with a view to increasing the number of experienced staff, especially senior lawyers, for which it recognises there is a need.

6.23 The OFT is confident that it will be able to implement these proposals without a negative impact on case throughput in the short or medium term. It also emphasised that it has recently enhanced the efficacy of the antitrust regime (as the following indicators evidence) and that this shows there is further potential for the administrative system to improve:

- The OFT currently has open 19 civil or criminal antitrust investigations.
- Three infringement decisions were issued in 2011, and the OFT anticipates that it will issue 2-4 infringement decisions in 2012 and 4-7 infringement decisions in 2013 (if the evidence in these cases supports such an outcome).
- Projected case timetables of cases that were commenced in 2010/11 anticipate infringement decisions being reached in 2 to 3 years of their formal launch (if the evidence supports such an outcome). The OFT therefore anticipates that, over a three year period from 2011 to 2014, average case durations will be reduced significantly, compared to previous cases.
- The OFT notes that some of its more recent cases have been completed more swiftly than in the past. For example, the *RBS/Barclays* and *Reckitt Benckiser* cases (neither of which the OFT considers to have been simple cases) took 32 and 29 months respectively even before some of the OFT's more recent reforms which might have helped to speed up the investigations.

- 6.24 On balance, the Government considers that the administrative model, if suitably enhanced, can deliver the Government's objectives to make the system more efficient and fair. But it considers that further steps going beyond the OFT proposals, and buttressed by further statutory provision, would need to be taken for this to be realised. And the Government is clear that a suitable Performance Management Framework to ensure the improvements will be fully delivered and will prove effective in practice, as well as a set Parliamentary process to review progress after a reasonable period, will need to be put in place.
- 6.25 In respect of the first of these requirements, the Government has therefore decided to:
- **Ask the OFT to consider further how it can put in place robust challenge procedures to ensure that the bespoke timetable is appropriate and sufficiently challenging in each instance;** and that an adequate explanation is given when these timescales are not met.
 - **Ask the OFT to consult on putting in place an expanded role for the Procedural Adjudicator** and the clarification of its investigative procedures, with the central aim of bringing about processes that give confidence to business, and so genuinely reduce the likelihood of judicial challenge.
 - **Ask the OFT to investigate further means of bolstering the separation of decision-making from investigation so that independence of mind is encouraged and the risk of confirmation bias reduced,** and to consult the CC and other stakeholders on them. The legislation for the CMA will allow the rules to make provision for the use of panellists in antitrust cases.
 - **Encourage the OFT to continue work on improving its project management capabilities** and make proposals for embedding excellent project management culture and skills.
- 6.26 The Government expects the OFT to consult shortly on proposed procedural changes to antitrust enforcement under the current regime. In the legislation for the CMA the Government will make specific provision enabling the statutory procedural rules to cover such important principles as the separation between investigation and decision-making. The legislation will also incorporate the changes described in the later sections of this chapter, which emerged from the consultation, such as lowering the threshold before which interim measures can be imposed and taking a power to require a person to answer questions. In addition, the Government has decided to include in the Bill **a power for the Secretary of State to introduce statutory time limits by order.** Respondents' views on the merits of statutory time limits were mixed, and the Government understands concerns that they might encourage parties to game the system. Nevertheless, the Government considers they may be a necessary backstop should the

reductions it wishes to see in the time that antitrust cases take not be forthcoming.

- 6.27 Finally, the Government intends to legislate that **financial penalties should reflect the seriousness of the infringement and the need to reduce the incidence of infringement through specific and general deterrence**; and that the **CAT should have regard to the statutory guidance (as updated) on the appropriate amount of a penalty**. These reforms will mitigate any unwarranted incentives to appeal decisions and fines (should there be any).
- 6.28 To assure that the changes will be fully delivered and will prove effective in practice, the outputs and outcomes to be delivered, and the timescales for delivering them, will be reflected in the CMA's Performance Management Framework. This will take account of the success measures set out in paragraph 6.23. The Government will monitor case numbers and outcomes, as the regime evolves, to check that procedural improvements in individual cases occur and are not at the expense of throughput or lower financial penalties. This will involve taking account of how many cases are economically complex 'effects' cases and multi-party cartel cases, as a check on whether throughput is being achieved by concentrating on the simplest cases.
- 6.29 As noted in paragraph 6.18, there is a risk in strengthening and enhancing an administrative approach that it could result in the overall process becoming even more protracted and procedurally heavy whilst still being reliant on appeals to correct mistakes made at the administrative stage. Overall, the logic for arguing that an enhanced administrative model can deliver improvements against the Government's objectives is that it can achieve a greater and swifter throughput of decisions whilst reducing the frequency and success of appeals against those decisions, as compared to the historical record, so there is a genuine efficiency gain (looking across the system as a whole) of the kind we would expect from a move to a prosecutorial system. This is therefore the central outcome we would expect the reforms to deliver, and against which the OFT/CMA's future performance will be judged.
- 6.30 In respect of a process to review progress, the Government intends that the **legislation will require the Secretary of State to review the regime and to report to Parliament on its working, no later than 5 years from the commencement of the relevant provisions**.
- 6.31 As is currently the case, the statutory provisions on antitrust enforcement will also apply to the sector regulators with concurrent powers, although we expect there to be some scope for them to meet the requirements in different ways than the CMA. Their outputs and outcomes in delivering antitrust cases will also be assessed by the Government.

Private Actions

- 6.32 The consultation document said that the Government is keen to promote private sector-led challenges to anti-competitive behaviour. Private actions can allow businesses and consumers to put a stop to such behaviour and to obtain compensation for losses they have suffered – and by doing so they can stimulate growth and innovation. However, currently it is rare for consumers and small companies to obtain redress from those who have breached competition law, and it can be difficult and expensive for them to go to court to halt anti-competitive behaviour.
- 6.33 Discussions with stakeholders during and since the consultation have suggested there is wide recognition of the need to make access to redress or dispute resolution easier. Subject to further reflection and soundings of stakeholders, the Government is minded to consult on a range of proposals to make it easier for consumers and small businesses to bring private actions, including:
- Whether to extend to businesses the current right of consumers to bring a collective action following a breach of competition law, and whether to make it easier to bring such actions.
 - Whether to extend the jurisdiction of the CAT, to allow it to hear stand-alone cases as well as follow-on cases and to grant injunctions.
 - Whether to introduce a ‘fast track’ procedure in the CAT to allow simpler cases to be heard swiftly and cheaply.
 - Whether the CMA should have a role in bringing about redress, for example by granting the CMA a power to order a company that has infringed competition law to implement a redress scheme, or to certify such a voluntary redress scheme, independently of any fine given.
 - How best to encourage Alternative Dispute Resolution methods, so that the courts are the option of last resort.
 - How to ensure that private actions complement the public enforcement regime, including whether leniency documents should be protected from disclosure in private actions or whether joint and several liability should be removed from immunity recipients.

Other changes to the antitrust arrangements

- 6.34 The consultation document sought views on the scope for introducing statutory or administrative time limits for antitrust cases, proposed to give the CMA the ability to impose daily fines for failure to comply with an investigation, and sought general views on the powers of

investigation. In its consultation response, the OFT made a number of further proposals for reform to the antitrust regime covering warrants to search premises, a power to require answers, ensuring that absolute privilege from defamation attaches to notices concerning an antitrust investigation, and interim measures.

6.35 The issue of administrative and statutory time limits is dealt with above.

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

6.36 The OFT has a range of powers for investigating suspected infringements of the antitrust prohibitions and the criminal cartel offence. There are criminal offences for non-compliance with these investigatory measures. Section 42 of the Competition Act 1998 (CA98) provides for criminal prosecution where parties do not comply with investigatory measures in relation to the antitrust prohibitions and where they intentionally obstruct an officer in exercising investigatory powers under section 27. Criminal investigations and prosecutions are resource intensive and time-consuming and may in practice not be feasible in many cases. The OFT has not to date pursued a criminal prosecution for non-compliance. In addition, there may be questions around identifying the appropriate individual to prosecute, or difficulties around prosecuting a company, as well as questions as to whether prosecution would be an appropriate measure or would meet the public interest test in relation to every instance of non-compliance. The OFT would have to prove failure to comply or intention to obstruct and the prosecution would need to be prioritised by the prosecuting authority. Also, the relevant standard of proof would be the higher criminal standard of 'beyond reasonable doubt'. These difficulties potentially undermine the effectiveness of the sanction.

6.37 The same issues arise in relation to offences for non-compliance and obstruction under other parts of the regime, including the offences in section 201 of the EA02 (in respect of investigatory measures under the criminal cartel offence).

6.38 In the consultation document, the Government proposed to amend the legislation to allow the OFT to impose financial penalties on parties who do not comply with the requirements in question in addition to the existing possibility to prosecute. It was suggested that the fines could be similar to the daily fines the European Commission can impose.

6.39 Most respondents, including the CBI, opposed this proposal. A number pointed to the absence of evidence of the difficulties the OFT has had in obtaining information.

6.40 The Government understands the difficulties the OFT foresees in prosecuting these cases. Financial penalties are likely to result in quicker and better quality responses to requests for information and consequently lead to more efficient investigations. It should also be

noted that similar civil fining powers exist in the markets and mergers regimes.

- 6.41 The Government has concluded that civil sanctions provide a better and more appropriate sanction, but it is concerned that it is over-regulatory for the CMA to have both civil and criminal sanction powers in this area. **The Government has decided to introduce a civil sanction power for CA98 investigations and to remove the criminal sanctions in respect of failure to comply with an investigatory measure except in the case of obstructing an officer in the exercise of powers to enter premises.** As with the mergers and markets regimes, the CMA would be obliged to publish a notice setting out its reasoning and the fining decision would be appealable on the merits to the CAT.
- 6.42 The Government considers it would be appropriate to retain criminal sanctions (and only criminal sanctions) for obstruction. The threat of prosecution may be important in securing cooperation from individuals when officers are seeking entry to premises having given notice or under the authority of a warrant. Criminal sanctions (and only criminal sanctions) would also remain for falsifying, destroying documents etc, and for criminal cartel investigations (which concern individual wrongdoing).

Powers of investigation including powers of entry

- 6.43 The consultation document sought views on the extensive powers of entry in the CA98 and the EA02 in the light of the provisions of the Protection of Freedoms Bill which include a power enabling the relevant Secretary of State (or other responsible Minister) to repeal specific powers of entry where they are judged unnecessary and to add safeguards or limitations to existing powers where appropriate, such as a requirement of a judicial warrant for use of the power, or adding explicit exclusions, such as ruling out use of the power for private homes where this is not essential. The Bill also imposes a statutory duty on Secretaries of State (or other responsible Ministers) to review all the powers of entry within their policy responsibilities and to report to Parliament within two years of Royal Assent.
- 6.44 Those respondents who commented on this aspect of the consultation generally agreed that the powers were necessary and appropriate. The OFT argued strongly that this is the case. The Government agrees with this and as presently advised will so report to Parliament. It considers that the powers are necessary in the light of the damage caused by anticompetitive agreements and conduct, including cartels, and the fact that in many cases infringing businesses will take great care to keep their activities secret. The Government also sees value in maintaining powers that are equivalent to those available to overseas competition authorities so that our regime can play an appropriate part in the detection and punishment of infringements that operate internationally.

- 6.45 In addition, however, the OFT also argued that consideration should be given to whether quicker and simpler procedures could be provided to make it easier to obtain warrants, and in particular whether warrant applications could be heard in the Magistrates Court. It also argued the case for it having the power (as it has in criminal cartel cases) to require persons to answer questions, as well as providing information and documents.

Warrants

- 6.46 Applications for warrants authorising the entry by force into property are usually heard in Magistrates Courts, and the CA98 is unusual in providing that the warrants must be authorised by the High Court. The High Court is less used to dealing with such applications.
- 6.47 However, as introduced the Competition Bill had contained the normal provision relating to the Magistrates Court and the requirement for warrants to be issued by the High Court was made by amendment in response to specific concerns raised during the Bill's passage through Parliament. Downgrading the level of judicial control would also be at odds with the thrust of the Protection of Freedoms Bill, under which Ministers will be considering, for the powers of entry for which they are responsible, raising the judicial control to the level of the High Court (this would make the High Court more experienced in dealing with warrant applications).
- 6.48 The Government has therefore decided not to adopt the OFT's proposal that warrant applications could be heard in the Magistrates Court. However, the Government has **decided to legislate to add the CAT to the High Court as a judicial authority to which warrant applications can be made**. The CAT is well placed to consider the evidence of an infringement of the antitrust prohibitions and could be expected to deal with them fairly and expeditiously. This would not be to downgrade judicial control for the CAT is at the same judicial level (and indeed a number of High Court Judges are CAT chairmen).

Power to ask questions

- 6.49 The OFT argued that the powers contained in section 26 of the CA98 should be amended so that they mirror the provisions of section 193 of the EA02 more closely. In particular, the OFT seeks the power in investigations under the former Act to require a person to answer questions, as well as providing information and documents, as the OFT believes this will support more efficient and more productive investigations.
- 6.50 There is significant overlap between the type of conduct investigated under the two Acts, and the evidence that the CMA will wish to rely on in taking a case forward. Where that includes witness evidence, the OFT is currently dependent on information provided voluntarily, or in response to a requirement made under section 26 of the CA98.

- 6.51 Under section 26 the OFT may issue a written notice requiring the provision of information by an individual. The OFT have suggested that having the ability to require individuals to answer questions will produce higher quality evidence more efficiently, and result in more robust and effective enforcement.
- 6.52 The OFT considers that it would be necessary to have adequate safeguards in place to restrict the use of material against the relevant individual, similar to those contained in the Enterprise Act in relation to criminal cartels. Further, the OFT recognises, as reflected in its current guidance on powers of investigation, that such a power could not be used to compel answers to questions where that might amount to an admission of an infringement of competition law by an undertaking.
- 6.53 Soundings of some other major respondents to the consultation such as the CBI indicate some concern that the proposal would be a significant and inappropriate extension of the OFT's powers, to the detriment of the rights of the undertaking under investigation.
- 6.54 However, the power proposed is simply to allow the CMA to obtain evidence from individuals in antitrust cases orally rather than in writing. No associated changes are proposed to rights of defence or the privilege against self-incrimination enjoyed by individuals and undertakings. As the OFT has recognised, it would need to take great care when asking oral questions to ensure that the privilege against self-incrimination is fully respected, just as it does when drafting section 26 notices.
- 6.55 Nevertheless, there is a potential issue here about rights of defence and privilege against self-incrimination, because in antitrust (as opposed to criminal cartel) cases it is the undertaking not the individual that enjoys these rights. Where this is relevant and employees or former employees of undertakings under investigation (including Board members and, in the case of a partnership, partners) are being interviewed either they could only be interviewed in the presence of a legal representative of the relevant undertaking or the use to which any self-incriminating replies given at a compulsory interview could be put would be restricted.

Absolute privilege in relation to notices regarding the existence of an OFT investigation in a CA98 case

- 6.56 Section 57 of the CA98 states that for the purposes of the law relating to defamation, absolute privilege attaches to any advice, notice or direction given, or decision made by the OFT in the exercise of its functions under Part I of the Act .
- 6.57 The OFT suggests that section 57 of the Act should be amended so that there is an explicit provision giving the OFT a power to publish a notice on its website regarding the existence of an antitrust investigation, the parties involved and the subject matter of the

investigation. Currently, some parties argue that publishing such a notice before details of a case have already entered the public domain could be defamatory.

- 6.58 The OFT considers that publishing such a notice will assist it in carrying out its functions in many cases, in particular, by alerting third parties to the existence of an investigation and potentially triggering evidence or submissions from such parties which may assist the OFT's evidence gathering process. It would also support *public* bespoke timetables for each case to improve the transparency of the timing of the investigative steps.
- 6.59 The Government notes that the European Commission issues press announcements stating that it is investigating a particular sector, and there seems no good reason not to do so in the UK. Doing so would reassure complainants, educate the public about the work of the competition authorities, and even be of benefit to the 'accused' in making matters transparent rather than possibly a matter for rumour and suspicion.
- 6.60 **The Government proposes to adopt the OFT's proposal but to make clear that the scope of the privilege does not cover 'fighting talk' where for example a competition authority could seek to generate press coverage by going beyond a simple statement of the procedural status of the investigation.**

Interim Measures

- 6.61 The CA98 allows the OFT (or a sector regulator) to impose interim measures in certain circumstances. Specifically, section 35(2) of the Act provides: "If the OFT considers that it is necessary for it to act under this section as a matter of urgency for the purpose (a) of preventing serious, irreparable damage to a particular person or category of person, or (b) of protecting the public interest, it may give such directions as it considers appropriate for that purpose."
- 6.62 Interim measures can be an important weapon in a competition authority's armoury. They allow the authority to prevent further damage occurring in circumstances where the authority is investigating a suspected infringement but has not reached the stage when it is able to reach a decision. They could be particularly valuable in a case such as alleged predatory pricing, where the purpose of the abusive behaviour could be achieved before a stop is put to it, but they can have a wider utility.
- 6.63 In practice they have been hardly used: only one interim measures direction has been issued, in a case involving the London Metal Exchange in 2006. The Government understands that authorities in other member states of the European Union do make greater use of their equivalent powers.

- 6.64 The ‘serious, irreparable damage’ wording presents a high threshold. In practice, the test is often interpreted as a requirement that, absent interim measures, the business will exit the market or even go out of business. This prevents the OFT or a sector regulator from making an interim measures direction under section 35(2)(a) in cases where the victim(s) of the alleged infringement are likely to suffer significant harm but there is no current threat of them exiting the market or going out of business.
- 6.65 The solution advocated by the OFT is to amend section 35(2)(a) so that the threshold would require there to be a perceived need to act for the purpose of preventing significant damage to a particular person or category of persons. This would be consistent with the tests used in some UK regulatory regimes before the regulator can make a provisional enforcement order. For example, the test in section 23 of the Postal Services Act 2000 requires Ofcom to have regard to “the extent to which any person is likely to sustain loss or damage as a result of anything likely to be done or omitted in contravention of the licence condition before a final order may be made”. Similar wording is included in section 25(3)(a) of the Electricity Act 1989 and section 28(3)(a) of the Gas Act 1986.
- 6.66 Some of those whom the Government sounded out about this proposal supported it whilst others opposed it. **The Government has decided to adopt the proposal. Without reform, it is likely that interim measures will be little used, and abusive conduct may materially weaken competitors before final decisions are reached.**

7. The Criminal Cartel Offence

Summary of the Government's decisions

The Government has decided:

- To **remove the 'dishonesty' element from the offence and define the offence so that it does not include cartel arrangements that the parties have agreed to publish in a suitable format before they are implemented, so that customers and others are aware of them.**
- In the rare cases where businesses operate arrangements that (absent disclosure) would fall within the scope of the offence but that nevertheless offer **countervailing benefits**, it is reasonable to require **a limited disclosure of those provisions so as to bring them outside the scope of the offence** (other elements of the arrangements could remain confidential).
- There will be a **short transitional period** prior to introduction of any revision to the cartel offence.
- **Not to adopt any of the respondents' alternative** proposals for improvements to the cartel offence.

The Issue and Proposals

7.1 The criminal cartel offence helps to deter the most serious and damaging forms of anti-competitive conduct: hard core cartels. Experience shows that the offence is capable of being applied to the biggest international cartels and in parallel with criminal investigations in the US and with Article 101²² investigations in Europe. But there have been only two cases prosecuted since 2003 and this weakens the offence's deterrent effect.

7.2 The consultation noted that the 'dishonesty' element in the offence seems to make the offence harder to prosecute and consulted on the following options:

- *Option 1:* removing the 'dishonesty' element from the offence and introducing guidance for prosecutors.

²² Article 101 of the Treaty on the Functioning of the EU sets out a prohibition on agreements, decisions and concerted practices between undertakings whose object or effect is to prevent, restrict or distort competition. The prohibition is enforced against undertakings by the European Commission by means of civil penalties. It is also enforced by the OFT and the sector regulators, but the more significant cases, involving infringements in several member states are investigated by the European Commission. There are mechanisms under Regulation 1/2003/EC for deciding on case allocation as between the European Commission and the EU member states' national competition authorities empowered to enforce Article 101 (including, in the UK, the OFT).

- *Option 2:* removing the ‘dishonesty’ element from the offence and defining the offence so that it does not include a set of ‘white-listed’ types of agreements.
- *Option 3:* replacing the ‘dishonesty’ element of the offence with a ‘secrecy’ element.
- *Option 4:* removing the ‘dishonesty’ element from the offence and defining the offence so that it does not include agreements made openly.

7.3 The Government expressed a preference for Option 4 because it appeared to decrease the likelihood of defendants seeking to rely on complex economic evidence that juries will find difficult to understand whilst also striking a good balance between:

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

The Questions

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.

Whether to remove the ‘dishonesty’ element from the criminal cartel offence

Summary of Responses

7.4 Nearly half of the formal consultation responses commented on the criminal cartel offence proposals. The views expressed formally and informally were mixed. The OFT, other prosecutors and overseas competition authorities generally favoured reform, as did a number of

academics and some members of the competition bar. Businesses, members of the criminal law bar and law firms with competition practices, on the other hand, mostly did not support the proposed change.

7.5 Arguments advanced by respondents supportive of removing the 'dishonesty' requirement included the following:

- Whether or not the parties acted dishonestly is irrelevant to the harm caused by hard core cartel conduct.
- Other economic offences, such as insider dealing and bribery, carry a similar or higher maximum sentence, and do not rely on dishonesty.
- The concept of 'dishonesty' in the context of business conduct is inherently uncertain and makes the offence more difficult and costly to investigate and prosecute. Even where they admit the conduct, defendants have a powerful incentive to contest the case in the hope that a jury will find that they were not acting dishonestly.
- The 'dishonesty' requirement has been used by defendants as a route to introduce expert economic evidence of the effects of the cartel conduct, which it will be difficult for juries to evaluate.
- Options 3 and 4 would remove the difficulties with 'dishonesty' whilst at the same time ensuring that only conscious participation in hardcore cartels is caught by the offence.

7.6 Respondents who objected to the proposals highlighted the following concerns:

- The case for change has not been adequately made out. The cartel offence is already having a deterrent effect, in spite of the fact that there have been only two prosecutions. Furthermore, neither of the two prosecutions to date show that prosecuting dishonesty is difficult.
- The small number of prosecutions is likely to be due (at least in part) to the OFT's inexperience, procedural flaws and the paucity of suitable examples of hard core cartel activity that could be prosecuted.
- The *Ghosh*²³ test for dishonesty works perfectly well in a wide range of offences. Juries are adept at drawing the necessary inferences from conduct to reach a view that there is a dishonest agreement, and dishonesty is a concept that is well understood and is a very good way of targeting the most pernicious conduct.
- An offence with significant custodial penalties should include a mental element that carries a strong element of moral culpability.

²³ *R v Ghosh* [1982] 2 All ER 689 [1982].

- The ‘dishonesty’ element is an important protection for defendants that ensures only the most serious cases are prosecuted.

The Government’s Decision

- 7.7 The Government considers that removing the ‘dishonesty’ element from the criminal cartel offence will improve enforceability, and increase deterrence, bringing levels closer to what was intended when the offence was introduced. While levels of prosecution were never expected to be high, they were certainly expected to be higher than they have been to date.
- 7.8 Notwithstanding the lack of live evidence of difficulties arising during the course of a jury trial in a contested case, the Government has concluded that it is more likely than not that the inclusion of the ‘dishonesty’ element in the cartel offence is in fact inhibiting the OFT in prosecuting cases. ‘Dishonesty’ offences appear to be particularly difficult to prosecute in a white collar criminal environment. This conclusion is supported by the experience of the Crown Prosecution Service in prosecuting cases based on fraud and conspiracy to defraud.
- 7.9 Without ‘dishonesty’ the criminal cartel offence will still require proof of the mental elements of intention to enter into an agreement and intention as to the operation of the arrangements in question. As to the need for a strong element of moral culpability, the Government recognises that the offence must contain a clear mental element which, in combination with the physical elements of the offence, is sufficiently serious to merit custodial sentences on conviction of up to the existing maximum of five years.
- 7.10 It has long been recognised globally that hard core cartels are the most damaging and pernicious forms of competition infringement and that they are capable of causing great economic damage. Accordingly, the Government is satisfied that even if ‘dishonesty’ is removed, the offence will remain sufficiently serious to merit the existing penalties, including custodial sentences of up to five years. **The Government has therefore decided to introduce legislation to amend section 188 of the EA02 to remove the ‘dishonesty’ element of the offence.**
- 7.11 This approach is consistent with the definition of other economic crimes, such as insider dealing, which requires proof that the defendant knew he had inside information, but does not require proof of dishonesty.

Analysis of the Options for removing the ‘dishonesty’ element from the criminal cartel offence

Summary of Responses on Options 1 and 2

- 7.12 The CBI and the International Chamber of Commerce UK, while not in favour of change, thought Option 1 – use of prosecutorial guidance – the best of the options if change were introduced. The great majority of respondents agreed with the Government’s provisional assessment that Option 1 would leave too much to prosecutorial discretion, could result in an offence whose scope included conduct that would not, in practice, be prosecuted, and could be criticised under Article 7 of the European Convention on Human Rights.²⁴ Option 1 also increased the risk that the offence would be classified as national competition law so that it could not be prosecuted in parallel with EU civil enforcement action.
- 7.13 The majority of respondents did not favour the adoption of Option 2 – using a legislative white list. The majority of respondents also commented that this Option might result in an offence that was narrower than it need be, that it could give rise to interpretational difficulties, and that it would risk not adequately differentiating the offence from the civil antitrust prohibitions, so as to call into doubt the CMA’s ability to prosecute the offence whenever there was a parallel European Commission investigation.
- 7.14 In addition, the majority of respondents who commented on Option 2 pointed out that introducing a white list would run contrary to the current approach of EU legislators, who no longer favour the use of white lists because they create uncertainty for business when agreements do not exactly meet their criteria. Some respondents also pointed out that if there was a white list of types of agreement carved out from the offence, this may well lead to more economic argument in criminal trials, rather than less.

The Government’s Assessment of Options 1 and 2

- 7.15 The Government agrees with the objections raised on Options 1 and 2 (some of which it had already canvassed in the consultation) and has **decided not to adopt either Option 1 or Option 2.**

²⁴ Article 7 of the ECHR provides that no one shall be held guilty of any criminal offence on account of an act or omission that did not constitute a criminal offence at the time when it was committed. The case law makes clear that it is a requirement under Article 7 that individuals should be able to determine from the wording of an offence (with the assistance of interpretation by the courts if necessary) which acts and omissions can result in their being criminally liable.

Summary of Responses on Option 3

- 7.16 Under Option 3, the consultation proposed an offence defined by reference to proof of 'active secrecy'.
- 7.17 A small number of respondents preferred Option 3. In addition, of those who objected to the overall proposal to remove the 'dishonesty' element of the offence a small number said that Option 3 was nevertheless the best of the Options if this change were made.
- 7.18 Of these proponents of Option 3, some said that it would help secure consistency with the civil prohibitions by providing a means by which agreements that might have countervailing economic benefits would not be caught by the offence (since they would tend not to be kept secret), and that the secrecy element would help maintain the distinction between the offence and the civil antitrust prohibitions. Some respondents also thought that it provided the clearest expression from among the Options of a morally wrong element to replace dishonesty.
- 7.19 A key drawback with Option 3 identified by other respondents was that requiring proof of active secrecy could in itself make the offence harder to prosecute rather than easing the prosecutorial burden. Hard core cartels, being highly unlawful, tend to be conducted extremely covertly, but they may not always take steps to conceal behaviour that can readily be characterised as 'active', and even where such steps are taken their very coyness may mean that evidence of them is hard to uncover. Option 3, therefore, replaces the current difficulties associated with establishing 'dishonesty', with a new difficulty of establishing active secrecy that may be equally problematic.

The Government's Assessment of Option 3

- 7.20 Although Option 3 has significant benefits, on balance **the Government has concluded that the risk that it could result in an offence that was at least as hard if not harder to prosecute means that it is not worth pursuing further.** The key rationale for considering change is to try to make the offence easier to prosecute. The risk that this Option could introduce new difficulties in bringing prosecutions has therefore weighed significantly in the Government's thinking.

Summary of Responses on Option 4

- 7.21 Under Option 4 the list of types of arrangement that fall within the scope of the offence would be modified so that arrangements entered into openly would not fall within the offence. The offence would not be committed where the customers had been or would be told about the arrangements at or before the time of purchase of the relevant product or service.

- 7.22 This Option was less favoured by respondents than Option 3, though a small number still preferred it. Those who favoured it thought that the carve out for agreements made openly would help to ensure consistency with the civil prohibitions, and also provide a ready means of distinguishing the cartel offence from Article 101, such that criminal cases could be pursued whether or not there were parallel EU civil proceedings.
- 7.23 In addition, respondents who supported Option 4 said it provided the best prospect of making the offence easier to prosecute: as the OFT noted, a carve out for agreements made openly would introduce an objective, fact-based, element into the offence that would be easier for a jury to apply than the dishonesty test.
- 7.24 Of those who objected, some raised concerns that they said applied to Options 3 and 4 – that ‘secrecy’ or its obverse ‘openness’:
- Could create conflict with legitimate commercial confidentiality and could capture legitimate and lawful joint venture and specialisation agreements that are exempt from the civil prohibitions on the basis of their countervailing economic benefits, but that have not been made public.
 - Would not adequately distinguish the offence from EU law, as many EU decisions have expressly referred to ‘secrecy’ as an aggravating element of the cartels in question.
 - Could enlarge the scope of the offence so that it captures conduct on the part of middle managers who are only acting on orders from their superiors, and conduct that may constitute a concerted practice but is not indicative of an actual agreement.
 - Would be alternative, but less inclusive and therefore unsatisfactory, ways of arriving at a definition of dishonesty.
- 7.25 A number of definitional concerns were also raised about Option 4.

The Government’s Decision

- 7.26 After careful consideration of the consultation responses, and in the light of the reasoning below, **the Government has decided to adopt a version of Option 4 - removing the ‘dishonesty’ element from the offence and defining the offence so that it does not include cartel arrangements where the parties have** agreed to publish details of those arrangements before they are implemented. It would be necessary to specify the format for publication which could be in the London Gazette or a similar publication. A principal determining factor has been that this option will provide a more objectively measurable way of proving whether the offence had been committed. This will go a long way towards meeting the objective of the consultation.

- 7.27 The Government accepts the need for businesses to protect aspects of their arrangements that are legitimately commercially confidential. However hard core cartel arrangements are illegal and information as to their existence is not legitimately susceptible to protection on the grounds of commercial confidentiality.
- 7.28 **The Government has decided that in the rare cases where businesses operate arrangements that (absent disclosure) would fall within the scope of the offence but that nevertheless offer countervailing benefits, it is not unreasonable to require the disclosure of those provisions so as bring them outside the scope of the offence** (other elements of the arrangements could remain confidential).
- 7.29 The Government believes it likely that the potentially anti-competitive elements of many, if not most, arrangements within this very small category are already known to customers.²⁵ However, since businesses must self-assess for exemption from the civil prohibitions, there may be some that are not already known to customers, and perhaps some that are covered by contractual non-disclosure agreements. The Government believes suitable allowance could be made for this and has **decided that there will be a short transitional period prior to introduction of any revision to the cartel offence.**
- 7.30 The Government has considered the fact that many hard core cartel cases expressly consider the secret nature of the cartel, and also that the European Commission's Notice on leniency in hard core cartel cases refers to the 'secrecy'. As secrecy is not an essential ingredient of the EU law prohibition (and the Commission's notice is not legally binding), the Government considers that, as amended, the criminal cartel offence would remain significantly distinct and so would not be more likely to be classed as 'national competition law' for the purposes of Regulation 1/2003/EC. This means that criminal cases could still be pursued if there were parallel civil proceedings at EU level.
- 7.31 The Government does not accept that mid-level executives who are doing their bosses' bidding should be exempt from prosecution if it can be shown that they have entered into agreements as defined in the cartel offence. On the contrary, the possibility of criminal sanctions, including imprisonment, for such conduct ought to encourage such individuals to refuse to engage in such agreements and/or to blow the whistle. In the case of individuals who implement cartel arrangements in ignorance of the existence of a cartel agreement, they will not be susceptible to prosecution since they will not individually be party to an unlawful agreement.

²⁵ For example it is publicly understood that four party card networks involve a commonly agreed fixed interchange fee.

- 7.32 Nor does the Government consider that the cartel offence as defined would apply to mere concerted practices. The offence requires proof of the existence of an agreement. Even if a jury is willing in a particular case to infer the existence of an agreement on the basis of conduct that appears to implement it, they will still need to be satisfied on the basis of all the evidence that there has been a meeting of minds that goes further than a mere concerted practice.
- 7.33 The Government does however have some concerns as to how a pure requirement to notify customers could be made to work in practice. It may not always be reasonably practicable to notify all customers. Also, the offence covers specified types of arrangement under which it will not always be possible to identify the customers who need to be notified. For some types of arrangement, the intention may be to prevent the supply of a product, so that no customers would be contemplated.
- 7.34 There would in addition be difficulties in a general disclosure requirement which might also operate arbitrarily (for example, would disclosure on a foreign language website be sufficient?). In particular, since the offence turns on what is contemplated at the time the arrangements are made (and this is important in providing a sufficient mental element in the absence of a dishonesty requirement) an individual would not be guilty if the arrangements were not notified although that is what was envisaged at the time.
- 7.35 The Government believes that these concerns can best be addressed by providing that the offence is not made out if the parties agree to publish key details of the arrangements in a specified medium (which could be the London Gazette) before they are implemented. This approach has the particular advantage of simplicity. It would be straightforward to publish in the London Gazette and relatively easy for a jury to decide whether or not the defendants agreed to do this. There would be no scope for arguing that it was not reasonably practicable to publish, nor would there be any issues about identifying actual or potential customers. The Government would also propose to take a power to specify an alternative publication – in case, for example, publication of the London Gazette ceased.

Further ideas to improve the criminal cartel offence

Summary of Responses

- 7.36 A minority of respondents suggested alternative improvements to the criminal cartel offence. Some, for example, were concerned that the Serious Fraud Office (SFO) had not yet been involved in prosecuting cartel offence cases. A small number of commentators felt that the only way markedly to increase successful prosecutions of the offence would

be to introduce a system of plea bargaining to increase incentives to plead guilty.

- 7.37 Some respondents thought that deterrence could be improved without change if the CMA made more use of the power to seek disqualification of company directors. Others, while supporting the case for change, thought that none of the Options were desirable and suggested more wide-reaching revision of the cartel offence.²⁶
- 7.38 Finally, some respondents suggested that wholesale revision of the cartel offence was needed, that notification of potentially anti-competitive agreements should be introduced, or that the offence should be abolished.

The Government's Decision

- 7.39 **The Government has decided not to take forward any of the suggested alternative ideas for improving the offence.** The Government is satisfied with the current arrangements – under which the SFO has concurrent jurisdiction with the OFT to prosecute in cases that are sufficiently serious to meet its prosecution criteria. The Government is satisfied that the CMA should prosecute in most cases, because of the need to secure consistency in the application of the leniency and no action policy which is the bed-rock of many civil and criminal cartel cases.
- 7.40 The Government notes that introducing greater scope for plea bargaining could alter incentives to plead guilty. The question of plea bargaining would have wider ramifications across the criminal justice system, and these would need to be considered carefully.
- 7.41 The Government agrees that increased use of competition disqualification orders could improve deterrence,²⁷ but does not consider this an adequate substitute for changes to improve prosecution of the criminal cartel offence.
- 7.42 None of the suggestions for wholesale revision of the cartel offence appeared sufficiently to cater for the need for consistency with, but separation from, the civil cartel provisions, in particular under EU law.
- 7.43 Reintroducing notification of potentially anti-competitive agreements would run counter to the changes brought about by the 2003 EU modernisation process.

²⁶ One suggestion was to define the offence by reference to 'subversion of competition or the competitive process.'

²⁷ It notes that the OFT introduced guidance on the use of disqualification orders in competition cases in 2010 http://www.of.gov.uk/shared_of/business_leaflets/enterprise_act/of510.pdf.

- 7.44 Finally, the Government has no intention of abolishing the criminal cartel offence: doing so would be directly at odds with the Government's aims under this part of its consultation.

8. Concurrency and Sector Regulators

Summary of the Government's decisions

The Government has decided:

- To **retain the concurrent competition powers of the sector regulators.**
- To **strengthen the primacy of CA98**, by requiring sector regulators with concurrent powers to consider CA98 first when they have a choice between enforcing CA98 and using their sectoral powers.
- To **encourage the CMA to be a more proactive central resource** for the sector regulators.
- To give the **CMA a bigger role in the regulated sectors**, by requiring the competition authorities to **share more information** about CA98 cases in the concurrent sectors, and giving the **CMA the power to take CA98 cases** from the sector regulators in certain circumstances.
- The CMA will be required to **report on the use of concurrent competition powers** across the competition authorities.
- The CMA will **not be required to undertake a regular programme of market reviews in the regulated sectors.**

The Issue and Proposals

- 8.1 The competition framework provides for concurrent jurisdiction over general competition law issues in the regulated sectors. There have been few CA98 cases or MIRs in the regulated sectors, and the Government is concerned that general competition law may not be being enforced as proactively as it could be, and that the cases that are brought may not be always be managed well.
- 8.2 Commentators have noted that the small number of cases in the regulated sectors is due to regulators having a duty to use their sectoral powers or having other, possibly less costly and speedier, tools to resolve competition issues. There is also greater degree of transparency and scrutiny in the regulated sectors, and the structure and EU regulatory frameworks are different to the rest of the economy.
- 8.3 The relative paucity of antitrust cases and MIRs in regulated sectors is important. If the opportunity to make generally applicable rules has been missed this would undermine clarity of the regime, the deterrent effect of infringement decisions, and could lead to consumer detriment. Also at stake is whether detailed behavioural regulation is imposed or maintained for longer than it needs to be as regulated markets develop the potential for more competition. Such regulation could dampen

innovation and deter the development of rivalry or scope for new entry in markets by favouring incumbent or larger firms which are better able to deal with regulatory requirements.

8.4 In response to these issues, the Government proposed a number of measures to improve the use of general competition powers in the regulated sectors and to improve coordination between the competition authorities:

- **Retaining Concurrency.** The consultation document set out the Government's view that concurrency should be retained as this permits the sector regulators to apply their knowledge of their sectors and an integrated toolkit to competition issues.
- **Strengthening the primacy of competition law.** A consistently strong statutory duty obligation on all the sector regulators that they should consider their competition powers prior to using their sectoral powers for a competition purpose.
- **Making the CMA a proactive central resource for the sector regulators.** Increased resource sharing among the competition authorities, to make the competition system as a whole more efficient.
- **Giving the CMA a bigger role in the regulated sectors.** A European Competition Network (ECN) type model in which there would be more information sharing on potential and actual CA98 cases, and the CMA would have a case allocation and oversight role. The CMA could also, following consultation with sector regulator, take over an ongoing case in a concurrent sector.
- The CMA to **report on the use of competition powers across the landscape** and carry out **market reviews in the regulated sectors.**

8.5 The *Principles for Economic Regulation*, published by BIS in April 2011, set out that regulatory regimes should be focused on outcomes rather than tools, and that regulators should have the freedom to choose the best tools to achieve their desired outcomes. The Principles also set out that competitive markets are the best way in the long run to deliver high quality and efficient economic infrastructure. The proposals are consistent with the Principles: under the competition regime, the competition authorities can apply a range of tools, and can decide amongst them which body is best placed to apply them. The proposals do not involve specifying outputs to any level of detail, merely that regulators should look to their competition powers first where appropriate, and that the CMA should have the scope to enforce CA98 in the regulated sectors.

8.6 Government should nevertheless be careful not to change the statutory frameworks of regulators without careful consideration. There are therefore reasons to be cautious - not only do the Principles call for a stable and predictable regulatory regime, there is little firm case study

evidence that regulators have incorrectly declined to enforce CA98 given the current regulatory frameworks. However, the primacy proposals will embed the current practices of a number of regulators in legislation and will not undermine regulatory certainty.

The Questions

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

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

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

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

- 8.7 The majority of respondents who commented on these questions supported the sector regulators maintaining their concurrent powers, but they generally agreed that the sector regulators have not always applied their general competition powers to as high a standard as they should. There were mixed views on the appropriate policy response.

Retaining Concurrency

Summary of Responses

- 8.8 The sector regulators argued that they have used their powers in appropriate situations, given the nature of their industries, duties and range of tools for promoting competition, and that the retention of concurrency is important as it allows them to use a full range of powers to deal with competition issues in an integrated manner. They also argued that maintaining concurrency is important to ensuring they can recruit and retain qualified staff who can apply their expertise in the use of general competition powers to their sectoral powers.
- 8.9 The legal community generally agreed with the regulators that they have been appropriately proactive in their use of general competition law, given the nature of their sectoral duties and powers, and wanted to see concurrency retained. But while they saw the regulators choice of tools as being reasonable, given the speed and certainty with which they can use their sectoral powers, they argued that there is scope for the sector regulators to improve the way they bring CA98 cases.

- 8.10 The OFT had some concerns about the relative paucity of cases in the regulated sectors and the fragmentation of roles of the UK competition regime, but was not in favour of measures to bring an end to the concurrency regime.
- 8.11 While some regulated businesses have called for concurrency to be ended, the CBI's view was that the regulators should retain concurrency, primacy of general competition law should be strengthened, and that the CMA should do more to help the sector regulators develop high standards of excellence in their application of general competition powers.
- 8.12 A small number of respondents, including businesses and academics, took the alternative view that concurrency should be ended as regulators have not been sufficiently proactive in their use. A small number of other respondents argued for the ending of concurrency for particular regulators or for those segments of regulated industries that are competitive and making the CMA solely responsible for ensuring effective competition.

The Government's Decision

- 8.13 **The Government has decided to retain concurrent competition powers.** This will continue to allow the integrated application of sectoral and competition law powers, the application of the sector regulators' industry expertise and ongoing sector surveillance to competition cases, and avoid regulated businesses habitually having to deal with two separate bodies with different objectives and approaches when competition issues arise. It will also avoid causing the regulators to rely even more heavily on their sector-specific powers than they do now to fulfil their duties, as they would not have access to ex-post competition powers.

Strengthening the primacy of competition law

Summary of Responses

- 8.14 The majority of respondents who commented on enhancing the primacy of competition law did not want the strongest possible form of primacy, i.e. a positive duty on regulators to use general competition law whenever they have a choice between sectoral regulation or competition law to promote competition. Some also thought a primacy duty would not make any difference to the way the regulators act. These respondents wanted the regulators to retain the flexibility to choose the best tool, and to be able to apply their range of tools in an integrated manner.

- 8.15 The OFT welcomed the primacy option, as did the CBI and a minority of the members of the City of London Law Society. Eversheds, for example, responded that ‘if a matter were capable of being dealt with under CA98 or license enforcement powers, the former route should be specified as the mechanism by which the sector regulator should proceed and, only where this mechanism proves inappropriate or ineffective in addressing the underlying problem, should the sector regulators resort to their license enforcement powers.’ The CC did not comment in their written submission on the strengthening of primacy. Ofcom noted that it already has a strong primacy obligation, and where it doesn’t its actions are constrained by the legal framework. CAA and Ofgem were concerned about the proposal, on the grounds that it may make opening investigations more unwieldy. ORR responded that it would not make a significant difference to the way it operates and must not interfere with its discretion to use the most appropriate tool.

The Government’s Decision

- 8.16 **The Government has decided to strengthen the primacy of general competition law, so that the Sector Regulators are required to consider whether the use of their CA98 powers is more appropriate before using their sectoral powers to promote competition.** The duty will be tailored to the individual regimes, which have differently formulated duties on and powers for the regulators.
- 8.17 This duty will not be applied to Monitor at this time, however the Secretary of State may commence this duty at a future date upon Government agreement. This reflects the unique characteristics of the Health sector, where the Government has acknowledged uncertainty as to whether competition law would apply and has already committed to retain the sector specific ‘Principles and Rules for Cooperation and Competition’ introduced by the previous administration.
- 8.18 While there is unlikely to be a large increase in the number of cases because of a change to the form of primacy, the Government expects there might be some increase over time, especially when taken together with the other concurrency and wider reforms proposed. It should encourage the regulators to consider whether their general competition law powers may be more appropriate for dealing with an issue earlier in the process of the regulators’ interaction with firms. This should improve overall case management by ensuring that the choice of the most appropriate powers is made at an early stage.
- 8.19 This option should also enhance cooperation between the CMA and sector regulators, as the sector regulators will be encouraged to develop a more similar approach to competition issues as that of the CMA.
- 8.20 There may be small additional costs associated with this option, as some of the sector regulators may be prompted, at staff level, to carry

out a more extensive competition analysis than they may do otherwise (this may, in turn, lead to more antitrust cases over time). Any such costs should, however, be offset by improvements in case management,

Making the CMA a proactive central resource for the sector regulators

Summary of Responses

- 8.21 About half the respondents who commented on concurrency made points about enhanced cooperation. The great majority of these thought it would be a good idea. Although there were a small number of respondents who were sceptical about its benefits, none of the respondents outright opposed it. The most favoured forms of cooperation were the sharing of best practice and staff secondments. Respondents did not generally want responsibility for decisions to become ambiguous, for example, through the use of joint investigations or by allowing the CMA to carry out an investigation and the sector regulators to make a decision.
- 8.22 The OFT was concerned about any fragmentation of decision-making authority on particular cases with the regulators. Furthermore, the OFT was concerned that the CMA's ability to prioritise its own resources could be distorted under some of the proposals. In its view, depending on resource availability, the CMA's existing cases could be delayed as a result of obligations to share its resource, which in turn could have an adverse impact on the speed and predictability of the CMA's enforcement programme. Sector regulators welcomed enhanced cooperation, and generally believe they could benefit by having access to the CMA's staff resources. The CBI agreed that the CMA should do more to help the sector regulators develop high standards of excellence in their application of general competition powers. The City of London Law Society supported enhanced cooperation and greater CMA leadership.

The Government's Decision

- 8.23 **The Government will ask the CMA and sector regulators to work together more closely.** One way it could do this is for the proposed 'strategic steer' (see chapter 10) to ask the CMA to work with and through the sector regulators to promote competition in the regulated sectors. Options for greater sharing of expertise or secondments between the competition authorities will provide some benefits to the regime, in terms of improving case management and bringing a wider competition perspective. The Government expects these options therefore to incentivise the regulators to bring more cases, particularly those where the decision to use general competition law was finely

balanced. The cases that are brought should also be better managed and their costs reduced.

- 8.24 The Government will not, however, take forward the options set out in the consultation document for a change in the legislation to permit joint CA98 investigations, oblige the CMA to act if a sector regulator demands it, or allow the CMA to run the case and the sector regulator make the decision. As noted by both the OFT and the City of London Law Society, these options may put the CMA in a position where its capacity to manage its caseload is undermined by calls on its resources from the sector regulators, as well as undermining the accountability of the competition authorities for decisions.

Giving the CMA a bigger role in the regulated sectors

Summary of Comments

- 8.25 Only a small number of respondents commented explicitly on the Government's proposals for enhanced exchange of information, but those respondents were mostly favourable to this proposal. Support was strongest where the exchange of information formed part of enhanced cooperation. While some respondents favoured linking this with an explicit quality assurance role, there was somewhat less support for this.
- 8.26 Some respondents commented on the power of the CMA to provide strategic direction on the use of competition law, or a power to take cases from regulators, and of these, the majority thought this was a good idea. Excluding the sector regulators themselves, a great majority commented that this was a good idea, including the City of London Law Society. The sector regulators themselves opposed the CMA having the power to take competition cases from them and the CBI, however, argued that the regulators should be consulting the CMA and there should be more cooperation, but it noted that the proposal for the CMA to have the power to take cases as 'not ideal'.
- 8.27 The City of London Law Society's view was that the CMA should have central oversight of the sector regulators' use of competition powers (including the power to take cases from them). The International Chamber of Commerce UK also noted that the information sharing and consultation obligations would not work unless the CMA also has the power to take cases.

The Government's Decision

- 8.28 **The Government has decided to amend the Competition Act 1998 (Concurrency) Regulations 2004 to require greater information sharing about competition cases between the CMA and sector regulators, oblige them to consult each other about case**

management decisions involving the concurrent sectors, and give the CMA the power to take CA98 cases from the sector regulators where it is better placed to proceed with the case. The CMA will have to consult the sector regulator before taking a case from the sector regulator, there will have to be a formal agreement with each regulator on how the CMA's oversight role is going to work in practice, and the CMA will not be permitted to take a case from a sector regulator (without its agreement) after a Statement of Objections has been issued. The circumstances under which the CMA will be able to take cases from the regulators will therefore be subject to a transparent and open process.

- 8.29 Greater information sharing and consultations will make cooperation more effective, by giving it structure and making clear that the competition bodies have a duty to share information about cases and consider the advice of other bodies with relevant expertise.
- 8.30 This reform will be a significant change to the competition regime as currently the OFT may not become aware of competition issues that are dealt with by the regulators under their sectoral powers.
- 8.31 To the extent that the CMA is more proactive and better equipped to manage cases than the sector regulators, this could lead to more competition cases with resulting benefits for consumers and the wider economy.
- 8.32 The Government expects the power to take cases will be rarely used, but it will provide a backstop if the other proposals to improve the operation of concurrency do not work.

The CMA to report on the use of competition powers across the landscape and carry out market reviews

Summary of Responses

- 8.33 There were a small number of written comments on the proposals for the CMA to report on the use of competition powers across the landscape and for an obligation on it to carry out reviews within the regulated sectors. The Joint Working Party, however, argued that there was no need for the CMA to have a duty to carry out reviews in the regulated sectors, and National Grid commented that market reviews would be duplicative and inefficient, but also a check on sector regulators. The OFT, CC and sector regulators all opposed the CMA being obliged to carry out a rolling programme of market reviews in the regulated sectors.

The Government's Decision

- 8.34 **The Government has decided that the CMA will be obliged to report annually on the use of concurrent competition powers across the landscape of competition authorities.** This report will demonstrate how general competition law is being applied in the regulated sectors, and how the CMA and sector regulators are working together to improve the operation of the competition regime. This will give the CMA and sector regulators an incentive to work effectively together and help ensure that Parliament can hold them to account.
- 8.35 **The CMA will not, however, be required to carry out a rolling programme of market reviews in the regulated sectors,** as this would duplicate the work of the sector regulators and undermine the ability of the CMA to prioritise its workload.

9. Regulatory References and Appeals and Other Functions of OFT and CC

Summary of the Government's decisions

The Government has decided:

- To **transfer the CC's roles in determining regulatory references and appeals and in Energy Code Modification appeals to the CMA.**
- **Not to legislate, as part of the competition reform process, to harmonise the regulatory appeals and reference processes.**
- To **develop model processes** for regulatory appeals and references.
- To **transfer the ancillary competition roles of the CC and OFT to the CMA with respect to: local bus schemes or agreements, access arrangements under the Payment Services Regulation and legal services regulation.**
- The **CC and OFT's role in keeping under review the regulating provisions and practices of the FSA, recognised clearing houses and recognised investment exchanges will be modernised under the *Financial Services Bill*.**
- To **repeal the provisions of the Competition Act 1980** that provide the Secretary of State with powers to refer to the CC any question relating to the efficiency and costs of, the service provided by, or possible abuse of a monopoly situation by, various public bodies and providers of bus services in Northern Ireland or rail passenger services in London.

The Issue and Proposals

- 9.1 The CC has a number of functions under sector specific legislation. These include determining licence modification references for regulated utilities, Energy Code modification appeals, and price determination appeals for regulated utilities.
- 9.2 The OFT and CC also have ancillary competition functions in:
- Enforcing competition tests that apply when local transport authorities form schemes or make agreements with bus operators.
 - Enforcing Part 8 of the Payment Services Regulations 2009 (PSR). Part 8 concerns non-discriminatory access to payment systems in the UK.

- Reviewing and reporting on regulatory arrangements of an approved legal services regulator prevent, restrict or distort competition within the market for reserved legal services.
 - Keeping under review the regulating provisions and practices of the FSA, recognised clearing houses and recognised investment exchanges.
- 9.3 Furthermore, there are powers under section 11 of the Competition Act 1980 for Secretaries of State to refer to the CC any question relating to:
- (a) the efficiency and costs of,
 - (b) the service provided by, or
 - (c) possible abuse of a monopoly situation by
- various public bodies and providers of bus services in Northern Ireland or rail passenger services in London.
- 9.4 The continuance of these functions needs to be considered in the context of the creation of the CMA.

The Questions

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

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

Summary of Responses

- 9.5 Of those respondents who commented on regulatory appeals and references, the great majority supported these being moved to the CMA, with appropriate safeguards. A small number of respondents expressed doubts about whether the CMA could hear such cases without bias, or the appearance of bias, and would want to ensure that the CMA corporate governance and staffing arrangements continue to support independent decision making. There was no support for harmonising processes merely for the sake of greater consistency.

The Government's Decision

The CMA's jurisdiction for regulatory appeals and references

- 9.6 The consultation document set out the Government's view that there would be **considerable benefit in the CMA continuing to perform the current functions of the CC in regulatory references and appeals**, as it will have the expertise, resources and procedures in place to handle a highly variable regulatory caseload and because there should be synergies from its competition expertise and skills in economic analysis of markets. The corporate governance and staffing arrangements will, as set out in chapter 11, need to provide independence for the decision makers and staff supporting them in such cases.

Harmonisation of processes

- 9.7 The processes that the CC is required to follow in carrying out regulatory inquiries vary to some degree because of EU regulatory requirements and the nature of the issues being considered, but some differences may be due to the uncoordinated way in which the regimes have been developed over time. These differences may create unnecessary regulatory complexity, with resulting inefficiency.
- 9.8 The Government's view, as set out in the consultation document, is that harmonising and simplifying the appeals regimes would enable the CMA to operate more efficiently, but the scope for doing this is limited by EU obligations and the nature of the sectoral regimes. Given this limited scope, and highly uneven flow of cases in particular sectors, **the potential benefits from harmonisation and simplification are likely to be outweighed by the transition costs of developing a new statutory regimes, developing new procedures and the undermining of precedents.**

Model processes

- 9.9 **The Government has decided that instead of harmonisation of appeals processes it is more appropriate to develop model appeals processes** that set out the high level procedural requirements that will be expected to apply where additional or regulatory functions are conferred on the CMA, or sectoral regimes are otherwise being updated, unless there are special reasons why such a model would not be appropriate. These model processes can be developed without any legislative change.
- 9.10 The models will not revisit any recent or agreed changes to reference or appeals processes, or reopen the issues considered in separate consultations.

Ancillary Competition Functions of the OFT and CC

- 9.11 The ancillary functions extend the CC and OFT's competition functions in regulatory regimes where there are no concurrent competition powers but where OFT and CC expertise may be particularly helpful.

The Government has decided that the CC and OFT's roles in reviewing local bus schemes or agreements, access arrangements under the Payment Services Regulation and legal services regulation will be transferred to the CMA.

- 9.12 **The financial services review regime will be replaced by new provisions in the Financial Services Bill.** The new Financial Conduct Authority (FCA) will be able to refer competition concerns to the OFT/CMA for review, to which the OFT/CMA must respond, and the OFT/CMA will be able to make competition recommendations on the FCA's rules, to which the FCA must say how it will respond.
- 9.13 The power of the Secretary of State to ask the CC to investigate certain public bodies and providers of bus services in Northern Ireland predates the establishment of the sector regulators, and while there have been investigations of various bodies, including bodies for which the devolved administrations are now responsible, the power has not been exercised since 1993. Most of the bodies it originally covered have been closed or privatised and so are no longer within scope. **The Government has therefore decided to repeal these Competition Act 1980 provisions.** This will tidy up the competition regime and avoid distracting the CMA from its competition focus.

10. Scope, Objectives and Governance

Summary of the Government's decisions

The Government has decided:

- To give the CMA a **primary duty to reflect the role the Government sees for the CMA in promoting effective competition in markets, across the UK economy, for the benefit of consumers.**
- The CMA will be constituted as a **Non Ministerial Department.**
- The **scope of the CMA's role in purely consumer protection issues will be decided following the conclusion of the Government's consultation on the consumer landscape.**
- The CMA will be accountable to Parliament.
- To legislate for the establishment of a **CMA Board.**

The Issue and Proposals

- 10.1. The overall scope, objectives and governance of the CMA will set the context for its operation, remit and ultimately how its success is judged. The Government is committed to ensuring that the arrangements deliver a framework which is coherent, robust and transparent.
- 10.2. The consultation document proposed that the CMA should have clear, and potentially statutory, objectives to underpin prioritisation, and invited views on what they should be. The current arrangements of the OFT and CC do not include any explicit overarching objectives, whereas the sector regulators often do have detailed objectives to guide their work. The consultation set out to understand the benefits, or otherwise, of being able explicitly to provide the CMA with a remit.
- 10.3. The consultation also asked for comments on the related issue of the scope of the CMA. Currently the OFT is a dual competition and consumer agency, and the CC a competition agency with additional remit in relation to regulatory appeals. The Government is also conducting a review of the consumer landscape. As such, the proposals in the consultation aimed to explore the most optimum scope for the CMA, such that it was able to perform effectively as a competition authority with responsibility for the functioning of markets.

The Questions

***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.

Summary of Responses

- 10.4. The majority respondents did not address these questions directly. Of those that did, the majority supported a legislative remit for the CMA. The majority also strongly supported the governance arrangements of the CMA ensuring its independence.
- 10.5. The majority of the respondents to these questions commented that the CMA should have a clear competition focus. However, other respondents, including Which? and the City of London Law Society, cautioned against the scope of the CMA and its objectives being too narrowly defined, for example, by excluding a consumer protection role from the CMA or restricting its access to consumer remedies. Some respondents, such as Linklaters, commented that they were unable to take a view, or a full and final view, of the questions until they had also seen the proposals in relation to the consumer landscape.
- 10.6. A small number of respondents, including the CC, did explicitly state that they did not believe that the CMA's objectives should be set out in legislation.

The Government's Decision

Objectives

- 10.7. Having considered the arguments for and against the provision of having a clear statutory underpinning for the CMA, on balance the Government's view is that a single primary duty for the CMA will be beneficial. **The Government has therefore decided to give the CMA a primary duty, which should reflect the role the Government sees for the CMA in promoting effective competition in markets, across the UK economy, for the benefits of consumers.** This duty will set the high level mission and rationale for the CMA and guide its work and its prioritisation of resources. The primary duty will underpin the competition focus of the CMA and its role in ensuring that markets as a whole are operating effectively. It is the Government's belief that it is important not to define the scope of the CMA too narrowly: it will be important for the CMA to be able to respond to a wide range of competition problems in the market.
- 10.8. The CMA will also have duties in respect of its roles in regulatory appeals, references and ancillary functions set out in chapter 9. The

Government's consultation document on consumer landscape reform²⁸ asks whether the CMA should play a role in national consumer enforcement and the extent to which it should have consumer enforcement powers. The Government will respond to this shortly. The Government recognises and values the close relationship between competition and consumer activities. The primary duty and the functions of the CMA mean that it will have the ability to tackle market problems that have a mixed consumer and competition element, in particular where a structural market problem may cause consumer detriment.

Status

- 10.9. It is vital that the CMA is independent and is seen to be independent. Confidence in the UK economy is influenced by the confidence that businesses and consumers have in the ability of the markets to be fairly operated. The Government firmly supports the independence of the CMA. The CMA will be constituted as a Non Ministerial Department (NMD) this status will ensure that the CMA is free from influence from Ministers, whilst also ensuring transparency of decision making and sound accountability. Its budget will be set by HMT and will be protected for the Spending Review period, so that its decisions on cases will not be influenced by their possible impact on future budgets. This will ensure that there is no appearance of Governmental interference in the CMA's decisions on cases.
- 10.10. The CMA will be accountable to Parliament and it will report annually on its plans and its performance. To increase transparency of the role of Ministers, when the CMA is established and once a Parliament, Ministers will publically consult on and publish a high level strategic statement which sets out how the Government envisages that the competition regime fits into the wider approach of Government policy. This 'strategic steer' will not be binding, but it will allow Ministers to convey their views to the CMA in an open and transparent fashion.

Internal Governance

- 10.11. The consultation document set out a number of options for the internal governance and decision-making arrangements. The Government has considered the most appropriate internal governance arrangements and **decided to legislate for the establishment of a CMA Board**. The CMA Board will be responsible for overall strategy, performance, rules and guidance, and for phase 1 decisions.
- 10.12. The Board will also have the power to delegate decision making on phase 1 cases (except for decisions on whether to make MIRs) to executives and senior staff. Phase 2 mergers and markets decisions

²⁸ Consultation on Institutional Changes for the provision of consumer information, advice, education, advocacy and enforcement, Department for Business Innovation and Skills, June 2011.

and regulatory appeals will be taken by panels. No member of the executive will have a decision making role in these. More detail on the Government's reasons for this structure and how it will work in practice is set out in the following chapter on decision-making.

10.13. The Government has decided that the CMA Board will consist of:

- A Non Executive Chair.
- A Chief Executive Officer.
- A number of executives. The number will not be specified in legislation, but is likely to be 2 or 3.
- A number of non-executives. The number will not be specified in legislation, but is likely to be 4 or 5.
- A number of Board members will be appointed as panel chairs (these members would have no involvement in any decision to refer a market for an investigation that they may subsequently be assigned to chair). The exact number of these members will not be specified in legislation, but it is likely to be 2 or 3. Not all panel chairs will be appointed to the Board.

10.14. These arrangements will link to CMA's accountability and performance framework, including a strategic steer, and along with access to reformed powers, will enable it to meet its objectives more effectively. Accountability arrangements will ensure that the new leadership takes responsibility for the performance of the CMA as a whole.

11. Decision-Making

Summary of the Government's decisions

The Government has decided:

- The **separation of phase 1 and phase 2 decision making** in mergers and markets cases, and ring fencing of regulatory appeals will be provided for in legislation.
- Legislation will provide for **phase 1 decisions in mergers and markets cases decisions to be the responsibility of the CMA Board.**
- Legislation will provide that **those decisions currently taken by the CC will be the responsibility of groups of independent panellists**, drawn from a pool of panellists and appointed to investigate and report on the inquiry to which they are appointed.
- The detail of decision-making on antitrust cases will need to reflect the Government decisions on implementing the separation of investigation and decision-making under the procedural rules but the legislation will not prevent the use of CMA panellists.
- To **retain the processes for appointing individuals to panels which currently apply to the CC under schedule 7 to CA98.**
- **There may be benefits to panellists having a greater time commitment** to the CMA, but will not legislate for this as it is possible under the current legislative framework.
- **Staff resourcing of cases, in particular the ability of staff to follow a case from phase 1 to phase 2, is an issue that is best left to the CMA** to determine for itself.
- The **maximum duration of terms of appointment of panellists will therefore remain 8 years**, as is currently the case for CC members.
- The **CMA will be required to publish procedural rules and guidance, including decision making structures and details of delegated** authorities.

The Issue and Proposals

- 11.1 The decision-making processes and governance structure of the CMA must be both efficient in carrying out its functions and arrive fairly at robust evidence based decisions. The success of the CMA will be judged largely by the quality of the decisions it makes and the process through which these decisions are reached.
- 11.2 The current regime is one of the leading competition regimes internationally. The robustness of the OFT's and the CC's decisions

plays an important role in this assessment. The current regime is noted for the objectivity enshrined via the two phase system in markets and mergers. The independence and quality of decision-making are assured by decisions being taken by separate organisations (both independent of Government), by the oversight of the OFT non-executive directors in phase 1 and the role of independent CC panel members in phase 2. These factors, taken alongside the rigour of the analysis undertaken at each stage are core components which deliver a well respected regime. In creating the CMA the Government will ensure that the current regime's strengths are not lost.

- 11.3 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, tight but realistic time limits make for efficient case management, speed the implementation of remedies, and enhance the deterrent effect of decisions. In addition to robust analysis, an adequate flow of cases is needed to ensure good quality decision making influences behaviour in the market.

Key considerations

- 11.4 The creation of the CMA will deliver a decision-making process which strikes the balance between two important principles, namely:
- Robustness of decision-making – it is vital that the CMA takes the right decisions that deter and prohibit anti-competitive practices, without unnecessary interference or chilling of legitimate or pro-competitive business practices.
 - Speed – it is a critical success measure of reform that the CMA is able to deliver faster decision-making.

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

- 11.5 These goals are derived from the overall objectives of the creation of a CMA, which underpin the competition reforms as a whole. In deciding on the appropriate decision-making structure for the CMA, the Government seeks to:
- Incorporate the best of the current regime, whilst maximising efficiencies.
 - Have clear accountability whilst recognising the CMA's independence from Ministers in relation to the decisions that it takes in individual cases.
 - Have appropriate checks and balances.

- Build a cohesive CMA and deliver robust decisions using a clear and consistent analytical and procedural framework.
- Command the confidence and respect of external stakeholders.

The Questions

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

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

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

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

Summary of Responses

- 11.6 Respondents commented on several issues including: the creation of the CMA; the importance of separation of phase 1 and phase 2 in mergers and markets cases, and ring fencing of regulatory appeals; the role of panels in phase 2; time commitment by panellists; the role of executives in phase 2; continuity of staff teams; transparency of decision making structure; and ECHR compliance.
- 11.7 The majority of respondents who commented on decision making favoured retaining the current separation of decision making structures for mergers and markets cases, with some form of executive decision-making at phase 1 and an independent panel based decision-maker at phase 2. There were some differences in views as to the composition of the panels and the time commitment that they should be expected to make.

The Government's Decision

- 11.8 **The Government has decided that, within the CMA, the separation of phase 1 and phase 2 decision making in mergers and markets cases, and ring fencing of regulatory appeals, will be provided for in legislation.**

- 11.9 **Legislation will provide for phase 1 decisions in mergers and markets cases to be the responsibility of the CMA Board.**
Mechanisms for delegation of decision making at phase 1 (except for decisions on whether to make an MIR) will be provided for in legislation to allow the CMA flexibility to adapt its decision-making processes over time to meet changing demands.
- 11.10 As is currently the case, legislation will require phase 2 decisions and decisions in regulatory appeals to be taken by panels of experts, will set out the maximum terms of appointment of such panellists and will provide mechanisms for their appointment and removal. The CMA will determine the balance of part time and full time working among panel members.
- 11.11 To ensure that there is sufficient transparency of decision making structure, the CMA will be required to prepare and publish procedural rules and guidance describing its procedures and decision making structures.

The creation of the CMA

Summary of Responses

- 11.12 Some respondents (in particular respondents from the legal community) expressed concerns about the proposed creation of the CMA. The impact of the creation of the CMA on decision-making and the elimination of the current institutional separation between phase 1 and phase 2 decisions in mergers and markets was one of the main reasons given by those who were sceptical about the benefits or who were actively opposed to the creation of the CMA. The response from the City of London Law Society below is typical of this type of concern.

“[W]e do not believe that such a major restructuring of the institutions is necessarily the most effective way to achieve the main reforms to the system that are urgently needed. Indeed, we fear that the proposed amalgamation potentially involves some real disadvantages, including (i) the institutional upheaval inevitably ushering in a period of transition and adjustment during which competition enforcement is bound to be less, rather than more, effective; and (ii) the loss of the “fresh pair of eyes” in mergers and market cases resultant on losing the separation of powers between the Phase 1 and Phase 2 bodies (although, as noted below, if there is to be a CMA, we advocate a decision-making structure within it that would preserve at least some of this “fresh fair of eyes”, guarding against confirmation bias)”

- 11.13 However, the majority of those who expressed concern about the CMA appeared to believe that provided that sufficient safeguards are put in place, it may be possible to recreate sufficient separation of phase 1 and phase 2 functions within the CMA.

The Government's Decision

11.14 The benefits of creating the CMA are set out in chapter 3. The Government also recognises the importance that respondents attached to the current separation and independence of decision making achieved by the institutional separation of the OFT and CC. It considers that **the CMA can be created while preserving sufficient separation and independence within the CMA.**

Separation of phase 1 and phase 2

Summary of Responses

- 11.15 The majority of respondents, including the CC, wanted to retain the separation of phase 1 and phase 2, with phase 2 panels comprising independent panellists with a variety of skills and experience described as the best way to do this. This was seen as a major advantage of the current system. Respondents wanted faster decisions and a smoother transition between phase 1 and phase 2, but did not want this to come at the expense of robustness or fairness of decisions. They therefore recognised that separation of the phases places limits on the speed and efficiency of the system. They saw the quality of staff and decision-makers as being key but recognised that the limited resources of the CMA will be an issue. Concerns were also expressed that the regulatory appeals function needs to be ring fenced from those activities of the CMA where it will be required to work closely with sector regulators. This is to ensure that there is no appearance of institutional bias in favour of the regulator on the part of the CMA.
- 11.16 The CBI expressed an alternative view in support of a 'unitary form' of decision making based on private sector corporate governance models, in which the CMA Board is ultimately responsible for all decisions on cases. It could, however, delegate actual investigations to sub-groups (potentially supplemented by independent panellists). However, the CBI also attached importance to parties having access to the decision maker, and not just the investigators, and considered that the Board should have a sufficient breadth and depth of expertise to cover the CMA's full workload.
- 11.17 The OFT preferred decision making by senior staff (accountable to the Board) but recognised that there may be a role for a version of the panel model in which the CMA executive takes decisions at phase 1 of mergers and markets cases and panels take decisions for phase 2 markets and for mergers. In its view, such panels would comprise senior staff as well as independent panellists drawn from a small pool of panellists making a significant time commitment to the CMA.

The Government's Decision

- 11.18 The Government has decided that separation of phase 1 and phase 2 processes for mergers and markets will be ensured by separation and independence of decision making for each phase. It is intended that the decision making structure will ensure that the benefits of a fresh pair of eyes for phase 2 cases and ring fencing of regulatory appeals are maintained within the CMA, thereby preserving the strengths of the current regime.
- 11.19 This means that the **Government will legislate that those decisions currently taken by the OFT will be the responsibility of the CMA Board (with appropriate powers to delegate decision making to individuals or to committees). Those decisions currently taken by the CC will be the responsibility of groups of independent panellists, drawn from a pool of panellists and appointed to investigate and report on the inquiry to which they are appointed.** The decision-making structure will need to ensure that executives do not form any part of the decision-making body for those decisions that are to be taken by such groups. Similarly, the members of such groups may not have any say in decisions of the type currently made by the OFT in phase 1. We will also need to ensure that there is an appropriate separation of CMA functions that entail close cooperation with sector regulators from those functions where the CMA acts as an appeal body in relation to regulatory decision by those sector regulators.
- 11.20 The detail of decision-making on antitrust cases will need to reflect the Government decisions on implementing the separation of investigation and decision-making under the procedural rules but the legislation will not prevent the use of panellists. See chapter 6 on the antitrust regime for more detail.

Role of panels in phase 2

Summary of Responses

- 11.21 A great majority of respondents who commented favoured panel based decision making for phase 2, with panellists drawn from a pool of senior experts in a variety of fields. This was seen by many as a major strength of the current regime. For the most part, respondents favoured the current CC approach where panellists have an investigatory as well as a decision-making role, although some respondents suggested that their role should be more adjudicatory. Decisions in phase 2 cases (which are necessarily complex and often controversial) were seen as benefitting from the panels of experts drawn from different fields. Respondents suggested that decision makers in such cases should be senior and experienced individuals to which the companies under investigation have access, and who are of roughly equivalent status

and experience to those senior management executives of the companies who appear before them.

- 11.22 Most respondents who favoured panels were in favour of a mix of relevant skills. For example the Joint Working Party argued that panels should comprise independent persons (not administrators) whose judgments and decisions are informed by experience and expertise in business, economics, finance and the law. Some respondents favoured panellists being drawn predominantly from lawyers and economists with competition experience and some respondents attached particular importance to such experts having relevant business rather than purely academic expertise.

The Government's Decision

- 11.23 The Government recognises the importance that respondents attached to decisions in phase 2 cases being taken by panels comprising a mix of relevant expertise and proposes that this strength of the current system will be maintained. The mix of full time and part time members from a variety of backgrounds enables the CC to draw on experienced decision makers in a cost effective and flexible way that matches the fluctuations in its workload over time. **The Government has decided to retain the processes for appointing individuals to panels as currently set out in schedule 7 to CA98.** Individuals will be appointed by the Secretary of State (although the Chairman of the CMA will be consulted on such appointments). The terms and conditions of such appointment will be for the Secretary of State to determine.
- 11.24 As is currently the case, it is intended that the panels appointed to investigate cases will generally be chaired by individuals appointed on a (largely) full time basis.

Time commitment by panellists

Summary of Responses

- 11.25 Respondents gave some support for panellists making a greater time commitment than is currently the case. Although some respondents were concerned that this might lead to panellists becoming “institutionalised” and less independent, and some were concerned that certain types of panellist may not be attracted by a full time role (e.g. those with a senior business background and a portfolio of non-executive positions or academic economists).
- 11.26 The CBI preferred a structure with full time decision makers and described a role that was more adjudicative than investigative. The OFT also favoured such a role. The CC favoured retaining the current system of predominantly part time members which it considered

enables it to have access to highly skilled individuals at a low cost, with flexibility to address its varying workload.

- 11.27 The City of London Law Society proposed that the majority of the panellists should be appointed on a full time basis or at least with a greater time commitment than current CC members. This core of full time members would be supported by part time members with specific industry or other expertise. By contrast, the Joint Working Party did not favour extensive use of full time members as there is a risk that they would lack, or be perceived as lacking, independence.

The Government's Decision

- 11.28 The benefits of a greater time commitment could include: greater exposure to the issues to be considered in reaching decisions on technical legal and economic issues; greater familiarity within a short period with CMA procedures and with the substantive tests to be applied; greater decision making experience acquired over less time; and more flexibility in being able to schedule hearings with parties.
- 11.29 The Government will consider whether requiring a greater time commitment from panellists will achieve these sorts of benefits, whilst ensuring that the posts continue to attract high calibre applicants. **This will not necessitate legislation as it is possible under the current legislative framework.**
- 11.30 However, the Government also wants to ensure that the pool of CMA panellists has sufficient breadth and depth of experience to be able to make robust decisions on a range of complex phase 2 mergers and markets cases and regulatory appeals. In addition, it will be important to ensure that conflicting commitments and conflicts of interest arising from outside or prior interests do not lead to situations where there were insufficient panellists to handle the caseload effectively.
- 11.31 The Government is not in favour of limiting terms of appointment to terms as short as 2 to 3 years as this would mean that market investigations could only ever be conducted by panellists that were new to the CMA (as only they would have sufficient remaining term of service to be able to participate in an investigation that could take at least 18 months, not including remedies). **The Government has decided that the maximum duration of terms of appointment of panellists will therefore remain 8 years, as is currently the case for CC members.**

Role of executives in phase 2

Summary of Responses

- 11.32 The preferred approach of the OFT, options to involve executive decision makers at phase 2 in mergers or as part of panels, did not elicit much comment or support. Some respondents, particularly those who regarded independence of the phase 2 decision maker as being paramount, opposed the suggestion of executive involvement in phase 2 in anything other than an advisory capacity.

The Government's Decision

- 11.33 As noted above, the Government is committed to separation of decision making as between phase 1 and phase 2 in merger and market cases and in the roles of the CMA in dealing with sectoral regulators in relation to antitrust cases and as a regulatory appeals body. The Government considers that this is best achieved by providing for the decisions in phase 2 merger and market cases and in regulatory appeals to be taken by panels made up of independent members drawn from a pool with relevant expertise. As such, **the decision making structures for the CMA will ensure that executives do not have any role as decision makers in such cases.**
- 11.34 There may be circumstances in which it would be appropriate for executives of the CMA to be able to provide advice to such panels. The CC's Chief Executive, for example, has a right to advise panels and a role in considering excisions from published reports. The Government considers that any such advisory role for executives (subject to maintaining separation and independence of decision making in such cases) could be provided for through the CMA's rules or procedural guidance and does not need to be set out in legislation.

Continuity of staff teams

Summary of Responses

- 11.35 There were different views amongst respondents on the merits of allowing staff teams from phase 1 to continue to work on a case in phase 2. Some argued that this would lead to risks of confirmation bias and should be avoided. Others argued that provided that there is separation of decision makers, some continuity at staff level may be appropriate. These respondents preferred for this to be at a lower level of seniority (so less likely to be able to influence thinking of decision makers in a way that could lead to confirmation bias through "contamination") and for those that transfer from phase 1 be a minority of the phase 2 team to ensure sufficient fresh thinking.

The Government's Decision

- 11.36 **The Government has decided that staff resourcing of cases is an issue that is best left to the CMA to determine for itself, although the CMA will be expected to establish principles for operation**

including adopting work practices that avoid or minimise risks of confirmation bias. Allowing staffing to be dealt with administratively within such operational principles will allow the CMA to respond flexibly to issues around work allocation and streamlining of cases.

Transparency of decision-making structure and access to decision-makers

Summary of Responses

11.37 Concerns were expressed by some respondents about the transparency of current decision making structures at phase 1 for mergers and markets and in relation to CA98 cases generally. Respondents had mixed views as to whether the OFT's recent procedural guidance goes far enough.

The Government's Decision

11.38 The Government does **not consider that it is appropriate to legislate the decision making process beyond: ensuring the separation of phase 1 and phase 2 separation decision makers; and, those provisions relating to decision making by groups set out in schedule 7 to the CA98, continue to apply (e.g. requirements for a two-thirds majority in order to make an adverse competition finding).** The CMA Board should be able to determine for itself the appropriate decision making structure for phase 1 cases within the executive and enable delegation to individuals or committees consistent with provisions in statute.

11.39 However, to address concerns expressed by respondents regarding the lack of transparency of the OFT's current decision making structures, the **Government has decided that the CMA will be required to publish procedural rules and guidance, including decision making structures and details of delegated authorities.** It is envisaged that these requirements to produce procedural rules and guidance will encourage the CMA to adopt procedures that make provisions for access to the decision maker where appropriate. It will also be a requirement on the CMA to consult on such guidance.

ECHR compliance

Summary of Responses

11.40 Concerns about the loss of institutional separation of phase 1 and phase 2 led some respondents to suggest that to be ECHR compliant, the market investigation regime should be made subject to a right of full

appeal on the merits, or that remedies in such cases should effectively be prosecuted in the CAT.

The Government's Decision

11.41 The Government considers such concerns to be misplaced.

11.42 It believes that its proposals will ensure sufficient separation between phase 1 and phase 2 decision making and that in combination with the scrutiny of the CAT, the regime will comply with ECHR requirements. CAT scrutiny of remedies in the CC's Groceries and Payment Protection Insurance (PPI) investigations demonstrates that issues around proportionality of such remedies will be subject to challenge as part of a judicial review of CMA decisions.

12. Merger Fees and Cost Recovery

Summary of the Government's decisions

The Government has decided:

- To **increase cost recovery of merger fees to approximately 60%** for 2012/13.
- **Not to introduce cost recovery in antitrust investigations.**
- To introduce a system of **one-way cost recovery for telecoms appeals, in which appellants are liable for the CMA's cost to the extent that their appeal is unsuccessful.** The Government has decided that interveners should also be liable for the costs to the CMA caused by their intervention, again to the extent to which the side on which they intervened lost. The exact costs figure for each appeal should be determined at the discretion of the CMA.
- To consult on a policy of **optimal cost recovery for operating the Competition Appeal Tribunal (CAT)**, in which costs are recovered from the majority of parties, but where the CAT has discretion to waive these in the interests of access to justice.

The Issue and Proposals

12.1. The competition regime brings large benefits to consumers and the wider economy. The current funding arrangements, however, impose significant costs on taxpayers. The Government therefore consulted on options on amending the ways in which costs involved in regulating mergers could be recovered through fees and ways to improve incentives and recover costs from those found to have broken the law. The challenge is to do this in a way which does not prejudice access to justice or detract from the appropriate safeguards within the system.

12.2. The Government consulted on four proposals:

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

12.3. Of the respondents who commented on these proposals, the majority accepted that increased cost recovery could be appropriate in some of

these areas. There was, however, a wide divergence of opinions as to which of the options should be taken forward and in what form. Some respondents also made points about appropriate legal procedures, access to justice and the possible impact on the wider economy.

- 12.4. After carefully considering the responses, **the Government has decided that it will not introduce cost recovery in antitrust investigations**, given the strong opposition and arguments advanced against it by the great majority of those who expressed an opinion. **The Government has decided to implement the other three proposals – an increase in merger fees, cost recovery in telecoms price appeals and reclaiming the cost for the services of the CAT.** While these decisions will increase the burden on some businesses, this should be seen in the context of the reforms as a whole, many of which reduce the burdens on business. Implementing these measures will help to ensure that the cost of these services are distributed more fairly between business and the taxpayer, whilst preserving or enhancing the benefits to the wider economy of the competition regime.
- 12.5. Further details of how this will be achieved, as well as how some of the concerns raised by respondents will be addressed, are discussed in greater detail in the individual subsections below.

Merger fees

The Question

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?

Summary of Responses

- 12.6. Businesses were strongly against any increase in merger fees. They argued that UK merger fees were already high compared to other countries. Some respondents argued that as mergers involving larger companies were more likely to be notified to the European Commission it would mean the UK fees would fall disproportionately on smaller companies.
- 12.7. Businesses also disputed the principle that merger control should be funded wholly through merger fees. They argued that the cost of merger control should be borne primarily by the Government as the regime does not provide a service to the parties to a merger but rather a service to society and it is the general public that ultimately benefits from merger control. Businesses also argued that a substantial increase in merger fees would lead to a chilling effect on merger

activity and a substantial regulatory burden on business that would go against the Government's growth agenda.

- 12.8. Only a small number of respondents questioned whether there was a better method of calculating fees than that based on turnover, and suggested that fees could be calculated on the basis of the complexity of the case or levying an additional fee for phase 2 cases. Only one respondent commented on which option they preferred on full cost recovery. This respondent preferred the inclusion of an additional fee band (option 3).

Government's Decision

- 12.9. The Government recognises the strength of feeling against significantly increasing merger fees to achieve full cost recovery. We are also concerned about the potential impact on growth of any increase of merger fees. However, the burden to taxpayers of merger control should be reduced and **the Government has therefore decided to increase merger fees to approximately 60% cost recovery from 6 October 2012.**
- 12.10. This will involve the introduction of a new fee band and increases in each fee band as shown in the table below.

Table 12.1 Merger Fees

| Value of the UK turnover of the enterprise being acquired | Current level | New level |
|---|---------------|-----------|
| £20m or less | £30k | £40k |
| Over £20m but not over £70m | £60k | £80k |
| Over £70m but not over £120m | £90k | £120k |
| Over £120m | £90k | £160k |

The possible introduction of a power to reclaim the cost of antitrust investigations

The Questions

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

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

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

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

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

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

12.11. Antitrust investigations can take a long time and are expensive: in 2008/9 the OFT spent an estimated £11.7m on antitrust investigations. One option for achieving partial cost recovery would be for infringers to be held responsible for the costs of investigating them. A new cost recovery regime might also further incentivise whistleblowers through granting immunity applicants a reduction in costs. The Government therefore sought stakeholders' views on the type of cases where it would be appropriate to reclaim the cost of an investigation.

12.12. Of the respondents who commented on the cost recovery for antitrust investigations proposals, the great majority were strongly opposed. Many of these argued on principle that it is not appropriate for a party found guilty to be forced to pay for the costs of the investigation. Some respondents pointed out that the fines levied in antitrust investigations already more than covered the costs of the regime; some respondents also said that, if cost recovery was introduced, it should be two-way; i.e. that if a company was investigated but cleared, it should be able to recover its costs from the competition authority or statutory regulator.

12.13. Other concerns raised by respondents were that granting the competition authority the power to recover costs could discourage efficiency, which the City of London Law Society stated would "*fly in the face of one of the overriding objectives of the proposed reform of the UK competition regime.*" Furthermore, smaller companies in particular could be pressured to settle rather than to fight a case and face costs, which would be both unjust and undermine the development of a body of precedents that forms an important part of the antitrust regime. A small number of respondents also commented that the proposal could create a perverse incentive on the competition authority to reach an adverse decision, even if the moneys were paid

into the Consolidated Fund. A small number of respondents considered that introducing a cost recovery regime could significantly enhance the leniency regime, though some commented that if introduced incorrectly it could undermine it.

- 12.14. Given the overwhelming balance of opinion and arguments advanced against this proposal, **the Government has decided that it will not introduce a power to reclaim the cost of antitrust investigations.**

Telecom Price Control Appeals Heard by the Competition Commission

The Question

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.

- 12.15. The CC is responsible for hearing regulatory appeals in a number of sectors, including the price control aspects of telecoms appeal cases. Unlike regulatory appeals in other sectors however, there is, however, no provision within the Communications Act 2003 to provide for this for telecoms price control appeals.
- 12.16. In the future, the CMA will have responsibility for hearing these appeals.
- 12.17. Ofcom has a statutory duty to make a determination in certain telecom price control cases and it is therefore impossible for Ofcom to control the risk of appeals, for example by deciding not to prioritise certain cases. As telecom price appeals are effectively a complex examination by the CC of the facts and Ofcom's economic analysis, it is inevitable that there will be differences of judgement between Ofcom and the CMA.
- 12.18. Moreover, Ofcom operates under a funding cap, the purpose of which is to drive efficiencies while minimising the impact on the delivery of Ofcom's core responsibilities. There is a concern that if Ofcom were to have to cover all or some of the costs of the CMA after losing an appeal, this could result it being unable to fund its statutory duties. The Government therefore consulted on a proposal that would allow the CMA to reclaim its costs from an unsuccessful appellant but not from Ofcom.

- 12.19. Of the respondents who commented on this question, the majority supported the proposal, stating that they could see no reason why telecoms should be treated differently from other regulatory price appeals. A small number of respondents, principally telecoms companies, opposed the proposal, citing the inherently complex and finely balanced nature of telecoms price appeals and the fact that the right of appeal forms a necessary part of the regulatory process, for which appellants should not be required to pay costs.
- 12.20. Other concerns, raised by both some of those who supported and some of those who opposed the proposal, were that the complex nature of the telecoms price control appeals meant it would be difficult to determine the appropriate level of the costs award. Furthermore, a system in which the CMA could only recover costs from the appellant rather than from Ofcom could lead to a perverse and justice-distorting incentive for the CMA to find against the appellant. Some respondents also felt strongly that an appellant should not have to pay if an appeal was brought because Ofcom was not transparent in its evidence. Others argued that it would be unfair to make an appellant liable for the costs caused by interveners, which it may not have requested and over which it has no control.
- 12.21. After considering the responses, **the Government has decided to introduce a system of one-way cost recovery, in which appellants are liable for the CMA's cost to the extent that their appeal is unsuccessful.**
- 12.22. The Government agrees with the majority of the respondents that cost recovery in this area should be treated in a similar way to other regulatory appeals. It considers that, as far as possible, the costs should follow the event and that it is right that a business bringing an appeal should be liable for costs in so far as it is unsuccessful rather than these costs being paid by the taxpayer. Furthermore, while there is no suggestion any telecoms appeals to date have been spurious, it is considered that by causing an appellant to be liable for costs to the extent that the appeal was unsuccessful will cause appellants to consider carefully which points it is worth appealing.
- 12.23. Interveners may present evidence supporting either the appellant or Ofcom. **The Government has decided that interveners should also be liable for the costs to the CMA caused by their intervention, again to the extent to which the side on which they intervened lost.** Recovering costs from interveners is in line with the overarching objectives of recovering costs and of incentivising the 'right' appeals, a principle which equally applies to interventions.
- 12.24. However, it is also the Government's view that the imposition of costs for these proceedings should not affect Ofcom's ability to carry out its statutory duties and therefore **the CMA will not have the power to recover costs from Ofcom.**

- 12.25. **The Government has decided that the exact costs figure for each appeal should be determined at the discretion of the CMA.** In making its decision the CMA will need to take into account the particular circumstances of the appeal including the number and complexity of the points won and lost, the general merit of each point, the conduct of parties and the clarity of the Ofcom decision. As all funds collected through this process will be paid to the Consolidated Fund rather than to the CMA, the Government does not consider that this proposal will create perverse incentives for the CMA, either with regards to making its decision on the appeal or with regards to awarding costs.

The Competition Appeal Tribunal

The Question

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

- 12.26. The CAT has the power to award costs to parties following an appeal but does not have the power to recover its own costs. The Government therefore consulted on whether the CAT should have the power to recover its costs except where the interests of justice dictate that these be set aside.
- 12.27. Of the respondents who commented on this question, the majority were opposed. Some of these argued on principle that courts (and tribunals) performed a public function and that to charge for this would be a fundamental change in the way that they were funded. Others raised practical concerns, in particular the issue of access to justice for smaller litigants and the risk of creating perverse incentives for the CAT.
- 12.28. Despite this, after careful consideration of the responses, the Government considers it is appropriate to take steps to enable the CAT to reclaim a proportion of its costs. Whereas other tribunals usually involve cases where individuals are affected and the sums at stake are relatively low, parties in the CAT's cases tend to be well resourced businesses arguing cases of substantially higher monetary value.
- 12.29. The Government recognises, however, that the above does not apply to all of the CAT's cases and agrees that the preservation of access to justice is important. **The Government has therefore decided on a policy of optimal cost recovery in which costs are recovered from the majority of parties but where the CAT has discretion to waive**

these in the interests of access to justice. To avoid any perception of bias, any funds recovered will be paid to the Consolidated Fund rather than the CAT.

- 12.30. The Government will consult separately on the detailed arrangements for this cost recovery, including on the appropriate level of costs to be recovered, and the circumstances in which the interests of access to justice waiver might apply. In reliance on paragraph 20, Schedule 4 (Part 2) to the EA02, the changes will be brought about by an amendment to the CAT's Rules of Procedure, by way of a statutory instrument subject to the negative resolution Parliamentary procedure.

13. Overseas Information Gateways

Summary of the Government's decisions

The Government has decided:

- **Not to make any changes to overseas information gateways.**

The Issue and Proposals

13.1. The consultation asked for comments on the case for extending the overseas information gateways to mergers and markets. It sought views on how well the current 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.

The Question

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

Summary of Responses

- 13.2. Businesses were strongly against any change to the overseas information gateways. They argued that there was a distinction between antitrust cases (where a firm is suspected of breaking the law) and mergers and market investigations where there is no suspicion of unlawful conduct. They argued that where there was no suspicion of wrong-doing, it would seem disproportionate for parties not to be protected from the disclosure of their commercially sensitive information to authorities in other jurisdictions.
- 13.3. They also argued that making changes to the gateways may discourage parties from sharing information and co-operating with an investigation. They also argued that it was very rare for parties to refuse to grant waivers to allow the exchange of information with specific competition authorities for specified purposes.
- 13.4. The OFT argued that the overseas information gateway could be streamlined to make its operation more efficient. It suggested amending the process to allow an upfront assessment of jurisdictions which had sufficient legal safeguards in place, rather than having to conduct a full assessment of the conditions under section 243(6) of the EA02 each time a disclosure is made. It also argued that it would be

more efficient if the OFT was not required to have regard to the business interests of the undertaking or the interests of the individual, where the receiving authority is subject to the same or similar restrictions on making a disclosure. The OFT's view was that the receiving authority may be better placed to carry out the assessment.

Government's Decision

- 13.5. The Government agrees with business respondents that there is no persuasive case for change and has **decided not to make any changes to overseas information gateways**. The Government is not persuaded by the OFT's argument for introducing a list of overseas authorities that have the appropriate safeguards that information could be shared with, without having to assess the legal safeguards in each case. A public list could be controversial and complex to run and may well be difficult to keep up to date. In addition, the Government believes it should be the CMA not the overseas authority that considers whether there is likely to be any harm to the parties from disclosure as the CMA will not have any control over the standards operated in the overseas authority.

14. Next Steps

- 14.1 A number of the proposed reforms will be subject to changes in primary legislation. Where this is the case, the reforms will be subject to Parliamentary timing and approval. The Government will work in parallel with the competition authorities and other stakeholders to implement those other reforms that do not require Parliamentary approval. The consumer enforcement powers and scope of how they will be used by the CMA is dependent on the outcome of the consumer landscape consultation. The Government will also consult further on the recovery of Competition Appeal Tribunal costs.

15. Summary of the Government's Decisions

The Government has decided:

Why reform the competition regime?

- To create a new Competition and Markets Authority and transfer the functions of the CC and the competition functions of the OFT to it.

A Stronger Markets Regime

- The CMA will have the power to **investigate practices across markets**.
- **Not to extend the super-complainant mechanism to SME bodies.**
- The Secretary of State will have the power to request the CMA to investigate **public interest issues** alongside competition issues.
- To introduce **statutory time limits and information gathering powers** for all stages of the markets process, including:
 - Statutory time limits and information gathering powers for market studies (phase 1) that will require the CMA to **consult on making an MIR within 6 months of launching a market study, where such an outcome is being considered, and concluding all studies within 12 months**. The OFT's current criminal penalties will also be replaced with civil penalties for failure to comply with information gathering requirements.
 - **Reducing statutory time limits for phase 2 market investigations (phase 2) from 24 to 18 months**, with powers to extend these by 6 months in special circumstances.
 - **6 Month statutory time limits for the CMA to implement phase 2 remedies** with powers to extend these by 4 months.
- To amend Schedule 8 to the Enterprise Act 2002 (EA02) to enable the CMA to require parties to **appoint and remunerate an independent third party to monitor and/or arbitrate on the implementation of remedies**; and to require parties to **publish certain non-price information**.
- To **clarify in legislation the type of interim measures that the CMA could take at phase 2**.
- Proposals to move to a **single stage process for the review of remedies, with new statutory time limits** are not a high priority at this time.

- **Not to change the current ‘*change of circumstances*’ threshold for the review of remedies.**
- **Proposals to clarify that the powers of investigation and requirements relating to timelines apply if a decision of the CMA is quashed and the matter is remitted back to it for a new decision are not a high priority at this time.**
- **Micro businesses and start-ups will not be subject before 1 April 2014 to the CMA’s new information gathering powers for market studies and market investigations remedies implementation.**
- **To remove the duty of the CMA to consult on decisions not to make an MIR unless any person has expressly asked for a reference to be made during a Market Study.** The CMA will have a duty to consult on decisions to make an MIR.
- **There is no need for further legislation to improve the interaction between MIRs and antitrust enforcement.**

A Stronger Mergers Regime

- **To strengthen the voluntary notification regime.**
- **To introduce statutory time limits for all parts of the merger review process.**
- **The CMA should have the discretion to trigger a power to suspend all integration steps pending negotiation with the CMA.**
- **To clarify in legislation the interim measures that the CMA could take at phase 1 and phase 2.**
- **To introduce financial penalties which will apply to integration measures taken in breach of CMA orders, with a maximum penalty of 5% of aggregate group worldwide turnover of the enterprises concerned.**
- **To introduce a time limited period after the phase 1 decision where merging parties could offer and negotiate UILs.**
- **To have specific time periods for different aspects of the UIL process so as to mitigate against any adverse impact on the markets.**
- **That there should be a possibility of extension to the UIL time limits.**
- **To have the possibility of a longer extension to time limits in cases where the CMA decides that an upfront buyer is needed.**
- **Micro businesses and start-ups will not be subject before 1 April 2014 to the CMA’s new information gathering powers at phase 1 and the UIL process of merger inquiries and phase 2 remedies implementation of merger cases.**
- **To amend Schedule 8 to the Enterprise Act 2002 (EA02) to enable the CMA to require parties to appoint and remunerate an independent**

third party to monitor and/or arbitrate on the implement of remedies; and to require parties to publish certain non-price information.

- **Not to change the current ‘*change of circumstances*’ threshold for the review of remedies.**

A Stronger Antitrust Regime

- To **embed an enhanced administrative approach to antitrust enforcement**, involving improvements to the speed of the process, and the robustness of decision-making, addressing perceptions of confirmation bias. This will include means of bolstering the separation between investigation and decision-making.
- To put in place a **performance framework to ensure the improvements will be fully delivered** and will prove effective in practice; and a process for review of progress and report to Parliament.
- To take a **power for the Secretary of State to introduce statutory time limits for cases**, to be exercised should reductions in the time cases take not be forthcoming.
- To legislate that **financial penalties should reflect the seriousness of the infringement and the need to deter and that the Competition Appeal Tribunal (CAT) must have regard to the statutory guidance on the appropriate amount of a penalty.**
- To provide for the competition authorities to impose **civil financial penalties on parties who do not comply with certain formal requirements during antitrust investigations** and to remove the current criminal sanctions (they would remain for falsifying, destroying documents etc).
- To provide for applications **for a warrant authorising entry to premises by force to be made to the CAT** (as well as the High Court and Court of Session).
- To provide in the case of antitrust investigations, and subject to certain safeguards, **a similar power to require a person to answer questions as exists in relation to the criminal cartel offence.**
- To provide explicitly that **absolute privilege from defamation attaches to a notice by a competition authority regarding the existence of an antitrust investigation.**
- To **lower the threshold before interim measures can be imposed**, so that they would require there to be a perceived need to act for the purposes of preventing significant damage to a particular person or category of person.

The Criminal Cartel Offence

- To adopt a version of Option 4 - remove the 'dishonesty' element from the offence and define the offence so that it does not include cartel arrangements that the parties have agreed to publish in a suitable form (which could be the London Gazette) before they are implemented, so that customers and others are aware of them.
- In the very rare cases where businesses operate arrangements that fall within the scope of the offence but that nevertheless offer **countervailing benefits, a limited disclosure to customers** of the aspects of the arrangements within the scope of the offence can be made by businesses in order to trigger the availability of the exclusion.
- There will be a **short transitional period** prior to introduction of any revision to the cartel offence.
- **Not to adopt any of the respondents' alternative proposals** for improvements to the cartel offence.

Concurrency and Sector Regulators

- To **retain the concurrent competition powers of the sector regulators**.
- **Strengthen the primacy of CA98**, by requiring sector regulators with concurrent powers to consider CA98 first when they have a choice between enforcing CA98 and using their sectoral powers.
- To **encourage the CMA to be a more proactive central resource** for the sector regulators.
- To give the **CMA a bigger role in the regulated sectors**, by requiring the competition authorities to **share more information** about CA98 cases involving the concurrent sectors, and give the **CMA the power to take CA98 cases** from the sector regulators where it is better placed to proceed with the case.
- The CMA will be required to **report on the use of concurrent competition powers across the competition authorities**.
- The CMA will **not be required to undertake a rolling programme of market reviews** in the regulated sectors.

Regulatory References and Appeals and Other Functions of OFT and CC

The Government has decided:

- To transfer the **CC's roles in determining regulatory appeals and references and in Energy Code Modification appeals to the CMA**.

- **Not to legislate, as part of the competition reform process, to harmonise the regulatory appeals and reference processes.**
- To **develop model processes** for regulatory appeals and references.
- To **transfer the ancillary competition roles of the CC and OFT** to the CMA with respect to: local bus schemes or agreements, access arrangements under the Payment Services Regulation and legal services regulation.
- The **CC and OFT's role in keeping under review the regulating provisions and practices of the FSA, recognised clearing houses and recognised investment exchanges will be modernised under the *Financial Services Bill*.**
- To **repeal the provisions of the Competition Act 1980** that provide the Secretary of State with powers to refer to the CC any question relating to the efficiency and costs of, the service provided by, or possible abuse of a monopoly situation by, various public bodies and providers of bus services in Northern Ireland or rail passenger services in London.

Scope, Objectives and Governance

- To give the CMA a **primary duty to reflect the role the Government sees for the CMA in promoting effective competition in markets, across the UK economy, for the benefit of consumers'**.
- The CMA will be constituted as a **Non Ministerial Department**.
- **The scope of the CMA's role in purely consumer protection issues will be decided following the conclusion of the Government's consultation on the consumer landscape.**
- The CMA will be accountable to Parliament.
- To legislate for the establishment of a **CMA Board**.

Decision-Making

- The **separation of phase 1 and phase 2 decision making** in mergers and markets cases, and ring fencing of regulatory appeals will be provided for in legislation.
- Legislation will provide for **phase 1 decisions in mergers and markets cases decisions to be the responsibility of the CMA Board**.
- Legislation will provide that **those decisions currently taken by the CC will be the responsibility of groups of independent panellists**, drawn from a pool of panellists and appointed to investigate and report on the inquiry to which they are appointed.

- The detail of decision-making on antitrust cases will need to reflect the Government decisions on implementing the separation of investigation and decision-making under the procedural rules but the legislation will not prevent the use of CMA panellists.
- **To retain the processes for appointing individuals to panels which currently apply to the CC under schedule 7 to CA98.**
- **There may be benefits to panellists having a greater time commitment** to the CMA, but will not legislate for this as it is possible under the current legislative framework.
- **Staff resourcing of cases, in particular the ability of staff to follow a case from phase 1 to phase 2, is an issue that is best left to the CMA** to determine for itself.
- The **maximum duration of terms of appointment of panellists will remain 8 years**, as is currently the case for CC members.
- The **CMA will be required to publish procedural rules and guidance, including decision making structures and details of delegated** authorities.

Merger Fees and Cost Recovery

- **To increase merger fees to achieve approximately 60% cost recovery from October 2012.** This will involve the introduction of a new fee band and increases in each fee band as shown in the table below.

| Value of the UK turnover of the enterprise being acquired | Current level | New level |
|---|---------------|-----------|
| £20m or less | £30k | £40k |
| Over £20m but not over £70m | £60k | £80k |
| Over £70m but not over £120m | £90k | £120k |
| Over £120m | £90k | £160k |

- **To not introduce cost recovery in antitrust investigations.**
- **To introduce a system of one-way cost recovery for telecoms appeals**, in which appellants are liable for the CMA's cost to the extent that their appeal is unsuccessful. The Government has decided that interveners should also be liable for the costs to the CC caused by their intervention, again to the extent to which the side on which they intervened lost. The exact costs figure for each appeal should be determined at the discretion of the CMA.

Summary of the Government's decisions

- **On a policy of optimal cost recovery for operating the CAT**, in which costs are recovered from the majority of parties, but where the CAT has discretion to waive these in the interests of access to justice.

Overseas Information Gateways

- **Not to make any changes to overseas information gateways.**

Appendix 1 - The Consultation Questions

Why reform the competition regime?

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

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

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

A stronger markets regime

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

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

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

A stronger mergers regime

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

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

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

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

A stronger antitrust regime

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

- *Options 1-3 for improving the process of antitrust enforcement;*

- *the costs and benefits of the options, supported by evidence wherever possible.*

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

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

The criminal cartel offence

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

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

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

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

Concurrency and sector regulators

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

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.*

Regulatory appeals and other functions of the OFT and CC

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

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.*

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.*

Decision making

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

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

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

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

Merger fees and cost

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?*

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

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

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

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

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

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

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.*

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?*

Overseas information gateways

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

Questions on the impact assessment

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?*

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

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

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

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

Appendix 2 – Key Events

BIS Ministers and senior officials spoke about competition reform at the following events.

| Date | Stakeholder/Event |
|--------------|--|
| 25 January | Jevon's Institute for Competition Law - roundtable on UK Reform of the Competition Law Regime |
| 10 March | CBI/Linklaters - seminar on the right competition framework for growth |
| 22 March | European Policy Forum - roundtable on streamlining of the competition authorities |
| 23 March | UK International Chamber of Commerce Committee on Competition – roundtable on competition reform |
| 4 May | City of London Law Society Competition Committee – Annual General Meeting |
| 25 May | Annual Conference of Competition Section of the Law Society |
| 26 May | Freshfields debate - UK Competition Reform |
| 24 June | Chatham House – Annual Competition Policy Conference |
| 9 June | Scottish Competition Law Forum |
| 12 September | Regulatory Policy Institute / City University - Annual Competition & Regulation Conference |
| 25 October | CBI Breakfast seminar on Competition regime reform |

Appendix 3 - List of Respondents

| | |
|---|--|
| Addleshaw Goddard | Charles Russell LLP |
| Allen & Overy | Citizens Advice |
| American Bar Association | Civil Aviation Authority |
| Andrews, Patrick | Cleary Gottlieb Steen & Hamilton LLP |
| Anglian Water Services Ltd | Clifford Chance LLP |
| Arnold & Porter | Commercial Council for Water |
| Arriva plc | Compass Lexecon |
| Ashurst LLP | Competition Commission |
| Association of Chief Trading Standards Officers | Competition Law Process Management Ltd |
| Association of Convenience Stores | Consumer Focus |
| Association of General Counsel & Company Secretaries | Corker Binning |
| Australian Competition and Consumer Commission | Competition Appeal Tribunal |
| Baker & McKenzie | Dundas & Wilson LLP |
| Berwin Leighton Paisner LLP | Edwards Angell Palmer & Dodge |
| Bird & Bird LLP | Energy Networks Association |
| British Airways | Energy Retail Association |
| British Brands Group | Ethical Economy |
| British Private Equity & Venture Capital Association | Eversheds LLP |
| British Retail Consortium | Federation of Small Businesses |
| British Sky Broadcasting Limited | Federal Trade Commission |
| The Business Services Association | Financial Services Consumer Panel |
| BT plc | Food Ethics Council |
| Building Societies Association | Forum of Private Business |
| Business in the Community / Cooperatition Incubator | Forum for the Future |
| Canadian Competition Bureau | Freshfields |
| Confederation of British Industry | FTI Consulting |
| Centrica | Hallsworth, Professor Alan |
| Centrica Storage | Harding, Professor Christopher and Joshua, Julian |
| Centre for Competition Policy | Herbert Smith LLP |

| | |
|---|--|
| Hogan Lovells | Rail Freight Group |
| HSBC | Reed Smith LLP |
| Incorporated Society of British Advertisers | Retail Motor Industry Federation |
| In-House Competition Lawyers' Association | Royal Institute of British Architects |
| International Chamber of Commerce UK | Scottish Power |
| Joint Working Party of Bars & Law Societies | Severn Trent Plc |
| Law Society of Scotland | Shepherd & Wedderburn |
| Lever, Sir Jeremy, QC | Simmons & Simmons |
| Linklaters LLP | Slaughter & May |
| MacCulloch, Angus | Spottiswoode, Clare |
| Maclay Murray & Spens LLP | Stubbs, A.W.G. |
| Merger Streamlining Group | Talk Talk |
| National Federation of Retail Newsagents | Tesco |
| National Grid | The Carpet Foundation |
| Norton Rose | The City of London Law Society - Competition Law Committee |
| Ofcom | Townley, Dr Christopher |
| Ofgem | Trading Standards Institute |
| OFT | UK Competitive Telecommunications Association |
| Ofwat | UK Competition Law Association |
| ORR | Virgin Media |
| Orrick, Herrington & Sutcliffe (Europe) LLP | Vodafone Limited |
| Oxera | Wardhaugh, Professor M Bruce |
| Pickering, Professor John F | Water UK |
| Pinsent Masons LLP | Whelan, Dr Peter |
| Property Ombudsman | Which? |
| Purnell, Nicholas, QC | White & Case LLP |
| | Wilks, Professor Stephen |
| | Wong, Dr Stanley |

Three respondents asked not to be named.

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