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8 June 2011

The City of London Law Society

Competition Law Committee

RESPONSE TO BIS CONSULTATION ON REFORMING UK COMPETITION REGIME

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2 Overview

2.1 This paper is submitted by the Competition Law Committee of the City of London Law Society in response to the Department for Business, Innovation and Skills's paper *A Competition Regime for Growth: A Consultation on Options for Reform*, published on 16 March 2011.

2.2 The City of London Law Society (CLLS) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government Departments, often in relation to complex, multijurisdictional legal issues.

2.3 The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

2.4 The CLLS Competition Law Committee has prepared this submission. The Committee is made up of solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who advise and act for UK and international businesses, financial institutions and regulatory and governmental bodies on competition law matters.

2.5 The authors of this response are:

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2.6 We are grateful for the contributions of colleagues on the Committee, and to Ian Winter QC of Cloth Fair Chambers, specialising in criminal law and fraud, for his insights and contributions to Section 6 on the criminal cartel offence.

2.7 The Committee was extremely impressed with the quality of the BIS consultation paper, noting that it was well-thought through and well-argued, and that care had been taken to take account of points made by competition law practitioners and by business in advance of its issuance.

2.8 Specifically, on the substance, the Committee **strongly supports and advocates**:

- **Greater procedural fairness in antitrust:** We endorse the proposals that, in investigations under the prohibitions - so-called "antitrust" - greater fairness could be achieved if there were a proper separation of powers between the investigators and those taking the final decision and possibly imposing penalties, i.e. both "Option 2" and "Option 3" in paragraphs 5.30 to 5.47 of the consultation paper. We see such proposals as necessary to redress the inherent unfairness of a single group of officials being investigator, prosecutor, judge and jury - the problem of "confirmation bias".

  On balance, we favour a modified form of Option 2 - the key features being

  (i) a second phase of antitrust investigation to be conducted within the CMA by a **group of independent decision-makers separate from the original investigating team** (essentially the independent decision-makers who make the Phase 2 market and merger decisions)

  (ii) but with **no need for a full internal tribunal**

  (iii) crucially, retention of a **full merits appeal to the CAT**.

  See paragraphs 5.2, and 5.11 to 5.16 below.

  This significant improvement on the present system is, of course, perfectly achievable whether or not the OFT and the Competition Commission are amalgamated into a single authority.

- **Retention of voluntary merger notification:** We welcome the consultation paper's recognition that mandatory merger notification is not necessarily the right way forward; indeed, we believe that it would be very damaging (see below).

  We welcome the consultation paper's identification of more proportionate, and practical, ways to address concerns about completed mergers (along the broad lines set out in paragraphs 4.12 to 4.16 of the consultation paper).

  We endorse **strengthened interim measures**, including the possibility of an order to reverse integration, and we favour the "second option" referred to in paragraph 4.13. *See paragraphs 4.25 to 4.43 below.*

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

2.10 That said, and notwithstanding our misgivings, the Committee wishes to engage constructively with the proposals being made in the consultation paper which assume the existence of a single CMA, and we have framed our response in that constructive spirit.

2.11 Specifically, if there is to be a single CMA, the Committee **welcomes**, and considers **essential**:

(a) the proposals that, within a single CMA, the decisions in "Phase 2" of both merger control and markets processes should be made by different people from those conducting the initial examination at "Phase 1" - so as to minimise the dangers of "confirmation bias" that might otherwise arise from an amalgamation of the two existing competition authorities; *see paragraphs 10.5 to 10.9 below.*

(b) the proposal that those "Phase 2" decision-makers within the CMA should be senior and experienced individuals to which the companies under investigation have access, and who are of roughly equivalent status and experience to those senior management executives of the investigated companies who appear before them; *see paragraphs 10.11 to 10.12 below.*

2.12 The Committee also has a number of serious **concerns** about some of the proposals - notably:

- those relating to the **cartel offence** - we do not believe that there are grounds, at this stage, to remove the "dishonesty" element in the offence; *see Section 6 below*

- the possibility of **mandatory merger notification**

  - we believe that this would represent an *unnecessary* regulatory burden on parties to mergers raising no competition issues, and would have the perverse effect that innocuous mergers would be caught by the regime while, as a consequence, many mergers with anti-competitive effects would escape scrutiny;

  - moreover, our analysis of completed mergers considered by the Competition Commission in recent years does not suggest a major crisis of completed anti-competitive mergers that would warrant the draconian legislative change to mandatory merger notification;

  see paragraphs 4.2 to 4.22, and 4.49 to 4.51 below

- the suggestions on **fees for merger control and antitrust investigations** - which the Committee considers disproportionate and excessive in the case of mergers (*see paragraphs 11.1 to 11.8 below*), contrary to proper principles of the administration of justice in the case of antitrust investigations (*see paragraphs 11.9 to 11.12 below*), and out of line with international best practice in the case of both (*see table at end of section 11*)

- **SME "super-complaints" in market investigations**; *see paragraphs 3.35 to 3.37 below*

- proposals on the workings of the **sector regulators' concurrent competition powers**; *see Section 7 below*.

General principles

2.13 Before dealing with our specific points, however, we thought it would be helpful to set them in their proper context - by explaining the general principles which have informed our approach. The Committee thinks that the appropriate objectives for a reform of the UK competition system should be:

(a) to reduce unnecessary regulatory burdens - both on British businesses, which (as the Government recognises) risk losing competitiveness as a result of excessive "red tape", and on the competition authorities which need to concentrate their limited resources on the things that really matter

(b) to improve procedural fairness - recognising that the implications for businesses of competition law interventions can be significant and severe; this applies to market investigations, which can result in the imposition of regulatory remedies on whole sectors, and antitrust processes, which can result in the companies concerned sustaining substantial fines, reputational harm and exposure to third party civil damages claims, as well as having an impact on the careers of senior management (including possible directors' disqualification)

(c) so far as is consistent with objectives (a) and (b), to enhance the efficiency and speed of processes

(d) to provide an environment and structure in which the UK's competition body can operate with authority and be recognised as being world class.

2.14 The Committee does not accept the criticism that the current system generates too few cases. Indeed, we do not see that volume of cases, e.g. relative to other countries, is an appropriate measure of the effectiveness of the regime; other factors, such as the actual existence of anticompetitive practices in Britain compared with other countries, and the way the volume of cases is measured, are also relevant. More specifically:

- We do not consider that there are too few market investigations. Rather, we believe that the increased regulation of hitherto unregulated sectors of the economy, as a result of market investigation remedies, is by no means an ideal, or even productive, way of achieving economic growth and well being.

- In antitrust, while we recognise the benefit of establishing a body of precedent through decided cases, both for certainty and for deterrence, in individual cases there are often very good reasons for the parties to reach a settlement with the competition authority.

2.15 Finally, we appreciate the opportunity afforded us to comment on these proposals and, following submission of this response, the Committee remains happy to assist BIS in its deliberations in developing the proposals.

3 Section 3 - "A Stronger Markets Regime"

General comments

3.1 The consultation paper states, in paragraph 3.5, that there have been too few market investigation references and that the markets regime system is under-utilised. It calls for the increased use of the markets regime.

3.2 However, in the Committee's view, to equate the proper functioning and efficient operation of the markets investigation regime with the number of cases taken misses the point. An increase in cases alone will not mean a more effective system. Making market investigation references (MIRs) purely in order to produce a greater number of cases is likely to lead to the investigation of a greater number of unmeritorious cases or markets of peripheral importance to the economy. This in turn would lead to a needless increase in the regulatory burden on business without having any corresponding consumer benefit. It will also create a more market interventionist policy; the effect of MIRs is often highly regulatory, with remedies involving costly changes to business practices and sometimes (for example in the case of airports) forced break-up of companies.

Q3: Comments on the proposals

Market studies (paragraphs 3.20 and 3.25 to 3.28)

3.3 Given the vague wording of section 5 of the Enterprise Act 2002 - the OFT's general duty to obtain and keep under review information relating to the carrying out of its functions (which we understand to be the statutory ground for OFT market studies) - there is a need to clarify the objectives and scope of the CMA's powers to commence market studies. It is essential, in the Committee's view to establish appropriate statutory criteria for the commencement of market studies/Phase 1 market investigations and the role of the CMA in that process given the associated proposal to confer upon the CMA information-gathering powers. We discuss this in more detail in paragraphs 3.7 to 3.10 below.

3.4 So what should the appropriate statutory criteria be?

3.5 In the Committee's view, market studies are useful filters for situations which may require regulatory scrutiny but do not immediately advertise themselves as being as candidates for CA 1998 enforcement or consumer protection remedies. We believe that the two-stage market investigation procedure works well. A "Phase 1" investigation helps to highlight whether a more detailed investigation of a particular market is warranted under a MIR. This two-phase process we believe provides an appropriate balance between achieving appropriate regulatory inquiry and minimising the burden and cost to business in taking part in the process.

3.6 It has been suggested, in discussions during the consultation period, that market studies might also be able to cover situations where the CMA wishes to undertake longer term reports where no competition or consumer remedies are contemplated. This is to a certain extent a reflection of the current practice where the OFT undertakes longer term studies as an aid to Government and which may for example conclude by recommending the need for future legislation. In our view it is hard to accommodate these types of report within the confines of the new proposed

reforms. Its short timeframes and use of information-gathering powers are not in our view appropriate for use in this context.

3.7 We are therefore in favour of dividing market studies into two specific types;

- "market studies" for long-term reports where the exercise of competition powers is not envisaged; and
- "Phase 1 market investigations" which would be competition based.

3.8 We would recommend that a new separate statutory power distinct from those relating to Phase 1 market investigations for the CMA to undertake longer term reports as an aid to Government. This process could possibly enable the CMA to set their own timetables if this was thought to be appropriate but would not benefit from information gathering powers. We would suggest that these reports are referred to as "market studies". In the event that a competition related issue arises during the course of a "market study" the CMA would need to commence a Phase 1 market investigation. Criteria for initiating Phase 1 market investigations clearly needs to be set at a lower standard than those for making an MIR under section 131 of the Enterprise Act, which requires the OFT to have "reasonable grounds for suspecting" a restriction, distortion or restriction of competition.

3.9 An alternative approach might be to frame the test around the EU "sector inquiries" test. Under Article 17(1) of Council Regulation 1/2003, the European Commission may start a market study

> "where the trends of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market".

This latter test lends itself to the approach, referred to in paragraph 3.3 above, of keeping key markets under review. Although the criteria need to be competition based they do not rule out subsequent exercise by the CMA of their consumer powers. .

3.10 Accordingly, whatever wording is chosen, it is essential to state clearly the scope and objective of Phase 1 market investigations. The Committee think the test could be entirely competition based. Given that the threshold for MIRs at Phase 2 (in section 131 of the Enterprise Act) is merely "reasonable suspicion", it would have to be even lower. A possible approach might be along the following lines:

(a) *The [CMA] may carry out investigations into any markets in the UK or a part of the UK in connection with the supply or acquisition of any goods or services where it has reason to believe that a feature or a combination of features may merit the exercise of its powers under section 131 ("a Phase 1 market investigation")*

(b) *Where the [CMA] decides to start a Phase 1 market investigation it shall announce-*

(i) the enactment under which it is made;

(ii) the description of the goods or services to which it relates;

(iii) its geographic scope; and

(iv) the reason or reasons why it has exercised its powers under [subsection (a)] above.

(c) *The [CMA] shall prepare and publish its Phase 1 market investigation under [subsection (a)] within a period of six months beginning with the date of its announcement in [subsection (b) above].*

Consumer protection and market studies

3.11 Although this is not a response to the Government's consultation paper on consumer powers, we do feel it is appropriate to emphasise our support for the CMA retaining some, if not all, of its consumer powers. We believe that Phase 1 market investigations should start with the CMA as long as the competition based test is triggered regardless of whether they appear to be consumer focused or not. The Committee has considered some form of remittal system to a consumer body to deal with consumer-related cases, but we have rejected this because we do not believe it would work and we think that it would certainly not be in the interests of consumers.

3.12 We believe that it is important that the CMA should retain consumer based remedies, and should be able to deploy its consumer enforcement measures alongside its competition based powers. This is because there is often a substantial overlap between the two areas. This can be seen from the fact that a number of MIRs to date have been heavily consumer-focused, notwithstanding the current test, which expressly requires a competition concern before a reference can be made. When these powers exist within a single body they can be exercised in a joined up way to the advantage of consumers and business.

3.13 Various possible structures for a trading standards organisation have been suggested during the consultation. One solution was the creation of an overarching Trading Standards Authority. This Trading Standards Authority would be given the benefit of an indemnity fund. We do not have any details about how such an authority would be structured, including in particular whether it would be a single entity or made up of local trading standards bodies representatives.

- Even if it were a new single entity we believe it would be less effective than the current system, for the reasons given in paragraphs 3.11 to 3.12 above.

- We would be even more concerned if such a Trading Standards Authority adopted a less centralised structure. We hope the Government shares our view that it is important to have a strong central national body which has the experience and resources to take on flagship consumer related cases while leaving other types of cases to trading standard bodies to pursue at a local level.

3.14 Without a single national body speaking with one voice like the CMA we believe that there will be an inevitable increase in the bureaucracy of enforcement (especially if trading standards bodies have to work with each other loosely within the terms of the Indemnity Fund or a similar financing structure). The uncertain allocation of responsibilities among a fragmented class of enforcement authorities runs the risk of severely compromising consumer protection in high profile complex cases.

Statutory time limits (paragraphs 3.18 to 3.20)

Phase 1 market investigations

3.15 The Committee favours the setting of a six-month time limit for Phase 1 market investigations.

3.16 We believe that a statutory limit will impose discipline and efficiency into the process which has not always been evident in the past. Finite limits to the investigations would also help limit the cost burden on business. We believe that all Phase 1 market investigations should be capable of being finished within six months. As mentioned above Phase 1 market investigations are preliminary filters to determine what further action, if any, is necessary under the CMA's competition or consumer powers. They should not be allowed to run on beyond this period.

3.17 In paragraph 3.20, the consultation paper asks whether all market studies should be completed within the six months time limit or only those which have the potential to be referred under section 131. We believe that all Phase 1 market investigations should be concluded within the six month period. Any other approach would compromise the efficiency gains derived from introducing a rigid six month time period. In paragraph 3.6 above we have suggested setting up a separate statutory process for long term reports which we have called "market studies" outside the fixed time limits regime with greater discretion for the CMA as to time limits.

MIRs

3.18 MIRs can be complex and involve a considerable number of parties in the provision of substantial quantities of information. Although we are conscious that the CC is now setting itself a target of completing MIRs within an 18 month timeframe past experience has shown that they are often hard pressed to complete their investigations within the current statutory 24 month period. Companies involved in the investigation would also have an increased burden imposed upon them as the CMA struggles to complete its investigation with the 18 month time limit. A hurried inquiry with equally hurried remedies is not a recipe for creating a world class competition regime. In addition, given the potential severe remedies such as divestment which the CMA has at its disposal, we believe it is essential that due process at MIR stage is not compromised by the shortening of time scales and this is particularly true at the remedies stage. We believe that the CMA should be given adequate time to carry out its role effectively. Consequently we believe the current statutory period of 24 months is the most appropriate period and a reduction to 18 months should be resisted. However we do believe that it is important to get as close as possible to remedies finalisation within this two year period. The present position is unsatisfactory as there is no timetable at all for agreeing remedies and this process can drag on for months or even years

3.19 If, however, BIS did decide to reduce the period to 18 months, careful consideration needs to be given to the powers of the CMA to extend an MIR. We believe the CMA needs generous powers to do so for the reasons mentioned above. There should be the power to extend for two periods each of twelve weeks. However a second extension should only be used in exceptional circumstances. Such a power of extension should only be exercised on grounds that:

(a) the inquiry involves either a large number of parties and cannot be completed within the original timescale envisaged;

(b) the complexity of the issues involved require extra time; and

(c) the CMA and the parties need more time to consider appropriate remedies.

Information gathering powers at Phase 1 (paragraphs 3.21 to 3.21)

3.20 We support the introduction of information gathering powers for Phase 1 market investigations to be completed within the six-month time period subject to an appropriate threshold for the commencement of a Phase 1 market investigation. However we would be opposed to extending such powers to those studies or long-term reports referred to above as Market Studies where there is no realistic proposals that the CMA will use its competition based powers.

Interaction between MIRs and antitrust enforcement (paragraphs 3.27 to 3.28)

3.21 If the CMA is given information gathering powers for Phase 1 market investigations, how will it treat such information if it decides to commence an "antitrust" investigation (i.e. under the prohibitions in the Competition Act 1998 and/or Articles 101 and 102 TFEU) following the conclusion of a Phase I investigation?

3.22 The Committee considers that the commencement of an antitrust investigation should be the opening of a new separate regulatory procedure. Information gathered at Phase 1 market investigation stage should not be used or be admissible in antitrust investigations. Nor should it affect in any way the ability of companies to request leniency within the context of the antitrust investigation. The CMA should be required to request that information afresh from the parties involved in the inquiry or to negotiate with them and gain their express consent on how far the parties would be willing to allow the CMA to make use of data previously provided at market study stage.

Remedies (paragraph 3.31)

3.23 It is important that the CMA is given not only the required time but also the necessary remedial tools to carry out its job effectively and efficiently. We therefore support the Government's proposals to extend the scope of Schedule 8 to the Enterprise Act, so as to include extra information provision powers and the payment of a Monitoring Trustee or such other arbitral body. However in relation to this latter aspect the power to order parties to make payment should be used in limited circumstances and only where it is essential in default of agreement with the parties. However this is with the proviso that the Monitoring Trustee or such arbitral body should only be used to enforce remedies set out in Schedule 8 and should not have a wider role

3.24 Divestment is a controversial remedy and it will remain so in any proposed reform of the MIR system. We believe it is still appropriate for the CMA as the investigating body to retain the power to make divestment orders.

3.25 That said, forced divestment is generally economically disadvantageous for the vendor and can be ordered under the Enterprise Act when the vendor owns on an entirely legitimate basis and has committed no offence. From an ECHR perspective this has something in common with an

expropriatory remedy, since it deprives the vendor of the enjoyment of its property, and should be subject to the highest standards of protection.[1] Accordingly, in order to retain business confidence and add further safeguards into the new proposed CMA process we would advocate a change from the present appeal rights before the CAT based on judicial review principles to a full merits review of MIRs in all cases. However if the Government wishes to continue the existing judicial review procedure for MIRs we would ask the Government to give special consideration to providing a full merits review where the CMA orders divestment remedies. Forced divestment is generally economically disadvantageous for the vendor and can be ordered under the Enterprise Act when the vendor owns a business on an entirely legitimate basis and has committed no offence.

Cross-market references (paragraphs 3.8 to 3.9)

3.26 The consultation paper proposes that the CMA should have the power to investigate across markets. It has been put to us that there may be situations where common practices are present across different markets or industries and that it will be a benefit to be able to review these practices within the context of a single inquiry.

3.27 Although this is a superficially attractive proposition we believe it is inappropriate and impractical. First, it is inappropriate because we feel that any remedies need to be taken in the context of an investigation of the particular industry as a whole and the issues it faces. They should not be taken in isolation. There may well be different reasons for the same practice in different industries and it would be wrong to apply generalised conclusions. Secondly, taking the above example it would involve a huge number of parties which would render any investigation unduly complex and unwieldy. This is likely to be the case in most cross-market studies. We do not believe that regulators are well equipped to handle such large numbers of participants and such large quantities of data. The end result is likely to be a significant delay in outcomes for such enquiries which would be the exact opposite of the intended result.

Where, however, there is in fact a close relationship between markets with similar practices, then either a broad product or service description would enable them to be dealt with in a single reference or two (or more) references could be conducted in a coordinated manner under existing rules. We would not go further.

Public interest (paragraphs 3.10 to 3.13)

3.28 Under the Enterprise Act 2002, political considerations were taken out of competition policy and so the sole criterion for merger and market investigations, except in certain limited circumstances, was that decisions were to be taken on competition grounds. The only exceptions to this were certain public interest exceptions within the merger regime, and also the ability to intervene on public interest grounds (currently only national security grounds) under the market regime (sections 139 and 153). The latter power has, however, not been used to date.

3.29 It is now contemplated that the Secretary of State should be able to ask the CMA to consider and report on public interest issues, as well as competition issues, in the context of a market

[1] This is not the same in mergers cases, where the party which has completed a merger in advance of clearance, buys in the full knowledge that the business may have to be sold and chooses to take the risk.

investigation. Currently, the Secretary of State has the power under the Enterprise Act 2002 (section 153(3)) to add additional public interest considerations which can be taken into account when making MIRs. In addition the Secretary of State may, either before or after the making of the MIR, issue an intervention notice (section 139) to allow himself, after the Competition Commission's Phase 2 market investigation, to order remedies to any adverse effects on competition identified by the Competition Commission taking account of national security or other public interest considerations specified in the intervention notice (section 147), and to require the Competition Commission to make recommendations as to the remedies the Secretary of State might order in respect of the adverse effects in competition (section 141(3)). These public interest powers for MIRs are narrower than those applicable in merger investigations, and, as we understand it, the consultation paper contemplates widening those powers so that they are in line with those under the merger control regime.

3.30 The Committee does not, however, favour the Secretary of State being given the power to order the opening of an MIR in order that it can add non-competition issues to the scope of the CMA's mandate. We take the view that there are substantial risks in mandating the CMA to look at public interest issues even where they are closely allied to an MIR.

3.31 Issues of public interest in markets are for Ministers and Parliament and not for competition authorities. We think it is a slippery slope which could result in public interest issues dominating future MIRs which should be primarily competition-based. We would not want to see the tail wagging the dog.

3.32 In addition the CMA does not have the required expertise or experience to opine on public interest issues and would, as contemplated in paragraph 3.13 of the consultation paper, need to have the ability to co-opt appropriately qualified independent individuals to the market investigation panel. This would further increase costs and put pressure on scarce financial resources. We also believe it would compromise the focus of the CMA as a centre of competition excellence. It also appears incorrect to us that non-elected representatives will be required to sit on judgment mandated to spine/report on what are essentially public policy, indeed political, issues within the context of a competition law based system. This is so even if the panel members are only charged with making recommendations with the Minister taking the final decision.

3.33 Establishing wider public interest considerations within the context of an MIR would also be very restrictive for politicians, Ministers and Parliament. It should be up to politicians to design the investigating panel, appoint its members and agree the scope and terms of reference of the inquiry freely. It is wrong, we believe, to shoehorn this whole process into the context of an MIR.

3.34 If, nevertheless, the Government were to take forward these public interest proposals, we think that they need to be used in a limited way subject to four principal conditions:

(i) only those public interest issues which arise directly in relation to an MIR which is being referred on competition based grounds by the CMA should be considered. In this context we do not think it is appropriate for the Secretary of State to have the power to make a reference on his own initiative under section 132 of the Enterprise Act and then to issue an intervention notice setting out various public interest considerations. Although we appreciate that the Secretary of State would still have to satisfy the competition test, we think such a development would be highly dangerous and open to potential abuse. This would further exacerbate the concerns outlined in paragraphs 3.31 to 3.33 above;

(ii) the areas of public interest should also be narrowly defined. We would suggest that these should be limited to the areas such as media plurality and financial stability in addition to national security which is already been included in section 151 - this is similar to the current merger control regime;

(iii) extra resources, the appointment of properly qualified individuals and sufficient time needs to be given to the CMA to carry out these duties; and

(iv) the public interest panel should make recommendations to Ministers and be separate from the CMA MIR panel deliberations and decisions.

Super-complaints (paragraphs 3.14 to 3.16)

3.35 The Committee is not persuaded that SME representative bodies should be given the ability to make super complaints.

3.36 Giving privileged status to SMEs sends out the wrong message in terms of competition policy. Competition policy should be about the protection and promotion of consumer welfare and are not about promoting the interests of SMEs, even those which are at an intermediate stage in the distribution chain. First, SMEs are able, like any other company, to file a complaint with the CMA in relation to competition based issues. Secondly, there is a danger that SME representative bodies could misuse this procedure to attack efficient practices of large companies. This would be a perverse result from the policy which is ostensibly designed to promote competition. It could also damage consumer welfare. In addition the use of the super-complaint powers by SMEs could result in an extensive cost burden for the CMA and divert scarce resources away from dealing with its main functions to dealing with investigating and answering super complaint requests from SMEs.

3.37 We believe that super-complaint powers are an appropriate tool in certain circumstances, notably when consumer interests need to be protected. However, the Committee does not believe that it is right or appropriate to give special rights of protection to SMEs as a class. If BIS is anxious to ensure SMEs as a business grouping are adequately heard and represented within the CMA, we would advocate the establishment of an SME desk within the CMA specifically to focus on SMEs' issues and concerns.

Q4: Further ideas

Greater focus

3.38 We would encourage better focusing and targeting of references on key markets by competition authorities. This will produce more meaningful outcomes and have a greater effect on promoting the efficient working of markets than solely increasing the numbers of MIRs. Another more structured approach could be to impose a duty the CMA to keep certain identified key markets under review.

A *de minimis* exception for small markets?

3.39 The Committee has also considered whether the provision of a *de minimis* exception for small markets might assist in focusing the CMA upon markets that are important to the national economy. However we feel that there is a danger that important issues to consumers in localised or regional markets could escape scrutiny if they feel under any statutory de minimis threshold. Therefore on balance we think it is best that the CMA retains its present wide discretion whether to pursue a particular case

Timescales

3.40 Much has been made in the draft proposals for reform of the need to streamline the market investigations regime by reducing timescales to produce faster decisions. The Committee generally supports greater efficiency in the system, but we believe that care needs to be taken not to compromise due process. Although we can see the advantages of introducing a short statutory time period for Phase 1 market investigations, we do not believe that the timetable for MIRs should be shortened. It is particularly important that the business community maintains full confidence in the transparency and fairness of the MIR process. An essential part of this is having adequate time to put their case to the authority. Accordingly compressing timescales is likely to compromise the investigation parties' rights of "defence". This is particularly so during the remedies stage where among other things the CMA could be contemplating divestment which would have serious financial and other implications for the businesses concerned.

4 Section 4 - "A Stronger Merger Regime"

General comments

4.1 In the Committee's view, the current UK merger regime works well on the whole – it is sophisticated, nuanced and flexible, and is rightly regarded as one of the best in the world. We do agree that there is room for improvement but consider that this should be incremental and should build on the current regime rather than fundamentally changing it. Although the current regime's voluntary nature is unusual[2], this does not mean that it is, therefore, by definition, the wrong system to have and we would caution against change for change's sake.

4.2 As foreshadowed in the Overview, we have serious concerns about the proposals for a mandatory merger regime (whether full or hybrid, and whether suspensory or non-suspensory), and we consider them hard to reconcile with the Government's growth agenda.

4.3 A full mandatory notification regime would, in our view, impose unnecessary regulatory burdens and costs both on business[3] and on the authorities (the CMA) in requiring the notification *even of mergers that raise no competition concerns*. The proposed jurisdictional threshold for the full mandatory regime is too low and its introduction at that level would, in our view, damage the UK's reputation as a world class competition regime. If a full mandatory system were to be introduced, the jurisdictional threshold would need to be set at a sensible level which would entail acceptance that the regime would not catch every acquisition that might be of concern.

4.4 A hybrid mandatory notification system would simply be too complex and, itself, an unnecessary added regulatory burden and cost. In addition, it would address neither the concern about unscrambling completed anti-competitive mergers referred to below nor the fact that a significant proportion of the problematic completed mergers arise from the application of the share of supply test, as opposed to the turnover test[4].

4.5 Our view is that the most proportionate way of addressing the principal concern which seems to be driving the merger reform proposals - namely, the difficulties encountered by the competition authorities in unscrambling completed anti-competitive mergers - is to strengthen the current voluntary regime through the practical and creative proposals set out in paragraphs 4.12 to 4.16 of the consultation paper, rather than engaging in wholesale reform of the regime[5]. We also consider that these difficulties are likely to be easier to address, in any event, within a single competition authority which would have the benefit of the combined expertise and experience of the OFT and the Competition Commission in dealing with hold separate arrangements.

4.6 The other supposed drawback of the current voluntary regime identified in the consultation document - namely missing anti-competitive mergers - is, in our view unproven and highly unlikely.

- Importantly, the voluntary regime does not give *carte blanche* to anti-competitive mergers. Even under the voluntary system, the penalties for completing an anti-competitive merger without prior notification and clearance are immense: the risk, post-

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2 In that it is one of very few OECD countries that operate on this basis (paragraph 79 of the Impact Assessment).

3 Estimated in Table 23 of the Impact Assessment at £78 million.

4 See footnote **[31]**.

5 We note that paragraph 103 of the Impact Assessment comments that the unscrambling problem has only affected a handful of the many SLC cases the OFT has handled.

completion, of a costly investigation lasting many months followed by the risk of the acquirer having to sell the acquired business, and having to do so at a "fire-sale" price (this entails both very significant financial loss as well as reputational damage). The voluntary system offers "relief" only to those mergers that are innocuous in competition terms.

- Indeed, although the Deloitte report suggests that, *back in 2007*, 50 per cent of potentially problematic mergers were going undetected (which is not, in any event, consistent with the Committee's experience), the consultation paper acknowledges that this does not seem to represent a serious failing in the current regime. The improvements in the OFT's merger intelligence function will presumably have helped significantly in this regard.

4.7 Further proposed areas for improvement include increasing the speed of decision making and streamlining the end-to-end merger review process. We support these aims in principle - they should also help to address the difficulties inherent in unscrambling completed mergers by reducing the length of time for which a target's future remains uncertain. However, care will need to be taken that the current high quality of analysis and decision making at Phase 1 is not compromised by compression of the Phase 1 timetable and that the process is not, in fact, lengthened by protracted pre-notification discussions of the type experienced at EU level.

4.8 A further consideration, flowing out of an amalgamation between the OFT and the Competition Commission into a unitary CMA, is whether it makes sense any longer to retain the "duty" of the OFT to refer mergers to the CC (in section 22(1) of the Enterprise Act 2002). On balance, the Committee favours retention of a "duty" (within the CMA) to commence a Phase 2 investigation - not least because a new test would render irrelevant the existing case law and practice, and create new uncertainty for business - but this depends on there being the flexibility in practice that, if a merger is referred by the CMA to Phase 2, there is the possibility in reality of early termination of the Phase 2 investigation[6]. Otherwise, there is a risk that the duty to refer will entail businesses having to go through a full Phase 2 investigation when the burden of this is disproportionate to the size or value of the merger - which would be a particularly burdensome outcome for SMEs.

Q5 and Q6: Options to address the "disadvantages" of the voluntary regime

Voluntary or mandatory notification

4.9 Our overall view is that the current voluntary notification regime should be retained. As mentioned above, it is a sophisticated, flexible and well established system which minimises the burden that it imposes on businesses while effectively capturing, in our view, all or almost all potentially anti-competitive mergers. Its flexible nature has enabled the regime to evolve over time to deal with new and unexpected scenarios[7] and has given the competition authorities the ability to focus in on the real mischief rather than being preoccupied with non-problematic cases[8].

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6 Either because the merger does not raise real issues, or because the parties can agree remedies at an early stage of the Phase 2, or because the merger is abandoned at an early stage.

7 For example ITV/BSkyB.

8 By contrast, under a mandatory system, in order to arrive at a sensible jurisdictional threshold, it would, in our view, have to be accepted that there would be some problematic cases that the CMA would not be able to review.

4.10 A voluntary regime is likely, by its nature, to result in parties notifying transactions only where there is some possibility of an adverse effect on competition (together with a small number of transactions where the buyer is particularly risk averse and/or has a policy of notifying all mergers irrespective of the degree of competition risk). Added to these proactive notifications will be those cases that the authority chooses to investigate, either on its own initiative or as a result of a third party complaint, both categories of which will often tend to be transactions where there is, at least potentially, a substantive competition issue.

4.11 If, however, there were to be a mandatory regime, the authorities would need to investigate not only mergers that may raise substantive competition issues, but also those where the risk of a substantial lessening of competition is non-existent or minimal. This is an inefficient and wasteful use of both the competition authority's and the parties' resources, and costs are likely to be incurred for deals that plainly do not warrant it. The waste of national resource (both private-sector and public-sector) and the (by definition) *unnecessary* burden on business would hardly make for a "competition regime for growth" (the Government's stated intention in these reforms).

4.12 It seems to us, then, that a mandatory regime - whether full or hybrid, suspensory or non-suspensory - has disadvantages (some of which are recognised in the consultation document) which vastly outweigh any possible benefits, and would be wholly disproportionate in its burdens and, as a consequence, inimical to the Government's growth objectives.

4.13 In our view, a mandatory notification system would:

(i) place a significant[9] - and unnecessary[10] - regulatory burden on businesses engaged in non-problematic mergers.

Even if a short form notification were to be introduced, if the EUMR process is any guide, parties to transactions that raised no material competition concerns would still be required to submit considerable information and argumentation by way of merger notification (and, indeed, in order to convince the CMA that short form notification was appropriate). The CMA would then have to consider and process these notifications - with pressure to do so within tight timescales in order to avoid unnecessary delay to completion of the transaction.

(ii) perversely result in the added burden being borne by parties to *innocuous* mergers; parties to mergers that raised material issues would be likely in any case (in voluntary regimes) to notify, rather than take the risks of completing without clearance. The same point can be made about the use of regulatory resources: the additional work is likely to involve mainly administrative processing of straightforward notifications rather than substantive analysis of transactions that are likely to raise significant competition concerns. This is the very opposite of an efficient use of scarce regulatory resources.

(iii) be at odds with the overall recent ***trend*** in competition process. In merger control, the UK is one of the most advanced countries in allowing self-assessment by the parties, with serious consequences for them if they get it wrong, rather than a formalistic system of notification of all transactions, whether or not materially anti-competitive. In the context of

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[9] In terms of cost (for both merging parties), management time and distraction of management attention (for both merging parties), and delay.

[10] Because there is no need to impose an obligation of notifying competition authorities of mergers with trivial or nil competition implications.

"antitrust", the recent trend - embodied in the "modernisation" of the competition prohibitions under Regulation 1/2003 at EU level and the 2004 reforms of the UK Competition Act - has been to abolish notification obligations, to require businesses to "self-assess" for competition risk, and thereby to free the competition authorities from having to waste resources on reviewing cases raising no serious competition concerns and to focus only on the most seriously anti-competitive cases. For the UK to move its merger regime in the opposite direction - from focussing only on anti-competitive transactions with the parties self-assessing risk, to having to review all mergers - would be a retrograde step, contrary to the spirit of "modernisation" in competition policy.

(iv) deprive negotiating parties in transactions of the flexibility to determine, according to their own judgement of the particular commercial circumstances they face, whether antitrust risk in a merger should be borne by the seller or the buyer[11]. It would *automatically* - and for no good reason - place the risk on the seller.

(v) distort, and unnecessarily restrict, competitive bid processes for companies that are put up for sale (whether by businesses or governments) by preventing bidders that did face some antitrust risk from being allowed to assume the risk and participate in the tender process on a "level playing field".

(vi) make it harder to rescue companies in financial difficulties from insolvency (where a rescue often needs to be completed in days rather than weeks) - so making it harder to save jobs, particularly in small and medium-sized businesses[12]; we recognise that this could be partially mitigated by the proposed derogation from suspension in a mandatory regime, although the experience of such a derogation system under the EU Merger Regulation (slow to obtain, and often refused) is not encouraging.

(vii) necessitate a change in jurisdictional criteria: (a) the removal of the material influence criterion (because it is too vague so that it would be uncertain whether parties had fallen foul of the mandatory regime - and if material influence were subject to a voluntary regime in a hybrid system that would add needless complexity and, hence, regulatory burden); and (b) probably also the removal of the share of supply threshold (for similar reasons). This would mean that - perversely - potentially anti-competitive mergers would escape scrutiny, while innocuous mergers were subject to mandatory notification.

The fact that a merger creating a 45 per cent share of supply might not meet the turnover threshold, because it is in a small market, does not mean that it should escape scrutiny

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11 In a mandatory regime, the risk of entering into a transaction that is ultimately prohibited lies largely with the sellers – following an adverse finding, the buyer can simply walk away, while the sellers are left in the (potentially embarrassing) position of having acknowledged that sale of the business is an attractive strategic option - and suffered the attrition of staff, business and morale that occurs once this becomes public - but having failed to achieve that sale. Under a voluntary regime, this position can be replicated if the buyer can negotiate with the sellers to make completion conditional on UK merger clearance, but the sellers will often seek to resist such conditionality unless the buyer's offer is so commercially attractive as to outweigh the risk of future competition intervention. The voluntary regime therefore gives more flexibility to sellers, as conditionality can be a negotiating point in a transaction.

12 This is because, in recent years, increasing numbers of near-insolvent companies have been saved by "pre-pack administrations"; the process by which a buyer is found for a company in financial difficulty, and the sale is ready by the time it goes into administration, so that it can go out of administration with the sale completed within 24 hours. If the sale could not be completed until competition clearance were obtained, i.e. after a minimum of four weeks at very best, that would in most cases be fatal to the prospects of such a rescue. Indeed, the very act of having to notify, and so make public that the company was up for sale, would be highly prejudicial - deterring companies from embarking on this process. Such rescues would therefore be much less available if compulsory pre-notification were introduced. (Of course compulsory pre-notification exists under the EU Merger Regulation, but pre-pack administrations are typically used to rescue SMEs which would not normally meet the EU Merger Regulation thresholds.)

(subject of course to a basic *de minimis*/materiality test). Consumers in small markets have rights too - including the right to be protected from anti-competitive mergers.

Supposed drawbacks in the voluntary system

4.14 The Government has identified two principal drawbacks to the current voluntary system, as follows.

(i) The risk that some anti-competitive mergers are escaping review (paragraph 4.3)

4.15 We would be surprised if, in reality, many anti-competitive mergers escape scrutiny by the competition authorities, and, indeed, the Government acknowledges that the lack of complaints and the smaller size of the mergers in question indicate that this is not a serious failing. It seems to us that the risk that a potentially anti-competitive merger will be missed entirely by the OFT is a relatively limited one given its monitoring activities and the vested interests of third parties in complaining, as well as the possibility of investigating a merger more than four months after completion (and then potentially ordering disposal of the acquired business) if it has been given insufficient publicity[13].

(ii) The voluntary system leads to the investigation of a large proportion of completed cases, which makes it difficult to apply appropriate remedies if they are found to be anti-competitive (paragraph 4.3)

4.16 There are a number of points to make to address this concern.

4.17 First, in the Committee's view, some of the problems identified would arise *regardless* of whether there is a voluntary or a mandatory system. For example, we understand that the Competition Commission has identified the departure of key senior personnel as a particular problem when trying to ensure that a target can be divested as a viable independent competitive entity following a prohibition decision. We think that this is more a function of a company being "in play" for a number of months (while the merger is under review by the OFT and the Competition Commission) in which circumstances it is unsurprising that key personnel should want to leave and look for alternative, possibly more secure, employment. In our view, the introduction of a mandatory regime is not the solution to this particular problem - it seems to us that given that the target's future will still be in doubt over a long period (its having been announced that the company's owners wish to sell it), key personnel are at least as likely to leave as under a voluntary system; the only difference between the two being that, in a mandatory (and suspensory) regime, the merger would not yet be completed and the target would remain in the hands of the sellers until clearance, albeit that it would be known that the sellers no longer wished to retain it with key personnel still facing the same uncertainty.

4.18 Second, the powers which the competition authorities already have to prevent prejudicial business integration[14] seem to us generally to work, although the scope and terms of the undertakings requested could benefit from more focus and further refinement. We also accept

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[13] Section 24 (2) Enterprise Act. An anti-competitive merger cannot escape scrutiny simply by being "hidden from view"; as soon as it becomes known, the OFT has four months to decide to refer it to the Competition Commission. That is plenty of time for the OFT to become aware of it and/or for anyone who is concerned about its effects (customers, suppliers, competitors) to draw the OFT's attention to it.

[14] Through hold separate measures and the statutory restrictions which apply following a reference.

that difficulties can arise where completed mergers do not come to the OFT's attention in good time[15] or where hold separate undertakings are imposed relatively early but integration has already progressed[16] which reduces the efficacy of the undertakings; although again in our experience these problems have not been significant in practice. In fact, if anything, the OFT appears to be using hold separate arrangements increasingly early and in a wide range of cases, including where there is little risk of potential harm arising from irreparable integration.

4.19 Third, while we do appreciate and understand the concerns which have been expressed (by the Competition Commission and others) about the difficulties of unscrambling completed mergers where practical integration is already well advanced[17], the solutions to this need to be proportionate and targeted.

- The concern about completed mergers, while real, should be kept in perspective. As the table at the end of this Section demonstrates[18], in the nearly five years since January 2007, there have only been 15 completed mergers referred to the Competition Commission, and ***only five of these completed mergers (i.e. just one a year) have been found to result in a substantial lessening of competition***.

- Likewise, the possibility of this problem being "solved" by mandatory merger notification should not be exaggerated, either. ***12 of the 15 completed mergers (i.e. 80 per cent) referred to the CC since January 2007 were referred only because they satisfied the share of supply test; a mandatory notification system, which could not possibly include a "share of supply" test would have been useless to "solve" the problem for that 80 per cent***.

- The solution should, instead, be focused, proportionate and effective. We therefore very much welcome the consultation paper's creative suggestions[19] for addressing the "unscrambling" concerns without going to the lengths of mandatory notification, discussed in paragraphs 4.25 to 4.43 below. By contrast, addressing this issue by requiring all mergers (whether or not anti-competitive) to be prenotified, reviewed by the competition authorities and suspended pending clearance would be a wholly disproportionate and unnecessary regulatory burden (on businesses and authorities alike) - a sledgehammer to crack a nut.

The Kraft/Cadbury issue

4.20 We are aware of the concerns, following the *Kraft/Cadbury* takeover early last year, about some of the dangers of takeovers being too easy. It has been suggested that mandatory notification might be a way of inhibiting undesirable or unwelcome takeovers. It is not the Committee's intention to enter into the debate about the merits of UK takeover policy other than to observe that

(i) Such considerations are a matter of takeover law and policy (the Companies Act, the Takeover Code, etc) rather than competition law and policy, and we doubt that it is a

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15 Although the evidence suggests that this is rare.

16 For example, through staff dismissals or branch closures.

17 Although, as noted previously, this does not necessarily accord with the experience of most members of the CLLS Competition Law Committee. We also note the comment at paragraph 103 of the Impact Assessment that "the unscrambling problem has only affected a handful of the many SLC cases the OFT has investigated".

18 See also footnote 22 below.

19 Paragraphs 4.12 to 4.16 of the consultation paper.

legitimate function of competition law and policy to reduce takeover activity.

(ii) A move to mandatory notification would have the perverse effect that it would be the more innocuous (in competition terms) takeovers that were harmed. Anti-competitive mergers are generally notified in any case under the UK voluntary system, because the risks of not notifying are too great (as discussed above), whereas the change to a mandatory system would have the greatest impact on mergers raising no serious competition concerns, which are often those between smaller players in a market.

(iii) A UK mandatory notification system would not make much difference to the likelihood of another *Kraft/Cadbury* takeover. In this context, it is striking that:

- *Kraft/Cadbury* itself was subject to EU jurisdiction, so that the UK competition regime was irrelevant
- *Kraft/Cadbury* was subject to a mandatory notification regime (the EUMR) - and still went ahead!

Hybrid mandatory notification (paragraphs 4.28 and 4.29)

4.21 Under the "hybrid" proposal, mergers where the value of the UK target turnover exceeded £70 million[20] would be required to be notified. In addition, the CMA would have jurisdiction over mergers where the turnover test was not met but either (i) the share of supply test was or (ii) where the small merger exemption did not apply. (4.28/4.29)

4.22 We consider the hybrid mandatory notification proposal to be almost the worst of all worlds. It would impose a notification burden on non-problematic mergers where the turnover test was met and still leave the difficulties of unscrambling completed mergers to be addressed in relation to those mergers which met the share of supply test[21] which is where a significant proportion of the difficulties under the current regime seem to have arisen[22].

The Singapore model (paragraphs 4.10 to 4.11)

4.23 We welcome the Government's indication, in paragraph 4.11 of the consultation paper, that it is not minded to pursue a similar route to that which is operated in Singapore, Australia and New Zealand.

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20 We note that paragraph 120 of the Impact Assessment assesses the impact of a turnover threshold of £40m as well.

21 Or did not fall within the small merger exemption.

22 As is shown by the table at the end of this Section, out of the 15 completed mergers referred to the Competition Commission under competition powers in the nearly five years since January 2007, only three have satisfied the turnover test - the other 12 (80 per cent) were referred only because they satisfied the share of supply test. It should also be noted that all but the most recent of these (*Sector Treasury Services/Butlers*) had been subject to "hold-separate" undertakings. Moreover, as the table also makes clear, of these 15, only five (in almost five years) were then found to give rise to an SLC - whereas eight were found to have no SLC and one provisionally found to have no SLC (with provisional findings for the *Sector Treasury Services/Butler* case expected to be announced in early July). These figures do not suggest a major crisis of completed anti-competitive mergers that would warrant the draconian legislative change of mandatory merger notification.

4.24 We think that it would be entirely inappropriate to impose penalties for anti-competitive mergers. The whole European competition framework - both at EU level, and in the individual Member States (including the UK) - recognises a fundamental conceptual distinction between, on the one hand, anti-competitive agreements and abuses of dominance, which are prohibited, illegal and subject to penalties - and, on the other, mergers, which are not illegal but, rather, subject to scrutiny ("merger *control*"). Implicit in this is that merger activity, which is perfectly lawful, can be stopped if it is likely to have anti-competitive effects, but not penalised. The "Singapore model" would fatally blur that distinction, and be incompatible with the conceptual structure of UK and European competition law and policy (and indeed that in the United States).

Strengthened interim measures (paragraphs 4.12 to 4.15)

Suggested options

4.25 The two potential options which are being considered by the Government[23] are as follows:

- **Option 1** – introducing a statutory restriction on further integration which would apply automatically, as soon as the CMA starts an inquiry into a completed merger, pending negotiation of initial undertakings. This would be akin to a strengthened form of the restrictions contained in section 77 of the Enterprise Act 2002 which apply automatically under the current regime once a reference has been made to the Competition Commission; and

- **Option 2** – giving the CMA the ability to trigger these powers[24] in its Phase 1 investigation to suspend all integration steps pending negotiation of tailored hold separate undertakings.

4.26 **The Committee's view is essentially to favour Option 2 - but with the CMA having discretion to exercise these powers in Phase 1 (not automatically when the CMA sends the parties a request for information), with published guidelines to give predictability to both parties and the CMA as to how the discretion will be exercised.**

Option 1 / Option 2

4.27 The principal difference between Options 1 and 2 is that, under Option 1, the prohibition on further integration would apply "across the board" in respect of all completed mergers that are investigated by the CMA (whether problematic or not) whereas, under Option 2, the CMA would be in a position to adopt a more targeted approach to such prohibition. It also seems that it is only in relation to Option 2 that the Government is considering clarifying the legislation to "make clear the type and range of measures that the CMA could take, including at Phase 1, in order to prevent pre-emptive action" (paragraph 4.15 of the consultation paper).

4.28 The advantages of Option 1, which have been identified in the consultation document, are that it would prevent the harm caused while initial undertakings are negotiated and may mean that the ability to obtain effective remedies is enhanced (paragraph 4.14). While we recognise these

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[23] Paragraph 4.13 of the consultation paper.

[24] We assume that the reference to "these powers" is a reference to a similar form of restriction to that contemplated under Option 1 but would welcome clarification of this and also of the interaction between "these powers" and the powers contemplated in paragraph 4.15. See further our comments on paragraph 4.15.

potential advantages, it seems to us that Option 2 offers similar advantages (depending on the timing of triggering of the powers by the CMA) but is more consistent with the nuanced, flexible and sophisticated merger control regime we currently have in the UK.

4.29 We consider Option 2 (which is discretionary, proportionate and targeted) to be more in keeping with a voluntary regime and prefer it to Option 1.

- We recognise that such a discretionary approach potentially carries some risks of uncertainty, both for the parties and for the CMA - and that the CMA has the additional concern that, if the decision to impose the statutory restriction is a discretionary one, it will be open to judicial review challenge. We believe that this concern can be very substantially mitigated (and in practice removed) by the publication of guidelines as to the criteria by which the discretion would be exercised.

- In the absence of such discretion, there is a potential for absurd outcomes. For example, a merger which is technically within UK jurisdiction (e.g. because of the turnover test) but which manifestly raises no competition concerns whatever (and was therefore not notified) should not always be held up - particularly when it is a merger between multinational companies, such that the UK holding up integration would have severe international effects on the businesses (truly, the tail wagging the dog).

4.30 In our view, a blanket restriction of the kind contemplated in Option 1, which applies from the very outset of the CMA's Phase 1 investigation and applies to all completed mergers, whether or not they are problematic, would be rather a blunt instrument. It would also be very damaging for the prospects of rescuing failing businesses where immediate measures are needed. By contrast, Option 2 could prove to be a more sophisticated and apposite tool as the CMA could presumably be selective about the cases in which it applied these powers and, as seems to be current OFT practice, not apply them in those cases where there was clearly no competitive overlap.[25]

4.31 Both options would, in our view, be likely to lead to more notifications of potentially problematic mergers as the inability[26]/potential inability[27] to integrate the merging businesses post completion would be a more significant factor and could lead more buyers to seek certainty before completion. However, we think that Option 1 would be more likely than Option 2 to lead to an increase in the number of non-problematic mergers being notified to the CMA as buyers would be less likely to be prepared to take the risk of completing without clearance if they were unable, in any event, to integrate pending a Phase 1 decision. By contrast, the more targeted approach of Option 2 would give buyers of businesses where there was no/limited overlap with their existing activities more latitude in deciding to proceed unconditionally and would be particularly helpful where insolvency makes this an urgent matter. This, again, would be more consistent with a voluntary regime.

4.32 Under either option, the initial restriction would, of necessity, have to be as broad as the restriction in section 77 in order to capture the widest range of pre-emptive conduct and would, as a consequence, be quite difficult to interpret in practice and would lack certainty. It would,

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[25] By way of clarification, we are not suggesting that the current thresholds for seeking initial hold separate undertakings or imposing hold separate orders be retained but we would hope that the CMA would be in a position to adopt a more targeted approach given its considerable experience in identifying potentially problematic mergers at an early stage.

[26] In the case of Option 1.

[27] In the case of Option 2.

therefore, in our view, be in the interests of all stakeholders for the restriction (under either option) to apply for as short a time as possible. This issue would be exacerbated, in the case of Option 1, by the restriction's blanket application to all mergers pending the negotiation of individual hold separate undertakings. In this context, the CMA ought to be empowered to release purchasers from its application altogether in non-problematic cases (rather than replacing the statutory restriction with individual undertakings).

4.33 In any event, the scope of the restriction should be delineated to ensure that, in public takeover offers which had closed, the restriction or integration did not prevent the acquirer "mopping up" remaining minority shareholdings.

4.34 We note that the drawback which has been highlighted in paragraph 4.14 of the consultation paper – namely that Option 1 might discourage parties from notifying completed transactions until they had already achieved a level of integration - could be overcome by giving the CMA an ability to require reversal of action that had already taken place as proposed under Option 2. Our thoughts on this "reversal" proposal more generally are set out in the following paragraphs.

Type and range of measures which could be taken under Option 2 - reversal measures

4.35 Under Option 2, the Government is considering clarifying the legislation to make clearer the type and range of measures that the CMA could take (including at Phase 1) in order to prevent pre-emptive action. These would include an ability to require reversal of action that had already taken place and to prevent further pre-emptive action notwithstanding the existence of any contractual obligations on the part of the merged entity (the "reversal measures").

4.36 We welcome this proposed clarification and support a strengthening of the powers available to the CMA to tackle pre-emptive action. However, the legislation (or, at least, guidance by the CMA) should make clear, and closely circumscribe, the circumstances in which it is contemplated that such measures could be taken. We think that it is important to ensure that their use is appropriate and proportionate. This is particularly the case in relation to the reversal measures and especially so as regards their use in Phase 1.

4.37 The Committee has doubts about the appropriateness of the reversal measures being exercisable in Phase 1, before the CMA has even reached a view on whether the reference test is met. In any event, whether or not they were exercisable in Phase 1, we would expect the reversal measures to be used sparingly[28] by the CMA[29], and we would expect the CMA to publish guidelines on its approach to the use of all of the powers that it is to have to prevent pre-emptive action.

4.38 As mentioned above, there should be clarification of the interaction between the reversal powers (referred to in paragraph 4.15 of the consultation paper) and the statutory restriction powers (referred to in paragraph 4.13) in relation to Option 2 - which we are assuming to be a form of the statutory restriction contemplated under Option 1. In particular, it should be clarified whether the reversal powers are to be exercisable only in those cases where the CMA does not trigger the Option 2 powers in a particular case or more widely.

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[28] The ability to override contractual obligations, in particular, could create unfairness for third parties who were unaware of the risk.

[29] Particularly in Phase 1, if it was decided that the measures should be exercisable then.

Negotiation and monitoring of undertakings

4.39 Whichever option is pursued, the CMA will need an experienced (and preferably dedicated) team to negotiate, monitor and deal with follow up queries/requests relating to both the individual hold separate undertakings and derogations from the statutory restriction/interim CMA restriction in a flexible, speedy and pragmatic way (which current experience suggests might be a possible concern). However, the creation of a CMA combining the experience and personnel of the OFT (which is already making increasing use of hold separate undertakings), and of the Competition Commission, could potentially help in this area.

4.40 In this context, we are assuming that there are no plans to give the CMA the ability to require third party "monitors" of hold separate undertakings at Phase 1 or extending the proposed ability to require the parties to pay for third party monitoring of remedies (paragraph 3.31 of the consultation paper) to the monitoring of hold separates. We would not support any such plans.

Timing

4.41 Another issue for consideration, in relation to both options, is timing. Paragraph 4.13 contemplates the statutory restriction applying as soon as the CMA commences an inquiry into a completed merger. The Committee's view is that Option 2 - giving the CMA the ability to trigger the powers in Phase 1 - must be a matter of discretion for the CMA. It should not apply necessarily or automatically on the commencement of a Phase 1 inquiry into a completed merger, or on the sending of an information request to the parties, but at a point (which may well be very early on) where the CMA considers it appropriate.

4.42 Separately, there is the question of when the restriction should *cease* to apply. In the Committee's view, the restriction should not necessarily, or always, continue to apply until the clearance decision. Again, the CMA should be given discretion over this. For example, in the case of a multinational merger which raised no competition issues in the UK, but which did raise some competition issues in other countries but had subsequently been cleared in those countries, we see no reason for the UK restriction to remain in place following clearance in other jurisdictions.

Penalties

4.43 The Committee does not object, in principle, to the proposal to introduce financial penalties for breach of hold separate obligations. However, we have concerns about the practicality of this proposal and would observe that it would need to be made very clear to the merging parties exactly what was and was not permitted (which, in our view, would be a particular challenge in relation to the section 77 style restriction). In addition, there would need to be a speedy, flexible and pragmatic procedure in place for checking grey areas/obtaining consents/derogations which would impose an additional burden on the CMA. We would also suggest that the CAT be given unlimited jurisdiction to review the imposition and level of any penalty levied in such cases.

Jurisdictional thresholds in a voluntary notification regime (paragraphs 4.38 to 4.39)

4.44 The Government is seeking views on whether there should be changes to the jurisdictional thresholds in the UK's voluntary merger regime.

4.45 One possible suggested approach is the replacement of the current tests with the ability for the CMA to have jurisdiction over all mergers except those which benefit from the proposed small merger exemption[30].

4.46 The Committee sees no reason to depart from the current thresholds; why should mergers which *neither* result in a 25 per cent share of supply, *nor* include taking over a business with turnover above £70 million, be newly subject to merger control? Moreover - in the absence of evidence that such a change would catch mergers which ought to be caught but currently escape scrutiny - this measure would simply be an unjustified and unnecessary extension of regulatory burdens, inconsistent with the Government's "growth" agenda.

Jurisdictional thresholds in a mandatory notification regime (paragraphs 4.23 to 4.33)

4.47 If the Government decided to introduce a mandatory notification regime, it would be critical to ensure that the jurisdictional thresholds were set at reasonable levels, balancing the benefits of *ex ante* review against the large costs to both business and the public purse. As noted in paragraph 4.23 of the consultation paper, any threshold would need to be clear and objective - which entails that, as acknowledged in paragraph 4.25, retention of the share of supply test would not be appropriate in a mandatory regime.

4.48 The jurisdictional threshold proposed by the Government for full mandatory notification ("Option 1", in paragraph 4.27 of the consultation paper) - i.e. notification wherever target UK turnover exceeds £5 million and acquirer worldwide turnover exceeds £10 million - has been universally recognised as unreasonable, unworkable and oppressively burdensome (both for business and for the competition authority). In practice, it would mean that vast numbers of mergers, which were not only innocuous in competition terms but also relatively insignificant even in financial terms, would be subject to the burden of mandatory notification and suspension pending clearance.

4.49 Indeed, it is hard to see how a mandatory notification system could work without thresholds being very high - much higher, indeed, than under the current voluntary system (otherwise, the CMA will be inundated with a huge increase in notifications, and UK business correspondingly subject to increased burden). Although views within the Committee differed, no one thought that it would be reasonable to subject a merger with less than £70 million UK turnover and less than £100 million global turnover, to mandatory notification.

4.50 This issue brings to the fore the problem with a mandatory system (already referred to above). The plain truth is that the consequence of a mandatory system is that jurisdictional thresholds must be raised substantially.

- Otherwise, the competition authority becomes inundated with notifications, and, given finite resources, its analysis necessarily becomes more superficial than at present - weakening the rigour of the scrutiny, and allowing possible anti-competitive effects to go undetected.

- But a mandatory system with raised thresholds also creates problems. As mentioned above, neither the concept of "material influence" nor the "share of supply" test could

[30] Paragraphs 4.40 to 4.42.

realistically survive in a mandatory notification system; they are just too uncertain in scope for it to be just or reasonable that a party within their terms be subject to sanctions for non-notification. However, both tests (unlike a turnover threshold) relate to potential anti-competitive effects - and abolishing the tests would mean a number of transactions with anti-competitive effects escaping scrutiny altogether.

4.51 In short, the consequence of the mandatory notification system would be that, however, thresholds are set, more innocuous mergers become notifiable, while potentially anti-competitive mergers escape detection. It is an entirely inappropriate outcome.

4.52 Finally, on thresholds, there is the proposal for a hybrid mandatory notification system. For the reasons explained in paragraphs 4.21 and 4.22 above, we consider this to be possibly the worst of all worlds.

Costs and benefits of the options

4.53 In the Impact Assessment (page 39), the Government asks whether respondents have any evidence about the costs to businesses of notifying mergers to the OFT, in terms of management time and legal fees. A number of the firms represented on the City of London Law Society Competition Law Committee have each given separate individual responses to this question to BIS.

Small merger exemption in both mandatory (hybrid) and voluntary regimes

4.54 We welcome the acknowledgement that some mergers are likely to be too small to warrant the time and cost of a review by the OFT and the notion that such mergers should fall outside the scope of the mergers regime altogether (unlike the current *de minimis* exception which involves all concerned in considerable time and expense in going through a Phase 1 review).

4.55 Indeed, we think that the *de minimis* exception should be extended to cover not just small markets, but small enterprises in large markets.

4.56 Nevertheless, we think that, if the voluntary system is retained, it would be possible and right that there should not be a blanket exemption for such mergers, but rather a strong presumption that such mergers would not be investigated in the absence of very strong evidence of anti-competitive effects. This is because the test that the Government suggests be applied does not have regard to the size of the market in which the companies in question operate, and such mergers could have seriously anti-competitive effects in small local markets; as noted in paragraph 4.13 above, consumers in small markets have the right to be protected from anti-competitive mergers. However in a mandatory system it is essential to have bright line rules wherever possible so that parties know where they stand.

Q7: Streamlining the merger regime

Statutory timescales (paragraphs 4.43 to 4.47)

4.57 The Government is considering whether to introduce statutory timescales for Phase 1 and the undertakings in lieu and remedies implementations stages of both Phase 1 and Phase 2 (4.43) in order to achieve quicker results and outcomes, give business certainty as to when decisions will be made and incentivise a speedier end to end merger process. No change is proposed to the statutory 24 week time limit for Phase 2[31].

4.58 We support the aim of speeding up the end-to-end merger process provided that this does not compromise the current quality and robustness of decision making.

Phase 1

4.59 In principle, we agree with the introduction of a statutory timetable for Phase 1, although we query whether this would necessarily speed up the end to end process. If the experience under the EU Merger Regulation is a guide, this could result in lengthy pre-notification discussions which could extend the timetable rather than reduce it. We suggest, therefore, that the Government considers also imposing a statutory time limit on pre-notification discussions.

4.60 We also wonder whether a 30 working day timetable would work in a mandatory regime given the large increase in notifications which is foreshadowed in the Impact Assessment and the fact that it would apply to non-problematic and problematic mergers alike. In our experience, it is sometimes a challenge for the OFT to meet the extended merger notice timetable of 30 working days and merger notices are generally only used in non problematic cases. We would suggest giving the CMA the ability to extend the timetable by a further 10 working days – as mentioned above, if a mandatory regime is to be introduced, our view is that it should be non-suspensory in which case this ability to extend the timetable should not be unduly problematic for the parties.

4.61 In a voluntary regime, we agree that a 40 working day timetable would be appropriate (paragraph 4.45 of the consultation paper) – effectively putting the current administrative timetable on a statutory footing, coupled with the extended information gathering powers referred to in paragraphs 4.48 to 4.49 of the consultation paper.

4.62 In addition, the current merger notice system should be retained in a voluntary regime. We can see no reason to deprive parties of the option to use the prescribed form of notification in return for a decision within a guaranteed time period (20 working days, extendable to 30 working days).

Phase 2

4.63 We agree that the 24 week statutory time limit for Phase 2 investigations should not be reduced.

4.64 We support the proposal to introduce a statutory timescale of 12 weeks (extendable by up to six weeks) on Phase 2 remedies implementation between the publication of the final report and either acceptance of undertakings or the making of an order by the CMA and agree that this

[31] This does not include remedies and is extendable by up to eight weeks.

would need to be accompanied by extended information-gathering powers for main and third parties during the remedies implementation stage of Phase 2.

Information-gathering and "stop the clock" powers (paragraphs 4.48 to 4.49)

4.65 We agree that, in both a voluntary and a mandatory notification regime, the CMA should be given the same powers to obtain information from main and third parties in Phase 1 as those which currently apply in Phase 2. We also agree that these powers would need to be accompanied by "stop the clock" powers if the main parties did not comply, as well as powers to impose a penalty if main parties did not comply; however, we think that such a penalty for third parties would be an unreasonable imposition. We note that this would rely on the CMA using its information gathering powers responsibly and guidance on the circumstances in which a fine might be pursued would be welcome.

Anticipated mergers in Phase 2 (paragraph 4.50)

4.66 We agree with the proposal, in the case of anticipated mergers, to introduce a discretionary stop the clock power to enable the CMA to suspend or extend its statutory review timetable for a period of three weeks should it believe cancellation or significant alteration to the merger is likely. This would be a very welcome change to the current system and significantly reduce the burden on all concerned.

Enable single CMA to consider remedies earlier in Phase 2 (paragraphs 4.51 to 4.52)

4.67 Our understanding is that, even now, there is no statutory impediment to the CMA considering remedies at an earlier stage in Phase 2.

4.68 That said, there is clearly a balance to be struck here. On the one hand, it is clearly more efficient to have a system where, if parties are able to agree remedies with the CMA at an early stage in Phase 2, both they and the CMA are spared the burden, time and expense of proceeding with the investigation to its natural conclusion. On the other hand, if this is encouraged too much, that would reduce the incentive on parties to agree remedies ("undertakings in lieu") at Phase 1, giving them every reason to gamble that they can avoid concessions at Phase 1 with little downside in terms of the risk of having to go through a full and lengthy Phase 2 investigation.

4.69 A possible alternative would be to give greater opportunity for transparent and meaningful negotiation of remedies (undertakings in lieu) at the end of Phase 1 than exists under the present system. Instead of the parties having to propose remedies "in the dark", the CMA at Phase 1 could show them its draft decision to refer Phase 2 and give them a period (of, say, two weeks) to negotiate undertakings before a final decision is published. The need to avoid a "false market" could be met by publishing the fact that an extension to Phase 1 is being given to enable the parties to negotiate undertakings (as is currently the practice under the EU Merger Regulation Phase 1 system); there would be no need to publish the draft decision to the world at large, and doing so would be destabilising and potentially (and unnecessarily) damaging to the parties.

Appeals in merger cases (paragraph 4.53)

4.70 Please see our comments on Chapter 10 of the consultation paper.

Remedies (paragraphs 3.29 to 3.38)

Appointment and remuneration of third parties to monitor and/or implement remedies

4.71 We do not see the need, in the mergers context, for an amendment of Schedule 8 to the Enterprise Act to enable the competition authorities to require parties to appoint and remunerate an independent third party to monitor and/or implement remedies. We are not aware of circumstances in which the current powers have proved insufficient and, in any event, it seems to us that the merged/merging parties, in any event, have every incentive to agree to such a proposition if the alternative is a prohibition decision.

Requirement to publish non-price information

4.72 We welcome the proposal to amend Schedule 8 to the Enterprise Act to enable the CMA to require parties to publish non-price information.

Streamlining of the remedies review process and revision of the threshold for review

4.73 We also welcome the proposals, in paragraphs 3.34 to 3.36 of the consultation paper, for streamlining the review of remedies process and revising the threshold for review so that it is clear that remedies can be reviewed to ensure that they operate as intended, rather that there being a need to identify a "change of circumstances".

Clarifying powers following remittals of merger

4.74 These proposals are very welcome indeed. As noted, the current uncertainty is unsatisfactory and gives rise to unnecessary costs and delays.

Summary of OFT references to the Competition Commission since 1 January 2007

	Parties	Date referred	Basis for UK merger jurisdiction	Completed?	Hold separate undertakings?	Outcome
1	Kemira GrowHow / Terra Industries	26/1/07	turnover test	No		SLC
2	MDA / Quest Associates	14/2/07	share of supply test	No		Cancelled
3	Greif Inc / Blagden Packaging Group	21/2/07	share of supply test	Yes	OFT, adopted by CC	Approved
4	Woolworths / Bertram Group	3/4/07	turnover test	Yes	OFT, adopted by CC	Approved
5	Tesco / Co-Op Slough	19/4/07	share of supply test	Yes	CC	SLC - divestment order
6	Sportech / Vernons	3/5/07	share of supply test	No		Approved
7	G4S Cash Services / Abbotshurst Group	18/5/07	share of supply test	No		Cancelled
8	BSkyB / ITV	25/5/07	public Interest	Yes		Report to Secretary of State
9	Polypipe Building Products / Verplas	11/7/07	share of supply test	No		Cancelled
10	Macquarie UK Broadcast Ventures / National Grid Wireless Group	8/8/07	turnover test	Yes	OFT, adopted by CC	SLC - undertakings required
11	GAME Group / GameStation	9/8/07	turnover test	Yes	OFT, adopted by CC	Approved

	Parties	Date referred	Basis for UK merger jurisdiction	Completed?	Hold separate undertakings?	Outcome
12	Cineworld Group / Hollywood Green Leisure Park	17/3/08	share of supply test	No		Cancelled
13	BOC / Ineos Chlor	29/5/08	share of supply test	No		SLC
14	Project “Kangaroo” - VOD joint venture - BBC Worldwide / Channel 4 / ITV	30/6/08	share of supply test	No		SLC
15	Nufarm / A H Marks	29/8/08	share of supply test	Yes	OFT, adopted by CC	SLC - undertakings required
16	Hospedia / Premier Telesolutions	7/10/08	share of supply test	No		Cancelled
17	Long Clawson Dairy / Millway	8/10/08	share of supply test	Yes	OFT, adopted by CC	Approved
18	Capita Group / IBS OPENsystems	19/11/08	share of supply test	Yes	OFT, adopted by CC	SLC - partial divestment order
19	Holland & Barrett / Julian Games	20/03/09	share of supply test (contested)	Yes	OFT, adopted by CC	Approved
20	Stagecoach / Eastbourne Bus	13/5/09	share of supply test	Yes	OFT, adopted by CC	Approved
21	Stagecoach / Preston Bus	28/5/09	share of supply test	Yes	OFT, adopted by CC	SLC – divestment order

	Parties	Date referred	Basis for UK merger jurisdiction	Completed?	Hold separate undertakings?	Outcome
22	Live Nation / Ticketmaster	10/6/09	turnover test	During CC investigation (following remittal by CAT)		Approved
23	Sports Direct / JJB Sports	7/8/09	share of supply test	Yes	CC	Approved
24	RMIG / Ash & Lacy Perforators	26/8/09	share of supply test	No		Cancelled
25	Brightsolid / Friends Reunited	3/11/09	share of supply test	No		Approved
26	Getty Images / Rex	8/7/10	share of supply test	No		Cancelled
27	Zipcar / Streetcar	10/8/10	share of supply test	Yes	OFT, monitoring trustee appointed by CC	Approved
28	Dorf Kettal Chemicals / Johnstone Matthey	19/11/10	share of supply test	No		Cancelled
29	Stena AB / DFDS Seaways Irish Sea Ferries Ltd	8/2/11	share of supply test	Yes	OFT, monitoring trustee appointed by CC	To be determined (provisionally approved)
30	Ratcliff Palfinger / Ross & Bonnyman	18/2/11	share of supply test	No	CC	To be determined (provisionally approved)

	Parties	Date referred	Basis for UK merger jurisdiction	Completed?	Hold separate undertakings?	Outcome
31	Thomas Cook / Co-operative Group / Midlands Co-operative	2/3/11	turnover test, following successful request under Article 9(2) of Council Regulation (EU) 139/2004 and fast-track reference	No		To be determined
32	MBL/Trigold Crystal	17/3/11	share of supply test	No		Cancelled
33	Sector Treasury Services/Butlers	31/3/11	share of supply test	Yes	CC	To be determined

Overall: 33 references - 6 on the turnover test, 26 on the share of supply test (and 1 on public interest grounds).

5 Section 5 - "A Stronger Antitrust Regime"

Summary and recommendation

5.1 The Committee agrees that there is a case for enhancing the efficiency of the current administrative approach to antitrust enforcement introduced by the Competition Act 1998. While a number of the recent streamlining and procedural improvements introduced by the OFT[32] are to be welcomed, the Committee believes that the current structure, whereby the OFT plays four roles - carrying out investigations; "prosecuting" an alleged infringement in the form of a Statement of Objections; deciding whether an infringement has in fact occurred; and determining the level of any penalty that should be imposed - gives rise to the very real risk of confirmation bias and is likely to contribute to inefficiencies. It is the Committee's view that the structure itself is likely to have materially contributed to the fact that many antitrust cases have taken too long and for a number of years there were few actual infringement decisions. Moreover, the Committee believes that the absence of senior experienced decision-makers who review the evidence and arguments in detail and engage with the parties as part of an effective oral hearing procedure is likely to have led to a greater number of appeals to the CAT than would otherwise have been the case.

5.2 **The Committee's favoured option is to maintain the single CMA as an administrative decision-making body, but with materially enhanced decision-making structures - essentially Option 2. However, as a variant of Option 2, the Committee considers that a full merits appeal to the Competition Appeal Tribunal (CAT) must be retained.** Both of these enhancements to procedural fairness are essential given the very significant adverse consequences of competition law infringements, not only in relation to the large fines imposed on companies, but also the possibility of directors being disqualified for up to 15 years.

5.3 The Committee also considers that it is important to maintain the CAT in its current form, given its efficiency and thoroughness in conducting full merits appeals, together with the invaluable support provided by the specialist Registrar and his team, which facilitates informed and active case management and materially enhances the efficiency of proceedings compared with tribunals that do not benefit from such a support structure. In the Committee's view, the CAT is an excellent model for a competition court, staffed as it is by expert chairmen supported by experienced and appropriately qualified lay members.

5.4 The Committee believes that the case for reforming the current administrative approach is compelling. The Committee has given detailed consideration as to whether it should support Option 3, i.e. the "prosecutorial" approach. However, on balance, the Committee believes that that prosecutorial approach may result in very significant economic pressure on smaller businesses to settle their cases with the CMA in the light of the costs of conducting litigation before the CAT. Instead, the Committee favours a variation of Option 2(b) i.e. the "independent office holders" (who would be involved in Phase 2 mergers and market investigations) would hear the parties' oral submissions following the Statement of Objections (SO), read their written representations, and engage actively with the parties through questioning and ultimately decide which of the allegations set out in the SO are sufficiently robust to form part of the CMA's decision. We would envisage that such an oral procedure would last 1-2 days, would not provide for cross-examination and therefore would not constitute an "internal tribunal" within the meaning of Option 2(a). Nevertheless, the Committee feels that such a development would

[32] Office of Fair Trading, *A guide to the OFT's investigation procedures in competition cases*, OFT1263, March 2011.

introduce a much needed degree of impartiality, objectivity and rigour at an important stage of the decision making process; it would separate the investigation part of the case from the decision-making part and would therefore make a significant contribution to the elimination of confirmation bias. It is also believed that such a process would, in time, come to be recognised by officials within the CMA (particularly those responsible for conducting investigations) as imposing very clearly defined internal checks and balances. Such a panel of independent decision-makers would not be sufficient to satisfy the requirements of Article 6 of the ECHR and accordingly a full merits appeal to the CAT would need to remain.

5.5 However, if Option 2 were not to be combined with a full merits appeal to the CAT, the Committee would favour Option 3 (prosecutorial approach) as necessary to give the requisite impartiality, fairness and rigour.

Overview: the need for change

Structural concerns - the risk of confirmation bias

5.6 The OFT's enforcement structure is based on the European Commission model and involves the OFT playing four roles: (i) it carries out investigations, having satisfied itself that it has reasonable suspicion of an infringement in order to exercise the stringent investigatory powers at its disposal, which include dawn raids and statutory demands for information, both of which are supported by the threat of criminal sanctions; (ii) it prosecutes alleged infringements in the form of a SO; (iii) it then adjudicates as to whether an infringement has in fact occurred by reviewing the parties' submissions in response to the SO and conducting an oral hearing, and thereafter taking an infringement decision; and (iv) finally it decides on the level of penalty that should be imposed. Case law has confirmed that competition law penalties, which can be extremely high, are criminal in nature. A similar investigatory, prosecutorial and adjudicatory structure exists within each of the concurrent regulators.

5.7 It is uncontroversial that this decision-making structure gives rise to the risk of confirmation bias. In this connection, most common law jurisdictions have adopted a clear separation between investigation and prosecution on the one hand and adjudication on the other, for example, in Australia, Canada, the Republic of Ireland and the USA, prosecutions are brought by the competition authority (or relevant governmental department) before an independent judge who decides whether an infringement has arisen and, if so, what penalty should be imposed. It is also relevant to note that in Hong Kong the Competition Bill, which is expected to be enacted during 2011, has adopted the judicial enforcement model, with enforcement actions being brought by the Competition Commission before the Competition Tribunal.

5.8 Following the OFT's August 2010 consultation in relation to its investigatory procedures, the OFT has sought to demonstrate that, in seeking to overcome the inherent risks that an integrated structure entails, a range of individual decision-makers, committees and processes have been introduced into the decision-making machinery. For example, a "Team Leader" is identified as running the case day-to-day; a "Project Director" directs the case and is accountable for delivery of high quality timely output and a "Senior Responsible Officer" (SRO) is accountable for delivery of the case. The SRO "decides whether there are sufficient grounds for opening a formal investigation and whether the evidential requirements of an infringement

have been met"[33]. The SRO can consult with other senior officers as he/she considers appropriate but does not necessarily review the evidence available on the case file, although he/she can call for it if he/she thinks that it would be of assistance in exercising his/her functions[34]. The SRO is described as being in attendance at oral hearings "unless it is impractical to do so"[35]. The decision maker ("who is generally, but need not be, the SRO"[36]) decides whether to issue an SO. It appears that the decision to issue an SO is taken by the SRO, but it is not clear who takes the final infringement decision, although it is stated that consideration of the parties' written and oral submissions "will primarily involve assessment of the representations by the case team"[37]. Accordingly, at no time during the process can the parties under investigation be sure that they are submitting their views and evidence to the actual decision maker(s) and, in particular, to decision-makers that are free from confirmation bias as they had no role in the investigation and prosecution (SO) stages of the case. Experience shows that clients value very highly the opportunity to present their arguments and evidence to the actual decision-maker(s). This has been a particular strength of the Competition Commission's procedures; unfortunately it has been entirely lacking in antitrust cases.

Number/quality of cases

5.9 The efficiency of the OFT's antitrust decision-making procedures has been considered in detail by the National Audit Office (NAO) in a number of reports. Most recently, in March 2010, the NAO observed that the case law that had arisen out of OFT and sector regulator investigations is not as rich as it needs to be, the decision-making process is unduly lengthy, most decisions are appealed to the CAT (which may reduce the appetite for sector regulators to use their enforcement powers), the sector regulators have so far made limited use of their enforcement powers, and there appear to be too much use of early resolution procedures.

5.10 The Committee agrees that many cases have taken very long periods of time before a decision was adopted (see the chart at the end of this Section) and that, overall, relatively few decisions have been taken. However, the Committee recognises that the number of cases in itself is not necessarily indicative of a failure of policy or that there are significant infringements in the UK that are not being addressed. As regards the length of cases, in the Committee's view the delay has arisen for a variety of reasons which include satisfactorily collecting evidence and dealing with witness evidence (difficulties in this regard have recently been highlighted by the CAT in the construction cases[38]), apparent delay in identifying the theory of harm with the consequence that prior investigation was often unfocused (this seems to have been a particular difficulty in the tobacco case) as well as too many "iterations" in formulating a Statement of Objections, Supplementary Statements of Objections etc. In the Committee's view, one difficulty would appear to have been the lack of significant senior oversight from an early stage in a case throughout the administrative phase to the SO and beyond. In addition, frequent changes of case-team, particularly for the larger, longer running, investigations, would appear to have been a factor contributing to delay and to deficiencies in process.

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33 A guide to the OFT's investigation procedures in competition cases, para 5.2.

34 Ibid, para 11.18.

35 Ibid, para 12.13.

36 Ibid, para 11.17.

37 Ibid, para 12.21.

38 *Durkan Holdings Ltd v OFT* [2011] CAT 6 paras 108-110.

Q8: Options for change

Option 1: retain and enhance existing approach

5.11 The Committee does not believe that "retaining and enhancing" the OFT's existing procedures is likely materially to address the concerns identified above; in particular, it will do nothing to address the structural concerns and the existence of confirmation bias. However, as explained in the summary above, the Committee's recommendation that the existing administrative approach be retained, but that it should be supplemented with the introduction of a group of second stage expert decision-makers (but without creating "an internal tribunal"), recognises the significant steps that the OFT has taken in improving the transparency and effectiveness of decision making in recent years and, in particular, the steps outlined in its 2011 guidance. The Committee doubts that further significant enhancements are possible without structural changes.

Option 2: develop a new administrative approach

5.12 For the reasons set out in the summary above (paragraphs 5.1 to 5.5), the Committee believes that the optimal approach is to retain the existing administrative structure with a full merits appeal to the CAT, but with a clear improvement to the structure of decision-making within the administrative process.

5.13 Within Option 2, the Committee does not accept that the creation of a full “internal tribunal” would be appropriate, as it would replicate the CAT and would increase costs (even if the CAT's jurisdiction were "down-graded" to that of judicial review). Rather, after the SO is delivered, there should be within the CMA a group of expert decision-makers, separate from the investigating team who prepared the SO - essentially the independent office holders who would be involved in Phase 2 mergers and markets decisions - who would conduct the “second stage” of the process and reach the final decision.

5.14 But retaining a full merits appeal to the CAT is essential if Option 2 is to deliver an improvement in fairness. Without full merits appeal, the Committee does not believe that Option 2 offers sufficient fairness, robustness and impartiality - and the Committee would then think Option 3 preferable.

Option 3: a prosecutorial system

5.15 One possible approach that would seem to hold out the prospect of enhancing the efficiency and fairness of the enforcement process would be for the CMA to "prosecute" an SO before the CAT (Option 3 in the consultation paper). This could potentially significantly reduce the duration of cases before the CMA and the sector regulators which would have the consequence of freeing up resources for other cases. In addition, there could be material savings for the parties who would simply submit their arguments and evidence in response to the SO to the CAT, rather than make such submissions before the CMA and then before the CAT in appealing against the final decision. Such an approach is also likely to avoid the issue of supplemental SOs and remittals to the CMA from the CAT. It may also encourage the sector regulators to use their enforcement powers and would certainly seem to hold out the prospect of consistency of outcomes as between the CMA and the sector regulators.

5.16 On balance, however, the Committee has concluded that - provided that the changes in relation to decision making outlined above are introduced to the administrative process in order to enhance its efficiency and fairness, and provided that the right of full merits appeal to this CAT

is retained - it would not be appropriate to move to a prosecutorial model. This is because it will lead to lengthy trials in those cases that are not settled which is likely to increase costs and which may be particularly disadvantageous for smaller businesses which would accordingly be encouraged to settle rather than contest a case. With a reformed administrative process having experienced "independent decision-makers" as described above, smaller businesses could, at a relatively low cost, instruct legal advisers to review the SO and key elements of the case file and make short written/oral submissions which may have the effect of "knocking out" certain allegations (or even the entirety of them) in the CMA's case, potentially resulting in a lower fine than a settlement would be likely to produce in a prosecutorial system. Moreover, it is not clear that a prosecutorial system would lead to more cases, and most of the Committee shares to some extent the OFT's concerns as to the likely adverse effects on policy, particularly as regards producing guidelines and encouraging compliance initiatives within the business community. We should stress, however, that even an enhanced administrative process would not remove the need for a full appeal to the CAT on the merits in order to meet ECHR standards.

Q9: Other changes proposed - timetable

5.17 In relation to the proposal in paragraph 5.48 of the consultation paper, a further reform that could be introduced would be to impose a fixed statutory time limit on the CMA's ability to issue an SO, subject to the possibility of an extension being granted by the CAT in light of particular circumstances. Such a limit, which might be fixed at, say, two years after the fact of the investigation first becomes known to the parties (e.g. through a section 26 request for information), would focus the CMA's resources on individual cases, and may well encourage the CMA to allocate resources to the most promising cases.

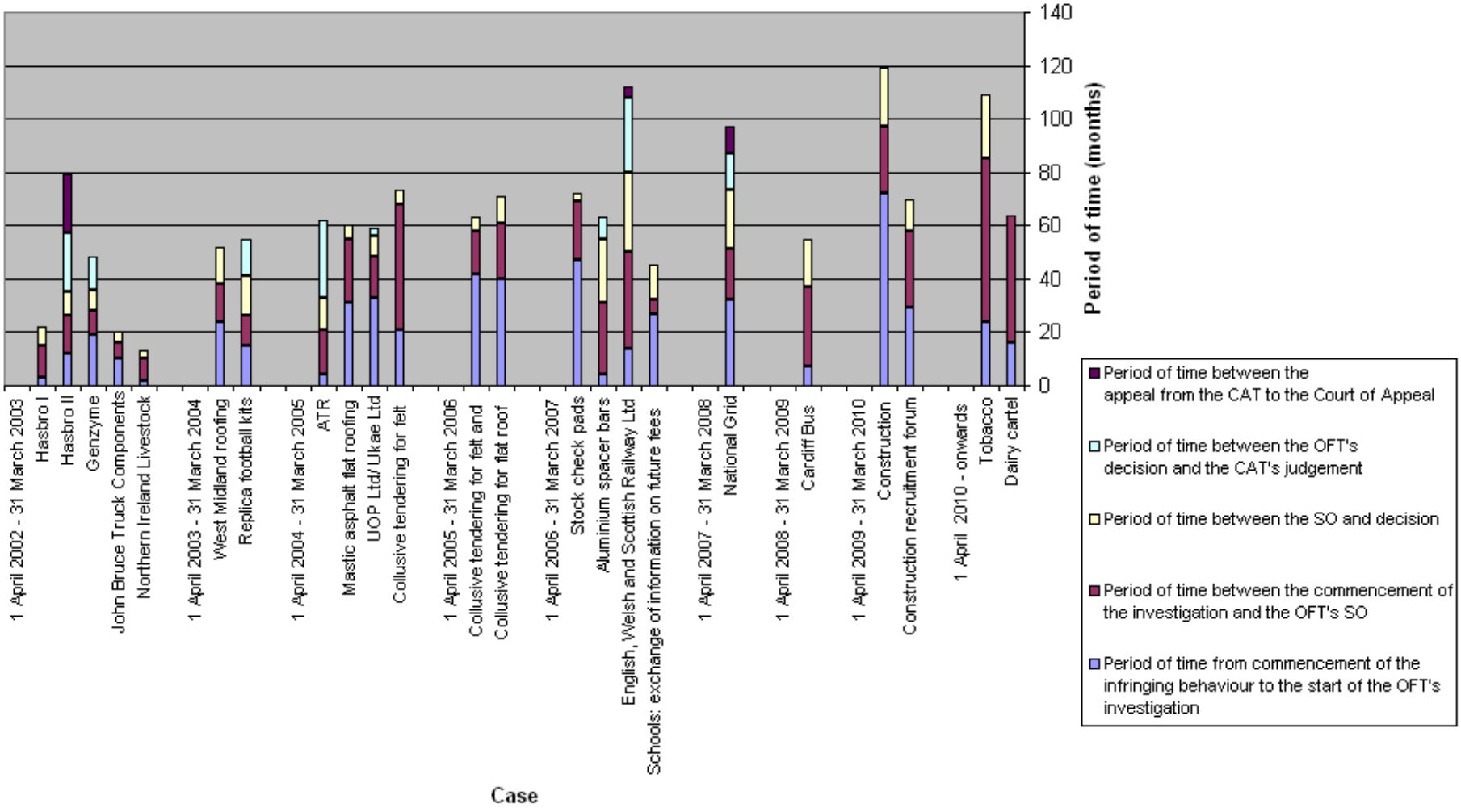
5.18 The Committee believes that such statutory time limits would provide much needed focus and discipline to investigations of antitrust infringements. We would be concerned that merely adopting *administrative* time limits would not impose an effective discipline.

5.19 We are aware of the concern that statutory time limits could be abused by parties who are under investigation deliberately drawing things out (delaying in providing information, etc) so as to escape an infringement decision through its being time-barred. However, we consider that effective use of stronger information-gathering powers would in practice remove this risk.

Q10: Further ideas

5.20 Further savings might be introduced if the CMA could avoid the need to engage in the redaction of documents on the case file, for example, by a confidentiality ring being instituted, as is the case for the Appellants before the CAT.

Infringement decisions under Competition Act 1998



6 Section 6 - The Criminal Cartel Offence

6.1 In Chapter 6 of the consultation paper, the Government states that the "dishonesty" element of the cartel offence appears to make the offence harder to prosecute. The Government also considers that the "dishonesty" element puts the United Kingdom at odds with developing international best practice on how to define a hard core cartel offence.

6.2 Accordingly, the Government is considering the following options for reform to the offence:

- Option 1: removing the "dishonesty" element from the offence and introducing guidance for prosecutors;
- Option 2: removing the "dishonesty" element and defining the offence so that it does not include a set of 'white listed' agreements;
- Option 3: replacing the "dishonesty" element of the offence with a 'secrecy' element;
- Option 4: removing the "dishonesty" element and defining the offence so that it does not include agreements made openly.

6.3 The Committee, having carefully considered these options, has come to the conclusion that the "dishonesty" element of the cartel offence should be retained, at least until further time has elapsed to form an empirical judgement on how well the current offence works. In the Committee's view, the case for removing the "dishonesty" element at this stage has not been made out.

Q11: The options

6.4 The Committee's views on the options set out in Chapter 6 are as follows.

Option 1: Removing the "dishonesty" element from the offence and introducing guidance for prosecutors

The proposal is premature

6.5 Before considering whether the element of dishonesty should be removed from the criminal cartel offence it is worth considering whether the case for a change to the law is made out. The consultation paper proceeds on the basis of two assumptions: (i) that the offence is harder to prove as a result of the requirement to prove dishonesty, and (ii) that the deterrent effect of the legislation is weakened by the inability of prosecutors to bring cases as a result of that difficulty. In our view, neither basis has been established as a matter of fact as a result either of failed prosecutions or as a demonstrable reason for candidate prosecutions not being brought. It would be wrong in the absence of satisfactory empirical data to reach either of the two assumptions. Only two prosecutions have been brought since the Enterprise Act 2002 came into force:

- In *R v Whittle, Allison and Brammer* (2008)[39] - arising out of the marine hoses cartel - the defendants pleaded guilty to the cartel offence in section 188 of the Enterprise Act 2002. This would tend to suggest that the presence of the element of dishonesty in the UK offence was not a bar to a successful prosecution. Although the case is plainly complicated by the global deal struck by the defendants in the United States, where dishonesty is not an element of the equivalent US criminal offence, the reason the defendants accepted in the UK that they had behaved dishonestly must have been, at least in part, because of the strength of the evidence in that regard. This evidence came from the covert nature of the cartel which involved, among other aspects, secret meetings where those attending came and went in ones and twos to prevent alerting customers or the authorities to the fact of the meetings and use of code names and false email accounts.

  Although not conclusive evidence, because of the pressure in the US to agree a global disposal of all cartel issues, the case does not support the assumption that the element of dishonesty prevented a successful prosecution of the offence.

- In *R v George* (2010)[40] - arising out of the British Airways/Virgin fuel surcharge agreement - the Court of Appeal held that it was not necessary for the prosecution to prove that both parties to the cartel had behaved dishonestly. All that was necessary was to establish dishonesty in the defendant on trial. This removed a potential hurdle for a prosecution that might be relying upon the evidence of the other party to the cartel and would otherwise require the full dishonesty of prosecution witnesses to be admitted.

  In the same case at first instance the trial judge, Owen J., ruled that:

  > "It is clear that Parliament intended that dishonesty would be assessed against the standards established in the case law, in particular by application of the *Ghosh* test, which requires the jury to consider both whether what was done was dishonest according to the standards of reasonable people, the objective element, and whether the defendant realised that this was the view of such people, the subjective element. As was submitted on behalf of the prosecution, an agreement to fix prices is capable of being inherently dishonest, but will not always be dishonest. Each case will be judged on its facts, and on the inferences properly to be drawn from the facts. I therefore rule that the proper construction of section 188 does not require the prosecution to prove additional dishonest conduct over and above the price fixing. It is obliged to prove dishonesty by reference to the *Ghosh* test."[41]

  It is clear from this ruling that the trial judge did not consider there to be anything particularly problematic or unusual about the dishonestly element in the offence. It would be considered by the jury in the usual manner by applying the two stage test in *R v Ghosh* (1982)[42], on the basis of the facts proved and the inferences properly to be drawn from those facts. The fuel surcharge case provides no support for the suggestion that the prosecution (which failed for procedural reasons) could not be brought because of an inability to prove dishonesty.

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39 [2008] EWCA Crim 2560.

40 [2010] 2 Cr. App. R. 17.

41 Ruling of 24 July 2009, unreported.

42 [1982] Q.B. 1053.

6.6 The OFT website states that there are three criminal investigations currently underway, each commenced in 2010[43]. Bearing in mind that the Court of Appeal in the marine hoses case (*R v Whittle*, above), considered that covert behaviour was sufficient evidence of dishonesty to support the conviction - and given the obvious essential requirement for any cartel to operate in secret - the difficulty, if any, in proving dishonesty would appear to be an unlikely reason for not prosecuting. It would certainly appear to be premature to reach such a conclusion prior to the decision by the OFT in relation to those investigations.

6.7 Very few, if any[44], of the other Competition Act 1988 decisions reached after the coming into force of the Enterprise Act 2002 (from June 2003) would appear to have satisfied the definition of "hard-core" cartel activity covered by the criminal offence. This appears to demonstrate that the reason for the lack of prosecutions is not the requirement to prove dishonesty but the fact that most cartel agreements are not of the "hard-core" type that the criminal offence was designed to cover.

6.8 The Committee's principal submission, therefore, is that the need for change in relation to the cartel offence has not been made out evidentially and further time should be allowed before any action is taken.

The consequence of removing dishonesty from the cartel offence

6.9 If dishonesty were removed from the cartel offence, it would become an offence for a person to enter into or implement an arrangement perfectly honestly but which (i) had the consequence of directly or indirectly fixing the price of the supply of a product or service, (ii) limited or prevented the supply of a product or service, (iii) divided the supply of a product or service between two suppliers or customers, or (iv) amounted to a bid rigging arrangement [see Enterprise Act 2002 s188 with the word "dishonesty" removed.

6.10 The removal of the word "dishonesty" would utterly transform the offence from one focused upon the intention of the cartelist to one wholly dependent upon the direct or indirect consequence of any particular business arrangement. An individual would be guilty of the offence, however careful that individual had been to prevent the consequence of an arrangement if in fact, albeit indirectly, that arrangement fixed, limited or divided the supply of products or services or rigged a bid. This would be damaging to business and contrary to the public interest.

6.11 The Law Commission concluded in Working Paper No. 31[45] that to make a man liable to imprisonment for an offence which he does not know that he is committing and is unable to prevent is repugnant to the ordinary person's conception of justice and brings the law into contempt. Removing the element of dishonesty would in effect render the cartel offence one of strict liability and dependent not upon what the offender intended to do or wished to achieve but on the consequences that in fact occurred as a result of his actions, however unintended they might have been.

6.12 Unless Parliament were to enact the removal of *mens rea* from the offence in the clearest of terms, the courts would be likely to read *mens rea* back into the offence (see the common law

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43 Involving the automotive sector, the agricultural sector and commercial vehicle manufacturers.

44 The few possible exceptions might be Construction Recruitment Forum, Aluminium Spacer Bars and Stock Check Pads.

45 Law Commission, *General Principles: The Mental Element in Crime,* 16 June 1970.

principle enunciated in *Sweet v Parsley* (1970)[46]). The new offence would therefore have to state clearly that it would be committed without any form of *mens rea*. It is very difficult in our view to justify the creation of a strict liability offence in relation to cartel activity.

6.13 The reduction of the offence to one of strict liability would also devalue it. Strict liability offences criminalise actions not intentions, normally because of an overwhelming public interest in preventing such actions (such as driving without a licence). In the case of cartel activity, the action (the existence and operation of the cartel) is already unlawful by virtue of the Competition Act 1998. There is accordingly no public interest in criminalising the action itself, as opposed to the *mens rea* of the offence since it is already unlawful and subject to a stringent enforcement regime that involves the power to levy heavy fines.

6.14 The central point of making cartel activity a crime was to deter individuals from becoming involved or allowing their companies to become involved in "hard core cartels" which, because of their dishonest criminal intent, would be much harder for the authorities to expose and prevent. If the dishonesty element were to be removed so as to render the offence effectively a mirror of the civil law position, Parliament would, in respect of those hard core cartel activities, have removed the distinction between actions that are prohibited and subject to civil enforcement and those that are criminal.

6.15 In the Committee's view the answer is not to leave the matter in the hands of the prosecutor as the consultation paper suggests. It is for the courts to determine whether conduct is such as to amount to a crime and not for the prosecutor. If the reality of the position is that only cartels that contain dishonesty are to be prosecuted, but under an offence that does not require dishonesty to be proved, the decision as to whether dishonesty is present will have been made by the prosecutor and not by the court. This is unconstitutional. Either dishonesty is required in which case it must be proved or it is not.

The supposed problems with the requirement to prove dishonesty

6.16 The consultation paper identifies four supposed problems in relation to the element of dishonesty. In the Committee's view none of those problems in fact pertains:

6.17 First, it is suggested that the element of dishonesty introduces a lack of certainty into the offence. If this were correct then all offences that included dishonesty would be uncertain and would risk falling foul of Article 7 of the European Convention on Human Rights (see *R v Rimmington* (2005)[47]. It has long been established that the test in *Ghosh* (above), is sufficiently certain both for it to be lawful and for it to be a sensible, workable basis for resolution of whether someone has behaved dishonestly. People well understand what dishonesty means and cartelists are no exception. We do not understand why it is thought that a cartel involves any more complex a factual matrix than conspiracy to defraud, for example. Parliament deliberately included the requirement to prove dishonesty in the Fraud Act 2006.

6.18 Second, it is thought that the requirement to prove dishonesty will introduce analysis of the economic consequence of cartel activity which would be difficult for juries to comprehend. In fact, in our view, the opposite is true. If dishonesty were to be removed the only element in any prosecution would be the consequences of the cartel arrangement and thus would focus the case on the detailed economic effect on consumers. Dishonesty would be established not by

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46 [1970] A.C. 132.

47 [2005] UKHL 63.

an analysis of the economic consequences but by proof of the deceptive, secretive or fraudulent behaviour of the defendant.

6.19 Third, it is thought that 40 per cent of ordinary people do not think that price fixing is dishonest and there is a fear that juries will decline to convict them. Many people think that cannabis should be legalised, for example, but that does not stop juries doing their duty when trying such cases. Juries are told what the law is by the court and must apply it to the facts of the case. There is no basis, as far as we are aware, for thinking that juries refuse to apply the law as they are directed by the court.

6.20 Fourth, it is thought that cartel activity is particularly problematic when it comes to dishonesty because it may not be possible to prove that the individuals involved had a sufficiently clear financial motive to behave dishonestly. This, with respect, is an argument for criminalising non-dishonest behaviour rather than a reason for why dishonest behaviour cannot be proved. If the evidence shows that the individual involved in the cartel was dishonest, because it proves deceptive, fraudulent or secretive behaviour there is no difficulty with the offence requiring the element of dishonesty. If on the other the evidence does not prove such behaviour then the cartel is one that did not go beyond the boundaries of the activity covered by the Competition Act 1998. In any event the purpose of criminalising cartel activity was to dissuade directors and directing minds from using their companies as vehicles for cartel activity, it was not primarily designed to cover mid-level employees.

Option 2: Removing the "dishonesty" element and defining the offence so that it does not include a set of "white-listed" agreements

6.21 This is unworkable in our view and suffers from all the defects identified above. The European Commission no longer favours "white-listed" exceptions because of the uncertainty it creates for business. They have been abandoned in the context of EU block exemptions. It is difficult to see why considerations that no longer apply in the context of the civil prohibition should be applied to criminal sanctions where penal consequences are involved.

Option 3: Replacing the "dishonesty" element of the offence with a "secrecy" element

6.22 The observations about the problems of removing the element of dishonesty from the cartel offence in paragraphs 6.9 to 6.15 above would obviously be answered, to a degree, by the replacement of "dishonesty" by an alternative *mens rea*. It would be important to remember that by doing so Parliament would be deliberately downgrading the offence to one significantly less serious than in its current form. It is difficult to see why Parliament would wish to send a message that is the diametric opposite of its stated intention.

6.23 There is also the difficulty of finding an alternative *mens rea*, below dishonesty but appropriate to cover the intentions of a cartelist. Recklessness would be inappropriate since it too would be wholly dependent on the consequences of the cartel arrangement and would require an analysis of the cartelist's foresight of those consequences. Deliberate intention would be meaningless since one does not ordinarily end up in a cartel arrangement by accident. It is not the deliberateness of the corporate activity that matters it is its criminal purpose.

6.24 Likewise we are of the view that it is inappropriate to replace the element of dishonesty with that of secrecy. If it were sufficient for the offence to be committed by the mere fact that no persons outside of the cartel knew of its existence then the secrecy element would not be part of the mens rea of the offence at all. It would merely be a question of fact as to whether any person outside the cartel knew of it. This offence would be equally subject to the criticisms levied in relation to Option 1 above. It would also be vulnerable to the problems that prosecutions experience in seeking to prove negatives. How does a prosecution prove that no one knew of the existence of the cartel? If the burden in this regard were reversed (i.e. secrecy is presumed) would it be sufficient for the defence to produce one person, outside the cartel who knew of it? This would be open to abuse.

6.25 To achieve its aim therefore the element of secrecy would have to be defined in terms of *mens rea* - namely, that the cartelist intended that the cartel should remain secret. The offence would be one of entering into the cartel arrangement intending that no person outside of the cartel should learn of it. The offence would focus upon the steps taken by the cartelist to ensure that its existence remained hidden. Such an offence would not catch cartelists who took no overt acts to ensure the secrecy of the cartel. Those cartels that were in fact secret but not thanks to any actual covert activity would not be caught. This would be absurd. To define a crime in terms not of its inherent criminal mens rea but in terms of the steps taken to ensure that it is not uncovered risks bringing the law into disrepute.

6.26 In the Committee's view, the offence should focus upon the clear criminal activity that dishonesty involves. Such dishonest cartel activity is significantly more serious than the prohibited civil cartel activity and is therefore rightly a crime. It is not clear why activity that is prohibited by the Competition Act 1998 should become a crime merely because the cartelist took positive steps to keep it secret. It is also not clear why a cartelist who did not need to take such positive steps because there was no risk of the cartel being exposed (but who would have done had the need arisen) should fall into a different category under the criminal law.

6.27 In our view the definition of secrecy in paragraph 6.41 of the consultation paper does not deal with the concerns described above and would mean that the gravamen of the offence was the taking of measures to prevent publication of the existence of the cartel rather than of the essential criminal cartel activity itself. The law should focus upon the core criminal activity sought to be prevented rather than on ancillary activity connected to it.

6.28 It is also important, in the Committee's view, to note that the replacement of the element of dishonesty with that of secrecy will remove all features of deception, fraud or dishonesty from the offence with consequences in sentencing terms. The offence would become one of keeping a cartel secret and not one of operating a criminal cartel. This would in turn have the effect of rendering the actual cartel activity non-criminal. This is the diametric opposite of Parliament's stated intention.

Option 4: Removing the "dishonesty" element and defining the offence so that it does not include agreements made openly

6.29 There is an essential right to privacy in English and EU law such that commercial arrangements are entitled to be conducted in private. Not only is this proposal unworkable it threatens the essential right to conduct one's business in private. It is not in the public interest to undermine such fundamental principles by requiring companies to publish their agreements for fear that

otherwise they might amount to criminal cartels. It further runs the risk of catching the lawful and beneficial market sharing activity permitted under European Union anti-trust law. In our view it suffers from all the problems identified above in relation to Option 3. This Option is just another way of seeking to criminalise the secrecy element of cartel activity.

Conclusion

6.30 In the Committee's view, the dishonesty element has not yet been adequately tested in the criminal context. It is far too early to pass judgement on whether it actually creates a barrier to prosecuting cartel activity. Bearing in mind that most hard-core cartels will, by definition, contain the sort of covert activity from which dishonesty can be inferred it is difficult to see the imperative for change. Parliament should not, in our view, be quick to undermine the ability of juries to know when true criminal dishonesty is present. They are very good at it and rarely fail to identify it when it is truly proven to have occurred.

6.31 The purpose of the criminal law is to prevent conduct that goes beyond that which is prohibited by the civil code. The purpose is to prevent conduct that ordinary people readily understand to be criminal conduct. When a jury is directed that a dishonest cartel is a crime because of the damage it does to markets, consumers and in the end to ordinary people they will readily understand why that is the law. They will then look for the indices of dishonesty just as they do under the Fraud Act 2006, in relation to conspiracy to defraud at Common Law, under the Theft Act 1968 and in relation to all financial crimes and those involving dishonesty. In our view there is no evidence to justify a conclusion that juries would be unable or unwilling to find dishonesty just because the factual matrix of the case happens to be a cartel.

6.32 Moreover, Parliament should, in our view, be slow to down-grade the offence to one not involving dishonesty. Cartel activity is a serious crime and one, where dishonesty is established by the tribunal of fact, that ought to result in a custodial sentence. It is much more difficult to justify such a sentence where dishonesty is not present or where the criminality involved amounts merely to keeping a cartel secret. There should be a clear distinction between the conduct that is prohibited by the Competition Act 1998 and that which is criminal.

Q12: Do you agree that the "dishonesty" element of the criminal cartel offence should be removed?

6.33 For the reasons set out above (paragraphs 6.5 to 6.20, and 6.30 to 6.32), Question 12 of the consultation paper is therefore firmly to be answered in the negative in our view.

Q13: Improving the criminal cartel offence

6.34 The cartel offence has not been on the statute book for very long. Time should be given for the proper assessment of the offence by a judge and jury. If a proper deterrent is sought for cartel activity then it comes with the understanding that a cartelist is at risk of being convicted of a serious offence of dishonesty not by the fact that he may be convicted of what is effectively a strict liability offence or an offence of keeping the cartel secret. In our view the element of

dishonesty should not be removed from the cartel offence, at least until it is shown (if that be the case) that prosecutions cannot be brought or fail because of it. That has not yet occurred.

7 Section 7 - Concurrency and the sector regulators

General comments

7.1 The Committee is concerned that the current position in relation to sector regulators does not, in relation to most regulated industries, achieve efficiency or consistency in the application of competition law in the UK. We are also concerned that this situation will be exacerbated by the fusion of the OFT and the Competition Commission into the proposed new CMA, which, unless there is reform of the relationship between the CMA and the sector regulators, will give rise to a very confused (indeed topsy-turvy) position - with the sector regulators (not the competition regulator) in control on "antitrust/competition" cases[48] in their sector, able to carry out preliminary (but probably not Phase 2[49]) market investigations (which they would refer to the CMA, as currently they would refer to the CC) and apparently subject to appeal or direction by the CMA on matters such as price reviews. This confused picture will extend from the industries currently subject to economic regulation to other sectors, including aviation (subject to the CAA), and banking and finance (where it is proposed that a financial sector regulator has concurrent powers) and possibly also health (where the Government is contemplating giving the proposed competition functions to the proposed Monitor).

7.2 It is, moreover, important to consider what would happen to the current non-competition (regulatory) functions of the CC (see also Section 8). Given that these functions were placed with the CC because it has the economic skills and resources to carry out those functions, we have assumed that they pass to the CMA: we consider (see Section 8) that this is the only efficient way to deal with these functions, as the CAT is not an inquisitorial body and does not have the resources to carry out these reviews. The non-competition functions include the review on the application of an affected utility of price cap determinations in quinquennial reviews in the rail, water and energy fixed distribution sectors, the quinquennial review of airport charges[50] and the price aspects of certain matters on which the CAT hears appeals from decisions by Ofcom. Given the importance of these determinations for the economic health of the regulated industries, any removal of the right to call for a full economic review would be likely to be counter-productive for the industries concerned and a mere right of judicial review would not be an adequate substitute.

7.3 The Committee thinks it important that there should be a consistency of relationship between the CMA and each of the sector regulators, both so that efficiencies can be improved and also so that the UK has a competition law regime which is coherent in its operation and fit for purpose when compared with those of other countries, few of which spread competition powers to any sector regulator and none of which, so far as we are aware, has adopted widespread concurrency, such as is found in the UK. We perceive that one of the Government's concerns about the relative paucity of competition cases stems from the concurrency powers and the understandable preference by sector regulators for the use of regulatory powers; although we question whether the lack of high numbers of cases is a cause for concern, there is no doubt that the concurrency regime as currently operated does nothing to encourage the use of Competition Act or Article 101/102 powers in relation to businesses in regulated sectors.

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48 That is, cases under the Competition Act 1998 Chapter I and Chapter II prohibitions, and Articles 101 and 102 TFEU.

49 The position on Phase 2 market investigations is not entirely clear, but only the CMA would have the appropriate resources.

50 Although a new regime for airports is under consideration.

7.4 It has also to be recognised that regulatory powers may, in some cases, be more suited to dealing with a potential problem than the use of competition powers. This is particularly so where a licence amendment for a licensed utility or for all or a class of licensees in a sector can nip a problem in the bud and deal with it for the longer term. In those cases, it will often not be cost-effective to use competition remedies to address any infringement of competition law prior to the licence amendment (although this would not prevent any aggrieved private party from taking action).

7.5 The question is one of striking the right balance and not inhibiting the effective use of regulatory tools, while ensuring that competition law is effectively and consistently applied where appropriate, bearing in mind the differences in the businesses and practices of the various regulated industries.

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

7.6 In short, we consider that concurrency should be retained, but that the CMA should be clearly the senior body on competition matters. We see no case for the expansion of the range of areas of competition law and policy in which sector regulators have concurrent powers, although this does not preclude other sector regulators being given the same powers as some already have. We would warn, however, that the more regulators there are with concurrent powers, the more important it is that the CMA is not inhibited from acting in their respective areas; already we would estimate that around half of the economy falls within concurrent regulation and this will grow enormously if these powers are extended as contemplated. Sector regulators are, rightly, concerned only with their own sector, and only the CMA can provide a national overview and also interface effectively on all UK matters with international bodies including the European Commission in areas of concurrent or interfacing powers.

7.7 As regards MIRs, we see no difficulty in maintaining the status quo in which the sectoral regulator can carry out an initial “Phase 1” market study or market review and, if it has concerns, then refer to the CMA (in place of the CC) for an in-depth “Phase 2” investigation. Only the CMA will have the competition economics and legal resource appropriate for this type of in-depth investigation. It is for debate whether the CMA should have the right to reject or amend the reference in the light of the initial report. We consider that sector regulators should be subject to the same rules as the CMA in relation to phase I and that there should be an option for the CMA to conduct phase 1 reviews within regulated sectors.

7.8 As regards mergers, the sector regulators have no concurrent powers and in the case of water, OFWAT has a specific role before the CC (Phase 2 CMA) which would be wholly inconsistent with concurrency powers for mergers. We do not believe that the sector regulators should be given any concurrency powers for mergers.

7.9 As regards “antitrust” (i.e. the UK Competition Act 1998 prohibitions and the EU prohibitions in Articles 101 and 102), while we think that there are some strong arguments against retaining regulators’ concurrent powers, on balance we conclude that it would be more efficient in terms of flexibility in use of knowledge and resources to maintain concurrency, provided that the CMA is clearly given the senior role and is not inhibited (as by the present protocol and practice) from acting at all in the regulated sectors. This would mean that the CMA would have oversight of the sector regulator's cases using their concurrent powers and the right to call in cases or to

commence cases in sector areas. We anticipate that these powers would be used by the CMA where the sector regulator does not appear to be addressing competition concerns or where issues of case management mean that the CMA is more suited to lead the case management (e.g. the CMA will be the repository of skills such as managing evidence in cases with concurrent criminal proceedings, dealing with dawn raids and dealing with cases where the EU dimension requires close liaison with the European Commission and/or Member State national competition regulators). The CMA will also be the repository of expertise where other regulators (e.g. in the USA) are taking action on the same factual situation. The ability of the CMA to act with confidence as the decision taking body in relation to cases with an international dimension, seems to us essential. The CMA needs to measure up to DG Comp at the European Commission, which applies EU competition law in regulated sectors (the remaining competition powers of the Transport Directorate were transferred to DG Comp in the last Treaty amendment), and to national bodies with similar wide competition enforcement powers as DG Comp. Also it is not practical (and would not be a good use of resources) for all the sector regulators to be represented on the bodies that interface internationally on competition matters (for example, the ECN) or otherwise to maintain relations with competition authorities outside the UK.

7.10 These powers are essentially the same as those of the European Commission in relation to national regulators (including OFT/CMA and all regulators with concurrent powers) in the administration of Articles 101 and 102. This would involve at least recasting the protocol which currently governs relations between the OFT and the sector regulators and it would be sensible if an approach similar to that in Article 11 of Council Regulation (EC) No 1/2003 on the Implementation of the Rules on Competition were to be applied to relations between the CMA and sector regulators with this being enshrined in the enabling legislation. It seems to us that this would be a coherent approach which would clearly make the CMA the "senior partner" in competition matters and also as an appellate body on the most important regulatory functions.

7.11 Under such a co-operation process, the sector regulator could have the lead role in relation to an investigation; alternatively, where the CMA is leading the investigation, the sector regulator could lend specialist resource to the CMA where appropriate, so preserving the benefit of the regulators' knowledge of their particular sectors in the application of competition law. At each stage we envisage a co-decision process in which the CMA would have the power to approve or veto the use of competition powers, but the sector regulator would be free to take regulatory action which would address the issues for the future, where it has suitable tools. Where regulatory powers were used, the impact of this would be taken into account in any competition proceedings, for example where the use of regulatory powers limited the duration of infringement or reduced it to a de minimis case not worth further public resource to pursue.

7.12 In the event that the sector regulators remained the prime investigatory body, we would envisage the CMA having the right to approve the following steps in relation to any case under the "antitrust" prohibitions:

- initial opening of an investigation
- any on the spot investigation
- the Statement of Objections and its content
- any decision on liability and penalties and its content.

7.13 This would help to promote consistency of decision-making, but would not address the cases where a sector regulator decided against use of competition powers altogether.

7.14 This is why we consider it important that the CMA should, in practice, be able to open competition investigations itself and to take over investigations, and that the CMA should be able to decide these matters independently. It should be the case that, where the CMA takes the lead in a competition case in a regulated sector, the sectoral regulator would be bound to co-operate and lend expertise and share information (including documents collected under regulatory powers). The sector regulators would remain free to take regulatory action and the CMA would be bound to take its effects into account (as above). This approach would ensure consistency and efficient deployment of experience and also that use of competition powers was not neglected or "traded off" in the regulator's debate with the regulated party (an issue where the sector contains a very small number of large regulated businesses). There would be a consistent relationship between the sector regulators and the CMA across all their interactions, with the CMA as senior partner on competition matters and in relation to its non-competition functions. This would enable the resources of the sector regulator to be used to assist in industry understanding and information gathering as well as in the decision making process, but it would not require (as the present approach to concurrency does) duplication of capacity for full competition case management and support.

7.15 Just as it would enable the CMA to take cases where its core procedural expertise is needed (see paragraph 7.9 above), it would also ensure that when a regulated industry throws up a case which has little to do with the core business of the sector, the expertise of the CMA in other sectors is fully available: for example, Ofcom does not seem to be the ideal body to consider conduct by one of its regulated companies on the sale of fixed line telephone equipment through high street and internet outlets, when the market is mostly supplied by non-regulated electronics manufacturers and the OFT has substantial experience of retail distribution cases - and yet under the current concurrency rules, the OFT/CMA could not insist on taking the case.

7.16 There would be some risk of over-much regulation on an individual case, but on balance we conclude that the better course would be to remove the current concurrency approach in favour of a co-operative process, where the CMA clearly has the senior role on competition matters.

Q15: Proposals for the use and co-ordination of concurrent competition powers

Strengthening the primacy of competition law over sectoral regulation - majority view

7.17 The overwhelming majority of the Committee does not think that mandating the use of competition law by sector regulators in preference to regulatory solutions is at all appropriate. This is because regulatory solutions may be quicker and more effective to stop and prevent further anti-competitive conduct to the benefit of consumers. Because the regulatory process is not one with the high burdens of a quasi-criminal burden of proof (whereas that is precisely what the antitrust process has) the process may also be considerably cheaper. The processes allow the regulator to take account of its statutory duty to promote competition, where it has one, in choosing and applying regulatory solutions.

7.18 There is no value in the use of specific competition law powers for their own sake if they are not the best tool to address the issue. One of the functions of competition powers is to punish

wrong-doing or to rebalance anti-competitive markets. This is not precluded by taking an effective regulatory measure under sector specific legislation and both private action and CMA action (if cost effective) under the antitrust/competition prohibitions and MIR would remain open. For some regulated businesses (e.g. Network Rail, Scottish Water, Channel 4), the fines imposed for breach of competition law simply remove resource which would otherwise be available to the business, so that consumers would be doubly punished by high fines. The ways of encouraging a compliance culture for publicly owned businesses is outside the scope of this response, but it would not lie in the primacy of competition law over regulatory solutions. Giving the CMA the power to ensure that appropriate use of competition law is not unnecessarily neglected, should in itself be a spur to sector regulators making sure that they have considered competition law solutions where appropriate.

Strengthening the primacy of competition law over sectoral regulation - dissenting view

7.19 A dissenting view on the Committee is more sympathetic to the proposal, in paragraph 7.23 of the consultation paper, to establish the primacy of competition law over sectoral regulation by way of a statutory obligation on all the sector regulators. This view proceeds from the premise that competition solutions are potentially more flexible and fluid. While acknowledging that regulated sectors (which are usually the old nationalised monopoly utilities) may never be fully competitive, and that most are, at least in part, natural monopolies (even in the most competitive of the regulated sectors, telecoms, the local loop remains essentially a natural monopoly), the dissenting view submits that the competition law prohibition on abuse of dominance is a much more effective way of controlling the adverse economic effects of natural monopolies than direct regulatory intervention through enforcement of regulators' licence conditions; the competition law prohibition on abuse of dominance can be targeted to prevent unfair or exploitative treatment of customers, to ensure that third party competitors have access to essential infrastructure facilities on terms which are reasonable and non-discriminatory, to prevent the natural monopolist using exclusionary tactics against downstream competitors (such as margin squeeze, predatory pricing, etc) and provides a basis for follow-on damages actions.

7.20 The dissenting view would favour a statutory obligation (slightly less strong than that proposed by the Government in paragraph 7.20 of the consultation paper) such that the regulator must, before taking action under its direct regulatory powers, first consider whether the objective could be achieved through a competition law solution. If the regulator then decides not to use competition law, that should be allowed, but the statutory obligation on the regulator to consider competition law would entail that the regulator, in line with its public law duties, must have defensible reasons for making that choice.

7.21 In response to this, the majority view is that competition remedies are not necessarily quicker and that it is better to leave the regulators with discretion on the choice of remedy they wish to pursue:

- Use of remedies under the prohibition on abuse of dominance is limited to those who have actually infringed - whereas a regulatory remedy can catch all with similar opportunities (e.g. in the case of industries with parallel regional monopolies such as water and electricity distribution).

- Market investigations involving a whole industry or class of regulated party are very resource intensive and do not readily lend themselves to agreed solutions, which are often possible in regulatory discussions.

- Mandating primacy of competition law may lead to use of a process which is less suitable to achieving the best outcome or to wasteful disputes about the form of process rather than the substance of the problem.

- It may require more expensive resource for all regulators to have the capacity to use competition law processes, which seems inherent in the primacy proposal.

The majority on the Committee would not go beyond ensuring that revised protocols emphasise that sector regulators should consider competition law remedies at the outset and that they should notify the CMA where they are using their regulatory powers to address actual or potential competition law issues. The majority would advise that care be taken to avoid opening up scope for disputes about form of process.

The CMA to act as a pro-active central resource for the sector regulators

7.22 As indicated above, we do not think this is the right approach. It is simply not a solution for a world class competition authority. There are two principal reasons.

7.23 First, in other areas (mergers, MIRs, non-competition price reviews) the CMA will be the senior regulator. The CMA cannot at the same time operate with its resources or some of them at the beck and call of the sector regulators, competing both among themselves and with the needs of the CMA itself. This creates muddle and tension with no clear lines of control. It would be likely to lead to friction and poor decision taking.

7.24 Second, if sector regulators have final decision-making powers without any role for the CMA (which is effectively the present position on the prohibitions as regards the OFT), then this militates against consistency of decision making, as sector regulators will be considering their decision in the context of other regulatory considerations, not competition policy for the UK and in relation to EU and international competition policy.

Giving the CMA a bigger role in the regulated sectors

7.25 As indicated above, we consider this is the only sensible solution following the merger of the OFT and the CC in order to produce consistent and effective decision taking, reduce duplication and inefficiency and allow the CMA to operate as an effective national competition regulator. The greater the part of the economy in which sector regulators have concurrent powers, the more important it is to ensure the primacy of the national competition authority on competition matters. In the interests of efficiency and clarity of relationship, we would give the CMA a clear role in all cases and the clear right to decide to run or take over antitrust/competition investigations within regulated sectors.

7.26 It has been suggested that use of competition powers by sectoral regulators would be bolstered if they knew that the Secretary of State could remove concurrency by statutory instrument, rather than full Parliamentary process. We doubt that this would have much effect one way or another.

7.27 Please refer to the full discussion in response to Question 14.

Q16: Further ideas to improve the use and coordination of concurrent competition powers

7.28 Please see the response to Question 14.

8 Section 8 - Regulatory Appeals and Other Functions of the OFT and CC

Q17: Should the CMA take on the CC's regulatory reference / appeal functions

8.1 The Committee agrees that, following amalgamation of the OFT and Competition Commission, the CMA would be the most appropriate body for considering regulatory references/appeals currently heard by the Competition Commission. We believe that only the CMA would have the right set of skills to consider these matters.

Q18: Model regulatory processes

8.2 In relation to the model regulatory processes set out in paragraph 8.12 of the consultation paper, the Committee agrees that these would be a useful tool for the CMA. The Committee would favour a full redetermination following which the CMA replaced the regulator's decision with its own.

9 Section 9 - Scope, Objectives and Governance

See Section 2 above (overview) for the Committee's thoughts on this.

10 Section 10 - Decision-making

General comments

10.1 The present UK system – and in particular, the rigour and independence of the Phase 2 process – is highly-regarded internationally.

10.2 Accordingly, it is essential that any reform of decision-making processes is not considered in the "abstract", but rather is undertaken in the context of the present system, based on experience gained from the operation of that system and with the retention of as many of the existing benefits of that system as possible as a primary objective.

- The Government should remain conscious of possible unintended consequences for the quality, speed and rigour of enforcement that might result from extensive changes to present decision-making processes.

- Given the specificities of each of the antitrust, merger and markets "tools", we consider that structural solutions should be tailored for each tool individually. Of course, where similarities do exist (particularly between the merger and markets regimes), we would encourage procedural and structural commonality, if this will enhance efficiency and reduce unnecessary duplication and costs. However, any such harmonisation of processes across tools should not be at the expense of procedural fairness for parties subject to investigation.

10.3 For both the merger and market regimes, we consider it essential to maintain (and to be *seen* to have maintained) effective separation and independence between Phase 1 and Phase 2 investigations and decision making. The combination of the OFT and the Competition Commission into a single CMA will inevitably create conditions in which, either from the outset or over time by evolution, there will be greater scope for the independence of the Phase 2 process to be eroded.

10.4 Although any reforms will necessarily involve some trade-off between the various objectives being pursued by the Government, we consider the maintenance of such independence to be of such importance that it warrants being given precedence over any desire to increase the speed of decision making or the efficiency of case transition from Phase 1 to Phase 2:

- That said, we do not see these dual objectives as wholly incompatible. For example, even if present structures (and thus the separation of Phases 1 and 2 bodies) were, as far as possible, retained, scope would remain for the CMA to introduce further internal process and procedural innovation aimed at expediting investigations over time, based on its early operational experience.

- We note also that the OFT and Competition Commission have recently introduced a variety of measures with precisely such efficiency-enhancing aims. The impact of these changes has yet to be seen. BIS should therefore bear in mind that retention of the status quo will not necessarily preclude further advances in case processing.

Q22: Arguments and costs/benefits of the models

10.5 For both mergers and markets, we regard the "base case" – under which current structures will be largely unchanged subject to wider process improvements – as the most compelling of the models presented by BIS. In our view, the "base case" would, in each case:

- best maintain the impartiality and robust decision-making that are strengths of the current system; and
- as far as possible, mitigate the likelihood of confirmation bias (albeit that, in our view, additional protections would be required).

10.6 As noted above, we consider a vital feature of any future authority to be the greatest practicable independence of the Phase 2 decision-makers from the Phase 1 panel and that, institutionally, the exercise of independence is valued more highly than consistency with the relevant Phase 1 decisions.

- The consequences for parties resulting from an adverse finding in a market or merger investigation can be extremely serious. As a result, we regard the existence of an independent and impartial Phase 2 body to undertake its own examination of the evidence to be essential.
- We do have some concerns, however, that the very "co-location" of the Phase 2 and Phase 2 processes within a single agency and any resultant mixing of staff and agency-wide *esprit de corps* will – in and of itself – give rise to a greater risk of confirmation bias.
- Consequently, it is all the more critical that a clear institutional framework is established within the CMA to promote – both structurally and culturally - the independence of the Phase 2 process. We are concerned that, without such strong cultural and structural internal safeguards, the risk of confirmation bias is only liable to increase over time.

10.7 In the light of the above, we do not consider appropriate the proposal that, for mergers, the same body (the Executive Board) could have decision-making authority at both Phase 1 *and* Phase 2, even if the decision at each Phase were undertaken by different Board members. For the same reasons, we do not support – for either mergers or markets cases – *any* transition of a Phase 1 decision-maker into the Phase 2 panel for that case.

10.8 We do agree, however, that there may be operational synergies and benefits for case transition if members of the Phase 1 case team also form part of the investigatory team at Phase 2. The rationale for such transition would appear to be particularly strong in market investigations, given the depth and breadth of the inquiry in such cases. However, any commonality of membership in the Phase 1 and Phase 2 case teams will necessarily increase the risk of confirmation bias: it is therefore critical that any such reform is accompanied by the imposition of certain internal safeguards to minimise those risks to the greatest possible extent, for example ensuring:

- that the Phase 1 team members who "transfer" across are supplemented by a sufficient number of "new" team members at Phase 2 to ensure that the majority of the Phase 2 case team were not involved at Phase 1; and

- that no members of the Phase 2 case team above an appropriate level of seniority were involved at Phase 1.

10.9 We also advise against the adoption of a more "prosecutorial" system, in which the Phase 2 panel solely opines as final adjudicator on a fully-worked case presented to it by the staff team, and does not have any further involvement in the investigatory process:

- It is not apparent that such a system would enhance the independence of the Phase 1 and Phase 2 processes any more than adoption of BIS's base case.

- It would also represent a significant cultural change for the CMA, overturning the long tradition of Phase 2 inquisitorial review that is currently so valued in the UK regime. Moreover, the significant re-skilling and "learning process" for CMA staff that such a shift would necessitate might be difficult to achieve in the short to medium term. Such radical reform thus also risks impeding the rigour of decision-making and the momentum of enforcement.

Appeals

10.10 We do not believe that significant reform of the existing appeal process is required, at least in respect of mergers and markets. This view is premised, however, on the maintenance of the independence, thoroughness and impartiality of the Phase 2 process. If the proposed reforms would limit such separation, the Government should review carefully whether an appeal on judicial review grounds alone remains sufficient to ensure compliance with the ECHR and we would think that a full appeal on the merits would need to be introduced.

Q23: Composition and appointment of the decision-makers

10.11 As noted above, we believe that the Phase 1 and Phase 2 decision-makers should - in so far as possible - remain independent of each other. For this reason, we also favour effective retention of the current composition of the decision-makers at each phase, i.e.:

- at Phase 1, one or more (clearly identified) senior members of the CMA Executive Board; and

- at Phase 2, a panel of members with a range of economic, business and legal expertise. We consider that the majority of such a panel should be appointed on a full-time basis (or, at least, with a greater time commitment than the current Competition Commission members). This is to ensure greater consistency of decision-making, with the same members being involved in a larger number of cases. This core of full-time members should be supported by a minority of part-time members with specific industry or other expertise. Where conflict of interest rules permit, we propose that this would include individuals currently or previously active in the industry sector that is under scrutiny.

10.12 The current method of appointing panel members and the use of fixed appointment terms provides a valuable safeguard, and has produced a high calibre of panel member. Accordingly, we see no compelling reason for fundamental change to this system.

Q24: Other suggestions

10.13 Finally, and irrespective of the identity of the decision-makers at Phase 1 and Phase 2 - we consider that this reform programme presents an important opportunity to enhance the rights of affected parties in merger and markets cases to engage directly with those decision-makers.

- Under the present system, an actual (or at least perceived) lack of direct access to the decision-maker, particularly at Phase 1, is a source of frustration for merger parties and gives rise to concerns that the parties' key arguments have not been fully or adequately articulated by the case team to the decision-maker.

- Greater transparency for the parties as to the specific identity of the decision maker at Phase 1 is also desirable. However, we do not believe it to be sufficient, in and of itself, to alleviate the access-related concerns that presently exist.

11 Section 11 - Merger Fees and Cost Recovery

Merger fees

Q25: Merger fee options

11.1 As a overarching point, the Committee questions whether it is appropriate for the Government to seek full cost recovery from the merger control regime. The Government has previously stated that its policy is to charge full costs for many publicly provided goods and services[51]. However, we are of the view that the merger regime is a cost that should be borne primarily by the Government and not the merging businesses. The merger regime does not provide a service to the parties to a merger but rather a service to society and it is the general public that ultimately benefits from merger control. As such, the regime should be - at the very least in part - paid for by the taxpayer.[52]

11.2 We consider that any decision to raise merger fees should be made in accordance with the principle that fees charged are fair and proportional. A move to full cost recovery would be counterproductive for a number of reasons.

11.3 First, the levels of merger fees contemplated by the Government based on full cost recovery would result in the UK having excessively expensive merger fees compared to the vast majority of other jurisdictions, particularly if the proposed fees under a voluntary system are adopted. In our view, the fee options proposed by the Government are disproportionate in scale, and out of line with international standards. This is clear from the Table at the end of this Section, which contains a comparison of the proposed UK fees in a voluntary regime against current filing fees in other major countries with a greater GDP than the UK. We note that, although the Government acknowledges in its Impact Assessment that UK merger fees are already high by international standards, it has not attempted to benchmark against other jurisdictions. The table demonstrates that countries with a higher GDP have lower merger filing fees than those proposed for the UK.

11.4 Secondly, the ever-escalating merger fees in the UK place a major regulatory burden on businesses wishing to undertake merger activity in the UK. We are concerned that excessively high merger fees could have a chilling effect on transactional activity in the UK, which would ultimately be detrimental to the UK economy. It is hard to see this as being consistent with the Government's "growth" agenda. As it is, companies already incur considerable costs in carrying out a legal assessment of transactions[53]. Excessively high fees could discourage merger activity, particularly for smaller mergers, but also for some larger mergers where the economic rationale for the transaction may be marginal. In some transactions, filing fees may represent a substantial portion of the costs associated with merger control[54] and there is a risk that the proposed fees could be disproportionately high for mergers that raise few or no competition concerns.

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51 HM Treasury, *Managing Public Money*, 2007, paragraph 6.1.1.

52 This view has been expressed by other jurisdictions such as Canada, Japan and New Zealand (ICN Report: *Merger Notification Filing Fees*, 2005).

53 According to BIS, the cost of notifying per case is estimated to be around £50,000 to £200,000 in legal fees (BIS Impact Assessment, paragraph 119).

54 PricewaterhouseCoopers, *A tax on mergers? Surveying the time and costs to business of multijurisdictional merger reviews*, 2003. This study found that, although legal costs were the greatest component of external costs associated with merger control, filing fees were the second most significant component, accounting for an average of 19 per cent of external costs.

11.5 Thirdly, the fees would fall disproportionately on smaller companies in the UK, contrary to the Government's objective of protecting SMEs. Mergers involving larger companies are more likely to be notifiable to the European Commission under the EU Merger Regulation - where no merger fees are payable. It would be perverse if the burden of disproportionately high fees were to fall primarily on smaller businesses which are subject to national merger control.

11.6 We note that the Government estimates that the total annual cost of the merger control regime is likely to be around £9 million in coming years, even though in 2008/9 actual costs were £14.5 million, and in 2009/10 actual costs were around £10.4 million - in years of relatively low merger activity[55]. We are concerned that this assumption of £9 million is too low and may be distorting the proposed fee level. It may be that, in fact, the actual fees charged will be substantially higher, in view of the Government's aim of recovering the full costs of merger control from businesses. Indeed, the consultation paper states, in paragraphs 11.14 and 11.15, that, at least in a mandatory regime, the cost of merger control to the competition authority may increase and that fees may need to be higher. We would welcome some clarification from BIS as to how it has reached the figure of £9 million has been calculated.

11.7 With respect to the fee options under a voluntary regime, the proposed levels are excessively high for both Options 1 and 2. Such high merger filing costs could have adverse consequences for a voluntary regime, as it is likely that some parties would be discouraged from notifying their transactions to the competition authority, particularly in the case of small mergers.

11.8 Regarding the fee options in a mandatory regime - a prospect which the Committee strongly opposes, for the reasons explained in Section 3 - we do not consider that a flat fee would be appropriate for either a full mandatory or a hybrid regime. The reason for this is that the costs would fall disproportionately on smaller mergers and could discourage some smaller transactions. The Government recognises this as a concern in respect of a voluntary regime, and in our view the same concern equally applies to a mandatory regime. Moreover, if a mandatory regime were to be adopted, costs to the competition authority would escalate as the CMA would need to review a higher volume of notifications (many of which raising no competition issues whatsoever, and therefore being "pointless" notifications). To this end, it is questionable whether the proposed flat fee of £7,500 in a full mandatory regime is realistic. If the there is a huge increase in the number of filings (and hence costs to the CMA), the proposed flat fee would no doubt need to increase correspondingly. We would welcome further clarification as to the basis for the proposed flat fees. Therefore, if a mandatory system were to be adopted, we would favour Option 2 (retention of differentiation of fees by turnover instead of a flat fee). We consider that any increase in the level of fees (in either a voluntary or mandatory system) should only be made in line with inflation in order to achieve greater cost recovery (as opposed to full cost recovery).

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[55] In 2008/9 and 2009/10 the OFT considered 72 and 55 mergers respectively under the Enterprise Act, compared to 106 mergers in 2006/7 and 97 mergers in 2007/8. In 2009/10 there were 337 acquisitions of UK companies compared to 656 acquisitions in 2008/9 and 1061 acquisitions in 2007/8 (OFT Annual Reports 2008/9 and 2009/10, Annex D).

Introducing a power to reclaim the cost of antitrust investigations

Q26 and Q27: The principle of recovering costs in antitrust investigations

Principle

11.9 The Committee is opposed to the principle that the CMA should be able to recover the costs of an antitrust investigation arising from a party that is found to have infringed competition law. But if the Government were minded to make such a move, then the principle of fairness dictates that such a system should be reciprocal; that is, a party should be able to recover the costs of an investigation arising in cases where the CMA abandons an investigation or takes a non-infringement decision. In such circumstances, the party that was under investigation should be able to recover all or at least some of its costs from the Government[56]. Alternatively, if there were a non-infringement decision, or if a case were abandoned, following an investigation that arose out of a third party complaint and which was found to have been based on erroneous or misleading information, the CMA should seek to recover its costs from the complainant rather than the non-infringing party.

11.10 We are aware that a very few other jurisdictions allow for cost recovery of antitrust investigations but, even in those cases, that does not amount to full cost recovery. For example:

- Czech Republic: The competition authority can only recover a lump sum of CZK 1,000 (around 40 euros) from an infringing party, which may be increased in complex cases or in case an expert opinion is needed to CZK 2.500 (100 euros). The lump sum is increased by 1,500 CZK for every appointed expert. However, the maximum amount is limited by CZK 6,000 (250 euros), so the amount that can be recovered by the authority is marginal.

- Canada: Although a liberal interpretation of the Canadian Competition Act suggests that the full recovery of costs is possible, there is no reported case law on the matter.

- Austria: An undertaking found to infringe competition law will be liable to pay a standardised fee (up to 30,000 euros) in respect of costs of the investigations. The sum is paid into the consolidated fund.

Practical effects

11.11 In addition, we are concerned that if the CMA had the power to recover the costs of its investigation from the infringing party, this could have the counterproductive effect of discouraging efficiency, which would fly in the face of one of the overriding objectives of the proposed reform of the UK competition regime. There may be less of an incentive for the CMA to streamline and target appropriate cases for investigation if costs become less of a concern as they could be recouped.

11.12 A further counterproductive effect would be that it would put pressure on the accused parties - particularly on SMEs - to settle rather than fight a case (or at least to concede rather than

[56] For example, the OFT closed its recent investigation into suspected price coordination involving a number of retailers and suppliers in the UK grocery sector on grounds of administrative priority. The companies that were investigated incurred substantial costs in responding to the OFT's requests for information but had no ability to recoup this expenditure.

contest key points) because they could not afford the prolongation of the case entailed in the issues being fully and fairly heard. That would be manifestly unjust, and moreover would reduce the number of cases resulting in a full decision (so reducing the body of precedent which is so important for the effective functioning of the antitrust regime).

Q27: Immunity, leniency, settlement and commitments

11.13 As explained above (Q26 and Q27), the Committee does not support the proposal that the competition authority should have the ability to recover its costs from the infringing party - the costs of the investigation should already be covered by the penalty for the infringement.

11.14 However, if the Government were to decide to adopt a mechanism for cost recovery, we are particularly concerned that this could disincentivise and undermine immunity and leniency applications. These options could appear much less attractive to companies that have infringed competition law if they are nonetheless pay for the costs of the subsequent antitrust investigation (on other parties). Immunity and leniency applications are in the public interest as well as the interests of the applicant parties; they are a major means by which the authorities uncover anti-competitive activity. We therefore consider that immunity and leniency parties, should not be required to pay for the costs of the investigation by the CMA[57].

Q29: Paying costs as an element of the fine

11.15 We do not agree that an additional costs element should be added to the fine payable for the infringement itself. However, if the Government were to move towards cost recovery, we agree that the increased penalty should be payable to the consolidated fund rather than the enforcement authority (in the same way that penalties are paid into the consolidated fund). If the sum were payable to the CMA, there would be a risk that this could affect the incentives of the CMA; for example, it may encourage the authority to make an infringement finding where it might not otherwise have done so.

Q30: Costs on appeals

11.16 If the Government were to adopt a cost recovery approach, we agree that a wholly successful appeal on the substance of the infringement decision should mean that the appellant should not be liable for the costs element. A successful appeal on substance implies that the CMA should not have incurred the costs of an investigation in the first place because there was no anti-competitive infringement.

11.17 The costs recovery element for partially successful appeals could be more problematic. The Government proposes that, where the appeal is only partially successful, the appellant should be liable for the costs of investigating the upheld infringements at a level to be decided by the CAT, but not for the costs of investigating the overturned findings. This approach ignores the

[57] We acknowledge that, in the Czech Republic, the competition authority can recover its costs from such parties, but there the amount is limited to the sums stated above in paragraph **[11.10]** and cost recovery is thus minimal.

possibility that the points of appeal that were won were very important and/or alternatives to the points lost.

11.18 Another option could be to limit cost recovery to situations where an appellant is wholly unsuccessful or only wins on immaterial points. In any event, some clarity as to exposure to costs would be welcome, such as a fixed or maximum costs amount payable by the relevant party.

Q31: A power to allow the enforcer to recover their costs, or amending the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?

11.19 As indicated above, we consider that the penalty imposed should already be sufficient to cover the costs of the investigation, without the need for additional powers/amendments to the legislation.

Q32: Telecom price control appeals heard by the Competition Commission

11.20 The Committee cannot see any reason why telecoms should be treated differently from other regulatory appeals and it would be useful to understand the justification for the current inconsistency.

11.21 If the Competition Commission were given the ability to recover its costs for a partially successful appeal, the concern indicated above in our response to Question 30 would also be relevant to telecoms price control appeals. Moreover, a potential concern may be that a move to cost recovery could affect incentives on the part of the CC if its costs are only paid where an appellant fails. The temptation - in, say, a borderline case at the end of a tough financial year for the CC and in circumstances where the CC is self-funding - might be to find against the appellant in order to recover costs. In order to address this, perhaps any cost recovery should be payable to the consolidated fund rather than directly to the CC.

Q33: CAT recovery of costs

11.22 We are concerned that allowing the CAT to recover its full costs would be contrary to the principle of access to justice as potential appellants might then be deterred from exercising their rights of appeal if they may have to cover the costs of the CAT. However, we note that the Government proposes to allow the CAT to exercise its discretion as to whether or not costs should be set aside in a particular case. Some guidance on the types of circumstances where the interests of justice dictate that costs should be set aside would be helpful. In any event, we would not object to the CAT recovering reasonable costs, such as for photocopying, postage etc by way of (for instance) court fees.

11.23 The Government has not addressed how interveners in appeals would be dealt with in terms of cost recovery. The role of interveners appears to be changing as a result of a recent Court of

Appeal judgment causing them to take a more active role[58]. The judgment implies that there is a greater onus on interveners to advance more substantive cases, which means that they are likely to cause more costs to be incurred. There would be unfairness in requiring an appellant to bear costs caused by an active intervention but, at the same time, there would be potential unfairness in requiring an intervener to bear costs where their involvement is the result of an appeal which they did not initiate and because the Court of Appeal has effectively required them to take the lead role in defence. Interested parties may be more reluctant to intervene for fear of being exposed to the risk of paying the CAT's costs.

[58] *British Telecommunications Plc v Office of Communications* [2011] EWCA Civ 245, paragraph 86.

Table - Jurisdictions which have a greater GDP and lower merger filing fees than the proposed UK voluntary regime (in descending order of GDP)

Country	GDP (adjusted for PPP)[59] $million	Filing fees
EU	15,170,419	None
United States	14,657,800	Fees are as follows: • transaction value of US$66 million or greater but below US$131.9 million = US$45,000 fee; (approx **£27,000**) • transaction value of US$131.9 million or greater but below $659.5 million = US$125,000 fee; (approx **£76,000**) • value of $659.5 million or greater= US$280,000 fee (approx **£170,000**)
China	10,085,708	None
Japan	4,309,432	None
Germany	2,940,434	A filing fee of up to €50,000 (approx **£45,000**)
Russia	2,222,957	A filing fee of 20 000 roubles (approx **£400**) applicable only to transactions that require Pre-Transaction Filing. No filing fees for a Post-Transaction Filing.
UK **(proposed voluntary)** **Option 1:** **Option 2:**	2,172,768	• Where the UK turnover of the target does not exceed £20 million, fee would be **£65,000** • Where the UK turnover of the target exceeds £20 million but does not exceed £70 million, fee would be **£130,000** • Where the UK turnover of the target exceeds £70 million, fee would be **£195,000** • Where the UK turnover of the target does not exceed £20 million, fee would be is **£60,000** • Where the UK turnover of the target exceeds £20 million but does not exceed £70 million, fee would be **£120,000** • Where the UK turnover of the target exceeds £70 million but does not exceed £120 million, fee would be **£180,000** • Where the UK turnover of the target exceeds £120 million, fee would be **£220,000**

[59] International Monetary Fund, 2010. PPP is Purchasing Power Parity - takes into account cost of living/inflation differences to produce a more accurate figure.