

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

Response form



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** Our response to each chapter has been drafted by a named academic member of the Centre for Competition Policy. Each was written following a sequence of discussions held in the Centre by the authors and other members. These discussions were coordinated by Dr Andreas Stephan and this response has been edited by Professor Bruce Lyons. Wherever possible, the views expressed are based on the available academic research and represent the collective view of the Centre. However, we have not attempted to agree on the precise nuance of interpretation so we retain named authors for each chapter and are individually responsible for the contents. Summary comments on this consultation have been published in recent months on our Competition Policy Blog: <http://competitionpolicy.wordpress.com/>. The support of the Economic and Social Research Council is gratefully acknowledged.*

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1. Why reform the competition regime?

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

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

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

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

Q.1. It is hard to disagree with these objectives, but the first should be prioritised. See our response to Q.2 below specifically on 'criteria by which to judge the proposed merger' of the OFT and CC.

Q.2. (by Bruce Lyons and Stephen Davies)

Any other merger, particularly one creating a monopoly, would be the subject of considerable scrutiny. We think that is appropriate in this case, so we structure our answer in the same way as a competition authority would go about any other merger review.

The 'industry' in which the firms/agencies operate

The OFT acts as a first phase review body for mergers and market investigations. If it finds a potential competition problem, it refers the merger (or market) to the CC for a detailed investigation. The CC has stronger powers to order remedies or to prohibit an anticompetitive merger. The OFT also investigates and prosecutes antitrust violations (i.e. cartels, anticompetitive agreements or abuse of a dominant position), and has a consumer protection role. The CC undertakes regulatory appeals. This division of responsibilities for each institution has evolved gradually since the Monopolies Commission was established in 1948.

Other countries have different institutions to perform similar tasks. For

example, DG Competition in Brussels undertakes the entire merger review process as well as antitrust. In the USA, there are two agencies (FTC and DOJ) but each does complete merger reviews and antitrust – cases are distributed roughly along industry lines. Other countries have other idiosyncrasies so there would seem to be an opportunity for comparative analysis to identify the best institutional design. However, it turns out that most peer reviews place the UK alongside the EC and USA as world-leading competition authorities. We believe it would be unwise to conclude that institutions do not matter.

Criteria by which to judge the proposed merger

The standard by which commercial mergers are judged is whether they substantially lessen competition. A modest lessening of competition may be balanced by efficiency gains as long as consumers do not lose out. In the case of a single CMA, we need to adapt these criteria. The first priority is:

- Would the merger likely result in a less competitive economy with adverse effects on consumers?

And if the answer is too close to call, we can bring in the efficiency defence:

- Would the business community receive a better service?
- Would there be cost savings to the taxpayer?

This ranking of criteria may require some justification. Annual consumer benefits attributable to competition policy in mergers, markets and antitrust are estimated at £739m. Furthermore, deterrence effects have been estimated to be at least five times as great. These benefits have to be set against combined annual costs of the OFT and CC of just £73m. Unfortunately, there is no reliable measure of business compliance costs, but it would clearly be unwise to risk even a small proportion of these benefits without huge cost savings.

Effects of the proposed merger

Cost savings on behalf of the taxpayer are easily dealt with. Potential cost savings include: rationalisation of back-of-office costs; single premises; and more effective use of staff with fluctuating work-loads. The consultation is backed by an analysis of such savings. According to the impact assessment, after allowing for transition costs, the expected saving averages £1.3m pa, or a tiny 0.18% of the measured policy benefits even excluding deterrence. Clearly the merger must be judged by its likely impact on good case choice and decisions that promote competition and do not chill innovation.

The review of a commercial merger focuses only on merger-specific effects. It sets aside anything that could be changed in its absence. Similarly, the evaluation of the OFT/CC merger should not be clouded by issues discussed in the consultation that are not merger-specific (e.g. compulsory notification of mergers). This leaves three key issues that would be directly affected by the

merger:

1. *Coordination.* There are less often anti-competitive effects and more often efficiencies in a vertical merger than there are in one that is horizontal. The OFT/CC merger is essentially vertical as the first phase cases flow from the OFT to the CC for deeper investigation. This has been the position since the OFT was established 38 years ago. The CC has no powers to initiate any investigation – every merger or market inquiry must come through the OFT (or a sector regulator). Also, the CC can impose remedies but the OFT often has to monitor them. It is, perhaps, disappointing that coordination is not seamless after all these years, but it is not and there remains room for improvement. One example is that case flow is not as smooth as it might be and this compromises resource utilisation.
2. *Externalities on other institutions.* The OFT and CC currently each have a range of roles beyond mergers and markets. For example, the OFT is the body responsible antitrust. Sector regulators can concurrently apply some of these provisions to their own sectors (though they rarely do). The OFT also has an important responsibility for consumer protection, which will probably be merged with other bodies responsible for representing consumers. The CC can receive market references from sector regulators and hears regulatory appeals. The Competition Appeals Tribunal has very different roles in relation to the OFT compared to its relationship with the CC. The system is very complex and might benefit from rationalisation, but an OFT/CC merger would be only part of the jigsaw. It will have profound (and not always obvious) implications for many other institutions. Our fear is that piecemeal reform may create knock-on problems for related institutions (e.g. CAT, regulators, consumer bodies).
3. *Decision making.* This is arguably the biggest issue of all. The OFT has a model of decision making that was apparently based on the European Commission (DG Comp). Case teams investigate and this is followed by an executive decision. The identity of the decision maker has been opaque, at least until the last couple of months when the OFT has begun naming an individual executive for each case. In contrast, the CC arose out of the Royal Commission model of decision making. This has a panel of named, part-time, non-executive experts brought together to advise the staff case team from the start and then to decide each case. In terms of corporate culture, the style of decision making could hardly be more different. We also know that many commercial mergers fail because it is impossible to weld two incompatible cultures together. Success in commercial mergers often depends on either wholesale adoption of the better approach or the careful design, bottom to top, of a rational decision making structure that is seen as such by all parties. The CMA requires the latter. We return to this in our answer to Q.24.

Provisional findings (i.e. our conclusion on Q.2 given what we currently know)

The UK already has a first class competition regime, albeit with room for improvement. The creation of a single CMA has the potential to enhance quality if it is well designed. There could be a smoother flow of cases, shared expertise and a more coordinated treatment of remedies. The system could also be faster and less complex for firms. On the other hand, there would be few potential cost savings, externalities on other institutions, and possibly a loss of competition between agencies vying to be the best.

Most importantly, the decision making structure of the proposed CMA must be got right. This applies to antitrust as well as mergers and markets, and it needs to be appropriate to whether decisions are final determinations or referrals for further investigation. We could only recommend (or not) approval of the merger once the proposed decision making structure, internal organisation of two-phase case flow and scope of activities of the CMA have been clarified.

2. The UK Competition regime and the European context

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

Comments: None

3. A stronger markets regime

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

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

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

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

Q.3. (by Bruce Lyons)

The markets regime is a powerful weapon that is available to almost no other country. In particular, it can impose remedies on non-dominant firms that have not broken the standard elements of competition law. Remedies can range from structural divestments to legally binding behavioural commitments. Other regimes, including the European Commission, can choose to investigate markets, but none can impose such powerful remedies (except Israel, which recently replicated the UK model). The consultation regards this as one of the key strengths of the UK competition regime that needs enhancing. We are more cautious.

Nine markets have received the full weight of a Competition Commission investigation since 2004. As the consultation points out, the average duration of investigation (including appeals) is just over three years. Additional time is then necessary to adopt remedies, usually 4-10 months but it can take up to a further three years. Many of the markets investigated in this way have related to consumer finance (e.g. store cards, home credit, NI personal banking, payment protection insurance) but they can also be a hangover from a problematic privatisation (e.g. BAA airports, rolling stock leasing) or a high profile consumer market (e.g. groceries). The OFT has conducted a further 24 smaller market studies in the same period (in addition to the first phase of the market investigations referred to the CC). These include a number of essentially consumer protection studies. The OFT's smaller studies take an average of 10.4 months but can only result in voluntary remedy agreements.

Some of these investigations have undoubtedly been greatly beneficial for competition. For example, it would have been very difficult to challenge the London airport monopoly (including Heathrow, Gatwick and Stansted) under Article 102EC/UK ch.2 (abuse of dominance) because the main problem was poor quality service and lack of innovation, not exclusionary conduct or obviously exploitative prices. However, in other cases *it has been difficult to identify remedies that address the identified competition problem*. For example, if consumers are apparently irrational in buying expensive payment protection insurance at the point of sale, careful evidence is required before a prohibition on such selling can be shown to improve welfare.

Where does this leave us? The markets regime can indeed be an important weapon in the competition armoury, but like all weapons it should be used with great care and it works best as a deterrent. The main focus should be on how better to identify markets suitable for investigation. We are unaware of any research supporting the view that the system needs more such inquiries.

However, that is the direction in which the consultation appears to be heading. It suggests four innovations which are unlikely to benefit competition and which may cause harm:

- Conducting *in-depth investigations into practices that cut across different markets*. The danger is that pricing practices almost always have market specific features that render generalisations fairly meaningless (e.g. ‘below cost selling’ may be a competitive consequence of a two-sided market with, for example, newspaper readers being appropriately ‘subsidised’ by advertisers who want access to them; or it may be aimed discriminately at a new entrant to the detriment of competition). An example of the failure of this approach is the Monopolies Commission inquiry into ‘parallel pricing’ (1973, Cmnd 5330) which found that prices might move together either due to competition or collusion. It would be hugely costly for firms across the economy to feel the weight of the CMA’s information-gathering powers and to follow due process in this form of inquiry. An appropriate division of labour is for academic research or commissioned projects to develop and clarify the principles that can distinguish between the economic effects in any particular case. The CMA should then gather the relevant evidence to apply the principles to particular markets under scrutiny.
- Giving powers to *report on public interest grounds* in addition to identifying adverse effects on competition. However carefully couched in caveats, this opens the gates to a re-introduction of a public interest test which would be a retrograde step for a competition authority. The value of a specialist competition agency is that it has expertise in how firms compete and how this can be channelled to benefit consumers. It is not well adapted to assess non-competition effects. This proposal could resurrect ‘industrial policy’ through the back door. If this proposal (to be able to report to the SoS in relation to the wider public interest) is nonetheless implemented, there should be a very tightly specified list of what constitutes the wider public interest, along the lines of the non-competition issues in the Enterprise Act in relation to mergers.
- Allowing *SME bodies to become ‘super-complainants’* such that they have the right to a reasoned response by the competition authority if they request a market inquiry – the super-complainants system was introduced to help consumer groups who feel their members are being ripped-off. However, this extension could support disgruntled or inefficient competitors. Competition works through consumers putting their money where their preferences are. SMEs are a vital source of new ideas to entice buyers, but they should spend all their energy in achieving this. Lobbying for protection only diverts such energy. Of course, the CMA must be alerted to anticompetitive practices, including those of large firms that exclude SMEs from providing consumers with what they would prefer. The CMA must listen to such intelligence, but formal SME ‘supercomplaints’ are unlikely to be an improvement and

could tie up scarce CMA resources.

- The markets regime would certainly benefit from streamlining, and there are some helpful recommendations in the consultation on how to ensure that remedies are proportionate and efficient. However, a proposal to introduce *more information gathering powers in phase one of a market inquiry* is less obviously ‘streamlining’. There are always several firms in each market and a heavy duty first phase could make the system more burdensome than necessary. The purpose of this first phase is not properly discussed in the consultation document. It should be a light-touch first filter and the second phase should be used for substantive requests for data that firms have not previously volunteered. A clearer phase I/phase II path would encourage firms to see the value of volunteering information in phase I.

The markets regime has so far done more good than harm. The first objective of any reform should be to keep it that way. For example, there is a danger of investigating markets in which competition may not work perfectly but for which there are no appropriate remedies.¹ This leaves plenty of room for improving case selection and investigation procedures. Some useful suggestions are made in the paragraphs following #3.29 in the consultation.

Finally, it would be helpful if there were clear *criteria for referral* of a market to second phase investigation. This could be along the lines of ‘a reasonable belief that the market could be delivering substantially higher prices or lower quality or slower innovation than would be delivered by a more effectively competitive market’. The ‘reasonable belief’ wording is taken from the CAT’s judgment on merger references (an alternative formulation could use the ECMR’s merger reference wording of ‘serious doubts’).

4. A stronger mergers regime

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

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

- *the arguments for and against the options;*

¹ The recent caution expressed by the OFT in relation to referral of the audit market is a sensible approach because of the concern that there may be no remedy even if an adverse effect on competition were found.

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

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

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

Q.5. (by Bruce Lyons)

The UK regime for controlling potentially anticompetitive mergers has a number of idiosyncrasies as compared with most other competition authorities across the globe. For example: the two phases of merger inquiries are carried out by separate institutions; merger notification is voluntary; very small mergers can be caught by the 'share of supply' test for jurisdiction; and minority shareholdings can be prohibited on the grounds of 'material influence'. Some of these are good idiosyncrasies, and other jurisdictions could learn from the UK, but other idiosyncrasies are a handicap, and the UK system would benefit from reform. Which fall into each of these two categories?

1. *Separate institutions for each phase.* The current UK system is unrivalled for avoiding 'confirmation bias', which can happen if an investigation team spends the second phase trying to prove its initial hunch was right. In the UK, if the OFT has a reasonable belief that a merger might be anticompetitive, it is referred to the CC for a completely new team to investigate and decide afresh. On the other hand, an increasing number of mergers are settled at the OFT stage (up steadily from a quarter in 2004/5 to two-thirds in 2009/10). We are aware of no research that distinguishes whether this is because firms are learning to predict the regime after the 2004 reform, or because firms and the OFT are rushing into inaccurate remedy agreements before the competition issues have been properly clarified. Our own research on EC settlements in Phase I suggests early settlement more likely leads to excessive remedies (Type 1 errors) in more straightforward mergers, but anticompetitive mergers (Type 2 errors) may be agreed in Phase I in the case of a complex merger or where the authority is under pressure of resources.² With careful design of an integrated institution, it should be possible to guard against both confirmation bias and excessively hasty agreements. Minimum requirements include different heads of investigation team and different decision makers in each phase.
2. *Voluntary notification.* See answer to Q.6 below.
3. *Share of supply test.* Most jurisdictions, including the EC, review

² Luke Garrod and Bruce Lyons 'Early settlement and errors in merger control' *CCP Working Paper 11-6*.

mergers only of a certain size. In the UK, this element is captured by the 'turnover test' which allows regulatory scrutiny if the acquired firm exceeding £70m turnover. For firms that may be smaller, the UK system also captures mergers that would create or enhance a 'share of supply' of at least 25%. Two-thirds of all UK mergers that require some form of intervention are captured, not by the turnover test, but by the share of supply. One reason for this is that the EC threshold captures most large mergers which are consequently dealt with in Brussels. This raises the question: do small monopolies matter? It is quite possible that the costs of an investigation would deter some beneficial small mergers but there would be serious dangers in the absence of share of supply test. For example, a sequence of local monopolies (e.g. funeral parlours) could develop across the country. If entry is easy, as it may be in many small scale markets, then there would be no need to refer the merger for heavy duty investigation. In fact, the OFT has been successfully prioritising along these lines for some years and there is no need to eliminate the share of supply test. However, if notification is to become mandatory, clear guidance would be needed on provisional market definition.

4. *Material influence.* The UK has the ability to intervene in cases of minority shareholdings that confer a material influence on another firm even though this falls short of full control. This was applied to good effect in the proposed merger of BSkyB and ITV. The EC does not have this power, which has resulted in Ryanair holding a substantial minority stake in Aer Lingus despite a full merger having been prohibited. Commissioner Almunia sees this as 'probably an enforcement gap' in Europe and we agree. The EC needs to emulate the UK on this one – not vice versa.

The consultation also discusses the '*small merger exemption*' (#4.40-4.42). That discussion makes some good points but it fails to emphasise the importance of a deterrent effect. Similar to the above arguments in relation to the share of supply test, even if the cost of investigating a small merger appear excessive in one particular case, this may still be justified in terms of the overall merger control system if it deters further anticompetitive mergers from being initiated.

Finally, another idea is floated in the consultation, apparently without much enthusiasm, which is to allow *remedy agreements very early in Phase II* and without further work on economic effects. That would be a very bad idea. It would encourage firms to try and bluff through an anticompetitive merger in Phase I, in the knowledge that if it was not accepted, it could immediately make a revised offer without incurring further costs of delay or investigation. The discipline of a negotiation timetable, including enforced delay before a revised offer in Phase II, is an important incentive for sensible initial offers.

Q.6. (by Bruce Lyons) *Mandatory notification*

A few mergers may slip under the radar of the OFT due to voluntary notification, but a greater problem is the consequence that half of all interventions in UK mergers have to deal with completed mergers. This creates problems when the businesses have already been integrated, key personnel changed loyalty or left, capital equipment moved or scrapped, information (including price lists) exchanged, etc. We know from research on merger remedies that divestitures create major problems even before businesses have been integrated (FTC, 1999; EC, 2005; Davies and Lyons, 2007; various evaluation studies conducted by the OFT and CC).³ Post-merger unravelling can only make these problems worse. If there is any chance of prohibition or that remedies may be required, it is far better to deal with uncompleted mergers.

Mandatory notification should, therefore, include a requirement that the merger must not be completed until the time necessary for a Phase I decision has passed (extended if there is a referral). This may delay the completion of some mergers, but it speeds first phase decisions for those that would have been picked up late by the OFT. There would be some increase in paperwork for firms, but this could be minimised by a simplified procedure for mergers without significant market overlaps or market dominance. This has been very successful for the EC and it may be further simplified as a screening device.

A concern may be the potentially increased workload for the CMA, though it would no longer have the cost of pro-actively trying to find information about un-notified mergers and their possible competitive effects. When France introduced mandatory notification in 2002, the authority's caseload appeared to rise substantially, but it is difficult to disentangle this from other changes including the jurisdictional threshold and economic cycle.⁴ A separate issue would be if a mandatory system was so bureaucratic that it deterred efficient mergers.⁵

³ Davies, Stephen and Bruce Lyons, 2007, *Mergers and Merger Remedies in the EU: Assessing the Consequences for Competition*, Edward Elgar; European Commission, 2005, "Merger Remedy Study" available at: <http://ec.europa.eu/comm/competition/mergers/others/>; Federal Trade Commission, 1999, "A Study of the Commission's Divestiture Process" accessed at www.ftc.gov/os/1999/08/divestiture.pdf

⁴ Personal communication with the Chief Economist at the French Competition Authority (Dr Thibaud Verge). He also points out problems with firms using a sequence of acquisitions to stay below any threshold and the need to maintain an over-ride for small, anti-competitive mergers.

⁵ Simon Evenett ('How much have merger review laws reduced cross border mergers and acquisitions?', *undated*) finds a statistical association between voluntary notification and increased US outward FDI in the 1990s. However, his statistical model does not account for political factors that appear to be highly correlated with the voluntary system. The nine voluntary notification countries include Australia, Chile, France, New Zealand, Norway, Panama, UK and Venezuela; while 'pre-closing' mandatory notification countries include Albania, Azerbaijan, Belarus, Bulgaria, Kazakhstan, Kenya, Macedonia, Ukraine and Yugoslavia, albeit alongside many other more closely aligned countries like

Mandatory notification also has an externality that may be beneficial to shareholders. Half of all mergers fail to add value to the firms, which is less surprising when you think about the pressures and constraints. Managements cannot discuss certain issues prior to completing a merger because this would breach Article 101EC/Ch.1UK (cartels), 'due diligence' has limitations, and there may be secrecy due to strategic issues in acquiring shares. A period of reflection to consider market effects and potential efficiencies may lead to a rethink which improves the proportion of successful mergers. The following evidence is suggestive.

Martynova and Renneboog (2006) conduct a large scale study of stock market reactions to mergers.⁶ They calculate the capitalised change in stock values around the time of the bid. This 'event study' approach provides the market expectation of enhanced (or diminished) value of a merger measured by its 'caar' ('cumulative average abnormal returns' between day x before the merger is announced and day y after it is announced: caar[-x,y]).⁷ M&R also calculate the proportion of mergers with positive caar (%pos). They do this for over 2,000 mergers across all European countries.

In the following table, I have taken their published aggregate figures by country and calculated averages for the three voluntary regimes at the time (UK, France and Norway) and compared them with all other countries in the sample. This reveals that mandatory regimes are associated with a greater proportion of successful mergers (at least in stock market expectation) and higher returns for the bidding firm.⁸ Without access to the original data, I have not been able to calculate statistical significance tests. However, these simple calculations are at least consistent with the view that mandatory notification encourages firms to consider why they are proposing a merger and to consider its consequences. Because many other national differences may be affecting these results and we do not have statistical significance tests, our more modest conclusion is that there is no evidence of mandatory notification deterring profitable mergers.

[Table follows on next page...]

Ireland, Israel and Japan. It is not convincing evidence of a deterrence effect of mandatory notification.

⁶ Marina Martynova and Luc Renneboog (2006) 'Mergers and acquisitions in Europe' see <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/publications/discussionpapers/2006-003.pdf>

⁷ More precisely, each merger has a 'car' and the 'average' in 'caar' refers to the average across a class of mergers. [-x,y] is known as the event window.

⁸ The single exception is caar[-60,60], but this four month event window will be subject to enormous noise as other events affect share prices over the period. For this reason, most event studies focus on much shorter periods as in the [-1,1] and [-5,5] day event windows.

Bidding firm abnormal returns (and % positive returns) around time of merger

	Notification Regime			
	All	Voluntary	Mandatory	Difference
caar[-40,-1]	0.88	0.64	1.23	-0.58
%pos	50	48.76	51.79	-3.03
caar[T=0]	0.51	0.31	0.80	-0.49
%pos	50	48.29	52.47	-4.18
caar[-1,+1]	0.74	0.45	1.16	-0.71
%pos	51	49.12	53.72	-4.60
caar[-5,+5]	0.74	0.55	1.02	-0.47
%pos	51	50.17	52.20	-2.02
caar[-60,+60]	-2.94	-2.70	-3.29	0.59
%pos	50	49.53	50.68	-1.15
# obs	2194	1298	896	402

Notes:

1. Averages for each regime are weighted by the number of mergers (1,298 in voluntary regimes [France, Norway and UK] and 896 in other European countries)
2. Calculated from the abnormal stock market returns data as reported in M&R book chapter Appendix B on abnormal returns
3. Voluntary notification is taken from Evenett working paper Table 1, which uses US international competition policy advisory committee data for 1999

5. A stronger antitrust regime

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

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

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

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

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

Q.8. (by Andreas Stephan)

Is a prosecutorial approach desirable?

The OFT currently enjoys the combined roles of policeman, prosecutor, judge and jury. While it must always be concerned with ensuring a decision stands up to appeal, there is no obstacle to it delivering as many competition decisions as it wishes. Under a prosecutorial approach, the competition authority builds a case which it prosecutes in an adversarial setting such as a court room or internal tribunal. Such antitrust procedures exist in the US, Australia, Canada and Ireland. The court is the decision maker, not the competition authority. A prosecutorial approach is likely to boost transparency, lend greater credibility to the enforcement regime and reduce the number of appeals. The court or tribunal's first instance finding will take into account many arguments that parties currently feel are not properly heard until the appeal to the Competition Appeals Tribunal (CAT). A prosecutorial approach would thus help address concerns from the business community over separation of powers.

However, a prosecutorial approach is unlikely to improve the frequency of cases because the OFT would have the added burden of convincing the court or tribunal that a decision should be adopted in the first place. It would thus introduce an obstacle to enforcement where there is currently none. If appeals under an adversarial system are heard by a general court, there will also be greater difficulty in getting economic evidence heard. One of the CAT's strengths under the current system is its proficiency in both the law and economics of competition policy. It does not necessarily follow that it would be able to deal effectively with economic evidence when presented in an explicitly prosecutorial manner. Finally, it would take the UK further away from the EU model with which it is obliged to ensure compatibility.

The dangers of streamlining

Past reports by the National Audit Office certainly suggests that the OFT could operate more efficiently and provide the taxpayer with better value for money. However, beyond management and administrative efficiencies, the consultation document speaks of the possibility of 'streamlining' current procedures. Although such mechanisms do improve efficiency, there is always a cost in terms of rigour and accuracy. For example, in the OFT's dairy price fixing case a number of firms under investigation agreed to settle the finding of an infringement. Later, the bulk of the infringement had to be dropped because two of the parties who refused to settle were successful in challenging it.⁹ Concessions of this kind risk coaxing firms into admitting guilt

⁹ A Stephan, 'OFT Dairy Price-fixing Case Leaves Sour Taste for Cooperating Parties in Settlements' (2010) ECLR 30(11) 14-16

when they are not even sure they have done anything wrong; something which is extremely damaging to the perceived legitimacy of competition policy.

The inadequacy of numbers

More research is needed to determine exactly why other EU states have delivered far greater numbers of decisions than the OFT. As most EU member states also follow the Commission's model (as opposed to a prosecutorial approach) procedures may not be flawed in the way the consultation document infers. As it recognises, numbers relating to the frequency and speed of UK antitrust cases may be misleading. For example, they do not measure the accuracy of decisions. Many would argue that a minimalist approach to competition law enforcement is, in any case, preferable – only intervening in markets when absolutely necessary. Sector specific regulators may be using other powers to address potential antitrust problems. UK businesses may be involved in less anticompetitive behaviour because of a stronger competition culture. In addition, the OFT may be engaging with businesses in order to ensure compliance, where other authorities prefer the finding of an infringement. The existence of these and other factors can only be confirmed by a more careful comparative evaluation of the UK competition regime.

Q.9. (by Morten Hviid) *Private actions*

Apart from a few words in the foreword by the minister Vince Cable and four paragraphs in chapter 5 [5.49-5.52], private enforcement is not mentioned in the consultation document. According to his foreword, Vince Cable is keen to promote private-sector challenges to anti competitive behaviour, but will bring separate proposals in due course. In doing so, I think BIS is missing a trick by believing that private enforcement is a separable complement to public enforcement.

Below I argue that there are several areas where the interaction between private and public enforcement is of such a nature that they are better looked at together. The two key areas are over-enforcement and settlement. Fears that private enforcement lead to over-deterrence¹⁰ can make competition authorities less willing to make adverse findings and where they do find an infringement, feel that they need to take into consideration the possible outcome of likely follow-on cases in setting fines. Follow-on cases are not cost effective, making it worthwhile to consider whether the competition authority

¹⁰ Over-deterrence refers to a situation where the ex-ante expected "penalty" for an action exceeds the expected harm so that a rational firm refrains from taking such an action. This can arise either because the "penalty" imposed exceeds that needed for deterrence or because there is a substantial risk that the authority wrongfully condemns the action.

can be given a direct role in helping consumers obtain compensation.

Looking at the EU and UK debate about private enforcement over the recent past¹¹, the view that the two enforcement modes are separable is possibly not a surprise. The debate in the EU [and to a lesser extent the UK] has been distorted through a single minded focus on compensation as the sole aim and effect of private enforcement and on cartel infringements as the key target for private enforcement. The typical discussion goes along the following lines:

Cartels overcharge consumers, thereby directly harming those who still purchase the good by reducing their disposable income. Consumers should be compensated for these losses. The best way to achieve this is for the people or their representative¹² to follow up on a competition authority decision with a follow-on action in the Competition Appeals Tribunal.

This standard line of argument deserves several comments, some of which illustrate the problem with separating out the discussion of private and public enforcement.

*Inefficiency*¹³

The first thing to make clear is that follow-on cases consume resources. While the costs of private enforcement may not show up in the Public Sector Borrowing Requirement, they are not a free good.¹⁴ In the past debate, little thought seems to have been given to this.

Follow-on litigation in the CAT means running the case for a second time (or a third if it has already been through an appeal). To the extent that we learn

¹¹ See for example the 2008 EU White Paper (White Paper on Damages actions for breach of the EC antitrust rules {COM(2008) 165 final}). The White Paper is accompanied by a Commission Staff Working Paper {SEC(2008) 404}, an Impact Assessment {SEC(2008) 405} and a Report: "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios". All documents are available at the European Commission Web site at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>. The new Commissioner Almunia is equally committed to making private enforcement work, see for example his May 12th, 2010 speech "Competition and consumers: the future of EU competition policy", {SPEECH/10/233} page 6. The UK Office of Fair Trading published their own discussion paper in 2007: "Private actions in competition law: effective redress for consumers and business", Office of Fair Trading discussion paper OFT916.

¹² This representative is envisaged as a private representative such as a consumer association, a law firm or possibly even a professional competition claims firm, rather than the competition authority.

¹³ Other, such as Daniel Crane also doubts that private enforcement is an efficient mechanism to secure either compensation or deterrence. See Crane, Daniel A., 2010, Optimizing Private Antitrust Enforcement (September 17, 2009). Vanderbilt Law Review, 63(2), 675-723.

¹⁴ An important distinction between public and a private enforcement is that the funding for the former comes via the Treasury where the distortionary effects of the taxes required to raise the necessary funds will have been considered, whereas the funding of the private case comes from one of the parties to the case with no thought to such effects.

nothing new through this, this seems an expensive way to secure compensation.¹⁵ Moreover, due to the cost of running the follow-on cases they are likely to have to be pursued as some form of class action. One proposal is that a designated body pursues the action on behalf of the consumers who were harmed. There is something odd in one body acting on behalf of the consumers taking over from another body who does exactly the same. An example of this is the “Replica Football Kit” case [Decision of the Office of Fair Trading No. CA98/06/2003]. Here *the Consumer Association* brought a follow-on action to the original OFT decision, which itself had already been appealed several times. Rather than running the case again, it would be at least worth considering giving the competition authority the power either to disgorge some of the fine to compensate those harmed, or to use a settlement procedures to set up mechanisms to compensate those harmed. The OFT in its consultation in 2007 [OFT discussion paper OFT916, paragraph 4.17] touched on the latter possibility. The counter argument would be that then only some people would be compensated, but firstly this is a matter of degree since there will always be cases which are too costly to pursue for damages. Secondly, given the evidentiary burden in private cartel cases, it is far from obvious that private individuals or their representatives are able to pursue a case successfully where the competition authority would not also have the necessary information and available mechanisms to design a compensation package. Where the consumers cannot be identified individually, the authority may be able to set up a fund (similar to *cy pres* awards in the US where unclaimed settlement funds may be given as such awards to relevant non-profit organisations), something which happened in the private schools case.

While a number of these issues are complex, they could and should be discussed alongside the discussion of the design of the public enforcement regime.

Deterrence

While legally one might distinguish between the fine applied by the competition authority, the damages awarded or agreed in the private case and any costs allocated to the firm, for the firm, the sum of these is the financial consequence of the competition law violation and this is what will serve as a deterrent. This leaves the competition authority with an interesting problem because they are inevitably the first mover and also the only party tasked with providing an appropriate punishment.

For the special case of cartels, it is often argued that private enforcement through increasing the total punishment adds positively to deterrence because public enforcement is inadequate. This argument is not convincing. If the public punishment is inadequate, then either the competition authority is not applying the appropriate fine or there is something preventing it from doing so. The latter may be the case as there is a 10% cap on fines, a cap which is a totally arbitrary and not based in any evidence about harm. If monetary fines

¹⁵ Of course it is possible that we learn more from the private action, for example, because competition authorities may be conservative in their estimate of harm in order to minimise the risk of heavy fine reductions on appeal.

imposed on the firm are inadequate, it is better to sort this out now rather than consider it as part of a separate, later consultation on private enforcement.

The main problem which private enforcement can create for general enforcement arises through possible adverse effects on leniency programmes. Since firms will look at the total bill from violating competition law, if damages become excessive this added risk may make firms less likely to come forward and reveal the cartel. These concerns are far from merely theoretical. The most obvious illustration of this is the US *Antitrust Criminal Penalty Enhancement and Reform Act* of 2004 which removed joint and several liability in a private action from a firm granted immunity under the leniency programme and in addition reduced the private liability of that firm to single damages. This Act was passed to deal with fears that firms were reluctant to seek immunity because the private damages might outstrip any public fines.

Cartel cases do present a separate problem for private enforcement in the case where there are credible concerns about the future financial viability of some of the cartel members, but that can equally be considered in a separate consultation.

For the other parts of competition law there is a much more serious risk of over-enforcement. This can arise because the theory of harm is not yet fully developed. For example, wrongly condemning a particular rebate scheme may in itself not impose large error costs because the firm may be able to construct an alternative incentive scheme which works almost as well. However if the decision gives rise to either a follow-on action for damages or future private litigation, the error costs imposed on the economy may be significant and affect the decision of the authority. Over-deterrence can also arise where the decision is unclear about how wide the reach is. An example of the latter is information sharing where a decision may still not make clear to other firms in other industries where the boundary is between what can and cannot be shared. More generally any area of competition law where there is any remaining legal uncertainty about the practice, and arguably this would account for most actions short of naked price fixing, any increase of the total bill for a finding of competition law violation would have a chilling effect on business. This risk may have a knock-on effect on the competition authority, who as a result may set a higher standard of proof to reduce the cases of errors.

If private enforcement becomes widespread, we may in the end observe that the competition authority pursues very few vertical agreement cases [Chapter I or Article 101 TFEU] or cases under Chapter II [or Article 102 TFEU]. Such a pattern of work-sharing between private and public enforcement may be entirely desirable. There are cases where one of the affected parties is better placed than the competition authority to enforce the law. Private parties harmed directly by the anti-competitive practice typically have better information about the infringement occurring than the competition authority. In some cases they also have the necessary information to enforce the law as well at the necessary resources. However, the extent to which this is possible or plausible, depends on the nature of the courts (specialist or generalist), the

right to obtain information and the cost of using the court system. See for example M. Harker and M. Hviid, Competition Law Enforcement: the "Free-Riding" Plaintiff and Incentives for the Revelation of Private Information, CCP Working Paper 06-9 and M. Harker and M. Hviid, "Competition Law Enforcement and Incentives for Revelation of Private Information" (2008) 31 World Competition 279-298.

Remedies

The private enforcement debate has focused almost exclusively on damages and mostly on follow-on cartel cases. Empirical reality in Germany shows that there are very few cartel cases, very few follow-on cases, and very few cases where the requested remedy is compensation. However, there are a large number of private cases in which firms (in particular SMEs) and consumers enforce their rights under competition law in the courts. These cases are looking for other remedies, in particular injunctions, either asking that another firm stop doing something (e.g. charging excessive prices or margin squeezing) or start doing something (e.g. supplying them or granting them access), see for example S. Peyer, Injunctive Relief and Private Antitrust Enforcement, CCP Working Paper 11-7. The aim of these cases would appear to help firms make markets work better for them and hopefully ultimately consumers. It is much more logical that firms are willing to use the law to enforce the non-cartel part of competition law and in particular in cases where they are not asking for compensation but for a fair treatment as guaranteed under the law. The concern about private enforcement is always that firms may not have an incentive to upset an important supplier or buyer and hence would be reluctant to bring a case, except possibly as a last resort. It may therefore be possible that firms perceive a big difference between asking someone to "play nice" through an injunction and to ask for financial compensation, with the latter a much more aggressive action.

It is by considering all the other possible violations of competition law where the problem of thinking of private enforcement as a complement not a substitute becomes much clearer. However, once we accept that private enforcement is there to support, not feed on, public enforcement and deterrence, it seems sensible to consider the two sides of enforcement together rather than separately.

Standing

The consultation document raises the possibility of extending the super-complaint powers to SME bodies [e.g. section 3.14-3.16] to give these standing to pursue private enforcement. This is not the place to go in to details with the potential dangers in the proposal, mainly related to tacit collusion and coordinated behaviour, but see our answer to Q3. However, to discuss this without considering the possibility of individual self-help through private enforcement runs the danger of overlooking the simplest solution.

Concluding remarks

This commentary has argued that it would have been appropriate to discuss

public and private enforcement together because fundamentally they serve the same purpose of deterring breach of competition law. While it is too late to bring private enforcement directly into the discussion, it would still be possible to have an eye to what private enforcement could add to the mix. The discussion of this consultation document should be cognisant of the later discussion about private enforcement.

Most importantly, in the discussion of any settlement powers and procedures, the discussion about the optimal design of the enforcement regime should consider the possibility of settlements also dealing with compensation for harm.

6. The criminal cartel offence

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

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

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

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

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

(by Andreas Stephan)

The collapse of the British Airways trial highlights a number of shortcomings associated with the cartel offence.¹⁶ The requirement of dishonesty is the most problematic aspect, as there is empirical evidence to suggest that attitudes towards cartel practices in the UK have not significantly hardened since criminalisation.¹⁷ This is in part due to the absence of frequent high profile convictions, which mean that the harmful and dishonest nature of price fixing has yet to be effectively communicated to members of the public and to some in the business community. Dishonesty has adversely affected the OFT's case selection and confidence as a criminal prosecutor, reflected by the reliance on a US plea bargain to secure the only convictions to date in *Marine Hoses*. The criminal offence has been overshadowed by a danger that juries will not be convinced that what was done was dishonest by the standards of reasonable and honest people, or that the defendant knew his actions were dishonest by those standards. The decision to redraft the offence should therefore be welcomed.

Should dishonesty be replaced with anything?

It is notable that none of the four options mooted in the consultation document suggest an alternative 'moral marker' to dishonesty. They focus instead on the more substantive scope of the offence. While the absence of such a definitional element would raise concerns among some in the business community, two things should be noted about having a wider cartel offence. First, the enduring success of cartel offences in the USA and Canada is largely due to the flexibility afforded by a wide definition. This is particularly important during the early stages of enforcement, when the prosecutor is seeking to build a body of successful cases. Second, the fallout of the failed British Airways trial demonstrates the reputational damage to the prosecutor of getting a case wrong. The public and media constraints on prosecutorial discretion should therefore not be underestimated. A lack of credibility will kill a criminal offence, regardless of how it is defined.

The desire to exclude countervailing economic arguments

The four alternatives ostensibly reflect the same concern which originally motivated the inclusion of dishonesty: that the offence should not capture behaviour which might be subject to countervailing economic arguments. There is a particular fear that such arguments would confuse jurors. However, we need to ask whether such concerns are appropriate where a criminal

¹⁶ A Stephan, 'How Dishonesty Killed the Cartel Offence' (2011) *Crim. L. R.* 6, 446-455

¹⁷ A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 *Comp. Law Review* 123-145

offence only applies to 'hard-core' horizontal practices. Countervailing economic arguments very rarely excuse horizontal price fixing, market sharing, output restriction or bid-rigging. When they do, the evidence needs to be very compelling indeed. An experienced judge can play a filtering role when directing the jury.

It is suggested that Option 4 (which is probably the most sensible of the four overall) would in some way avert countervailing arguments, but it is unclear exactly how. It perhaps assumes that firms making such arguments will always be open about defensible collusive practices because they have nothing to hide. The fact that an agreement has been kept secret cannot, however, preclude economic arguments of countervailing benefits. Ironically, the courts have even ruled that economic evidence can be relevant to the issue of dishonesty under the current criminal offence.¹⁸

Can customers really avoid companies which openly collude?

A stated rationale for Option 4 is that where a cartel openly informs customers of its anti-competitive conduct, those customers will choose to trade elsewhere. This is rather dubious given the very characteristics that make a cartel worthwhile (significant enough market share to raise price, high barriers to entry, and low substitutability) also mean that customers have little choice about who they buy from. However, this would not preclude customers from seeking damages or prevent the competition authority from imposing fines under the Competition Act 1998.

Reconciling civil and criminal enforcement

Once the dishonesty requirement is consigned to the history books, the biggest challenges to increasing the number of criminal cartel cases may have little to do with the design of the offence itself. Unlike many other competition regimes, the UK's cartel offence relates only to individuals. This means that unlike Canada, the US or Ireland, criminal investigations against individuals must complement civil investigations against their firms. The authority's experience and internal expertise are consequently geared for a different process. As the standard of proof is higher for criminal cases, these investigations must take precedence. Criminal cases will thus hold up the civil cases. It also means they are unlikely to be engaged in the most serious pan-European cartel cases dealt with by the European Commission.

Criminal investigations are more time consuming, more expensive and more risky than civil cases against the firm, making it likely they will have an adverse effect on the way in which an authority prioritises its cases. For example, the repeated delays and legal challenges in the failed British Airways case appears to have caused the OFT to back off from applying the offence in its other civil cases. In particular, Director Disqualification Orders appear to have gained greater prominence in recent years as a proxy for the deterrent effect of the criminal offence. These problems are (to some extent) averted in the US and Canada through sophisticated systems of direct

¹⁸ *IB v The Queen* [2009] EWCA Crim 2575

settlement or plea bargain in criminal cases. Such mechanisms are not currently available in the UK.

The proposed reforms to the criminal offence would certainly make it easier for a prosecutor to successfully argue their case. However, this will not necessarily ensure a wave of criminal cases. There are serious procedural issues which also require careful attention – in particular the incentives to prioritise ‘safer’ civil investigations over less predictable criminal prosecutions. The OFT’s lack of experience as a criminal prosecutor is also something which needs to be addressed; in particular, its over-reliance on the single cooperating party in *British Airways* when building their case.

The importance of pressing on with criminalisation

Despite the failings of the current offence and the tricky business of reform, it is essential that the UK presses on with criminal sanctions against individuals involved in cartel practices. Corporate fines under the administrative procedure are typically imposed years after an infringement was instigated and do not directly affect the individuals responsible. Unlike a prison sentence, they can also be treated as a cost, rather than a sanction. If we fail to punish individuals, there will be limited deterrence of cartel infringements because cartelists will know it is the firm that bears the risk of their misbehaviour. The only civil sanction available against individuals is Competition Disqualification Orders, but these are not imposed where the employee has cooperated with an investigation (which is why none have been imposed to date) and are not available at the EU level. Criminal sanctions also help raise awareness of why cartels are illegal, strengthening a culture of competition within the UK.

7. Concurrency and sector regulators

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

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

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

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

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

(by Catherine Waddams)

Sector regulators are generally established to impose ex ante regulation in markets where monopoly is inevitable, desirable, or both, at least in the short term. They have developed and refined tools for the purpose. Meanwhile some parts of the supply chain have become competitive, often as a result of the regulator exercising its duty to encourage competition where appropriate. So UK regulators find themselves with responsibility for and expertise in sectors where suppliers compete for business and from which they have withdrawn ex ante regulation (for example in energy and telecoms retail).

Potential tension arises because regulators also carry statutory duties for the sector, imposed by Parliament, particularly to meet environmental and social objectives. While such objectives may sometimes be delivered appropriately through monopoly networks, it is very difficult to achieve them in markets which are open to competition. Often, as in the case of the non discrimination clauses introduced in retail electricity,¹⁹ interventions are likely to undermine the competitive process and as a result often struggle to deliver both the competition and non competition objectives. Remedies to improve competition are usually concerned with process, while other objectives are much more focused on outcomes. Where ex ante price caps remain, these can be used as an additional instrument for the regulator to exercise trade-offs between different statutory duties. Where markets have opened to competition, the regulator's application of additional criteria will usually lead to different remedies and outcomes from those applied by a Competition Authority whose objectives are competition focused.

Whether the Regulator or the Competition Authority should have primacy therefore depends on whether the Government believes that the non economic objectives should apply to the competitive part of the market, or only to the regulated monopoly part. If the former, the Regulator should have primacy over competition issues, to ensure that the other objectives are considered (though the outcome for competition itself will, by definition, be poorer). But if potentially competitive parts of the market are to be governed by competition concerns alone, then the Competition Authority should have primacy. The decision about priorities has important implications for delivering policy, and it belongs squarely with the government. If the government does not bite this bullet and make clear its priorities, its agencies will behave as counterproductive rivals rather than effective complements.

Where does this leave us in relation to the current consultation? Competition is a means to deliver better outcomes to consumers and society in general. For the sector regulators, it is often specifically included in their statutory duties. For example the Utilities Act gives to GEMA a primary duty "to protect the interests of consumers ..., wherever appropriate by promoting

¹⁹ See Morten Hviid and Catherine Waddams Price 'Non-discrimination clauses in the retail energy market' *CCP Working Paper 10-18*

effective competition". This was amended by the 2010 Energy Act to make explicit that competition was seen as being a means to the end of protecting consumers, and that other means should also be assessed. Other developments have imposed additional objectives on many regulators, for example environmental and social.

In contrast the CMA is likely to have a clear primary competition focus (pace section 9). It will certainly favour competition remedies over others (as the ROSCO MIR illustrated). Even if it has wider public objectives, these are likely to be less clearly focussed than those of the sector regulators. So if the sector regulators' objectives apply across their sector, including the (potentially) competitive parts, they should retain primacy on competition matters, using the expertise of the CMA, but retaining the decision whether to conduct an inquiry, and what its terms and remedies should involve. If this route is taken, competition issues will be applied differently in regulated than in unregulated sectors.

If, however, competition is seen as pre-eminent where it is feasible, then the CMA should have primacy. Such a solution would be difficult to implement because of the different objectives for different parts of the sector, and would give the sector regulators an incentive to discourage competition, since they would lose influence over a part of the sector, and so have fewer instruments with which to deliver the various other objectives with which it is charged.

I therefore conclude that if sector regulators have non-competition powers, these should extend to (potentially) competitive areas, and that the sector regulators should have access to the expertise of the CMA to help it apply competition inquiries and remedies within this wider framework.

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

Yes, with primacy for the sector regulators, see argument above.

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

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

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

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

(by Catherine Waddams)

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

Yes. The issues of conflicting objectives discussed in relation to Chapter 7 are currently dealt with by the CC adopting the objectives of the sector regulator in undertaking regulatory appeals, and this would need to be extended to the new CMA.

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

This would seem an excellent idea, though there is necessarily a tension between having a model which is both sufficiently general and adaptable to apply to the variety of sector regulators, and contains a common core.

9. Scope, objectives and governance

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

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

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

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

(by Pinar Akman)

Q.19. There are advantages and disadvantages to stipulating the objectives of the CMA in the legislation. Some of these are already recognised in the consultation documents. One thing that is not recognised, however, is a potential clash with EU law as interpreted by the EU Courts. Although a ‘duty to promote competition to the benefit of consumers’ is in essence what the goal should be, there may be problems with the conformity of this goal with the jurisprudence of the ECJ, in light of the rule in section 60 of the Competition Act, particularly after *GlaxoSmithKline*.²⁰ There is also a potential issue of who the ‘consumers’ are whose interests are to be protected. There are many instances in which the interests of the intermediate ‘customers’ and the interests of the final ‘consumers’ will differ [see Akman, “‘Consumer’ versus ‘Customer’: the Devil in the Detail” (2010) 37 (2) *Journal of Law and Society* 315]. Thus, if the term ‘consumer’ is to be used, then it must be made absolutely clear what it means in the legislation. Even with an objective merely expressed as ‘duty to promote competition’, there are potential problems so long as it is not made absolutely clear what ‘competition’ and its protection in this context mean. All in all, it might be best to leave a general objective out of the legislation, but indicate the specific duties of the CMA in the individual context of the prohibited practices.

Q.20. The CMA should *not* have a principal competition focus to the exclusion of roles in consumer protection. There are several reasons for this.²¹

First, there may be an important *loss of synergies* that result from a single authority dealing with both consumer protection and competition law. A single authority when dealing with a certain market (e.g. due to competition concerns) gains valuable insights into that market which might *trigger or prevent* further action under consumer protection law. Similarly, action in consumer protection (e.g. prohibiting certain ‘unfair’ practices) can have implications for competition on the market as a whole and might be better undertaken by a single authority responsible for both functions.

Second, there will be a *loss of expertise* that the OFT has thus far built in the area of consumer protection. Perversely, this expertise, being consciously forsaken, will have to be rebuilt by Trading Standards (TS) and Citizens Advice (CA). There is no mention in the BIS consultation of any cost implications of this at all. Moreover, neither TS (funded by *local councils*) nor CA (a *charity*) has the broad expertise that results from *national* enforcement or the appropriate resources. It is questionable that they will ever be in a position to deal with requirements of *national* enforcement, let alone those resulting from the UK’s obligations to apply EU law.

²⁰ See Akman [The ‘Consumer Welfare’ Delusion in GlaxoSmithKline – A Response to Bruce Lyons](#), November 25th, 2009, CCP Blog

²¹ For some of them see Akman [Separating Consumer Protection from Competition Enforcement: ‘if it ain’t broke, why fix it?’](#), May 11th, 2011, CCP Blog

Third, if the CMA is to have the duty to ensure ‘fair and effective competition and promote competitive markets conducive to stability, growth, innovation and consumer welfare’ (#9.2 of consultation) and it is called the ‘Competition and Markets Authority’ then it will be rather strange for it not to have any consumer functions, when consumers are clearly an integral part of most markets. Indeed, the examples in the consultation used to demonstrate a categorization of the subject matter of the market studies conducted by the OFT clearly show that at a substantive level, issues of consumer protection and competition law are tightly related, if not, intertwined. Issues such as consumer contracts, payment protection insurance, local bus services, etc can at any given time be issues of pure consumer protection, pure competition protection or a mix of the two. A separation of the powers of consumer protection and competition is very likely to cause serious problems for the market studies regime.

Finally, an overall problem regarding the separation of the powers is that nowhere in the BIS consultation two issues are addressed: *why* it is necessary to separate these powers (i.e. what is the evidence demonstrating that the current system does not work) and *how much* it will cost to separate these two powers (i.e. what will be the cost to the economy of the lost synergies and the resources spent on TS and CA to gain the necessary expertise).

As it stands, it is impossible to understand why the consultation seeks to deprive the CMA of consumer protection powers. With so many reasons not to do this, it can only be hoped that the current system is preserved.

10. Decision making

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

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

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

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

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

(by Bruce Lyons)

Q.22 & 24. The proposed merger of the OFT and Competition Commission is a great opportunity to review how decisions should best be made in a competition authority. There are plenty of alternative models and most countries seem to have their own distinctive styles. Much of the reputation of different agencies results from the expertise of its staff, including economists, lawyers and administrators. This can sometimes paper over the cracks of a fragile formal decision-making structure. In the long term, however, a robust institution is one that provides a well-informed challenge to both firms and its own staff. Unfortunately, there is a serious danger that the proposed Competition and Markets Authority (CMA) will be given a hotch-potch of superficially targeted, but in practice incompatible, decision processes by which different bits of competition law are enforced by a divided institution.

How different are the *skills required to gather and interpret evidence* in different elements of competition law (e.g. mergers, agreements, abuse of dominance, market inquiries)? The answer is 'very little'. The essence of competition law, appropriately interpreted through the lens of economic effects, is that it requires a blend of law and economics skills to implement. This is true of assessing the likely effect of a merger or rebate scheme or exclusive contract on price or investment or innovation incentives. In both the OFT and CC, staff with economic and legal skills gather the evidence. A similar blend of skills is necessary to balance the evidence and decide a case, though decision makers need additional, wider experience, and do not necessarily require all the technical skills for compiling economic evidence.

The UK system, despite its common law roots, falls firmly in the European tradition of agency-led inquisitorial cases. The courts are for appeal against agency decisions (unlike in the adversarial US system). There is also almost no private action in prosecuting competition cases in the UK. Unless the chosen ch.5 options result in fundamental changes, *agency-led inquiries* will continue at the core of the system.

Given that *similar skills are required by decision makers* for most categories of competition case, who should make those decisions? The current UK system has two institutions with very different processes for making decisions based on a staff investigation. As stated in our answer to Q.2: 'The OFT has a model of decision making based on the European Commission (DG Comp). Case teams investigate and this is followed by an executive decision. In contrast, the CC arose out of the Royal Commission model of decision making. This has a panel of non-executive experts brought together to advise the staff case team and then decide each case.'

The OFT currently decides on antitrust and first phase mergers and market inquiries. The CC decides second phase mergers and markets. *This mix and associated differences in decision making bodies cannot be justified.*

Spurious arguments are sometimes wheeled out to justify what is essentially a historical accident. For example, ‘mergers are different because they are prospective, so require skills to predict likely effects’, but current practices (e.g. restrictive contracts) also need an assessment of what would happen in their absence. Another argument is that ‘anticompetitive agreements and abuse of market power are illegal, so subject to fines while proposed anticompetitive mergers or uncompetitive markets are not’, but this is an Alice-in-Wonderland justification for having the illegal activity decided by a single executive while mergers and markets are decided by a panel of independent experts.²²

If there is to be a unified decision making structure, what should it be?

Executive decisions are speedy and usually reliable when implementing relatively straightforward rules. In cases where issues must be balanced and nuanced, however, there is value in widening the decision-making base. Also, when the decision is based on evidence provided by their own staff, an executive can quite naturally be influenced by staff management and support issues. A panel’s strength is in the diversity of experience it brings to a judgment, and the ability to debate key issues between equals. Furthermore, a non-executive panel will also be less influenced by organisational priorities or career concerns, though it may be a little slower to reach its decision. Executive decisions are perfect for phase one decisions, including whether to open a serious antitrust investigation; and decisions by a non-executive panel have exactly the right qualities for deciding second phase cases. The latter require impeccable credentials not least because they can involve the transfer of private property (e.g. a fine or preventing the sale of business).

*This does **not** mean that the CMA should straightforwardly adopt the CC model.* There are some strong positive attributes to CC panels, most of which are not found in other jurisdictions. For example, panel members read all the evidence as it comes in. They also undertake site visits which provide insight into the businesses under scrutiny, and they have face-to-face hearings with the executives responsible for the businesses and business practices. This provides an unrivalled access of firms to decision makers but in a structured and open environment. It allows the decision makers to ask direct questions face-to-face about any aspect of the business they consider relevant; and it allows the firms to rebut the staff case in front of the decision makers.²³

However, other features of the CC panel system require reform. There is a serious confusion between leading the investigation and independent decision making. Although there is a staff inquiry director, the panel continually reviews internal documents and can influence the direction of the inquiry. This continues with the drafting of chapters for the preliminary and final reports. This inevitably compromises the appearance of impartial review of

²² As will be argued below, the differentiated appeals system does not sensibly compensate for this oddity.

²³ EC hearings are more ‘set piece’ presentations and are typically not in front of the decision makers. The hearing officer’s important role is in ensuring due process but his input into the decision is mainly to confirm a fair hearing. At the FTC, the commissioners individually see the firms a few days before reaching a decision.

the evidence in reaching a decision. The panel should stay at a distance and only draft its decision/conclusions.

The clinching issue for a unified structure of decision making, with non-executive panels deciding all phase two cases (including antitrust), is that we need a coherent appeals system. Currently, natural justice and the Human Rights Act mean that decisions taken by a panel (i.e. the CC) are subject to judicial review (i.e. the court can require the CC to investigate certain points more carefully and to reconsider its decision), while executive decisions (i.e. OFT antitrust) are appealed 'on their merits' (i.e. the court can replace the OFT's decision with its own decision). Judicial review is consistent with the inquisitorial approach of agency decisions. Indeed, it is used by the European Court in relation to all European Commission decisions. JR keeps the agency on its mettle but does not unbalance decision making.

Unfortunately, 'merits' appeals completely unbalance a competition case. Agency staff in the OFT (and, indeed, Brussels) search for unbiased evidence on which to present the basis for a decision. If such a decision is appealed 'on its merits', the firms involved have every incentive to present one-sided evidence to the court. In a full-blown adversarial system (as in the USA), the agency might respond by selectively emphasising its most powerful evidence of anticompetitive behaviour.²⁴ However, that cuts against the grain of an inquisitorial system where the agency is itself in search of the truth. Furthermore, the court (i.e. CAT) does not have a full complement of staff to investigate cases, even though it does have a panel to decide them. Antitrust cases often involve several firms (horizontally or vertically related or both) who are party to an appeal. The CAT can then face technical expert evidence from, possibly, half a dozen well-funded defendants selectively supporting one side of the case plus one modestly funded OFT expert trying to support the middle ground. *It is not possible for the OFT to shift from inquisitor to prosecutor between decision and appeal.* In such circumstances, a 'merits' appeal system cannot be expected to work well. It is far better to have cases decided by an independent panel and subject to appeal on grounds of judicial review.

Reading the options and apparently preferred option in the consultation, I am very concerned that the proposed CMA will fail to have a rational decision making structure. History has a powerful hold on institutions, particularly those with fine international reputations. The status quo is more aggressively defended than attacked, especially between collegial institutions that have no wish to undermine each other. Meanwhile, law-makers in government pay more attention to accountability to parliament than they do to the nitty-gritty of how individual decisions are made. The complex set of options set out in the current consultation might too easily muddle into place.

²⁴ Luke Froeb and Bruce Kobayashi 'Evidence production in adversarial vs. Inquisitorial regimes' (*Economics Letters*, 2001, 70, 267-272) compare the two 'pure' systems and find that each has advantages but neither dominates the other. It is clear from their model, however, that a mixed system of one side inquisitorial and the other adversarial would be problematic.

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

The CC members system provides an excellent array of relevant expert talents, including economists, lawyers, finance and business people with employment backgrounds in the private sector, public sector and universities. This allows for an important skill mix to be available in each panel. However, the current system includes far too many members each taking too few cases. It would be better to move to a much smaller set of members in a rolling system with greater commitment (3-5 days p.w.) for 2-3 year terms.

11. Merger fees and cost recovery

Merger Fees

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

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

Recovering the cost of anti trust investigations

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

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

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

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

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

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

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

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

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

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

Recovery of CC costs in telecom price appeals

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

Recovery of CAT costs

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

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

(by Morten Hviid)

When considering how to finance enforcement it is important to remember that this delivers positive externalities. Firstly, enforcement leads to *deterrence effects* and so implies that those involved in the case are not the only “beneficiaries” of the decision. Secondly, enforcement *clarifies the law* and how it will be applied, which benefits all firms which is also a general benefit. Where there are positive externalities, there is reason to subsidise users out of general taxation. This may include a levy on firms subject to competition law but there is no reason for cost recovery on any specific case. This general point applies to merger fees and appeals but the unintended consequences of cost recovery seem most problematic for antitrust investigations.

Merger Fees

Q.25. (*optimal fee structure*)

Given arguments above, it is not at all obvious that full cost recovery is desirable. Decisions involve both an element of *deterrence and an element of learning, both of which are public goods*. It is generally recognised that if public goods are funded privately, there is a risk of underinvestment in these goods since the person providing the funding does not get all the associated benefits. In the case of mergers, underinvestment would imply too few mergers being proposed. To avoid this, at least the public goods element of the costs should be covered through general taxation.

Secondly, some of the costs included in the table in recital 11.4 are *fixed costs*, although we do not know how big a share this is. The allocation of these to individual cases will be almost totally arbitrary. Again funding the fixed cost element out of general taxation would appear the more sensible solution. If we focus on option 1, for a merger where the target turnover is £10 million, the fee would be 0.65% of turnover while for a merger where the target turnover is £100 million, the fee would be about 0.2% of turnover. In other words, the fee is regressive and smaller mergers attract a larger percent fee. One can only assume that this arises because the fixed costs per case are substantial, but is that the case?

Thirdly, the current three bands are based solely on the value of the acquired business. Is there *any good reason to think that this is a good proxy for the complexity and hence cost of the case*? It seems rather odd that there is no increase in the complexity of the merger when the turnover of the target is increased from £70 million to £140 million. Is this an indication that essentially the same amount of resources would be thrown at each merger in the same size class? If this is the case, what is the justification?

Fourthly, if turnover of the target is a reasonable measure of the complexity of the case, why have bands rather than a percentage of some measure of the turnover of the target? Would there be a large number of

targets estimated to have a turnover of £19,999,999 or £69,999,999?
What is the *logic of having fees fixed within band*?

Fifthly, it is unclear whether it is the intention to have different fees for *first and second phase investigations*? How problematic would it be to have the fee depend on this? For example, if there are to be differences in fees, how can we ensure that the incentive of the merging parties is not to offer too much in terms of remedy to settle the case in phase I?

In conclusion, full cost recovery for merger cases is a poor idea both theoretically and practically. If the fees are kept reasonably low, there is not much to choose between the two options. The proposed bands are poor proxies and a better proxy for complexity should be sought, especially if there was mandatory merger notification.

Q.26–Q.31. Antitrust costs

The proposal is to let those who have violated competition law pay the costs of investigating the case. On the face of it, this sounds reasonable. More careful thought may suggest that this really is a Pandora's box which might better be left unopened. The first point is that as for merger cases, where there are *positive externalities*, usually general taxation is a better way to fund enforcement than through levies on those directly involved. This is true both for the competition authority decision and any subsequent appeals. Secondly, it may be hard to argue against symmetry so that when the *competition authority is not able to prove their case*, they pay the firms against whom a case has been initiated their costs. There appears no desire for such symmetry in the consultation document. If cost allocations are symmetric, there is a real risk that this is going to make the competition authority more risk averse, resulting in [even] fewer cases being pursued.

The fundamental problem is that while the courts may consider the cost allocated and the fine as two very separate things with two very separate motivations, costs to fund the enforcement activity and fines to deter future behaviour, for the firm they are one and the same thing, money which has to be handed over. A similar argument is made in answer to Q9. Hence an allocation of costs is to the firm not distinguishable from an increase of the fine. Two implications follow from this.

The fine is currently assessed to be able to deter. If fines and costs are treated as completely separate, adding costs will lead to over-deterrence in all but the simplest open-and-shut price-fixing cases. However, if costs are allowed for in the computation of fines, then since both fines and costs are supposed to go to the Government's consolidated fund, nothing is gained. A question which should then be asked is whether the distortion through allocating costs is greater than the distortion from simply raising taxes. A second problem arises when it comes to the effect of the fine on the future viability of the firm. We have lately seen several cases where a bankruptcy discount has reduced fines even if the violation was price fixing. Will costs and fines be dealt with in the same way? Obviously

careful thought has to be given to the effect on immunity and leniency programmes since the value of these is undermined if most of the financial effect on the firms arise from cost allocations rather than fines and if the costs are not part of the discount.

There is an (admittedly arbitrary) 10% of turnover cap on fines. There is a danger that appeals courts will see the cost allocation as a too clever means of circumnavigating this cap. This is particularly so since there is invariably some issues about which cost should be allocated. The table of costs in recital 11.4 does not distinguish between fixed (or common) costs and variable costs. The allocation of the fixed costs is often seen as being arbitrary.

Other issues relate to incentives. It is unclear how allocating costs will affect incentives to settle and whether this can lead to unfair settlements. The risk of racking up very large costs if the case is not terminated now may push a firm who is convinced that it did not violate the law to offer to settle. This type of cost allocation may have positive efficiency effects if it serves as a punishment to firms who “drag out” the case by being obstructive.

It is unclear how the *incentives of the competition authority to manage its costs in a reasonable manner* would be affected. Equally unclear is the solution to the practical problem about how to allocate costs when there are multiple defendants. Who will adjudicate on any disputed levels of costs? Will the Senior Courts costs office be charged with this task or will this be a matter for the CAT? In either case, who will pay for appeals relating to costs? The consultation document rightly identifies the problem of what to do with initially allocated costs if the decision is overturned on appeal, but that is just one of many problems.

Following on from this, *it is unclear whether we will get more appeals*. A significant part of enforcement is a public good which benefits us all and it may well be best to fund enforcement through general taxation rather than try to identify specific funders, no matter how much the bill is merited.

Let me finish on an irritation about an oft cited and rarely questioned statistic. The consultation claims that cartels have a 15% detection rate. This claim does not have strong empirical foundation. It basically arises because decisions in the US and EU find the average length of a cartel is 7 years. If detection rates are the same every year, this suggests the probability of being detected in any given year is one divided by seven, i.e. approximately 15%. The fallacy in this approach is that in many cartel decisions we do not have a precise estimate of the duration of the cartel, partly because in order to minimise appeals, authorities err on the side of caution and underestimate duration in order to secure a conviction. Furthermore, we only know of the duration of the cartels which are detected (i.e. the sample is biased).

Summary answers to the questions:

Q.26: We do not agree for reasons stated above.

Q.27: This is best left alone.

Q.28: Since firms will look at their total liability when seeking immunity, leniency or settlement, if cost recovery was contemplated, any discount offered should include costs.

Q.29: If both costs and fine goes to the consolidated fund, what exactly is the point?

Q.30: If the appellant is wholly successful, the original decision on cost allocations should clearly be reversed. If partially successful, this should be factored in to how much of the original costs the firm is liable for. Note that this will increase the value of the appeal to the firm and hence affect the incentives to appeal.

Q.31: Given all the possible problems which cost recovery throws up, the government would be well advised to leave this one alone.

Q.32. *Telecoms*

As there seems to be no good reason for Ofcom to be any different from the other regulators, the necessary steps to eradicate this difference should be taken.

Q.33. *The CAT*

As a matter of principle, the CAT as a tribunal should be able to do whatever all other similar appeals tribunal and courts do. In bringing an appeal, the appellant should be aware of the cost which this imposes and, unless there are good externality arguments which could be made when it comes to appeals in general or a particular appeal, should take this into consideration when deciding to lodge the appeal. Cost allocation provides the CAT with an instrument to respond to frivolous appeals or to parties who are misbehaving during the appeals process.

12. Overseas information gateways

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

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

Comments: None

13. Questions on the impact assessment

Mergers

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

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

Anti-trust

In this section we outline the costs and benefits of the options for achieving a greater throughput of antitrust cases including enhancing the OFT's existing procedures, developing a new administrative approach and developing a prosecutorial approach. In addition we review the costs and benefits of retaining the 'dishonesty' element in the criminal cartel offence but exclude the possibility for defendants to introduce economic evidence produced after the events that constitute the alleged dishonest 'agreement'.

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

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

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

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

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

Comments: We have had insufficient time to address these questions beyond our response on the main consultation.

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