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Client Briefing
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Reform of the UK Competition Regime: What's on the Table?

The UK Government has set out the options for a major reform of the UK competition regime.

The consultation issued by the Department for Business, Innovation and Skills ("**BIS**") on 16 March 2011 contains proposals touching on every area of competition regulation, including:

- combining the Office of Fair Trading ("**OFT**") and the Competition Commission ("**CC**") into a single "Competition and Markets Authority" ("**CMA**");
- introducing mandatory filing requirements and standstill obligations into the UK merger control regime and increasing filing fees to as much as £220,000 for the largest transactions;
- removing the requirement for dishonesty in the criminal cartel offence;
- creating an Internal Tribunal within the CMA to act as the decision maker in investigations into breaches of the civil prohibitions on anticompetitive agreements and abuse of dominance, or moving to a more prosecutorial model with the Competition Appeal Tribunal ("**CAT**") adjudicating;
- imposing shorter time limits on market investigations and allowing super-complaints by representatives of small and medium sized enterprises ("**SMEs**");
- imposing stronger obligations on sector regulators to apply competition law in preference to regulatory powers, and giving the CMA a greater role in regulated sectors; and
- plans (separately announced) to transfer the consumer enforcement and advisory functions of the OFT to Trading Standards and the Citizens Advice Bureau.

The consultation explains that the key aims of the reforms are 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. While cost-savings do not feature prominently in the objectives, BIS notes that "reform should wherever possible reduce the cost to business and the public purse".

The deadline for responses to the consultation is 13 June 2011. For further information, or to discuss how your business can become involved in the consultation, please contact a member of Clifford Chance's antitrust team in London.

Creation of a single Competition and Markets Authority

Merging the OFT and the CC is intended to allow more flexible and efficient use of competition powers and processes. For example, merging parties subject to a detailed "Phase 2" merger inquiry would not, in principle, need to spend time explaining the relevant markets and the effects of the merger to a new case team, as they do at present. The consultation recognises, however, that such changes could create risks to the objective and independent decision making that is viewed as a key strength of the current two-tier regime, and introduce a greater degree of "confirmation bias" within the regulator, i.e. an interest in

Key Issues

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seeing initial concerns confirmed in the eventual decision. In recognition of this, BIS is consulting on a range of options – which differ according to the regime in question - to preserve and enhance robustness and speed of decision making. These are described below. In a welcome step, where investigations or decisions are conducted by panels of independent members (as is currently the case, for example, in CC merger reference inquiries) BIS will consider the benefits of reducing the number of part-time panellists - whose other commitments can create significant problems for administering reference timetables and hearings - in favour of panellists committing a significantly greater share of their time to the CMA.

The Paper also describes the separately-announced proposals to transfer the enforcement of various consumer protection laws from the OFT to other bodies, principally Trading Standards and Citizens Advice.

Comment
Those responding to the consultation with objections to the merger of the OFT and the CC are likely to waste their ink: the consultation is almost entirely focused on how the CMA would operate, with the decision as to its creation seemingly already made. BIS expects that the CMA would not become operational until January 2013 at the earliest.

Merger Control

The options for reform of the merger control regime are set out in the table below.

	Option 1 Retain voluntary regime	Option 2 "Full" mandatory regime	Option 3 "Hybrid" mandatory regime
Mandatory notification?	No	Yes, with voluntary notification possible in certain circumstances.	Yes, with voluntary notification possible in certain circumstances.
Jurisdictional thresholds	Retain current thresholds, possibly with a new statutory exclusion for mergers where both: (i) the target's UK turnover is less than £5 million; and (ii) the buyer's worldwide turnover is less than £10 million.	Target's UK turnover is more than £5 million and the buyer's worldwide turnover is more than £10 million.	Mandatory notification if target's UK turnover is over £70 million. Voluntary notification if: (Option 3a) "share of supply" test is met (i.e. merger creates or increases a UK share of supply of at least 25%); or (Option 3b) target's UK turnover is more than £5 million or buyer's worldwide turnover is more than £10 million.
Standstill obligation?	No, but stronger "hold separate" interim measures, either: (i) applying from start of CMA investigation; or (ii) greater powers for CMA to impose measures, including reversal of steps already taken. Also, higher penalties for breach (up to 10% of parties' worldwide turnover).	Likely.	No, where filing is voluntary. Likely, where filing is mandatory.
Test for control	Material influence.	Mandatory notification where decisive influence (i.e. EU Merger Regulation standard). Voluntary notification if only material influence acquired.	Mandatory notification where decisive influence (i.e. EU Merger Regulation standard). Voluntary notification if only material influence acquired.
Filing fees	At least double current levels, ranging from £60k to an eye-watering £220k depending on the turnover of the target (with highest fee if target has turnover of over £120m).	(i) Flat fee of around £7,500 or (ii) variable fees at around 13% of current levels (£4k to £12k depending on turnover of the target).	(i) Flat fee of around £7,500; (ii) variable fees at around 30% of current levels; or (iii) £26k if turnover test is met and £13,000 if only share of supply test met.
Timing	Possible statutory Phase I deadline of 40 working days (no change to Phase II deadline).	Possible statutory Phase I deadline of 30 working days (no change to Phase II deadline).	Possible statutory Phase I deadline of 30 or 40 working days depending on whether notification is voluntary (no change to Phase II deadline).

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The Paper invites views on the levels at which the various turnover thresholds should be set under each of the above options. The mooted thresholds for the full mandatory option (£5 million UK turnover for the target / £10 million worldwide turnover for the buyer) would leave the UK with some of the lowest filing thresholds of any of the major European economies. For example, France requires that both target and buyer have at least €50 million of domestic turnover and Italy's thresholds include a €47 million domestic turnover threshold for the target. Even Germany, in which notification can be triggered where one party has as little as €5 million of domestic turnover, requires a combined worldwide turnover in excess of €500 million. As justification for the level of the proposed thresholds, BIS refers to statistics which indicate that of the 116 cases since 2004 in which competition concerns triggered the OFT's duty to make a referral to the CC, 54% involved a target with a UK turnover of less than £70 million, and 42% involved a target with UK turnover of less than £25 million. That of course assumes that the OFT's concerns were justified in reviewing such small scale transactions. Respondents to the consultation are therefore likely to focus on arguments why the efficiency of the merger regime and the wider UK economy would be better served by excluding a greater range of mergers from the CMA's review.

Other proposed reforms include: (i) strengthened powers to gather information and to "stop the clock" in Phase 1 (to cater for the mooted introduction of a statutory deadline) and during remedies procedures; (ii) the ability for a Phase 2 investigation to be suspended where it appears likely that a referred merger will be abandoned; and (iii) the possibility for remedies to be considered at an earlier stage of the Phase II process.

As regards decision-making, the "base case" would resemble the current system, with Phase 1 decisions taken by senior members of the CMA's executive board and Phase 2 decisions and investigations undertaken by panels of independent members. Alternative structures under consideration include: (i) having Phase 2 decisions taken by a different member of the executive board (possibly in conjunction with a non-executive member of the supervisory board or panel member); or (ii) removing the panel's Phase 2 investigative functions so that it acts solely as decision maker on cases investigated by the CMA case team.

Comment
From the practitioner's perspective, the current voluntary regime has been working well. In support of a move to mandatory notification, the Paper points to research which estimates that under the current regime around half of problematic mergers escape review by the OFT. This perception is not universally shared. The other concern relates to mergers that complete before or during the review process, which can make it difficult (but by no means impossible) to recreate the level of competition that existed prior to the merger. If the Government decides that these concerns are valid, and that they cannot adequately be addressed by strengthening the "hold separate" interim obligations on parties to completed mergers under the current regime, then the Government will almost certainly plump for a mandatory filing regime, combined with a standstill obligation (i.e. a prohibition on completion prior to clearance). Of the two mandatory regimes under consideration, while a "hybrid" mandatory regime may gain some traction, on the basis of figures contained in the Paper such a regime would require that only around half of potentially problematic mergers are notified, while creating costly filing requirements for many more unproblematic mergers than is currently the case.

Civil Antitrust Investigations

The civil law antitrust prohibitions against anticompetitive agreements and abuse of dominance are contained in Chapters I and II of the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the EU ("**TFEU**"). The options for reform of the antitrust regime are as follows:

- Option 1: retain the current system, including various measures recently introduced by the OFT, such as the trial of a "Procedural Adjudicator" - a non-judicial route to resolving disputes on procedural issues such as deadlines and confidentiality redactions;
- Option 2: create an independent "Internal Tribunal" within the CMA, which would adjudicate on antitrust cases at first instance but would not carry out investigations. The attraction for regulators of this option is that it would (in the eyes of BIS at least) allow appeals of such decisions to move away from the current system in which the merits of first instance decisions are subject to detailed scrutiny by the CAT on appeal, and towards the less exacting "judicial review" standard, which prevents the CAT from reviewing issues that are deemed to fall within the decision maker's broad margin of discretion;
- Option 3: move to a more prosecutorial system, in which the CMA (or sectoral regulator) would "prosecute" cases before the CAT, which would decide on both liability and penalties. Given the frequency with which antitrust decisions of the OFT are appealed, cutting straight to the CAT in this way would have the potential advantage of obviating a large portion of the procedure to which companies are currently subjected, and freeing up regulatory resources. BIS notes, however, that shifting decision making powers to a court might cause antitrust policy to become slower to adapt to developments in economic thinking.

The Paper also contains proposals to introduce administrative financial penalties for failure to comply with investigative measures such as information requests, in place of the (to date, unused) criminal penalties that apply currently, and invites views on the merits of introducing administrative or statutory timetables for antitrust investigations. It also proposes introducing legislation to allow the CMA to reclaim from parties that are found to have infringed the competition

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rules its costs of investigating them. This would be subject to a possible grant of waiver or a reduction for those qualifying for immunity or leniency in respect of antitrust fines and those entering early resolution (settlement) agreements. While there are no figures in the Paper on how much an average investigation costs, this proposal would likely lead to substantial increases in the level of fines imposed.

Comment
Various statements in the Paper suggest that the above proposals for reform are motivated by a view that the UK does not bring enough antitrust cases in comparison with other European countries. This seems a questionable basis for action, in the absence of credible evidence that greater enforcement is warranted. While none of the proposals would inherently weaken the procedural rights of the parties under investigation, or increase the risk that they are subject to unchallengeable bias, it will be important to ensure that no such relaxation of standards is introduced as the details of any reform are further developed.

The Criminal Cartel Offence

The Paper sets out concerns with the current requirement for prosecutors to establish that those accused of committing the criminal cartel office acted dishonestly. BIS considers that not only does it create uncertainty as to when the offence bites, it also poses considerable difficulties in securing a conviction, given that only around 60% of the UK population are reported to believe that price fixing is inherently dishonest. The Paper therefore proposes removing the requirement for dishonesty from the definition of the criminal cartel offence and replacing it with:

- nothing (Option 1), and relying instead on the general requirement for a "mental element" (i.e., an intention to enter into a cartel arrangement) combined with guidance for prosecutors as to the types of agreement that are most likely to warrant investigation and prosecution. This would bring the UK criminal offence closer to its US counterpart, in which the requisite mental element can be satisfied where an individual participates in a cartel "with knowledge of its probable consequences". The drawbacks of this option are that it would draw the offence so widely that it could cover certain rare types of cartel agreements that are excepted from the civil prohibition on anticompetitive agreements due to their countervailing beneficial effects for consumers. This could create problems under human rights legislation and might inhibit the prosecution of criminal cases in the UK where there is a parallel investigation by the European Commission under the TFEU;
- a set of "white listed" agreements that are expressly excluded from the scope of the offence (Option 2). This would mitigate some of the problems associated with Option 1, as white listed agreements could be defined to cover the commonest forms of potentially beneficial agreements. BIS proposes to avoid wherever possible the need to consider economic arguments in order to determine whether an offence has been committed, so the white list would exclude from the criminal offence a larger category of agreements than are excepted from the civil prohibition. This Option would, however, also inhibit prosecutions in the UK where a parallel EU investigation is launched;
- a "secrecy" element (Option 3), that could be satisfied where, for example, the individuals that entered into the relevant cartel arrangements take measures to prevent them becoming known to customers or public authorities. The Paper notes that one difficult issue with this Option would be whether to criminalise "passive" secrecy, i.e., cartel agreements which the parties did not announce, but also did not take active steps to keep secret; or
- an exclusion for agreements entered into "openly" (Option 4), i.e., where customers are told about the relevant cartel arrangements at or before the time of purchase of the relevant product or service. The Paper appears to favour the simplicity of this option.

Comment
The reasons for consulting on the removal of the dishonesty requirement are that it "artificially" limits the scope of cases that can be successfully prosecuted, and that more criminal cases would strengthen the deterrent against cartels. As is the case for the proposed reform of the civil antitrust regime, this appears to elide the desired result (more cases) with the reason for seeking to achieve it. Moreover, given that no UK jury has yet been given the opportunity to consider the application of the current dishonesty test, its reform is arguably premature.

Equally, the question should be asked whether it is appropriate, in the name of efficiency and deterrence, to remove a key element of *mens rea* in the offence. It is arguable that individuals should not be sent to prison unless they knew, or should have known, that what they were doing was wrong.

Market Investigations

The Paper identifies a need to modernise the market investigation regime to improve speed and efficiency, update remedy powers and stimulate more market investigation references. The proposed reforms include:

- cross market investigations. The CMA would be able to carry out detailed investigations into certain practices – such as below cost selling, provision of extended warranties or switching costs for consumers – across more than one market. While it is possible under the current regime for the OFT to refer multiple markets to the CC, BIS considers that the proposed reform would ensure that such investigations remain focused on the practice in question, limiting the potential for "scope creep" in each of the markets under consideration;

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- reporting to Government on public interest issues. At present, the CC cannot investigate or make recommendations to the Secretary of State ("**SoS**") on any public interest issues that have been raises by the SoS under the market investigation regime. BIS considers that allowing the CMA to do so would allow the CMA's experience to be drawn upon more effectively and would negate the need to create ad hoc independent inquiry bodies, such as the Independent Commission on Banking;
- allowing bodies that represent SMEs to launch "super complaints", which oblige the regulator to published a reasoned response. It is hoped that this would tackle barriers to entry and conduct of large firms which has the effect of squeezing out smaller firms. At present, only bodies representing consumer interests – such as the Consumers Association - can do so;
- reducing the statutory timescale for Phase 2 market investigations from 24 to 18 months, and introducing a binding deadline for remedies proceedings and Phase 1 investigations. These would be accompanied by wider powers to gather information in Phase 1 and to stop the clock in various circumstances;
- enhanced powers to impose remedies, such as the appointment of an independent third party "trustee" to monitor and/or implement remedies and the publication of certain no-price information; and/or
- remove the duty of the CMA to consult on a decision not to carry out a Phase 2 market investigation.

Responsibility for investigating and deciding on Phase 2 references would continue to lie with a panel of independent members within the CMA.

Comment
Some of these reforms are likely to be welcomed, particularly by those who have endured scrutiny of their activities over very long periods under the current market regime, and suffered the frustration of having to explain the relevant markets to two different regulators as part of the process. Others, however, may prove controversial. For example, the interests of small firms are by no means synonymous with those of consumers, so affording SMEs the power to divert regulatory resources through super complaints might not result in the best use of those resources.

Sector Regulators

BIS favours maintaining the concurrent competition powers of the sector regulators and the CMA, citing the benefits of an integrated application of sectoral and competition powers. However, the Paper points to the relative paucity of antitrust cases and market investigation references in the regulated sectors. BIS acknowledges that this may be because sector regulators have other powers that may be easier and quicker to use. However, it is concerned that detailed regulation can dampen innovation and inhibit new entry and should therefore fall away as regulated markets become competitive. It proposes to prompt sector regulators to favour the use of powers under generally applicable competition regulation, and to encourage more antitrust cases in the regulated sectors, by:

- requiring sector regulators to work together to establish a common framework for deciding which of their powers to use and/or placing stronger obligations on them to use competition powers in preference to sectoral powers;
- more resource-sharing between the CMA and the sector regulators, with the CMA providing a "central core of expertise" to overcome capacity constraints and relative lack of competition experience within some of the sector regulators. Various models are under consideration, including: (i) the CMA running all investigations, with the sector regulator as decision maker (assuming decision making in civil antitrust cases is not transferred to a court); (ii) joint investigations and decision making by the CMA and sector regulators; (iii) the CMA acting in a purely advisory capacity; and (iv) CMA staff being made available through secondments or hiring out to the sector regulators;
- giving the CMA a greater role in regulated sectors by granting it powers to take over cases from sectoral regulators where it considers that it is better placed to take the case (e.g., due to greater resources and experience), or where it has concerns about the sectoral regulator's approach. The Paper also suggests that the CMA could be given a say in sector regulators' decisions as to whether to use competition powers or sectoral powers.

BIS also proposes that the CMA will continue to perform the current functions of the CC in regulatory references and appeals (such as licence modification references and price determination appeals), subject to some harmonisation of the applicable processes and procedures.

Comment
Allowing the use of competition resources and expertise to be shared more effectively between regulators is a sensible aim. However, promoting the use of effects-based competition powers over the certainty of ex-ante sectoral regulation may give rise to some difficult issues. While it would probably deter a greater range of anticompetitive conduct from happening in the first place, it could mean slower and less efficient resolution of disputes relating to such conduct when it does arise.

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Conclusion

The Government's consultation has become subject to the kind of "scope creep" that often affects regulatory investigations. What started as an exercise in achieving procedural efficiency has become a wide ranging review of all aspects of the UK competition regime. Some of the reforms – such as the combination of the OFT and the CC – are almost certain to proceed. The fate of other proposals will be determined by the arguments raised in response to the consultation, including respondents' views as to whether the (potentially major) costs that they entail for businesses will be outweighed by benefits for consumers and taxpayers.

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